ALBERTA SECURITIES COMMISSION

DECISION

Citation: Re Bison Acquisition Corp., 2021 ABASC 188 **Date: 20211221**

Bison Acquisition Corp. and Brookfield Infrastructure Corporation Exchange Limited Partnership

-and-

Inter Pipeline Ltd. and Pembina Pipeline Corporation

Panel:	Kari Horn Tom Cotter
Representation:	Timothy Robson Danielle Mayhew Tracy Clark Tonya Fleming for Commission Staff
	Shane D'Souza Kara Smyth John Osler Robert Richardson William Main for Bison Acquisition Corp. and Brookfield Infrastructure Corporation Exchange Limited Partnership
	Jeffrey Sharpe Andrew Sunter Paul Chiswell Joanne Luu for Inter Pipeline Ltd.
	David Tupper Alyssa J. Duke for Pembina Pipeline Corporation
	Gordon Tarnowsky, Q.C. for the Special Committee of the Board of Inter Pipeline Ltd.

Submissions Completed: July 9, 2021

Date of Oral Decision: July 12, 2021

Date of Written Reasons: December 21, 2021

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I. INTRODUCTION

[1] On July 9, 2021, we held a hearing (the **Hearing**) of three applications seeking orders under the *Securities Act* (Alberta) (the **Act**):

- a June 9, 2021 application (the **Brookfield Application**) by Bison Acquisition Corp. (**Bison**) and Brookfield Infrastructure Corporation Exchange Limited Partnership (**BICELP**) (Bison and BICELP are two of the several entities relevant to this matter that are connected to Brookfield Asset Management Inc. (**BAM**); we refer to all of those connected entities collectively as **Brookfield**);

- a June 18, 2021 cross-application (the **IPL Application**) by Inter Pipeline Ltd. (**IPL**); and

- a June 18, 2021 cross-application (the **Pembina Application**) by Pembina Pipeline Corporation (**Pembina**).

[2] We refer to the Brookfield Application, the IPL Application, and the Pembina Application collectively as the **Applications**.

[3] The Applications were made in connection with:

- an unsolicited take-over bid for the common shares of IPL (the **IPL Shares**) made by Brookfield on February 22, 2021 and varied on June 4 and June 21, 2021 (respectively, the **February 22 Offer**, the **June 4 Offer**, and the **June 21 Offer**; and, collectively, the **Brookfield Offer**);

- provisions in IPL's May 8, 2017 shareholder rights plan, as reconfirmed by IPL shareholders on May 7, 2020 (the **First SRP**), and provisions in IPL's March 31, 2021 supplemental shareholder rights plan (the **Supplemental SRP**; and, together with the First SRP, the **IPL SRPs**);

- a May 31, 2021 plan of arrangement agreement between IPL and Pembina (the **Pembina Arrangement**), which included a termination fee of $350 million (the **Break Fee**) payable by IPL to Pembina in certain circumstances if the arrangement failed to proceed; and

- certain cash-settled total return swaps (**Swaps**) referencing IPL Shares (collectively, the **IPL Swaps**), entered into between Brookfield as swap investor and Bank of Montreal as swap dealer between June and October 2020. Bank of Montreal was not identified in any Brookfield disclosure of the IPL Swaps as of the date of the Hearing, and was referred to only as an unnamed "ISDA swap dealer" (**ISDA** is the International Swaps and Derivatives Association, Inc.). We use the term **BMO** to refer to various Bank of Montreal entities, including Bank of Montreal, BMO Nesbitt Burns Inc. (**BMO NB**), and BMO Capital Markets (**BMO CM**). According to the evidence, BMO CM is a trade name, which includes BMO and BMO NB. We do not differentiate among these unless stated otherwise.

[4] On July 12, 2021, we delivered an oral ruling (the **Oral Ruling**) dismissing the Brookfield Application and granting certain relief under the IPL Application and the Pembina Application, as set out in an order of the same date cited as *Re Bison Acquisition Corp.*, 2021 ABASC 107 (the **Order**). These are our reasons for the Oral Ruling and Order.

II. BACKGROUND

A. Parties and Witnesses

1. Brookfield Entities

[5] As noted, several connected Brookfield entities were relevant or mentioned in the evidence. We do not differentiate among them, unless stated otherwise.

[6] Bison is an Alberta corporation and BICELP is an Alberta limited partnership. Each was established for the purpose of making the Brookfield Offer.

[7] Brookfield acquired IPL Shares between March and October 2020. At the time of the February 22 Offer, Brookfield beneficially owned and exercised control and direction over 41,848,857 IPL Shares, or approximately 9.75% of the 429,219,175 IPL Shares issued and outstanding as of February 19, 2021.

[8] As of February 22, 2021, Brookfield also had economic exposure to 42,492,698 IPL Shares (the **Swap Shares**), or approximately 9.9% of the IPL Shares, through the IPL Swaps. The Brookfield Offer stated that Brookfield had no "right to vote, or direct or influence the voting, acquisition, or disposition of" any Swap Shares held by the swap dealer, and that "no person acting jointly or in concert with [Bison] beneficially owns or exercises control or direction over any securities of IPL".

[9] Brian Baker (**Baker**) is a Managing Partner and Chief Investment Officer with Brookfield Infrastructure, which is BAM's "infrastructure investment management business". He was Brookfield's primary fact witness and swore two affidavits that were tendered into evidence at the Hearing: one dated June 17, 2021 (the **Baker Affidavit**) and one dated June 25, 2021. He was cross-examined on his affidavits on June 28, 2021.

[10] Brookfield retained James Osler (**Osler**) to provide expert opinion evidence. He is one of the founding principals of Origin Merchant Partners, which was described as an independent Canadian financial advisory firm. He has approximately 27 years of experience in investment banking, including experience advising on large corporate transactions. Osler swore an affidavit on June 16, 2021 that appended his expert report dated June 16, 2021. Osler was cross-examined on his affidavit on June 28, 2021.

2. IPL

[11] At the time of the Hearing, IPL was an Alberta corporation in the petroleum transportation and natural gas liquids processing business. It owned and operated certain western Canadian energy infrastructure assets, including the Heartland Petrochemical Complex (the **HPC)**. The HPC was described as North America's first integrated propane dehydrogenation and polypropylene facility that would convert propane into higher-value polypropylene.

[12] The IPL Shares were listed and posted for trading on the TSX.

[13] The evidence at the Hearing included an affidavit sworn by Margaret McKenzie (**McKenzie)** on June 22, 2021. During the time relevant to the Applications, McKenzie was an independent director and chair of IPL's board of directors (the **IPL Board**), as well as chair of the IPL Board's Special Committee (the **Special Committee**) formed in February 2021 to undertake a strategic review of IPL's options (the **Strategic Review**) and assist in responding to the Brookfield Offer. She was cross-examined on her affidavit on June 27, 2021.

[14] William Quinn (**Quinn**) is the Executive Managing Director and Co-Head of Mergers and Acquisitions at TD Securities Inc. (**TD Securities**), which the IPL Board retained as its financial advisor in November 2020. Quinn was a senior member of the TD Securities advisory team that worked on this matter, and swore an affidavit on June 22, 2021 (the **Quinn Affidavit**).

[15] Andrew Castaldo (**Castaldo**) is a Managing Director in the Global Mergers and Acquisitions, North America Group at J.P. Morgan Securities LLC, with authority to act on behalf of certain affiliates including J.P. Morgan Securities Canada Inc. (collectively, **J.P. Morgan**). The Special Committee retained J.P. Morgan as its financial advisor effective February 18, 2021, and Castaldo was the lead J.P. Morgan mergers and acquisitions (**M&A**) professional involved. He swore an affidavit on June 22, 2021 (the **Castaldo Affidavit**).

[16] In addition to these fact witnesses, IPL retained two expert witnesses: Cameron Plewes (**Plewes**) and Poonam Puri (**Puri**), each of whom swore an affidavit on June 22, 2021 (the **Plewes Affidavit** and the **Puri Affidavit**, respectively).

[17] Plewes is the president of Peters & Co. Limited, described as an independent investment dealer that specializes in investments in the Canadian energy industry. He is a Chartered Accountant, Chartered Financial Analyst, and Chartered Business Valuator, and indicated that he has been involved in numerous M&A transactions.

[18] Puri is a professor at Osgoode Hall Law School, where she teaches corporate and securities law. Among other qualifications, she is the co-founder and Academic Director of an investor protection clinic that provides *pro bono* legal advice to investors, a former director and Head of Policy and Research at the University of Toronto's Capital Markets Institute, director of several public companies, and a former commissioner of the Ontario Securities Commission (the **OSC**).

[19] Quinn, Castaldo, and Plewes were each cross-examined on their affidavits on June 27, 2021. Puri was not subject to cross-examination.

3. Pembina

[20] Pembina is an Alberta corporation that provides pipeline and midstream services and owns various facilities and infrastructure. Its common shares (the **Pembina Shares**) are listed and posted for trading on the TSX and the NYSE. Like IPL, Pembina's business includes the transportation, storage, and processing of natural gas.

[21] Pembina's fact witness was J. Scott Burrows (**Burrows**), who swore an affidavit on June 22, 2021. He is Pembina's Senior Vice-President and Chief Financial Officer, and oversees Pembina's financial operations, corporate planning, capital market financings, and corporate development, including M&As.

[22] Pembina's expert witness was Joshua Mitts (**Mitts**), an associate professor at Columbia Law School and the principal of M Analytics LLC, a financial economics consulting firm in New York. His June 22, 2021 affidavit appended his expert report of the same date (the **Mitts Report**).

[23] Burrows and Mitts were cross-examined on their affidavits on June 24 and June 25, 2021, respectively.

4. Staff

[24] Staff (**Staff**) of the Alberta Securities Commission (the **ASC**) Corporate Finance division participated in the Hearing process but did not introduce any evidence.

B. Submissions and Evidence

[25] All of the aforementioned affidavits and cross-examination transcripts were entered into evidence at the Hearing with the exception of the Puri Affidavit, which is addressed later in these reasons. A June 25, 2021 affidavit sworn by a litigation clerk employed at the office of Brookfield's counsel and attaching certain documentation was also admitted into evidence, as were the undertaking responses from Baker's cross-examination.

[26] Since there was no *viva voce* evidence led at the Hearing, all references in these reasons to a witness's cross-examination are references to cross-examinations on affidavits.

[27] In addition to the evidence, we received written submissions from counsel for Brookfield, IPL, Pembina, and Staff. We heard oral submissions at the Hearing from the same parties, as well as from counsel for the Special Committee.

III. CHRONOLOGY OF SIGNIFICANT EVENTS

[28] The background facts of this matter were complex and involved numerous significant dates. For convenience we set them out in the form of a chronology of significant events.

March 2020	Brookfield identified IPL as an investment opportunity and began acquiring IPL Shares on the TSX
April 24, 2020	Brookfield (through two limited partnerships) executed two IPL Swap agreements with BMO (together, the **Swap Agreements**) (although no transactions occurred under the agreements until June 2020)
June 2020	Brookfield reached an ownership position of approximately 9% of the issued and outstanding IPL Shares, then began entering into IPL Swaps under the Swap Agreements for "further economic exposure" to IPL

June 15, 2020	Brookfield's first IPL Swaps with BMO were confirmed pursuant to two letter agreements on BMO CM letterhead (together, the **IPL Swap Letter Agreements**)
	Baker spoke with IPL's Vice-President, Corporate Development, Spil Kousinioris (**Kousinioris**); they had a general discussion regarding IPL and the HPC, and Baker suggested a follow-up discussion in early autumn
June 18, 2020	Brookfield's combined beneficial ownership of IPL Shares (39,917,357) and economic exposure to IPL Shares through the IPL Swaps (3,424,900) exceeded 10% (10.098%) of the total issued and outstanding IPL Shares (429,219,175)
September 11, 2020	Baker and another Brookfield executive, Paul Hawksworth (**Hawksworth**), met with Kousinioris and IPL's President and Chief Executive Officer, Christian Bayle (**Bayle**), to discuss Brookfield's business, energy infrastructure trends, and challenges facing IPL
October 5, 2020	Brookfield stopped entering into IPL Swaps
November 4, 2020	Baker and Hawksworth met with Bayle and Kousinioris again; according to Baker, they told Bayle and Kousinioris that Brookfield was a significant shareholder of IPL, had additional economic exposure through the IPL Swaps, and was interested in "exploring a potential strategic acquisition of IPL"
	McKenzie confirmed that IPL first learned of Brookfield's interest in an acquisition on November 4, 2020, but stated that Bayle and Kousinioris did not remember Brookfield mentioning the IPL Swaps during their meeting, and that the IPL Board did not hear about the IPL Swaps until December
November 5, 2020	Baker called Kousinioris to offer another meeting and was told that Brookfield should submit a written expression of interest for the IPL Board to consider
November 11, 2020	Brookfield sent IPL a letter confirming Brookfield's interest in exploring a potential strategic transaction and reiterating that Brookfield was one of IPL's largest investors
November 18, 2020	Baker and another Brookfield executive, Sam Pollock (**Pollock**), spoke with Bayle and Richard Shaw, Q.C. (**Shaw**), McKenzie's predecessor as chair of the IPL Board; Bayle and Shaw asked

	Brookfield to send "an indicative non-binding proposal" to the IPL Board for consideration
November 27, 2020	Brookfield sent a non-binding proposal (the **November Proposal**) to IPL that contemplated a consensual take-private acquisition whereby Brookfield would acquire all IPL Shares at a value of $17.00 to $17.50 per IPL Share (payable in cash and up to 10% in Brookfield Infrastructure Corporation (**BIPC**) shares (the **BIPC Shares**), which are listed and posted for trading on the TSX and the NYSE) The November Proposal attached a term sheet that indicated the deal would be subject to "customary, market terms, including (i) standard break-fee and reverse break-fee provisions, (ii) an agreed-upon go-shop mechanic, and (iii) other customary deal protections"; it did not mention the size of Brookfield's interest in IPL After receiving the November Proposal, the IPL Board retained counsel and TD Securities for legal and financial advice, respectively
December 1, 2020	Effective December 1, 2020, Brookfield engaged BMO NB as its financial advisor for the possible acquisition of IPL; the engagement was confirmed in a letter agreement on BMO CM letterhead dated January 27, 2021 (the **BMO Engagement Letter**), which provided for a $15 million completion fee payable to BMO NB on Brookfield's acquisition of IPL (the **BMO Completion Fee**)
December 11, 2020	Call among Bayle, Shaw, Baker, and Pollock; IPL indicated that the value of the November Proposal was too low, but that it was open to further discussions at a higher value
December 18, 2020	According to McKenzie, IPL first learned of the IPL Swaps during a conversation between Baker and Bayle Brookfield sent a revised non-binding proposal (the **December Proposal**) to IPL increasing the consideration to $18.25 per IPL Share (payable in cash and up to 20% in BIPC Shares), which represented a premium of 40% to 50% over the TSX trading prices for IPL Shares The December Proposal referred to Brookfield "as a shareholder with an economic interest in IPL of near 20%", and attached a

	term sheet with the same "customary, market terms" as the November Proposal
January 8, 2021	Call among Bayle, Shaw, Baker, and Pollock; IPL indicated that it was unwilling to have further discussions at the value set out in the December Proposal, and suggested that Brookfield meet with TD Securities to discuss Brookfield's valuation assumptions
January 12, 2021	Baker, Hawksworth, and another Brookfield executive spoke to a representative from TD Securities regarding Brookfield's valuation assumptions
January 25, 2021	IPL sent a letter to Brookfield stating that IPL would not move forward based on the December Proposal valuation and wanted a pre-emptive offer of $24 or more per IPL Share (the closing price for IPL Shares on the TSX that day was $13.36)
January 27, 2021	Bayle said that Baker told him Brookfield would respond to IPL's January 25 letter by the end of the next week or early the week following According to Baker, Brookfield concluded that IPL "had no serious intention of engaging with us", and began considering an unsolicited take-over bid
February 10, 2021	Pollock called Shaw and told him Brookfield thought the IPL Board was not meaningfully engaging with the December Proposal and that IPL shareholders deserved to know about it Brookfield issued a news release announcing its intention to make the February 22 Offer; McKenzie said that this news release was the first time Brookfield publicly mentioned its "aggregate economic interest" in IPL of 19.65%
February 12, 2021	The IPL Board established the Special Committee comprised of IPL's independent directors
February 18, 2021	IPL issued a news release announcing the Special Committee and IPL's commencement of the Strategic Review The Special Committee retained J.P. Morgan as its financial advisor
February 22, 2021	Brookfield made the February 22 Offer, at $16.50 cash or 0.206 of a BIPC Share per IPL Share, each subject to proration based

	on a maximum of 76.2% cash ($4.9 billion) and 23.8% (or 19,040,258) BIPC Shares; open for acceptance until June 7, 2021
	IPL issued a news release urging IPL shareholders not to take action regarding the February 22 Offer until the conclusion of the Strategic Review
February 25, 2021	Pembina's board of directors (the **Pembina Board**) met and discussed IPL's Strategic Review and a potential acquisition of certain IPL assets
"early March 2021"	Bayle and Pembina's Chief Executive Officer, Michael Dilger (**Dilger**), had preliminary discussions about a possible transaction
March 7, 2021	At a Special Committee meeting, TD Securities and J.P. Morgan gave their opinions that the February 22 Offer was inadequate
	Pembina asked IPL if it would agree to a break fee if a superior offer were provided
March 9, 2021	IPL filed a Directors' Circular dated March 8, 2021 (the **March 8 Directors' Circular**), which recommended that IPL shareholders reject the February 22 Offer; it also called on Brookfield to make public disclosure of certain particulars concerning the IPL Swaps
March 31, 2021	The IPL Board adopted the Supplemental SRP
April 10, 2021	Dilger and the Pembina Board's chair, Randall Findlay (**Findlay**), had a call with Bayle and McKenzie; they discussed a potential all-share transaction whereby Pembina would acquire either all of IPL, or 100% of IPL's natural gas liquids (**NGL**) business and a partial interest in the HPC
April 13, 2021	Brookfield sent a letter to IPL in an attempt to re-start discussions
April 15, 2021	Dilger emailed IPL proposing that Pembina acquire a partial interest in the HPC and either 100% of IPL's NGL business or certain other assets
April 20, 2021	IPL sent a letter in response to Brookfield's April 13 correspondence stating that while Brookfield's offers to date did not reflect fair value, IPL was open to Brookfield participating in the Strategic Review and submitting an improved offer; IPL also said that to receive non-public information about IPL, Brookfield

	would have to sign a non-disclosure agreement (the **Definitive NDA**) including standstill protections, as all other interested parties in receipt of IPL's non-public information had done
April 21, 2021	Bayle told Dilger that IPL was not interested in Pembina's April 15 proposal, but was open to an *en bloc* bid
April 26, 2021	BMO NB's Bradley Wells (**Wells**) advised Baker that the Special Committee's advisors told him that Brookfield would have to sign a preliminary NDA (the **Pre-NDA**) to govern negotiations of the Definitive NDA, and that the Definitive NDA would have to include a condition that Brookfield would not revoke or increase the consideration in the February 22 Offer without the Special Committee's approval According to McKenzie, TD Securities and J.P. Morgan offered to send Brookfield's advisors the proposed form of agreements, but Wells told them not to
April 28, 2021	Brookfield issued a news release stating that IPL was not engaging in a manner that would allow Brookfield to be part of the Strategic Review, and that IPL was seeking unreasonable conditions for accessing due diligence information
April 29, 2021	IPL issued a news release stating that Brookfield declined to receive a non-disclosure agreement and negotiate customary terms; it also stated that IPL would provide an update on the Strategic Review before the February 22 Offer expired on June 7, 2021
May 10 or 11, 2021	Brookfield and IPL agreed to a Pre-NDA
May 12 or 13, 2021	Brookfield and IPL executed a Definitive NDA
May 14, 2021	Brookfield accessed IPL's data room
May 18, 2021	Pembina engaged Scotia Capital as its financial advisor for a potential IPL acquisition and told IPL that Pembina was interested in acquisition via an all-share transaction
May 19, 2021	Dilger and Findlay advised McKenzie and Bayle that Pembina was authorized to pursue an all-share acquisition of IPL at a value of $18.00 per IPL Share Pembina entered into a confidentiality agreement with IPL to access IPL's data room; the agreement included a standstill

	provision; after it was executed, Pembina commenced due diligence
May 20, 2021	IPL entered into a reciprocal confidentiality agreement with Pembina to access Pembina's data room
May 25, 2021	Pembina and IPL began to negotiate an all-share transaction under s. 193 of the *Business Corporations Act* (Alberta) (the **ABCA**); Pembina sought a $400 million break fee
	Brookfield made a revised proposal to IPL that included an option for IPL shareholders to continue to hold an interest in the HPC through a proposed separate Brookfield entity (the **HPC GrowthCo**)
May 26, 2021	The Special Committee met to consider the Pembina and Brookfield proposals, and decided neither one was in the best interests of IPL's shareholders
	Pembina made a management presentation to IPL; IPL advised that Pembina's proposal was not in IPL's best interests, but negotiations continued
May 28, 2021	IPL proposed a reciprocal break fee of $300 million to Pembina
	Brookfield representatives had meetings with IPL representatives to discuss the HPC and the merits of the proposed BIPC Share consideration
May 29, 2021	Baker and other Brookfield representatives had a call with McKenzie and other IPL representatives to discuss the HPC GrowthCo proposal; according to Baker, Brookfield got the strong impression that the IPL Board was not interested
	Pembina proposed a break fee of $350 million and IPL proposed a reciprocal break fee in the same amount; Burrows, Dilger, and Findlay presented a revised offer to the Special Committee (the **Revised Pembina Offer**) at a value of approximately $18.80 per IPL Share
May 30, 2021	McKenzie asked Pembina for further improvements to its offer, including confirmation that monthly dividends would be raised, the exchange ratio would be increased to 0.505 of a Pembina Share per IPL Share, and a break fee of $250 million to $300 million payable to IPL would be included

Pembina revised its proposal by increasing the dividend, increasing the exchange ratio to 0.49325 (the mid-point between the 0.4815 Pembina proposed and the 0.505 IPL requested), and agreeing to a break fee of $300 million; the Special Committee met and agreed to continue discussions with Pembina to improve the Revised Pembina Offer even further

According to Baker, McKenzie told him and Pollock that another bidder had made an *en bloc* offer and asked for Brookfield's "best and final offer"; she suggested that the offer should not reference the HPC GrowthCo proposal

Brookfield made what it described as its "***BEST AND FINAL OFFER***" (original emphasis) at $19.00 or 0.219 of a BIPC Share per IPL Share, each subject to proration based on a maximum of 73% cash ($5.4 billion) and 27% (or 23,000,000) BIPC Shares; open for acceptance until 12:00 p.m. EST May 31, 2021 (the **May 30 Offer**)

The May 30 Offer indicated it would be subject to "[c]ustomary Brookfield . . . deal protections"

May 31, 2021

Castaldo of J.P. Morgan emailed Baker to advise that the IPL Board was still reviewing proposals and needed more time – Brookfield therefore extended the deadline for the May 30 Offer from 12:00 p.m. to 2:00 p.m. EST; later that day, Brookfield was informed that the IPL Board was inclined to accept the competing proposal but had not yet agreed to it; Brookfield responded that it would make a further improved offer, and sent another "***BEST AND FINAL OFFER***" at $19.50 or 0.225 of a BIPC Share per IPL Share, each subject to proration based on a maximum of 74% cash ($5.6 billion) and 26% (or 23,000,000) BIPC Shares; open for acceptance until 4:00 p.m. EST May 31, 2021 (the **May 31 Offer**)

The May 31 Offer indicated it would be subject to "[c]ustomary Brookfield . . . deal protections"

Pembina made the **Final Pembina Proposal**, which increased the exchange ratio to 0.50 of a Pembina Share per IPL Share (reflecting a value of $19.45 per IPL Share), confirmed the dividend increase, and provided for a reciprocal $350 million break fee

The Special Committee met to consider the Final Pembina Proposal and Brookfield's May 31 Offer; the Special Committee

	concluded that the Final Pembina Proposal was superior, and decided to recommend that the IPL Board approve entering the Pembina Arrangement
	Pembina and IPL entered into an exclusivity agreement and McKenzie informed Brookfield that IPL had entered exclusive negotiations with the competing bidder
June 1, 2021	Pembina and IPL executed the Pembina Arrangement and announced it in a joint news release
June 2, 2021	Brookfield issued a news release announcing its intention to vary the February 22 Offer "at a price per IPL [Share] currently valued at $19.75" (according to the Baker Affidavit, $19.75 was a typographical error – the news release should have said $19.74)
June 3, 2021	IPL issued a news release acknowledging Brookfield's intention, but confirming that it continued to recommend the Pembina Arrangement to IPL shareholders
June 4, 2021	Brookfield made the June 4 Offer, at $19.50 cash, 0.225 of a BIPC Share, or 0.225 of a BICELP limited partnership unit (**BICELP Unit**) per IPL Share, each subject to proration based on a maximum of 74% cash ($5.56 billion) and 26% (or 23,000,000) combined BIPC Shares and BICELP Units; open for acceptance until June 22, 2021
	Brookfield issued the **Brookfield June 4 News Release**
June 10, 2021	IPL issued a news release confirming its support for the Pembina Arrangement
	IPL filed a notice of change to the March 8 Directors' Circular dated June 9, 2021 (the **June 9 Directors' Circular**), and included commentary about the importance of retaining a 28% interest in the HPC under the Pembina Arrangement
	Brookfield filed the Brookfield Application
June 18, 2021	Brookfield issued a news release announcing its intention to vary the June 4 Offer by removing the limit on the cash consideration option (thus allowing IPL shareholders to elect 100% cash consideration without proration), and by increasing the consideration by up to $0.90 per IPL Share if the Break Fee were removed or decreased

	IPL filed the IPL Application and Pembina filed the Pembina Application
June 21, 2021	IPL issued a news release acknowledging Brookfield's announcement, but confirming its continued support for the Pembina Arrangement
	Brookfield made the June 21 Offer, removing the proration on the cash consideration; the BIPC Share and BICELP Unit consideration remained the same as in the June 4 Offer; open for acceptance until July 13, 2021
June 23, 2021	Brookfield filed an application with the ASC seeking an exemption from s. 150(1)(b) of the ABCA regarding certain proxies solicited in connection with the shareholder vote on the Pembina Arrangement; the order was granted by the ASC's Corporate Finance division on June 29, 2021 (the **Proxy Solicitation Order**, cited as *Re Inter Pipeline Ltd.*, 2021 ABASC 100)
June 25, 2021	The IPL Board amended the Supplemental SRP so that it expired the day after the IPL shareholder vote on the Pembina Arrangement

IV. PRELIMINARY MATTERS

A. Confidentiality

[29] On July 8, 2021, we issued a confidentiality order (the **Confidentiality Order**) under s. 221 of the Act (cited as *Re Bison Acquisition Corp.*, 2021 ABASC 105) concerning certain defined **Confidential Information** that was provided to the ASC for the purposes of the Applications and the Hearing.

[30] Under that order, the Confidential Information will be held in confidence by the ASC until otherwise ordered, unless it becomes publicly available by other means or the ASC is required by law to disclose it. Additionally, any facts from the Confidential Information included in the written submissions of Brookfield, IPL, or Pembina are not protected by the Confidentiality Order.

B. Admissibility and Weight of Certain Evidence

1. Background

[31] Before arguing the merits of the Brookfield Application, Brookfield submitted that there were two preliminary issues: (i) whether the Puri Affidavit attaching her expert opinion (the **Puri Report**) should be admitted into evidence and, if it were, the weight it should be given; and (ii) the weight that should be given to the evidence and opinions of two of IPL's financial advisors, Castaldo and Quinn. Brookfield challenged the admissibility of the Puri Affidavit, and suggested that Castaldo's and Quinn's evidence should be given little weight.

[32] According to the Puri Report, Puri has significant experience with change of control transactions, and has previously testified on issues relating to corporate governance, securities regulation, and investor protection in Canada and other jurisdictions. IPL retained her to provide expert opinion evidence regarding the IPL Swaps and the Supplemental SRP. She described her mandate:

> - From a capital markets public policy perspective and investor protection standpoint, comment on [Brookfield's] conduct in connection with, and any impact on investors and the integrity of the capital markets resulting from, the series of [IPL Swaps] that Brookfield . . . entered into with an unknown ISDA swap dealer between June and October 2020, as well as [Brookfield's] subsequent take-over bid for IPL and [Brookfield's] public disclosure in connection with [the IPL Swaps] and take-over bid; and
>
> - From a capital markets public policy perspective and investor protection standpoint, comment on the [Supplemental SRP] that the [IPL Board] approved on March 31, 2021, subsequent to [Brookfield's] commencement of its take-over bid, including my views on whether the [Supplemental SRP] held, and continues to hold, any benefit to IPL shareholders and the integrity of the capital markets more generally.

[33] While the Castaldo Affidavit and the Quinn Affidavit were accepted into evidence at the Hearing as mentioned, the Puri Affidavit was marked as an exhibit for identification only. We indicated that we would make our decision on the admissibility of the Puri Affidavit in the course of deciding the Applications and include our reasons for that ruling in this written decision.

2. Arguments of the Parties

[34] Brookfield and IPL were the only parties that made submissions on these issues.

(a) Brookfield

[35] According to Brookfield, Puri's expert opinion was unnecessary and an improper attempt to usurp this panel's role in this proceeding. In addition, Castaldo and Quinn lacked sufficient independence to provide reliable opinion evidence.

[36] Brookfield acknowledged that pursuant to s. 29(f) of the Act, ASC hearing panels are not bound by the laws of evidence and have wide discretion as to what evidence to admit and the weight it should be given.

[37] However, Brookfield suggested that when considering an evidentiary issue, there is authority for the proposition that ASC panels will generally take into account the policy reasons and legal requirements underlying the relevant evidentiary rules.

[38] Brookfield cited the recent decision in *Re Solar Income Fund Inc.*, 2021 ONSEC 2, and an OSC panel's conclusion that expert opinion evidence is presumptively inadmissible in commission proceedings unless it is necessary because the subject matter is outside the commission's expertise (at para. 55). Brookfield also relied on several past ASC panel decisions in which it was held that expert opinion evidence will be given little weight where it purports to reach a conclusion on the ultimate issue to be decided, or where it is not based on an independent analysis of the facts (see, for example, *Re De Gouveia*, 2013 ABASC 106 at para. 106 and *Re Ironside*, 2006 ABASC 1930 at para. 424, aff'd. *sub nom. Ironside v. Alberta (Securities Commission)*, 2009 ABCA 134).

[39] In light of these authorities, Brookfield submitted that Puri's opinion should not be admitted into evidence because we have specialized expertise and are capable of making the necessary determinations in this matter without the aid of expert evidence. In Brookfield's view, Puri opined on issues in which we are well-versed – including public policy in the context of the capital market and investor protection – and introduced legal argument disguised as opinion evidence. Brookfield argued that Puri also went outside the role of an expert witness by giving her opinion as to what she believes the law should be concerning two issues relevant to the Applications, equity interests and beneficial share ownership.

[40] Brookfield took issue with the Castaldo Affidavit and the Quinn Affidavit because they were submitted as fact affidavits, and in Brookfield's assessment, their content was more akin to expert opinion evidence. Because Castaldo and Quinn served as the financial advisors to the Special Committee and to the IPL Board respectively, Brookfield submitted that they had an interest in the outcome of the Applications and could not be considered independent or neutral. Therefore, any opinion evidence (as opposed to fact evidence) they gave should be given little, if any, weight.

(b) IPL

[41] IPL argued that this panel should consider all of the relevant evidence led and use our broad discretion as to the weight to be given to that evidence. It disagreed that the approach to expert evidence applied by the OSC panel in *Solar Income* should be applied in Alberta, and pointed out that in *Re Workum and Hennig*, 2008 ABASC 363, aff'd. *sub nom. Alberta (Securities Commission) v. Workum*, 2010 ABCA 405, an ASC hearing panel admitted certain expert evidence despite finding that it was capable of conducting its own analysis on the pertinent issues.

[42] Accordingly, IPL argued that we should admit and consider the expert evidence – including the Puri Report – that we find helpful, and afford it the weight we consider appropriate. IPL further pointed out that the Puri Report was tendered in part in response to the evidence given by Brookfield's expert, Osler, which IPL said similarly offered opinions on some of the issues we must determine in deciding the Applications.

[43] As for the Castaldo Affidavit and the Quinn Affidavit, IPL emphasized that these individuals were its financial advisors during the relevant period, and that most of their evidence simply outlined the facts of their involvement. As financial advisors, they necessarily gave analyses and opinions at the time, and IPL argued that summarizing those analyses and opinions in their affidavits *post facto* did not make the affidavits opinion evidence in the legal sense. However, IPL argued, even if they did constitute opinion evidence, they could still be considered and made subject to weight.

[44] IPL also disagreed that Castaldo and Quinn lacked independence, as the compensation paid to J.P. Morgan and TD Securities was not contingent on any particular party's successful acquisition of IPL. In their respective affidavits, Castaldo and Quinn confirmed that J.P. Morgan and TD Securities had no financial incentive to prefer one deal over another, as they would get their fees upon the completion of any transaction.

3. Analysis and Conclusions

[45] It is well-established that as an expert tribunal, certain issues are within a securities commission panel's expertise, experience, and knowledge, and third-party expert evidence on those issues is not required (see, for example, *Re Magna International Inc.* (2010), 33 O.S.C.B. 6013 at para. 40; *Re Aitkens*, 2018 ABASC 27 at para. 137; and *Re Chilean Metals Inc.*, 2019 BCSECCOM 24 at paras. 77-79). However, ss. 29(e) and (f) of the Act make clear that ASC hearing panels have wide discretion to decide what evidence to admit and what weight it should be given. Those two subsections state:

> (e) the [ASC] . . . shall receive that evidence that is relevant to the matter being heard;
>
> (f) the laws of evidence applicable to judicial proceedings do not apply[.]

[46] As Brookfield pointed out, although the laws of evidence do not apply, when making decisions about admissibility and weight, we generally consider the policy reasons underlying any relevant evidentiary rules and the legal requirements of those rules (as discussed in *Re Sentinel Financial Management Corp.*, 2008 ABASC 477 at para. 10).

[47] In *R. v. Mohan*, [1994] 2 S.C.R. 9, the Supreme Court of Canada (the **SCC**) held that in proceedings before the courts, expert evidence is admissible if: (i) it is relevant; (ii) it is necessary in that it is information outside the ordinary experience and knowledge of the trier of fact; (iii) no other exclusionary rule applies; and (iv) it is given by a properly qualified expert (see paras. 17 and 21).

[48] In *Solar Income*, the OSC panel relied on the *Mohan* criteria and declined to admit an expert report on the grounds that it was irrelevant and gave an opinion on an issue (the reasonable expectations of investors) that was for the panel to determine, and on which the panel did not require expert assistance (see paras. 6, 55, 92, 99, and 101-103).

[49] However, this is not the position in Alberta. As IPL noted, in *Workum and Hennig*, the ASC panel admitted expert evidence that was not strictly necessary because the panel had the expertise to decide the issue itself. On appeal to the Alberta Court of Appeal, the appellants argued that the ASC panel erred in doing so, and relied on *Mohan* (see paras. 22 and 69). The Court dismissed the appeal and held that the *Mohan* criteria do not apply in the administrative law context, although it also indicated that consideration of the *Mohan* criteria may lead a tribunal to give more or less weight to the expert evidence at issue (at paras. 82-84).

[50] Past ASC decisions indicate that even where expert evidence is not strictly necessary, a panel may admit and rely on it if it is helpful to the analysis, even if it simply confirms the panel's own views.

[51] For example, in *Workum and Hennig*, the panel found that it was fully capable of conducting its own analysis and reaching its own conclusions without the expert evidence, but still referred to some of Staff's expert's testimony in its decision. The testimony confirmed the panel's conclusions, even though it did not "present or illuminate new and unknown principles" (at para. 105).

[52] In *Ironside*, the panel accepted an expert "in the area of securities law" (at para. 78), and another "on the issue of materiality in the securities industry" (at para. 300), despite the fact that both were squarely within its own expertise.

[53] At least one earlier OSC panel decision suggested a similar approach. In *Re Biovail Corporation*, 2010 ONSEC 21, the panel admitted expert evidence it concluded was not required or necessary on the basis that it may have been "relevant or useful" (at paras. 80, 201, 213, and 238).

[54] Even if admitted, an ASC panel is not bound by the expert evidence tendered. In *Workum and Hennig*, the panel specifically noted that the evidence was not determinative of the issues it had to decide and that it was not bound to accept all of the expert's opinions (at paras. 105 and 108). In *De Gouveia*, the panel found that it was not bound by the expert's opinion on the ultimate issue, and that it remained the panel's task to consider and weigh that evidence along with all of the other relevant evidence (at paras. 66 and 71). The panel explained (at para. 104):

> We found Stewart [the expert] to be a credible witness. We gave great weight to her explanations of various trading practices and their consequences, and her testimony was of considerable assistance to us in our review of some of the documentary trading evidence. That said, we were not bound to accept her conclusions. Rather, we considered and analyzed all the evidence and reached our own conclusions, taking into account, but not dictated by, Stewart's opinions and conclusions. Although her conclusions did not dictate our findings, we regard the parallels between them as important corroboration of our analysis.

[55] In view of the foregoing principles, we decided to exercise our discretion to admit the Puri Affidavit into evidence as Exhibit #19. While not strictly necessary given this panel's expertise and experience, we found Puri qualified to express her opinions and found some of those opinions both helpful and relevant to the issues before us. We did not consider ourselves bound by her evidence, but as will become apparent later in these reasons, we took her evidence on certain matters into account and gave it commensurate weight where we concluded it was appropriate and useful to do so, and where it corroborated our own independent conclusions. We gave her evidence little to no weight where her opinions were more in the nature of legal argument or policy recommendation.

[56] As for the Castaldo Affidavit and the Quinn Affidavit, we agreed that both expressed opinions and even addressed some of the opinions given by Brookfield's expert witness, Osler, in a manner somewhat reminiscent of rebuttal expert reports. However, we also agreed with IPL that as its financial advisors at the relevant time, in recounting the facts of their involvement, Castaldo and Quinn necessarily referred to the advice and opinions they had given. That they confirmed their advice and opinions in their affidavits – including by way of contrast with Osler's opinions – did not make the affidavits expert opinion evidence in the usual sense. Indeed, most of the fact witnesses expressed their personal views on the events that occurred and the issues raised.

[57] In weighing their evidence on the matters at issue, we took into account the roles Castaldo and Quinn played in the events under consideration, as well as their M&A experience, the basis of their evidence, and its consistency with other reliable evidence. We took the same approach with all of the witnesses whose evidence was tendered at the Hearing, especially where one or more of the parties raised concerns about that evidence.

[58] Where these or other arguments or aspects of the evidence factored into our analysis, they are discussed further in later sections of this decision.

V. THE APPLICATIONS

A. The Brookfield Application

[59] Initially, Brookfield applied for orders under ss. 179 and 198 of the Act in connection with what it described as the inappropriate defensive tactics taken by the IPL Board in response to the Brookfield Offer: adopting the Supplemental SRP and agreeing to pay Pembina the $350 million Break Fee. The precise relief sought was:

> (a) an order pursuant to section 198 of the [Act] that all trading cease in respect of any securities that are proposed to be issued or exchanged in connection with the rights issued under the IPL [SRPs], including the issuance of any IPL . . . Shares upon exercise of such rights;
>
> (b) an order pursuant to section 179(1) of the [Act] restraining IPL from paying, and the IPL Board from causing or permitting IPL to pay, the . . . Break Fee to Pembina;
>
> (c) an order pursuant to section 198 of the [Act] that all trading cease in respect of any securities that are proposed to be issued or exchanged in connection with the [Pembina] Arrangement, including, without limitation, in respect of the proposed transfer of all of the outstanding IPL . . . Shares to Pembina in exchange for [Pembina Shares] pursuant to the plan of arrangement attached as Schedule "A" to the [Pembina] Arrangement [a]greement; and
>
> (d) such further and other relief as the [ASC] deems appropriate.

[60] In reply, IPL argued that the ASC does not have the jurisdiction to interfere with the payment of the Break Fee under s. 179 of the Act. That section states:

> 179(1) On application by an interested person, if the [ASC] considers that a person has not complied or is not complying with this Part or the regulations, the [ASC] may make an order
>
> (a) restraining the distribution of any document, record or materials used or issued in connection with a take-over bid or issuer bid,
>
> (b) requiring an amendment to or variation of any document, record or materials used or issued in connection with a take-over bid or issuer bid and requiring the distribution of amended, varied or corrected information,
>
> (c) directing any person or company to comply with this Part or the regulations,
>
> (d) restraining any person or company from contravening this Part or the regulations, or
>
> (e) directing the directors and officers of any person or company to cause the person or company to comply with or to cease contravening this Part or the regulations.

> (2) On application by an interested person, the [ASC] may order that a person or company is exempt from any requirement under this Part or the regulations if the [ASC] considers it would not be prejudicial to the public interest to do so.

[61] Since s. 179 only applies "if the [ASC] considers that a person has not complied or is not complying with this Part [i.e., Part 14 of the Act, *Take-over Bids and Issuer Bids*] or the regulations [e.g., National Instrument 62-104 *Take-Over Bids and Issuer Bids* (**NI 62-104**)]", IPL pointed out that s. 179 did not apply here because Brookfield neither alleged nor proved that IPL breached or would breach the Act or regulations by agreeing to or paying the Break Fee. Further, it argued, only certain types of orders can be granted under s. 179, none of which would provide the relief sought by Brookfield.

[62] Pembina agreed. In its view, to direct IPL not to pay the Break Fee to Pembina would be to direct IPL to breach a contract – which is not within the ASC's jurisdiction.

[63] Staff were of the same opinion. They stated that while the IPL SRPs and the Pembina Arrangement could be cease traded under s. 198 of the Act, s. 179 does not provide authority to restrain payment of the Break Fee.

[64] Although Brookfield initially argued that s. 179(1) gives us the authority to grant the order sought on the basis that agreeing to the Break Fee was an improper defensive tactic, Staff pointed out that defensive tactics are addressed only in a policy, not in the Act or regulations. Moreover, Staff argued, the Pembina Arrangement did not fall under Part 14 because it was not a take-over bid or an issuer bid – it was a plan of arrangement under s. 193 of the ABCA.

[65] Staff submitted that we have the authority to cease trade the Pembina Arrangement if we determined that the Break Fee was clearly abusive of investors and the capital market. While doing so would effectively restrain payment of the Break Fee, Staff cautioned that it would also deprive IPL shareholders of the opportunity to choose the Pembina Arrangement.

[66] While we agreed with IPL, Pembina, and Staff, we were not required to make a decision on the point. After listening to the other parties' arguments, Brookfield indicated at the Hearing that it had been persuaded by Staff's submissions and withdrew its application for relief under s. 179 of the Act. As a result, we considered the parties' arguments concerning the Break Fee solely in the context of orders permitted under s. 198.

B. The IPL Application

[67] IPL asserted that Brookfield's conduct in connection with the IPL Swaps was abusive of IPL shareholders and the capital market on four grounds:

- using the IPL Swaps to avoid early warning reporting obligations under NI 62-104;
- failing to make proper public disclosure regarding the IPL Swaps, including as required under NI 62-104;
- using the Swap Shares "held by a captive and compliant [swap] counterparty (which Brookfield [had] recently characterized as forming part of the 'Brookfield Block' in

its public disclosure) to try to defeat shareholder approval of the Pembina Arrangement"; and

- using the Swap Shares to try "to meet the minimum tender condition of 50% of IPL . . . Shares beneficially owned or over which control or direction is exercised by parties other than Brookfield or parties acting jointly or in concert with Brookfield", under s. 2.29.1(c) of NI 62-104.

[68] The IPL Application sought the following relief in relation to the IPL Swaps under ss. 179 and 198 of the Act:

- a s. 198 order directing Brookfield to issue a notice of change to the Brookfield Offer and provide public disclosure of:
    - the material aspects of the IPL Swaps (including dates, parties, relationship between Brookfield and other parties, and fee arrangements);
    - the terms and conditions of the IPL Swaps (including details of Brookfield's economic exposure and any option to acquire IPL Shares);
    - the expiry or termination dates and events of the IPL Swaps (including anything that could give the swap dealer an incentive to tender Swap Shares to the Brookfield Offer); and
    - the IPL Swap instruments or contracts

  (collectively, the **Proposed Disclosure Order**);

- a s. 179 or s. 198 order directing that the Swap Shares be considered beneficially owned or controlled by Brookfield or a person acting jointly or in concert with Brookfield for the purpose of s. 2.29.1(c) of NI 62-104 (and therefore excluding the Swap Shares from the minimum tender condition amount, which is discussed later in these reasons) (the **Proposed Minimum Tender Order**); and

- a ss. 198 and 199 order deeming the Swap Shares to be voted at the IPL shareholders meeting scheduled for July 29, 2021 regarding the Pembina Arrangement (the **IPL Shareholders Meeting**) in the same proportions for or against the arrangement as all other non-Brookfield-owned or controlled IPL Shares, or preventing the Swap Shares from being voted regarding the Pembina Arrangement (the **Proposed Voting Order**) (as s. 199 deals solely with administrative penalties, we assumed that IPL's reference to s. 199 here was an error and it is not addressed further in these reasons).

[69] Initially, IPL also applied for relief under s. 179 of the Act on the basis that certain Brookfield entities should have signed the required certification for the Brookfield Offer. However, IPL withdrew this aspect of its application after Brookfield changed the certification.

C. The Pembina Application

[70] Pembina adopted the IPL Application, and sought an additional order under s. 198 of the Act cease trading any securities proposed to be issued or exchanged in connection with the Brookfield Offer, including the proposed transfer of IPL Shares pursuant to the Brookfield Offer (the **Proposed Brookfield Offer CTO**).

VI. GENERAL PRINCIPLES

A. The ASC's Public Interest Jurisdiction

[71] As mentioned, each of the Applications sought relief under s. 198 of the Act, which provides that the ASC may make a variety of orders if we consider that "it is in the public interest to do so". Similar provisions are included in securities regulatory statutes across Canada.

[72] The leading case on Canadian securities commissions' public interest jurisdiction is the SCC's decision in *Committee for the Equal Treatment of Asbestos Minority Shareholders v. Ontario (Securities Commission)*, 2001 SCC 37.

[73] In *Asbestos*, the SCC considered an OSC panel's application of s. 127 of the *Securities Act* (Ontario) (the **Ontario Act**), that province's version of Alberta's s. 198. The SCC made the following findings:

- Section 127 of the Ontario Act provides the OSC with very wide discretionary power to intervene in the public interest in activities related to the Ontario capital market. The section's permissive language expresses a legislative intent "to leave it for the OSC to determine whether and how to intervene in a particular case" (at paras. 39 and 49).

- While no breach of the statute is required to trigger the section, the OSC's public interest jurisdiction "is not unlimited" (at paras. 41-42).

- The precise nature and scope of the public interest jurisdiction should be assessed by considering the OSC's mandate "to provide protection to investors from unfair, improper or fraudulent practices" and "to foster fair and efficient capital markets and confidence in the capital markets." Therefore, both "the fair treatment of investors" and "[t]he effect of an intervention in the public interest on capital market efficiencies and public confidence in the capital markets" should be considered before making an order in the public interest (at para. 41).

- In deciding whether to exercise its public interest discretion in the *Asbestos* case, the OSC panel below correctly considered whether the transactions at issue were "clearly abusive" of investors and the integrity of the capital market (at para. 52).

[74] Similar principles were articulated some years prior to *Asbestos*. In *Re Canadian Tire Corp.* (1987), 10 O.S.C.B. 857, the hearing panel concluded that its public interest jurisdiction could be used "to deal with situations that are inconsistent with the best interests of investors or where a transaction constitutes a flagrant abuse of the marketplace" (at para. 124), and "to restrain a

transaction that is clearly abusive of investors and of the capital markets, whether or not that transaction constitutes a breach of the [Ontario Act], the regulations or a policy statement" (at para. 130).

[75] While such an intervention might be necessary to fulfill the OSC's mandate to regulate the capital market in the public interest and avoid a loss of confidence in the market, the *Canadian Tire* panel acknowledged that the power still must be used cautiously (at paras. 126, 130, and 151). It explained (at para. 154):

> Participants in the capital markets must be able to rely on the terms of the documents that form the basis of daily transactions. And it would wreak havoc in the capital markets if the [OSC] took to itself a jurisdiction to interfere in a wide range of transactions on the basis of its view of fairness through the use of the cease-trade power under s. 123 [now s. 127 of the Ontario Act]. . . . The [OSC's] mandate under s. 123 is not to interfere in market transactions under some presumed rubric of insuring fairness.

[76] In *Re Carnes*, 2015 BCSECCOM 187, a panel of the British Columbia Securities Commission (the **BCSC**) similarly explained the need for caution (at para. 129):

> We recognize that when a panel issues an order in exercise of its public interest jurisdiction, the order has the effect of restraining or prohibiting conduct that is not prohibited specifically by legislation. Market participants should be able to structure their affairs within the context of the specific provisions of the [*Securities Act* (British Columbia) (the **B.C. Act**)], without fear of enforcement actions alleging wrongdoing that is not encoded in the [B.C.] Act, regulation or rules of the [BCSC].

[77] According to the *Canadian Tire* panel, this is why the conduct or transaction in question must rise to the level of "clearly abusive" before the OSC's public interest jurisdiction is engaged (at para. 155):

> To invoke the public interest test of s. 123, particularly in the absence of a demonstrated breach of the [Ontario] Act, the regulations or a policy statement, the conduct or transaction must clearly be demonstrated to be abusive of shareholders in particular, and of the capital markets in general. A showing of abuse is something different from, and goes beyond, a complaint of unfairness. A complaint of unfairness may well be involved in a transaction that is said to be abusive, but they are different tests. Moreover, the abuse must be such that it can be shown to the [OSC]'s satisfaction that a question of the public interest is involved. That almost invariably will mean some showing of a broader impact on the capital markets and their operation.

[78] It is in such a case that "the exercise of private legal rights must give way to broader considerations" – namely, "the equitable operation of [Ontario's] capital markets" (*Canadian Tire* at para. 158).

[79] These principles have been applied and reiterated in numerous Canadian securities commission decisions since *Canadian Tire* and *Asbestos* (see, for example, *AbitibiBowater inc. (Produits forestiers Résolu) v. Fibrek inc.*, 2012 QCBDR 17 at paras. 96 and 98; *Re Neo Material Technologies Inc.* (2009), 32 O.S.C.B. 6941 at paras. 33-35; *Re Patheon Inc.*, 2009 ONSEC 13 at para. 114; and *Re ARC Equity Management (Fund 4) Ltd.*, 2009 ABASC 390 at paras. 65-67 and 70).

[80] While it was not in dispute among the parties that the principles set out in *Asbestos* apply in Alberta, IPL further argued that in determining if certain conduct is abusive, the focus should be the effect of the conduct on investors and the integrity of the capital market, not the impugned party's subjective intent or motivations. It cited *Re H.E.R.O. Industries Ltd.* (1990), 13 O.S.C.B. 3775, in which an OSC panel held that regardless of a party's motives, the more important question is the effect its actions had on the public interest. In that case, the effect was that one party would have received a premium for its shares while the other shareholders received nothing and lost the opportunity to tender to a competing bid. The panel therefore concluded that the conduct in question was clearly abusive of the integrity of the capital market (at paras. 28-29).

[81] IPL also suggested that in addition to or as an alternative to the "clearly abusive" test, the ASC can intervene in the public interest on a broader basis where the letter of the applicable securities law, policy, or rule has been complied with, but the "animating principles" or spirit underlying those rules have not. IPL cited *H.E.R.O.* (at para. 18) and *Patheon* (at para. 116) in this regard, but the concept has also been referenced in other OSC decisions, including *Re Magna International Inc.*, 2010 ONSEC 13 (at paras. 184 and 186) and *Re VenGrowth Funds (Special Committee of Directors)*, 2011 ONSEC 17 (at para. 67).

[82] In *VenGrowth*, for example, the panel found that one of the fundamental tenets of the take-over bid regime in Canada is that a shareholder's right to choose between competing proposed transactions must be protected. Therefore, a provision in support agreements entered into between the hostile offeror and target company shareholders that prevented the shareholders from later changing their minds and choosing a different transaction was found to have undermined an animating principle of the Ontario Act and, consequently, the public interest – even though the hostile offeror's solicitation of the agreements was not contrary to Ontario securities laws and the panel concluded that there was no abuse (at para. 52, 54, 57-60, 62, and 67).

[83] Brookfield disagreed that the "animating principles" standard had any application in this case. It argued that the ASC has not adopted that standard, whereas the "clearly abusive" standard was confirmed in *Re Perpetual Energy Inc.*, 2016 ABASC 2 (at para. 46).

[84] Brookfield also pointed out that in *Re PointNorth Capital Inc.*, 2017 ABASC 121, the panel rejected PointNorth's argument that it should exercise its public interest jurisdiction on the basis that the conduct at issue was contrary to the "animating principles" of securities laws, which PointNorth contended was a standard lower than "clearly abusive" (at paras. 26 and 39).

[85] The *PointNorth* panel noted the distinction drawn in some decisions between conduct on which securities laws are silent – and where the "animating principles" standard could apply, if adopted – and conduct falling into an area on which securities laws "articulate 'specific acts which constitute misconduct'" – where the "clearly abusive" standard applies (at paras. 30, 34, and 36). Because Alberta securities laws "set out comprehensive and detailed requirements" for the conduct at issue in *PointNorth* (proxy solicitation and the conduct of brokers), the panel held that the appropriate test was whether the conduct was "clearly abusive of shareholders and of the capital market in general" (at paras. 37 and 39). It therefore did not decide whether the "animating principles" standard should be adopted in Alberta.

[86] As discussed later in these reasons, in granting the IPL Application and the Pembina Application in part, we were satisfied that Brookfield's conduct met the clearly abusive standard. Therefore, as in *PointNorth*, it was not necessary for us to decide whether the animating principles standard applies in Alberta in general, or applied in this case in particular.

B. The Business Judgment Rule

[87] Despite the broad discretion Canadian securities commissions have to act in the public interest, it is also true "that a degree of deference is owed to the decision of the board of directors of a market participant with respect to the issue under review" (*Neo* at para. 35). This is to give effect to the well-known "business judgment rule" that is also applied in the courts. The Court described the rule in *Mudrick Capital Management LP v. Wright*, 2019 ABQB 662 (at para. 92):

> The Business Judgment Rule is a rebuttable presumption, originating in US law, that the decisions of corporate directors are made on an informed basis and in good faith and therefore in the best interests of the company. Judges are not to second-guess the decisions of duly elected directors but rather, deferring to their autonomy and expertise, consider only whether the decision was reasonable, not whether it was perfect . . .

[88] As long as a decision made by a board of directors falls within the range of reasonable alternatives in the circumstances, deference to the decision should be shown (*Neo* at para. 103; see also *CW Shareholdings Inc. v. WIC Western International Communications Ltd.* (1998), 39 O.R. (3d) 755 (Ont. Gen. Div.) (***CW Shareholdings (Ont. Gen. Div.)***) at para. 66, and *Pente Investment Management Ltd. v. Schneider Corp.* (1998), 42 O.R. (3d) 177 (ONCA) at paras. 34 and 36).

[89] The Ontario Court (General Division) explained further in the context of a contested take-over bid (*CW Shareholdings (Ont. Gen. Div.)* at para. 62):

> The directors' actions are not to be judged against the perfect vision of hindsight, and should be measured against the facts as they existed at the time the impugned decision was made. In addition, the court should be reluctant to substitute its own opinion for that of the directors where the business decision was made in reasonable and informed reliance on the advice of financial and legal advisors appropriately retained and consulted in the circumstances.

[90] In *Pente*, the Ontario Court of Appeal drew the same conclusion if a board acted on the advice of an independent committee that made an informed, good-faith recommendation as to the best available transaction for shareholders (at para. 38).

[91] This is not to suggest that blind deference should be shown to any decision made by a board of directors in any circumstances, as Brookfield cautioned against in its written submissions. The board's decision must still be a reasonable one given the situation and the applicable law and policy. In the present context, that includes the overall objectives of the take-over bid regime.

C. Swaps

[92] We accepted the description of Swaps given by Mitts, Pembina's expert witness:

> A *swap* is a contract where two parties agree to exchange cash flows in the future. In a *cash-settled total return swap*, one party (the "buyer") agrees with the other party (the "counterparty") to exchange cash flows arising from an underlying asset, like shares of stock. The counterparty typically agrees to pay the buyer (a) interest, dividends or other distributions which are paid to

> holders of the underlying asset and (b) any appreciation in the market value of the underlying asset upon expiration of the swap. Should the underlying asset decline in value, the buyer agrees to pay the difference to the counterparty.
>
> A typical cash-settled total return swap thus yields the buyer a financial payoff which is economically equivalent to buying the underlying asset, holding that asset for the duration that the swap contract is open, and selling the asset at the market price upon termination of the swap. Absent any hedging, the counterparty has a financial payoff which is the reverse of the buyer's–that is, economically equivalent to selling the underlying asset and repurchasing that asset from the buyer at the market price upon termination of the swap. However, . . . a swap counterparty typically hedges its exposure to the underlying asset (including by purchasing the asset) and profits by charging a fee for acting as a dealer. [original emphasis; footnotes omitted]

D. The Take-Over Bid Regime

1. Overview

[93] National Policy 62-203 *Take-Over Bids and Issuer Bids* (**NP 62-203**) sets out the objectives of the take-over bid regime in Canada (at s. 2.1):

> The [take-over bid regime in NI 62-104 and NP 62-203] is designed to establish a clear and predictable framework for the conduct of bids in a manner that achieves three primary objectives:
>
> - equal treatment of offeree issuer security holders;
> - provision of adequate information to offeree issuer security holders; and
> - an open and even-handed bid process.

[94] Section 1.1(2) of National Policy 62-202 *Take-Over Bids – Defensive Tactics* (**NP 62-202**) also discusses the regime's objectives:

> The primary objective of the take-over bid provisions of Canadian securities legislation is the protection of the bona fide interests of the shareholders of the target company. A secondary objective is to provide a regulatory framework within which take-over bids may proceed in an open and even-handed environment. The take-over bid provisions should favour neither the offeror nor the management of the target company, and should leave the shareholders of the target company free to make a fully informed decision. The Canadian securities regulatory authorities are concerned that certain defensive measures taken by management of a target company may have the effect of denying to shareholders the ability to make such a decision and of frustrating an open take-over bid process.

[95] Section 1.1(5) of NP 62-202 refers to the desirability of unrestricted auctions in the take-over bid context:

> The Canadian securities regulatory authorities consider that unrestricted auctions produce the most desirable results in take-over bids and they are reluctant to intervene in contested bids. However, they will take appropriate action if they become aware of defensive tactics that will likely result in shareholders being deprived of the ability to respond to a take-over bid or to a competing bid.

[96] The regime requires an offeror to deliver a take-over bid circular to each target shareholder (NI 62-104 at s. 2.10). That circular must be in a required form (Form 62-104F1 *Take-Over Bid Circular* (**Form 62-104F1**)) and contain extensive specified disclosure to ensure that target shareholders have sufficient information from the offeror on which to base an informed decision.

It must also include a certificate stating that the circular contains no untrue statements or omissions of material facts.

2. 2016 Amendments to the Take-Over Bid Regime

(a) Relevant 2016 Amendments

[97] Take-over bid regime amendments – and associated policy guidance – came into force in Canada effective May 9, 2016 (the **New Bid Regime**). Three significant changes relevant to the Applications were:

- a mandatory minimum initial deposit period of 105 days from the date of the take-over bid (increased from the previous 35-day minimum) (see NI 62-104 at s. 2.28.1);

- a mandatory minimum tender condition of more than 50% (the **Minimum Tender Condition**) (see NI 62-104 at s. 2.29.1(c)); and

- a statement of the effect of potential deemed beneficial ownership of securities in certain circumstances under the early warning regime (the **EWR**) (see NP 62-203 at s. 3.1 in the context of NI 62-104 at s. 5.2).

(b) Minimum Initial Deposit Period

[98] The mandatory minimum initial deposit period is the length of time an offeror must allow for target shareholders to decide whether to deposit their securities to a take-over bid. It allows the target and its shareholders time to analyze the take-over bid, and gives the target the opportunity to attract or search for rival bidders.

[99] This period was increased from 21 days to 35 days in 2001, then increased to 105 days in 2016. The 2016 increase affected the law relating to shareholder rights plans, as discussed later in this decision.

(c) Minimum Tender Condition

[100] Pursuant to s. 2.29.1(c) of NI 62-104, the Minimum Tender Condition prohibits an offeror from taking up securities deposited under a take-over bid unless:

> . . . more than 50% of the outstanding securities of the class that are subject to the bid, excluding securities beneficially owned, or over which control or direction is exercised, by the offeror or by any person acting jointly or in concert with the offeror, have been deposited under the bid and not withdrawn.

[101] Brookfield originally made its offer subject to its own requirement that at least 66 2/3% of IPL Shares – including those owned by Brookfield – be deposited to the Brookfield Offer before it would take up those shares. That condition was removed in later iterations of the Brookfield Offer, leaving only the statutory Minimum Tender Condition.

(d) Early Warning Regime

[102] Take-over bid regulation includes the EWR. This requires an entity to file an early warning report once it acquires 10% or more of a company's issued and outstanding securities (see

NI 62-104 at s. 5.2). The EWR reporting requirement applies even if that entity is not planning to make a take-over bid at the time it reaches or exceeds 10%. After an entity files an early warning report, it must also make further disclosure of any increases or decreases of 2% or more in its beneficial ownership.

[103] An EWR report alerts the market to a potential take-over bid and prevents "creeping take-overs", in which an entity acquires control of a company or gets close to a control position (through transactions such as private placements and market purchases that are exempt from take-over bid rules) without paying a premium for the target company's securities (see D. Johnston, K. Rockwell, and C. Ford, *Canadian Securities Regulation*, 5th ed. (Markham: LexisNexis, 2014) at para. 11.31). One criticism of Swaps is that they could effectively allow circumvention of the EWR, as IPL and Pembina alleged occurred here.

[104] In discussing the purpose of the EWR, Staff referred to a September 4, 1998 Canadian Securities Administrators (the **CSA**) Notice (Proposed National Instrument: NI 62-103 – *The Early Warning System and Related Take-Over Bid and Insider Reporting Requirements*) (at p. 2):

> The early warning system contained in the securities legislation of most jurisdictions requires disclosure of holdings of securities that exceed certain prescribed thresholds in order to ensure that the market is advised of accumulations of significant blocks of securities that may influence control of a reporting issuer. Dissemination of this information is important because the securities acquired can be voted or sold, and the accumulation of the securities may signal that a take-over bid for the issuer is imminent. In addition, accumulations may be material information to the market even when not made to change or influence control of the issuer. Significant accumulations of securities may affect investment decisions as they may effectively reduce the public float, which limits liquidity and may increase price volatility of the stock. Market participants also may be concerned about who has the ability to vote significant blocks as these can affect the outcome of control transactions, the constitution of the issuer's board of directors and the approval of significant proposals or transactions. The mere identity and presence of an institutional shareholder may be material to some investors.

[105] Only beneficial ownership of voting or equity securities is currently subject to the EWR disclosure requirements. Interests in Swaps and similar derivatives are not subject to those requirements, although guidance added in 2016 to NP 62-203 (at s. 3.1) provides that beneficial ownership can be deemed in some circumstances, which would be relevant for EWR compliance:

> An investor that is a party to an equity swap or similar derivative arrangement may under certain circumstances have deemed beneficial ownership, or control or direction, over the referenced voting or equity securities. This could occur where the investor has the ability, formally or informally, to obtain the voting or equity securities or to direct the voting of voting securities held by any counterparties to the transaction. This determination would be relevant for compliance with the early warning and take-over bid requirements under [NI 62-104].

[106] We discuss the interaction of Swaps with EWR requirements later in this decision.

3. Acquisitions by Offeror During Take-Over Bid

[107] After an offeror announces a take-over bid, it may not acquire any of the target securities outside of the take-over bid, subject to certain exceptions (NI 62-104 at s. 2.2). The exception relevant to this matter is the **5% Exemption**, which permits an offeror to acquire another 5% of

the target's issued and outstanding securities as at the date of the take-over bid if certain conditions are met (see NI 62-104 at s. 2.2(3)).

[108] As an OSC panel explained in *Re Falconbridge Limited*, 2006 ONSEC 21 (at para. 73):

> From a policy perspective, the purchases under the 5% Exemption contribute to liquidity in the target company's shares, provide all target shareholders with an equal opportunity to sell their target shares prior to conclusion of the bid, raise the market price of the shares, and encourage bidders to raise their offer prices.

E. Voting Threshold for a Plan of Arrangement

[109] Voting on the Pembina Arrangement at the July 29, 2021 IPL Shareholders Meeting was subject to the majority voting requirement set out at s. 193(6)(a) of the ABCA. At least 66 2/3% of the votes cast by shareholders voting on the resolution had to be in favour of the Pembina Arrangement for it to be approved.

VII. THE BROOKFIELD APPLICATION

A. Defensive Tactics – General

[110] As mentioned, the Brookfield Application challenged the defensive tactics taken by the IPL Board in response to the Brookfield Offer. Brookfield suggested that there were two broad issues for determination by this panel:

- Did the Supplemental SRP prejudice IPL shareholders, including Brookfield?
- Did the quantum of the Break Fee prejudice IPL shareholders?

[111] We consider the IPL SRPs and the Break Fee in detail later in these reasons, but set out here some general principles concerning defensive measures and the parties' positions as to the application of those principles in this case.

1. Governing Principles

[112] As its title – *Take-Over Bids – Defensive Tactics* – suggests, NP 62-202 sets out the views of Canadian securities regulators concerning defensive tactics that may be employed by a target company subject to a take-over bid. Sections 1.1(2) and (5) were cited above. The following additional portions of s. 1.1 are also relevant to the Brookfield Application:

> 1.1(1) . . . Management of a target company may take one or more of the following actions in response to a bid that it opposes:
>
> 1. Attempt to persuade shareholders to reject a take-over bid.
>
> 2. Take action to maximize the return to shareholders including soliciting a higher bid from a third party.
>
> 3. Take other defensive measures to defeat the bid.
>
> . . .
>
> (3) . . . Canadian securities regulatory authorities wish to advise participants in the capital markets that they are prepared to examine target company tactics in specific cases to

> determine whether they are abusive of shareholder rights. Prior shareholder approval of corporate action would, in appropriate cases, allay such concerns.

[113] These statements reflect the applicable case law. Canadian securities commission decisions have typically recognized that in discharging its fiduciary duty to the corporation, a target's board of directors may legitimately employ defensive measures such as shareholder rights plans in a genuine attempt to increase value for the target shareholders above that represented by a hostile bid (see, e.g., *Re Royal Host Real Estate Investment Trust*, [1999] 47 B.C.S.C.W.S. 43 at para. 73 and *Re Icahn Partners LP*, 2010 BCSECCOM 432 at paras. 32-33 and 50).

[114] Canadian courts have made similar observations. In *Rogers Communications Inc. v. Maclean Hunter Ltd.* (1994), 45 A.C.W.S. (3d) 1215 (Ont. Gen. Div.), the Court held, "[i]t is reasonable that a target board not roll over and play dead. If it were completely passive, it would be soundly criticized for not doing anything to maximize the situation for the target organization" (at para. 18). It also acknowledged that, "[l]egitimate actions of a target board (to maximize shareholder value) may thwart a complainant's bid" (at para. 23).

[115] At the same time, however, commission panels have recognized that even if they are generally reluctant to do so, it may be necessary to exercise their public interest jurisdiction to constrain or dismantle defensive tactics that impede shareholders' ability to dispose of their shares as they wish or to choose a proposed transaction, including a hostile bid (see *Re Canadian Jorex Ltd.* (1992), 15 O.S.C.B. 257; *Re Suncor Energy Inc.*, 2015 ABASC 984 at para. 13; and *Royal Host* at para. 73).

[116] Whether a defensive tactic is appropriate will depend on the circumstances of the case (see *CW Shareholdings (Ont. Gen. Div.)* at paras. 57 and 97). The Ontario Court (General Division) described it as "a question of balance, proportionality and commercial reasonableness in the overall context of the take[-]over bid and the directors['] mandate to enhance and maximize value for the shareholders as a whole" (*ibid.* at para. 97).

2. Arguments of the Parties

(a) Brookfield

[117] In Brookfield's submission, the IPL SRPs and the Break Fee undermined the objectives of the take-over bid regime set out in NP 62-202: the protection of the *bona fide* interests of the shareholders of the target company, and the provision of a regulatory framework within which take-over bids may proceed in an open and even-handed environment. It argued that IPL's defensive tactics constrained the auction, prejudiced Brookfield as both an IPL shareholder and a bidder, unfairly favoured the Pembina Arrangement, frustrated and undermined the Brookfield Offer, frustrated IPL shareholders from receiving an enhanced Brookfield Offer, and were generally abusive of IPL shareholders and the capital market.

[118] Brookfield further argued that NP 62-202 indicates that defensive tactics during contested take-over bids are tolerated in Canada only to the extent that they give a target company's board of directors an opportunity to maximize shareholder value by seeking a better bid or alternative transaction. It brought the Brookfield Application arguing that relief from this panel was necessary to level the playing field by preventing IPL's defensive tactics from depriving IPL shareholders of Brookfield's best offer.

(b) IPL and Pembina

[119] IPL suggested that the narrow issues on the Brookfield Application were whether the Supplemental SRP or the Break Fee was clearly abusive to IPL shareholders and the integrity of the capital market, and, if so, the appropriate relief to be granted. In its submission, neither was clearly abusive, and the Brookfield Application should be dismissed.

[120] Pembina likewise disagreed with Brookfield's assertion that the Supplemental SRP and the Break Fee were improper defensive tactics. To the contrary, it argued, both promoted shareholder democracy, created choice for IPL shareholders, and helped overcome "the unfair advantage that Brookfield created with its abusive use of [IPL Swaps]". Neither the Supplemental SRP nor the Break Fee prejudiced IPL shareholders or the capital market, and therefore they did not raise public interest concerns that should be addressed by this panel.

[121] IPL pointed out that defensive tactics are permissible under the take-over bid regime, and argued that they are appropriate where necessary to protect a target company and its shareholders. It submitted that the ASC should not get involved unless, as set out in NP 62-202, a defensive tactic will deprive the target shareholders of the ability to respond to a bid. Although NP 62-202 also indicates that a secondary objective of the take-over bid regime is to provide a regulatory framework within which take-over bids may proceed in an open and even-handed environment, IPL argued that that provision is intended for the benefit of shareholders, not hostile bidders.

[122] IPL also cited NP 62-202 in support of its argument that in contested bids, the target board's task is to maximize shareholder value and protect the integrity of the process to ensure shareholders have an opportunity to make an informed decision. There is no single prescribed method for a target board to fulfill its fiduciary duty, and its decisions should not be second-guessed if it has acted reasonably.

(c) Staff

[123] Like Brookfield, Staff cited the objectives of the take-over bid regime as described in s. 1.1(2) of NP 62-202. They argued that this panel's review of defensive tactics should be based on those objectives, ensuring that target shareholders can make fully informed decisions, and preserving the shareholders' right to choose among competing transactions.

[124] Staff noted that defensive tactics in the take-over bid context are reviewable by a commission panel pursuant to both our public interest jurisdiction and NP 62-202. They acknowledged that while defensive measures may be genuinely employed in an attempt to secure a better bid, if they impair the take-over bid regime's objectives and deny or severely limit the ability of target shareholders to respond to a bid, we should intervene.

3. Brief Conclusion

[125] In our Oral Ruling, we indicated that we were not satisfied that IPL engaged in any improper defensive tactics, and found that Brookfield did not establish sufficient grounds for us to exercise our public interest jurisdiction and make the orders sought. We therefore dismissed the Brookfield Application.

[126] Our reasons for these conclusions are set out in the next sections of this decision.

B. The IPL SRPs

1. Additional Background and Evidence

(a) General

[127] According to McKenzie, after Brookfield made the February 22 Offer and the Strategic Review commenced, the Special Committee grew increasingly concerned about the effect Brookfield's IPL Swaps would have on the Strategic Review, the take-over bid process, and the IPL Board's efforts to maximize value for shareholders.

[128] In March 2021, IPL's advisors indicated that when they contacted other potential bidders, some voiced reluctance to participate because of the size of Brookfield's economic interest in IPL. Based on investor calls and several inaccurate media reports, it also appeared that the market was confused about the difference between Brookfield's ownership of IPL Shares and its economic interest in additional IPL Shares through the IPL Swaps.

[129] IPL thought that Brookfield's 19.65% position created a perception that it would be difficult for any other bidder to succeed in acquiring IPL without Brookfield's support, which discouraged competing bidders from coming forward. Brookfield's position also raised the concern that IPL shareholders would not come out to vote on any alternative transaction that arose if they were under the impression that the February 22 Offer was a "done deal" and they had no real choice other than to tender their IPL Shares to Brookfield.

[130] IPL feared that if Brookfield further increased its position by entering into additional IPL Swaps and acquiring additional IPL Shares under the 5% Exemption, the situation would be exacerbated. As McKenzie stated in her affidavit:

> . . . with its 19.65% interest, the Special Committee was concerned that even the acquisition of an additional 5% of IPL Shares in the market within the take[-]over bid rules could effectively end the Strategic Review, such that even if a superior competing transaction came forward, it would not have a fair opportunity to be considered by IPL shareholders.

[131] During cross-examination, McKenzie further explained that given its historically low voter turnout, IPL was concerned that if more IPL Shares were held by swap counterparties who had no economic incentive to vote on a competing transaction and Brookfield held as many as 15% of the IPL Shares and voted them against such a transaction, other IPL shareholders' votes would effectively not count. In her words, "the more shares that are held in [IPL Swaps], the more likely it becomes that the Brookfield ownership of [IPL Shares] has a greater and greater weight on the overall outcome".

[132] Castaldo provided a similar explanation:

> Even if the [Swap] Shares underpinning the [IPL Swaps] could not be voted or tendered in connection with any change of control transaction, by entering into further [IPL Swaps], Brookfield could effectively take additional blocks of IPL voting shares out of play. This would give Brookfield's remaining beneficial holding disproportionately greater weight in any vote[.]

[133] These issues are discussed in more detail later in this decision in the context of the IPL Application and the Pembina Application.

[134] In response to these concerns, IPL's financial and legal advisors recommended that IPL adopt the Supplemental SRP.

[135] If triggered by a single shareholder acquiring 20% or more of the IPL Shares, the First SRP would have given IPL shareholders the right to buy additional IPL Shares at a steep discount. The Supplemental SRP maintained the 20% threshold, but expanded the definition of "Beneficial Ownership" from the First SRP to include "Derivative Transactions". This had the effect of treating Brookfield's IPL Swaps as equivalent to beneficial ownership of additional IPL Shares for the purpose of the trigger. According to McKenzie, this was intended to ensure all IPL shareholders were treated equally in the face of a take-over bid and prevent the aforementioned "creeping" acquisitions of control.

[136] IPL's news release advising that it had adopted the Supplemental SRP specifically indicated that it was a response to Brookfield's February 22 Offer, but explained:

> The Supplemental [SRP] is <u>not</u> intended to prevent Brookfield . . . or its affiliates from acquiring [IPL] pursuant to its hostile take[-]over bid dated February 22, 2021 . . . . The Supplemental [SRP] includes a technical revision to [IPL]'s [First SRP] to treat certain financial derivatives, which have already been utilized by Brookfield, as equivalent to beneficial share ownership. [original emphasis]

[137] The Supplemental SRP was initially set to expire on September 30, 2021 unless approved by IPL shareholders prior to that date. As noted in the Chronology, it was amended on June 25, 2021 so that it would expire at the close of business on the first business day following the IPL Shareholders Meeting held to vote on the Pembina Arrangement.

(b) Expert Evidence

(i) Brookfield

[138] Brookfield retained Osler to provide expert opinion evidence concerning the IPL SRPs, the Break Fee, and, generally, the matters an investment banker would advise a target board to consider when choosing between competing acquisition proposals.

[139] Osler observed that shareholder rights plans are typically adopted for the purposes of giving a target board sufficient time to undertake a strategic review process and find other potential transactions, giving shareholders the time and information they need to make a fully informed decision, and ensuring that all shareholders are treated fairly in the event of a take-over bid. In his view, shareholder rights plans are intended to be temporary, and cease to be of use once a superior transaction is identified and presented to a target company's shareholders.

[140] According to Osler, with the advent of the New Bid Regime in 2016 and its extended timelines and Minimum Tender Condition, the need to implement a shareholder rights plan in Canada has diminished. In the circumstances here, Osler opined that there was no longer a compelling commercial rationale for maintaining the IPL SRPs once the IPL Board decided to recommend the Pembina Arrangement.

(ii) IPL

[141] As mentioned, Puri was retained by IPL in part to provide expert opinion evidence concerning its adoption of the Supplemental SRP.

[142] Puri acknowledged that since the mandatory bid period was extended under the New Bid Regime, fewer shareholder rights plans are implemented for the purpose of giving a target board more time to consider strategic alternatives to an unsolicited bid. However, she noted that such plans are still useful for protecting against "creeping" bids. In her view, shareholder rights plans can help to "level the playing field" in change of control transactions, as they may be used to prevent a bidder from assembling a negative control block that would unreasonably limit shareholder choice in the ways described by McKenzie and Castaldo.

[143] Puri also explained that while the provisions in the Supplemental SRP that included derivatives in the definition of beneficial ownership are novel in Canada, they are common in the United States (the **US**). She considered IPL's implementation of these provisions reasonable and appropriate to allow the Special Committee to conduct an effective Strategic Review and give shareholders the opportunity to make a choice.

[144] Puri suggested that maintaining the IPL SRPs until IPL shareholders voted on the Pembina Arrangement was also reasonable and appropriate, as it prevented Brookfield from gaining a negative blocking position. Without it, Brookfield could have purchased another 5% of IPL's shares on the market and increased its IPL Swap position, which would have given it enough of an interest to have negative control and defeat the required 66 2/3% vote on the Pembina Arrangement.

[145] Puri emphasized that the Brookfield Offer was a permitted bid under the Supplemental SRP. Therefore, it did not prevent Brookfield from pursuing its bid, or deprive IPL shareholders of the opportunity to tender their shares to the Brookfield Offer. Instead, it legitimately preserved IPL shareholders' ability to choose between the Brookfield Offer, the Pembina Arrangement, and any other alternative that may have emerged as a result of the Strategic Review.

2. Applicable Law

[146] Past securities commission decisions are clear that adoption of a shareholder rights plan is not in and of itself unusual or improper, whether or not it is adopted in response to a hostile bid (see, e.g., *Re High Arctic Energy Services Limited Partnership*, 2006 ABASC 1510 at para. 74; *ARC Equity* at para. 85; and *Falconbridge* at para. 36). Shareholder rights plans are permitted under NP 62-202 (*Falconbridge*, *ibid.*).

[147] However, as mentioned, unrestricted auctions are preferred in change of control scenarios to maximize shareholder value. Canadian securities commissions have therefore traditionally taken the view that shareholder rights plans should be "tolerated" rather than "promoted" – and then only for the limited purpose of giving a target board of directors time to fulfill its fiduciary duty to maximize shareholder choice and value, including by conducting a strategic review (see, e.g., *Re Inco Ltd.*, 2006 LNONOSC 747 at para. 22; *Re BGC Acquisition Inc.*, [1999] 25 B.C.S.C.W.S. 44 at p. 4; *Re MDC Corporation and Regal Greetings and Gifts Inc.* (1994), 17 O.S.C.B. 4971 at p. 4979; and *Icahn* at para. 56; in the courts, see also *Pente* at para. 16). The

question addressed in many of the cases is therefore not *if* a shareholder rights plan should "go" or cease to operate, but rather, *when* (*High Arctic* at para. 74; *Re Pulse Data Inc.*, 2007 ABASC 895 at para. 96; and *Icahn* at paras. 32-33).

[148] In *High Arctic*, an ASC hearing panel cease traded a shareholder rights plan when it found that there was no prospect (despite the target board's efforts) of an alternative bid being made before the hostile bid expired. If the plan had not been terminated, it could have left the target shareholders with no bid to consider (see paras. 79 and 84). BCSC panels reached similar conclusions in *BGC Acquisition* (at p. 7) and *Re Inmet Mining Corporation*, 2012 BCSECCOM 442 (at para. 30), as did the panel in *Re CW Shareholdings Inc.* (1998), 21 O.S.C.B. 2899 (***CW Shareholdings (Comm. #1)***) (at paras. 75-76).

[149] In *Suncor*, an ASC panel weighed the possibility of other offers if the plan were left in place against the risk that Suncor would not extend its hostile bid if the plan stayed in place for its full term. To balance the two considerations, the panel issued an order cease trading the plan, but not until after it continued to operate for an additional short period (see paras. 73-74, 89, 97, 100, and 103-106).

[150] In *Re Afexa Life Sciences Inc.*, 2011 ABASC 532, the shareholder rights plans gave the target board time to generate another bid, but the hearing panel found that in the circumstances of the case, eventually the plans' operation would prevent shareholders from getting a better offer from the hostile bidder (see para. 43). The panel concluded that at that point, the competing offers should be left to unfold without the hindrance of the shareholder rights plans. It therefore directed that the plans remain in place until the end of the target company's go-shop period, but not thereafter (at para. 47).

[151] In *Re Baffinland Iron Mines Corp.* (2010), 33 O.S.C.B. 11385, the panel was similarly concerned that the shareholder rights plan at issue would deprive the target shareholders of the ability to tender to the unsolicited offer or prevent the unsolicited bidder from increasing its offer (see paras. 14 and 25). It concluded that the possibility of the unsolicited bidder making a better offer was a potential benefit to Baffinland shareholders that justified cease trading the plan (see para. 38).

[152] Some securities commission decisions have recognized that giving a target board more time to find a better offer in the face of a hostile bid is not the only legitimate reason for implementing a shareholder rights plan. In *Neo*, an OSC panel said that "shareholder rights plans *may* be adopted for the broader purpose of protecting the long-term interests of the shareholders, where, in the directors' reasonable business judgment, the implementation of a rights plan would be in the best interests of the corporation" (at para. 112 (original emphasis); see also para. 107). In *Falconbridge*, the panel observed that the target board had identified a number of concerns that could be addressed by a shareholder rights plan, including the prospect of a creeping take-over bid (see para. 20).

[153] As mentioned previously, under the New Bid Regime, time for a board to consider a bid and find a superior alternative transaction is built into NI 62-104, making that justification for maintaining a shareholder rights plan less significant. However, as Institutional Shareholder

Services observed in a document appended to the Baker Affidavit and entitled, *Proxy Voting Guidelines for TSX-Listed Companies, Benchmark Policy Recommendations* (Effective for Meetings on or after February 1, 2021), "'new generation' shareholder rights plans will continue to serve an important purpose because they ensure that shareholders are treated equally in a control transaction by precluding creeping acquisitions or the acquisition of a control block through private agreements between a few large shareholders" (at p. 28).

[154] Whatever the motivation for adopting a shareholder rights plan, it appears to be common ground among the case authorities that the plan should cease to operate once that goal has been achieved and there is no longer a basis for allowing the plan to continue (see, e.g., *Icahn* at para. 56). At some point, a target company's shareholders must be given an opportunity to decide for themselves whether to tender to a take-over bid or support an alternative transaction, and it is in the public interest to ensure that they have that chance (see *Icahn* at paras. 32-33 and 89, and *Pulse Data* at para. 95).

[155] In *Re Cara Operations Ltd.* (2002), 25 O.S.C.B. 7997, an OSC panel explained (at para. 53):

> While it may be important for shareholders to receive advice and recommendations from the directors of the target company as to the wisdom of accepting or rejecting a bid, and for directors to be satisfied that a particular bid is the best likely bid under the circumstances, in the last analysis the decision to accept or reject a bid should be made by the shareholders, and not by the directors or others.

[156] Accordingly, shareholder rights plans should cease to have effect once they no longer benefit shareholders and enhance their choice, but instead interfere with that choice or otherwise "impair [shareholders'] ability to exercise their fundamental right to decide whether to accept or reject a take-over bid for their shares" (*Afexa* at para. 28).

[157] Similar conclusions were drawn in *Canadian Jorex* (at p. 4), *Icahn* (at para. 47), *Re Aurora Cannabis Inc.*, 2018 ONSEC 10 (at para. 148), *Baffinland* (at para. 26), and *Neo* (at para. 144). As the *Afexa* panel described it, the applicable test is "whether there is, and remains, a real and substantial possibility that, given a reasonable period of further time under the protection of the plan, the directors of the target company can increase shareholder choice and maximize shareholder value" (at para. 28).

[158] If the answer to that inquiry is "no" and a shareholder rights plan impedes shareholders' ability to choose, a securities commission may intervene (*BGC Acquisition* at pp. 4-5). Hearing panels have the discretion to make that determination, which will depend upon the facts and circumstances of the case (*Afexa* at para. 28; see also *High Arctic* at para. 76 and *Falconbridge* at para. 36).

[159] To guide the determination, many past decisions cite the non-exhaustive list of factors set out in *Royal Host* (at para. 74, cited, e.g., in *Falconbridge* at para. 35, *Pulse Data* at para. 96, *High Arctic* at para. 76, *Suncor* at para. 14 *et seq.*, and *Neo* at paras. 40-42):

- whether shareholder approval of the rights plan was obtained;
- when the plan was adopted;

- whether there is broad shareholder support for the continued operation of the plan;
- the size and complexity of the target company;
- the other defensive tactics, if any, implemented by the target company;
- the number of potential, viable offerors;
- the steps taken by the target company to find an alternative bid or transaction that would be better for the shareholders;
- the likelihood that, if given further time, the target company will be able to find a better bid or transaction;
- the nature of the bid, including whether it is coercive or unfair to the shareholders of the target company;
- the length of time since the bid was announced and made;
- the likelihood that the bid will not be extended if the rights plan is not terminated.

[160] Not all of these factors will apply in every case, and despite listing them, the *Royal Host* panel recognized that no specific test would provide the answer in every situation: "Take[-]over bids are fact specific; the relevant factors, and the relative importance to be attached to each, will vary from case to case" (at para. 76; see also *Icahn* at paras. 32-33 and *Neo* at para. 43).

[161] Likewise, in *Baffinland* (at para. 29), an OSC panel adopted some of the language from the *Royal Host* decision and held that, "at the end of the day, there is no one test or consideration that constitutes the 'holy grail' when deciding whether a rights plan should remain in place or be cease traded"; the hearing panel must decide what course of action is in the public interest in the circumstances. The primary consideration is always the best interests and fair treatment of the target shareholders (*ibid.*; see also *Cara Operations* at para. 55, *Pulse Data* at para. 94, and *High Arctic* at paras. 48 and 76).

3. Arguments of the Parties

(a) Brookfield

[162] Brookfield argued that the Supplemental SRP was an improper defensive tactic that was unfairly adopted in direct response to the Brookfield Offer. In its submission, the plan unduly and unfairly interfered with the rights of IPL shareholders – including Brookfield *qua* shareholder – and frustrated the take-over bid process.

[163] Brookfield emphasized that the IPL Board neither sought nor obtained shareholder approval of the Supplemental SRP, which had the effect of improperly substituting the board's views concerning the Brookfield Offer and the Pembina Arrangement for that of IPL's shareholders, who should have been permitted to decide for themselves.

[164] Brookfield further argued that in this case, the Supplemental SRP did not benefit IPL shareholders because it prevented IPL's largest shareholder, Brookfield, from exercising its statutory right to purchase additional IPL Shares on the secondary market under the 5% Exemption. This not only prejudiced Brookfield, but also denied other IPL shareholders liquidity and the chance at a premium if they wanted to sell their shares on the market.

[165] Although IPL maintained – and Baker acknowledged during his cross-examination – that the 5% Exemption was still available to Brookfield as long as it terminated a corresponding portion of its IPL Swaps so that its total interest in IPL did not exceed 20%, Brookfield contended that it should not have to terminate an agreement with a third party entered into for *bona fide* commercial

reasons before it could exercise its legal rights. It pointed out that this suggestion ignored the difficulty it would have terminating its IPL Swaps and the time it would take to do so and then acquire another 5% of the IPL Shares on the market.

[166] Brookfield also argued that because it beneficially owned only 9.75% of the IPL Shares, another 5% would not have given it a veto over the Pembina Arrangement or positioned it to end the auction prematurely. Brookfield argued that the Swap Shares were irrelevant to that assessment because the uncontradicted evidence was that Brookfield had no right to control whether the Swap Shares were voted or how. Having 14.75% would not raise the potential for abusive conduct, either, as Brookfield could not waive the Minimum Tender Condition under the New Bid Regime.

[167] In Brookfield's view, if the Supplemental SRP ever served a *bona fide* purpose for IPL's shareholders – which was denied – it had served that purpose once the IPL Board decided to support the Pembina Arrangement and the Special Committee acknowledged it was no longer looking for another bidder, because Brookfield considered the Strategic Review concluded at that point. Although IPL indicated that it considered the Strategic Review unfinished until IPL shareholders had a chance to vote on the Pembina Arrangement, Brookfield suggested that showed the IPL Board was improperly protecting the Pembina transaction.

[168] Given the Supplemental SRP's negative effects and the fact that it had ceased to serve any legitimate purpose that it may once have had, Brookfield submitted that it should be cease traded.

(b) IPL and Pembina

[169] IPL and Pembina took the position that IPL properly adopted the Supplemental SRP to support, facilitate, and protect the integrity of the Strategic Review process, support the fair treatment of all IPL shareholders, preserve shareholder choice, protect against a creeping bid, and stem what McKenzie described as "the harm and potential abuse" caused by Brookfield's use and incomplete disclosure of the IPL Swaps. Pembina argued that it was appropriate for the IPL Board to protect shareholders' interests in this manner, and that doing so was consistent with the objectives of the take-over bid regime.

[170] IPL pointed out that because the Brookfield Offer was a "Permitted Bid" under both the First SRP and the Supplemental SRP, neither plan prevented IPL shareholders from tendering to the Brookfield Offer if they wished to. Likewise, the IPL SRPs applied to all market participants, and therefore did not unfairly target Brookfield.

[171] IPL and Pembina disagreed that the IPL SRPs no longer served a purpose once the Strategic Review resulted in the Pembina Arrangement. As McKenzie indicated during her cross-examination, IPL was no longer looking for another bidder, but it did not consider the Strategic Review process concluded until the shareholder vote.

[172] Until then, IPL and Pembina argued, the Supplemental SRP continued to be in the best interests of IPL shareholders because it was the only thing protecting the integrity of the vote by preventing Brookfield from increasing its economic interest in IPL above 20%. Additional IPL Swaps may have sidelined additional Swap Shares, giving Brookfield sufficient negative control to block the Pembina Arrangement or any other alternative transaction, and depriving other IPL

shareholders of their right to choose. As Pembina pointed out, with even a 25% interest, historically low voter turnout at IPL shareholders meetings could have meant that Brookfield's blocking position was insurmountable.

[173] Pembina cited the *Falconbridge* decision as factually analogous. The hostile bidder there had acquired almost 20% of the target's shares, and if it acquired another 5%, it would have been in a position to block the white knight transaction and end the auction prematurely. To minimize that risk, the OSC panel determined that it was in the public interest for it to allow the shareholder rights plan to continue for a further brief period. Since the same risk was present in this case, Pembina submitted, the Supplemental SRP should be allowed to continue for a further brief period.

[174] In its submissions, Brookfield had argued that *Falconbridge* was distinguishable. Brookfield was not in a position to block a competing bid because documents governing the IPL Swaps provided that Brookfield "shall not acquire any *right* to vote, or direct or influence the voting, acquisition or disposition of any [Swap] Shares" (emphasis added).

[175] Both IPL and Pembina disagreed with this distinction. They argued that Brookfield nonetheless retained the *ability* to influence voting of the Swap Shares, especially given the significant business relationships between Brookfield and BMO discussed later in these reasons. Moreover, if the Swap Shares were not voted, the proportionate weight of Brookfield's IPL Shares would increase.

[176] As for Brookfield's argument that the Supplemental SRP was suspect because it was not approved by IPL's shareholders, Pembina pointed out that there was no practical benefit to seeking a shareholder vote for that purpose because the Supplemental SRP would expire the day after the vote on the Pembina Arrangement. In Pembina's submission, the vote on the Pembina Arrangement was therefore tantamount to a vote on the Supplemental SRP.

[177] Pembina also disagreed that the Supplemental SRP deprived IPL shareholders of liquidity. It emphasized that IPL's share price had risen above the headline value of both the Brookfield Offer and the Pembina Arrangement, which suggested strong demand for IPL Shares should any IPL shareholders seek to sell.

(c) Staff

[178] Consistent with the case law, Staff observed that while shareholder rights plans are no longer required to achieve some of the objectives they served before the New Bid Regime, they may still be adopted for other legitimate purposes. Although much of the commission jurisprudence concerning shareholder rights plans prior to the advent of the New Bid Regime in 2016 tended to focus on whether a plan should survive beyond the minimum deposit period (which is no longer an issue), Staff argued that the decisions still provide useful guidance on the principles Canadian securities regulators will apply when reviewing a shareholder rights plan.

[179] Staff emphasized that our assessment of the IPL SRPs should take into account the over-arching public interest principles underlying the New Bid Regime and NP 62-202. They recommended that we consider the following questions:

(a) Do the IPL [SRPs] have the effect of denying IPL shareholders the ability to make a fully informed decision about the Brookfield Offer and frustrating an open take-over bid process?

(b) Will the IPL [SRPs] likely result in shareholders being deprived of the ability to respond to a take-over bid or competing bid?

(c) Has prior shareholder approval of the IPL [SRPs] been obtained and/or is there information available that indicates the views of shareholders?

(d) Are the IPL [SRPs] designed to facilitate an auction or a genuine attempt to obtain a better bid?

[180] Staff argued that the answer to the first question was likely "no". To the contrary, the Supplemental SRP may have been necessary to give IPL shareholders the opportunity to make a decision about the Pembina Arrangement. The limitation on Brookfield's ability to acquire an interest in IPL above the 20% threshold may also have been a necessary response to Brookfield's lack of early warning disclosure and the uncertainty around whether and how the Swap Shares would be voted.

[181] Staff were of the view that the answer to the second question was also likely "no". The IPL SRPs did not preclude IPL shareholders from tendering to the Brookfield Offer or prevent Brookfield from taking up and paying for any IPL Shares tendered. However, they did increase the likelihood that IPL shareholders would have the opportunity to choose the Pembina Arrangement, because they made it more difficult for Brookfield to acquire a *de facto* blocking position prior to the vote.

[182] Staff noted that the answer to the third question was "no". Only the First SRP was approved and confirmed by IPL shareholders, while the Supplemental SRP was not. Further, IPL confirmed that it did not intend to submit the Supplemental SRP for shareholder ratification because it was set to expire immediately following the vote on the Pembina Arrangement.

[183] As to the fourth question, Staff submitted that the answer was "yes". They were of the view that without the Supplemental SRP and its limitation on Brookfield's ability to increase its interest in IPL, Pembina may not have made a competing bid and created an auction. They agreed with IPL and Pembina that the circumstances in *Falconbridge* were analogous to this case, as the OSC panel had been concerned about the possibility of a blocking position. Staff therefore suggested that we could follow *Falconbridge* and let the Supplemental SRP stand for a short time until after the vote on the Pembina Arrangement.

[184] Staff concluded that, "in the specific circumstances before the Panel, the [Supplemental SRP] is a reasonable defensive tactic of the IPL [B]oard that will preserve the IPL shareholders' ability to choose between the Brookfield Offer and the Pembina Arrangement."

4. Analysis and Conclusion

[185] As discussed, even before the New Bid Regime, providing time for a board of directors facing a hostile take-over bid to conduct a strategic review process was not considered the only valid reason for a company to adopt a shareholder rights plan. In our view, whether related to the

provision of additional time or not, a plan that furthers the objectives of the take-over bid provisions set out in NP 62-202 – protecting the *bona fide* interests of the shareholders of the target company and providing a framework within which bids may proceed in an open and even-handed manner – may be entirely appropriate, depending on the circumstances of the case.

[186] Here, the IPL Board identified several legitimate concerns raised by the size and nature of Brookfield's interest in IPL, including its effect on the willingness of other prospective bidders to participate in an auction, the willingness of other shareholders to make the effort to vote on a competing transaction, and the outcome of any vote that would take place.

[187] We discuss the possible implications of Brookfield's IPL Swaps on such a vote in detail later in these reasons in the context of the IPL Application and the Pembina Application. For the purposes of this discussion, it suffices to say that we agreed with the IPL Board's assessment that the Swap Shares had the potential to unfairly distort the outcome whether they were voted against an alternative transaction or not voted at all. If Brookfield were at liberty to continue to increase its interest – including through a potentially unlimited number of IPL Swaps – the effect would have been compounded.

[188] We were therefore satisfied that the IPL Board acted reasonably when it adopted the Supplemental SRP in response to these concerns.

[189] The evidence was that the directors followed the advice of their legal and financial advisors and exercised their business judgment in doing so, with the goals of facilitating an auction, generating a better bid that would have a fair chance of success, and preserving IPL shareholders' ability to make a meaningful choice. Because the Supplemental SRP applied to all bidders and was implemented before the Pembina Arrangement was on the table, we were not persuaded that it unfairly targeted Brookfield or improperly protected the board-supported transaction. The Brookfield Offer was a "Permitted Bid" under both the First SRP and the Supplemental SRP, and neither plan precluded Brookfield from increasing its offer.

[190] More importantly, we were satisfied that the Supplemental SRP did not prejudice IPL shareholders.

[191] To the contrary – and with reference to the questions Staff suggested should guide our analysis – the IPL SRPs operated to the shareholders' benefit and supported their interest in maximizing value for their IPL Shares. While the IPL SRPs did not preclude shareholders from tendering to the Brookfield Offer, they did prevent Brookfield from accumulating a negative control position that could have blocked a genuine preference for the Pembina Arrangement or any other alternate transaction. IPL amended the Supplemental SRP to terminate after the vote on the Pembina Arrangement – the time at which we concluded the plan would have served its legitimate purpose. If IPL had not done so, we would have issued an order with the same effect.

[192] Brookfield pointed out that it, too, was an IPL shareholder whose *bona fide* interests should have been supported in accordance with the objectives of the take-over bid regime. However, Brookfield's interest in having the IPL SRPs cease traded so it could increase its shareholding position and therefore its chance of acquiring the company as cheaply as possible was clearly not

the same as the interests of other IPL shareholders, who wanted to obtain the highest value possible for their shares. It is the latter group's interest that was intended to take precedence, and not Brookfield's interest *qua* bidder who also happened to be a shareholder.

[193] We were not persuaded by Brookfield's argument that the IPL SRPs denied other shareholders liquidity because Brookfield could not purchase additional IPL Shares on the market without terminating an equivalent interest in the Swap Shares. The evidence was that the IPL Share price was increasing at the relevant time and the shares were already liquid. We considered it unlikely that an IPL shareholder who wanted to sell on the market would have had difficulty doing so.

[194] Similarly, we were not persuaded that it would have been too difficult for Brookfield to terminate some of its IPL Swaps and then make additional market purchases to acquire a beneficial interest in a corresponding number of IPL Shares. There was no evidence this was the case beyond Baker's speculation in that regard, and no evidence Brookfield even attempted this course of action to avail itself of the 5% Exemption. In fact, the terms of the IPL Swap Letter Agreements provided for Brookfield's optional termination of all or a portion of the IPL Swaps.

[195] It was suggested in argument that a decision not to cease trade the IPL SRPs would be tantamount to a decision to endorse treating derivative interests as equivalent to beneficial ownership, contrary to the CSA's decision not to do so in 2016 after running a full stakeholder consultation process prior to implementing the New Bid Regime (as discussed later in this decision).

[196] We disagreed. Although that possibility is contemplated in s. 3.1 of NP 62-203 ("[a]n investor that is a party to an equity swap or similar derivative arrangement may under certain circumstances have deemed beneficial ownership, or control or direction, over the referenced voting or equity securities"), a decision whether to cease trade a shareholder rights plan is based on the facts and circumstances of the particular case. Our conclusions concerning the Supplemental SRP or the IPL Swaps more generally are not intended to be a general pronouncement on the treatment of derivative interests in all situations.

[197] In arriving at our decision, we considered the factors set out in *Royal Host*. As in other cases, not all of the factors were relevant here – particularly since a number of them are oriented toward shareholder rights plans adopted for the purpose of giving a target company's board of directors time to conduct a strategic review.

[198] Brookfield emphasized the factors relating to shareholder approval, given that the IPL Board adopted the Supplemental SRP without submitting it to a shareholder vote. It is true that lack of express shareholder support for a plan has had significance in some past securities commission decisions, but the decisions also note that shareholder approval is not necessarily determinative (see, e.g., *Cara Operations* at para. 65, *Falconbridge* at para. 46, *Suncor* at para. 27, and *Neo* at paras. 44-45).

[199] Here, as in *Suncor* (at para. 29), we considered it a neutral factor. Broad IPL shareholder support for a shareholder rights plan with most of the same provisions as the Supplemental SRP

was established with shareholder approval of the First SRP, reconfirmed as recently as May 7, 2020. In addition, we agreed with Pembina that there was no point seeking a vote on the Supplemental SRP given that it was to terminate immediately following the shareholder vote on the Pembina Arrangement. In the circumstances, that vote would have served as a proxy for a vote on the Supplemental SRP.

[200] As Brookfield pointed out, in *CW Shareholdings (Comm. #1)*, the panel suggested that because the shareholder rights plan at issue was adopted in the face of a hostile bid and without the approval of target shareholders, the target company should have demonstrated that "it was necessary to do so because of the coercive nature of the [hostile bid] or some other very substantial unfairness or impropriety" (at para. 74). While this harkens back to one of the *Royal Host* factors, we did not consider it to be a general principle applicable in all cases. Even if it were, we were satisfied that whether the Brookfield Offer could be considered coercive or not, it was reasonable for the IPL Board to have concluded it was necessary to implement the Supplemental SRP to address the potential unfairness posed by Brookfield's use and disclosure of the IPL Swaps.

[201] In support of its argument that the Supplemental SRP had outlived its usefulness once IPL entered into the Pembina Arrangement, Brookfield relied on the fact that compared to the plans in other cases, the Supplemental SRP was to be in place for a relatively long time – from March 31, 2021 until the end of July 2021, a period of approximately four months. Some past decisions have held that the longer a plan has been in place, the higher the onus on the proponents of the plan to show it still serves the interests of the shareholders (see, e.g., *Cara Operations* at para. 60).

[202] In our view, although the length of time a plan has operated may be a significant consideration in some circumstances, there is no hard and fast rule in that regard. The real focus of the inquiry is whether a plan continues to operate in the best interests of target shareholders. Brookfield argued that the Supplemental SRP no longer served a purpose once IPL and Pembina agreed on a transaction. We were satisfied that its purpose – to address concerns relating to the effects of the IPL Swaps – continued until the shareholder vote. Moreover, as we have already observed, the plan did not interfere with shareholder choice or otherwise frustrate the take-over bid process.

[203] In the result, we dismissed this part of the Brookfield Application. We found that the IPL Board's decision to adopt the Supplemental SRP and maintain it until the IPL Shareholders Meeting was reasonable in the circumstances.

C. The Break Fee

1. Additional Background and Evidence

(a) General

[204] As set out in the Chronology, Burrows indicated that Pembina first raised the issue of a break fee with IPL on March 7, 2021. The evidence was unclear as to how IPL responded to that inquiry at the time, but the subject arose again between the two parties on May 25, 2021 as they discussed a possible all-share transaction.

[205] Burrows explained that based on advice from its financial advisors, Pembina initially proposed a break fee of $400 million, which it considered was an amount commensurate with its risk and consistent with comparable past transactions. Further negotiations followed, and break fee numbers ranging from $250 million to $400 million were discussed, as was a reciprocal or reverse break fee payable to IPL.

[206] Ultimately, the parties agreed on the reciprocal $350 million break fee set out in the Pembina Arrangement. According to Burrows, IPL accepted this number in exchange for Pembina's agreement to other contractual terms, including an increase in the consideration it offered per IPL Share and its agreement to pay a post-closing dividend. Both McKenzie and Burrows described the Break Fee as having been heavily negotiated between the parties as just one element of a complex deal with many parts, and McKenzie said she did not believe the deal would have proceeded without it.

[207] Quinn said the Break Fee represented approximately 2.3% of IPL's enterprise value and approximately 4.2% of equity value. He explained that equity value "theoretically quantifies the break fee relative to the consideration to be received by shareholders" and enterprise value "theoretically quantifies the break fee relative to the overall size of the target company, reflecting the value of both the equity consideration and the debt or other securities outstanding".

[208] IPL's witnesses further explained that the Special Committee wanted to secure the transaction because it had concluded that the Pembina Arrangement was in the best interests of IPL and its shareholders and clearly superior to the Brookfield Offer – including the two offers each described as Brookfield's "***BEST AND FINAL OFFER***". McKenzie, Quinn, and Castaldo gave some of the reasons for that conclusion:

(a) Based on Pembina's May 28, 2021 share closing price, the Pembina Arrangement had a headline value of $19.525 per IPL Share. Based on Pembina's May 31, 2021 share closing price, it had a headline value of approximately $19.45 per IPL Share. Both exceeded the headline value of Brookfield's May 31 Offer of approximately $19.42 per IPL Share, based on the closing price of the BIPC Shares on May 31, 2021.

(b) J.P. Morgan thought that Pembina Shares were undervalued on the market, so the Pembina Arrangement gave IPL shareholders an opportunity to acquire Pembina Shares at a relatively low value. Pembina Shares are far more liquid than BIPC Shares, and J.P. Morgan had concerns about the BIPC Shares' valuation.

(c) The combination of IPL's and Pembina's complementary assets would result in greater "vertical integration, expanded customer service offerings and enhanced global market reach" – i.e., a stronger combined company that would allow IPL shareholders to participate in both the upside of Pembina's business and the upside of IPL's standalone business.

(d) The Pembina Arrangement would create "significant value through the realization of near term synergies and high return growth opportunities" by merging two of Canada's largest midstream companies. Pembina estimated that the combined company would achieve $150 million to $200 million in "synergies".

(e) IPL shareholders would retain an implicit 28% interest in the HPC, which, once in full service, was expected to help the combined company to generate $1.1 billion to $1.4 billion in adjusted cash flow from operating activities after dividends annually. Under the Brookfield Offer, IPL shareholders would retain an indirect interest of 3% or less.

(f) IPL shareholders would receive a 175% increase in their monthly dividend upon closing.

[209] As McKenzie explained, the Special Committee considered a break fee a customary term in a transaction like the Pembina Arrangement, and understood that break fees tend to be higher than average in white knight transactions such as the Pembina Arrangement. Quinn was of the view that break fees are a standard term included in almost all public company M&A transactions in Canada. TD Securities' research revealed that of 298 transactions involving Canadian public companies with an equity value of over $500 million over the last 20 years, there were break fees in 293 or 98.3%.

[210] Concerning the quantum of the Break Fee, Quinn cautioned against over-reliance on precedent given the variability of the circumstances surrounding different transactions. However, he confirmed that in TD Securities' view, the fee here was consistent with the precedent range, which has averaged 3.1% of enterprise value and 3.5% of equity value over the past 20 years and 3.3% of enterprise value and 3.9% of equity value and over the past 10 years.

[211] Quinn also indicated that before agreeing to the Break Fee, IPL satisfied itself that it had thoroughly canvassed the market and conducted a fair auction process that led to the highest value transaction possible. He pointed out that the risk of a failed transaction was enhanced in this case because of the size of Brookfield's interest in IPL, its opposition to a deal with Pembina, and the fact that it was not constrained by a standstill agreement and could have responded to the Pembina Arrangement by making an improved competing offer directly to IPL shareholders. Quinn considered that the reluctance of other parties to enter the auction because of Brookfield's position negatively affected IPL's bargaining power and the size of the break fee Pembina sought.

[212] Quinn concluded:

> Based on the above analysis and TD Securities' experience, the [B]reak [F]ee associated with the Pembina Arrangement . . . was, in the view of TD Securities, reasonable, standard, within the precedent range, and was consistent with the average on a percentage of equity value basis, and below the average on a percentage of enterprise value basis, of sell-side break fees offered in Canadian target transactions with greater than $500 million implied equity value over the past 10 years arising from strategic review processes similar to the IPL Strategic Review.

[213] From Pembina's perspective, Burrows explained that Pembina sought the Break Fee as compensation for its investment of resources and the expenses it incurred to pursue IPL on an accelerated timeline, as well as its lost opportunity costs – i.e., the loss of its ability to pursue other transactions during the IPL negotiations and the value of any impact on its business operations from its focus on the negotiations. Pembina also sought compensation for the risk it undertook in agreeing to a deal with IPL, including the potential risk to its reputation and share price if the transaction failed.

[214] Pembina confirmed that in its view, the risk of a failed transaction was higher than normal in these circumstances, given the size of Brookfield's economic interest in IPL and the possibility that Brookfield may have had the ability to influence the voting of the Swap Shares. Like McKenzie, Burrows suggested that break fees are typically higher following an auction and where a white knight is involved because of the risk of bidding into a hostile take-over. He also pointed out that Pembina faced additional risk by sharing its confidential information with IPL, a competitor in the same industry.

[215] Although Brookfield maintained that it never sought a break fee during its dealings with IPL, McKenzie contended that was not true. Brookfield's November and December Proposals both contemplated transaction documentation with "standard break-fee" provisions and "other customary deal protections". Brookfield's May 30 and May 31 proposals likewise indicated that Brookfield expected any agreement to include "[c]ustomary Brookfield . . . deal protections", which the Special Committee and its advisors understood would include a break fee.

[216] McKenzie acknowledged during cross-examination that Brookfield never proposed a break fee number and IPL never asked it for one. However, in her affidavit, she pointed out that was because Brookfield did not provide a form of arrangement agreement or a mark-up of IPL's form of agreement. According to Quinn, it would generally not be until after a party's bid was determined to be superior and negotiations of a final agreement were underway that he would seek specific information about a break fee or other deal protections. He and Castaldo both assumed Brookfield would ask for a break fee similar to what Pembina sought, since that figure was in line with market precedent.

(b) Expert Evidence

(i) Brookfield

[217] Osler acknowledged that there have been break fees in the vast majority of Canadian public M&A transactions over the last 20 years with an equity value of $500 million or more. In his opinion, a break fee is generally appropriate in contested M&A transactions when it is necessary to induce an offeror to make a materially superior proposal. He confirmed that offerors seek break fees as compensation for their time and out-of-pocket expenses incurred in completing due diligence, negotiating an agreement, and satisfying closing conditions, and for both their opportunity costs and the risks posed to their reputation and share price by the prospect of an unsuccessful transaction.

[218] Osler observed that while an offeror will always want the greatest deal protections it can get, a target board has a responsibility to minimize those protections so they do not preclude other proposals or result in a disproportionate amount of the value of a proposal going to the break fee

recipient. Deal protections should not have the effect of depriving target shareholders of their right to make a decision among competing proposals.

[219] To assess the appropriateness of agreeing to a break fee, Osler suggested that a target board should consider whether:

(i) the solicited proposal will create more value for shareholders than the business's standalone prospects;

(ii) the solicited proposal is superior to the unsolicited proposal (in terms of value and likelihood of timely completion); and

(iii) the board is satisfied that it has explored all other reasonable alternatives and determined that none will deliver the same or better value to shareholders or has a higher likelihood of completion.

[220] Applying these considerations to this case, Osler concluded that based on the information he reviewed, the IPL Board appeared to have determined that at least as of May 30, 2021, the Brookfield and Pembina proposals were superior to IPL's standalone prospects and preferable to continuing the *status quo*. It was then the board's responsibility to secure the best deal possible. If the IPL Board concluded that Pembina's offer was superior, Osler acknowledged that it was appropriate for IPL to have attempted to secure the transaction by offering deal protections, including a break fee.

[221] However, Osler disagreed with the IPL Board that Pembina's offer was clearly superior to Brookfield's. In addition to pointing out the small difference in the respective headline values of the two offers as of May 31, 2021 and concerns he had about the value of Pembina Shares compared to BIPC Shares, he questioned the ostensible value added by the estimated "synergies" IPL and Pembina touted. He also pointed out that Brookfield's offer was predominantly in cash. In his opinion, cash is typically better than non-cash consideration because it is not volatile and, unlike share consideration, it is not subject to discounting. Similarly, he contended that any deferred, contingent, or restricted consideration may need to be discounted because it can be uncertain and beyond the control of the target board.

[222] Osler further opined that the Brookfield Offer was superior in terms of its timing, conditionality, and transaction certainty, because an acquisition that can close quickly with little risk of non-completion is preferable to one that will be slower to complete or has a higher level of conditionality or uncertainty of completion. While Brookfield had already obtained all necessary regulatory approvals and anticipated paying IPL shareholders their total consideration within 21 days, Pembina did not yet have those approvals and did not expect to close the Pembina Arrangement until later in 2021.

[223] In addition, Osler noted that it was uncertain whether the Pembina Arrangement would garner the necessary 66 2/3% approval by IPL shareholders when IPL's largest shareholder, Brookfield, intended to vote against it. He thought that the IPL Board should have taken that uncertainty into account before agreeing to the Break Fee.

[224] Given his conclusion that the Pembina Arrangement presented only a "marginal, if any" premium over the Brookfield Offer, Osler was of the view that the Break Fee was excessive relative to the value offered, even if the IPL Board had determined in good faith that the Pembina Arrangement was superior. At 4.2% of equity value, he considered the Break Fee to be at the very high end of the precedent range.

[225] Osler also commented on the possible chilling effect of a break fee where there is another bidder in play that might otherwise increase its offer. He stated in his report that he did not think it was clear in this case that the auction had ended before the IPL Board agreed to the Break Fee, as Brookfield's use of the word "***FINAL***" in its last few written offers should not have been taken literally. In his view, IPL lost value for its shareholders as a result. Instead of paying additional consideration to IPL shareholders, Brookfield would end up paying it to Pembina in the form of the Break Fee.

(ii) IPL

[226] Plewes was retained by IPL to provide expert opinion evidence about its Strategic Review and the Break Fee. Like Osler, he opined that break fees are a standard component of almost all Canadian M&A transactions, and that a target board should generally avoid agreeing to a break fee that would prevent a better offer from being made to shareholders. He suggested that the following factors are relevant when negotiating a break fee:

(i) the absolute size of the fee;
(ii) the absolute size of the transaction;
(iii) the percentage of enterprise value that the fee represents;
(iv) the percentage of equity value that the fee represents;
(v) the relative size of the parties to the transaction;
(vi) the value and benefits to shareholders that directors are seeking to protect;
(vii) the competitive dynamics of the transaction;
(viii) other terms and conditions of the transaction agreement; and
(ix) the degree to which the protection provided by the fee is important to entering into a transaction agreement.

[227] Plewes considered that it would be inappropriate for him to critique any single factor in this case in isolation, given that he was not directly involved in the negotiations between IPL and Pembina and did not have access to each party's relevant confidential information. He pointed out that in negotiating the Break Fee, Pembina was aware of the outstanding Brookfield Offer and no doubt weighed the likelihood that Brookfield – or another third party – would make further competing proposals.

[228] In cross-examination, Plewes agreed with Brookfield's counsel that in the context of an auction with two competing offers, a target company's board should understand and, if necessary, seek out all the terms and conditions of both proposals and how they compare, including whether deal protections such as a break fee are being sought. However, in his report he made note of the fact that in IPL's data room, both Brookfield and Pembina had access to the process letter and IPL's proposed form of arrangement agreement, which included termination provisions. He therefore concluded that both Brookfield and Pembina were given multiple opportunities to improve their

respective offers, and that both were made aware a termination fee would form part of any arrangement agreement.

[229] Since Plewes did not give an opinion about the appropriateness of the Break Fee in this case, Brookfield argued that we should have drawn an adverse inference that his view would not have supported IPL's position. In response, IPL pointed out that Plewes was not asked for that opinion – either in preparing his report or by Brookfield when it had the opportunity to do so during cross-examination on the Plewes Affidavit.

2. Applicable Law

[230] There appear to be a limited number of reported decisions that discuss break fees – also described as bust-up, break-up, termination, or kill fees. However, the decisions cited by the parties generally agreed that such fees are common in M&A transactions, and that they can be legitimate deal protection mechanisms (see, e.g., *Re Pacifica Papers Inc.*, 2001 BCSC 1069 at para. 49 and *CW Shareholdings (Ont. Gen. Div.)* at para. 50).

[231] Break fees are intended to entice bidders to participate in an auction. As alluded to in the previous section of this decision, they compensate a party for its wasted time, resources, and lost opportunity costs should a proposed transaction fail (*CW Shareholdings (Ont. Gen. Div.)* at para. 50). They can offset various potential risks, including disclosure risk and reputational risk. From the target's perspective, agreeing to a break fee may assist it in its goal of generating the best bid to maximize shareholder value. From the bidder's perspective, a break fee protects against "the price being shopped and the transaction being abandoned in favour of a marginally better deal" (*Pacifica* at para. 49).

[232] *CW Shareholdings (Ont. Gen. Div.)* is a leading case on the subject of break fees in Canada. In its reasons, the Ontario Court accepted that a break fee is appropriate where (at para. 51):

(i) it is needed to induce a competing bid;

(ii) the bid represents better value for shareholders; and

(iii) the fee reflects "a reasonable commercial balance between its potential negative effect as an auction inhibitor and its potential positive effect as an auction stimulator" (the ***CW Shareholdings* Test**).

[233] However, if the quantum of a break fee is unreasonable in the circumstances, it could be considered an improper defensive tactic (*Re CW Shareholdings Inc.* (1998), 21 O.S.C.B. 2910 (***CW Shareholdings (Comm. #2)***) at para. 52).

[234] In *Abitibi*, Québec's Bureau de décision et de révision (the **Québec BDR**) found that a break fee in the amount of 5% of equity value and subject to further escalation was "unjustified" and "overly generous", but did not prohibit the bid to which it related (at paras. 55-56, 226, and 229; see also the Québec Court of Appeal's affirming decision, 2012 QCCA 569 at paras. 19 and 55-56). By contrast, in *Pacifica*, the British Columbia Supreme Court noted that the evidence had

shown that at 4.5% of equity value, the break fee was within "the accepted range" of 3% to 5% (at paras. 118 and 152).

[235] In *Re Alamos Gold Inc. and Aurizon Mines Ltd.*, 2013 BCSECCOM 393, as in this case, the bidder, Alamos, argued that the break fee agreed between the target and a competing bidder was an improper defensive tactic, while those parties argued that the fee had been heavily negotiated and was necessary to induce the competing offer (at paras. 18-20). The BCSC panel agreed that the fee was necessary, and was not simply an attempt to frustrate the Alamos bid (at para. 21). At $27.2 million or 3.5% of the transaction's value, the panel concluded that the break fee was within the acceptable range (at paras. 8 and 23).

[236] In *CW Shareholdings (Ont. Gen. Div.)*, the target agreed to a break fee of $30 million, or 2.6% of the proposed transaction value (at paras. 5, 34, and 107). The Ontario Court noted that the fee had been the subject of negotiations between the parties, and its quantum had varied during their discussions from a low of $25 million to a high of $40 million (at para. 83). The Court found the break fee (and another proposed condition that was not relevant to this matter) justified in the circumstances of the case to induce a second bid where there was otherwise no competing bidder (at para. 69). In addition, the Court concluded that the break fee was "well within the normal parameters for such inducements in the industry", and was satisfied that it had achieved a result that benefited the target shareholders (at para. 107).

3. Arguments of the Parties

(a) Brookfield

[237] As mentioned, Brookfield took the position that like the Supplemental SRP, the Break Fee was an improper defensive tactic that was contrary to the best interests of IPL shareholders because it inhibited the auction and prevented shareholders from receiving a better offer. Brookfield acknowledged that break fees are typical in M&A transactions and that the Break Fee at 4.2% of equity value was within the range set by precedent transactions, but also pointed out that it was at the high end of that range.

[238] In Brookfield's submission, the Break Fee did not satisfy the *CW Shareholdings* Test.

[239] First, Brookfield questioned whether the Break Fee – or at least a break fee in that amount – was needed to induce the competing bid from Pembina. Because the Special Committee did not raise the subject of a break fee with Brookfield, Brookfield argued that IPL failed to try to leverage its break fee discussions with Pembina by playing the two offering parties against each other. The IPL Board therefore failed in its duty to negotiate the lowest break fee that would still induce Pembina to make an offer better than Brookfield's. Instead, IPL agreed to a break fee that was disproportionate to the minimal amount of time and resources Brookfield thought Pembina would have expended on due diligence, negotiations, and seeking regulatory approvals during the short period that it was involved in the Strategic Review.

[240] In addition, Brookfield was of the view that IPL did not need to agree to such a high break fee when it was in a positive bargaining position with Pembina – it had the Brookfield Offer in hand, and knew or ought to have known that Brookfield would come back with an even better offer if the auction had continued. According to Brookfield, that should have been apparent from

the fact that Brookfield was IPL's largest shareholder, it had been pursuing a transaction with IPL for the previous seven months, and it had significantly improved its offer twice within the 24 hours preceding IPL's agreement to the Pembina Arrangement.

[241] Second, Brookfield argued that the Pembina Arrangement did not represent better value for IPL shareholders – or, as Brookfield described it, "excess value realized" – largely for the reasons cited by Osler. Brookfield pointed out that the Break Fee did not protect a premium, since it had calculated that Pembina's offer at $19.45 per IPL Share was less than the Brookfield Offer at $19.50 per IPL Share (or 0.225 of a BIPC Share), subject to proration. Brookfield also suggested that IPL shareholders who were IPL employees faced the prospect of job losses as a result of the planned "synergies" between IPL's and Pembina's operations if the Pembina Arrangement proceeded.

[242] Moreover, even if the IPL Board reasonably concluded that the Pembina offer was superior, Brookfield argued that it was not sufficiently superior to justify a break fee of $350 million. According to Brookfield's review of the case law, there are no Canadian precedents in which a target company's board agreed to a break fee – much less an "exorbitant" break fee – where the white knight offer was lower or, at best, only marginally better than the unsolicited offer.

[243] In Brookfield's submission, the size of the Break Fee was also disproportionate to the likelihood that it would have to be paid. The ABCA requires that a plan of arrangement must be approved by at least 66 2/3% of the votes cast by shareholders. Brookfield beneficially owned 9.75% of the IPL Shares and was of the view that its May 31 Offer was better than the Pembina Arrangement. Therefore, a "no" vote was reasonably foreseeable when IPL agreed to the Break Fee.

[244] Finally, Brookfield argued that the Break Fee was not an auction stimulator, because Brookfield was already at the table with a superior offer. To the contrary, it was an auction inhibitor: it negatively affected Brookfield's ability to improve its offer further because the Break Fee added another $350 million to its costs. Brookfield asserted that it would make a better offer but for the Break Fee, and that it would increase its offer by an amount commensurate with any reduction in or elimination of the Break Fee ordered by this panel.

(b) IPL and Pembina

[245] IPL argued that s. 198 of Act does not give the ASC jurisdiction to make an order cease trading, eliminating, or reducing the Break Fee as Brookfield requested. Citing the decision in *CW Shareholdings (Comm. #2)* (at para. 49), IPL submitted that there is no jurisdiction to interfere in private contracts, and that there did not appear to be any Canadian securities commission cases in which a break fee was reduced or eliminated. IPL therefore characterized Brookfield's public statements about increasing its bid in accordance with any reduction or elimination of the Break Fee as misleading and improper.

[246] IPL acknowledged that the ASC does have the jurisdiction to cease trade securities in the public interest, and that in *CW Shareholdings (Comm. #2)*, it was noted in *obiter* that the quantum of a specific break fee could amount to an improper defensive tactic warranting a cease-trade order. However, IPL stated it was unable to locate any cases in which a Canadian securities commission

actually issued such an order. Even in *Abitibi*, where the break fee was found to be an improper and abusive defensive tactic, IPL pointed out that the Québec BDR did not prohibit the subject bid.

[247] IPL also argued that because break fees are a usual feature in the take-over bid context, it would "wreak havoc" in the markets if orders cease trading bids on that basis were routinely granted. As stated in *ARC Equity* (at para. 69):

> In our view, this cautious approach [to exercising the ASC's public interest jurisdiction] recognizes the danger that a well-intentioned panel minded to address a harm discerned in a particular set of facts could inadvertently respond too aggressively or with too broad a brush, with unintended and undesirable consequences, including consequences for participants in other, unobjectionable transactions or circumstances. Accordingly, we believe that a panel would be ill-advised to rely solely on its public interest authority to intervene in a transaction and interfere with negotiated, and otherwise legal, arrangements or outcomes unless there is compelling evidence that a failure to intervene would truly be abusive to investors and the integrity of the capital market.

[248] IPL disagreed with the applicability of the *CW Shareholdings* Test, as that test was articulated in the context of an oppression action under the *Canada Business Corporations Act* and not in the context of an application under securities laws. However, even if the test were applicable to the Brookfield Application, IPL argued that Brookfield misquoted it, misapplied it, and ignored the Court's observation that directors of target corporations must be afforded flexibility when carrying out their duties.

[249] Pembina similarly pointed to the business judgment rule, and maintained that the IPL Board's decision to agree to the Break Fee was reasonable and is owed deference by this panel. It was of the view that the Break Fee satisfied each of the three criteria set out in the *CW Shareholdings* Test. It argued that the evidence established the Break Fee was necessary to induce it to make its offer, especially in light of the size of Brookfield's economic interest in IPL – which not only inhibited other bidders' willingness to come forward, but also increased the risk that there would be low IPL voter turnout at any vote held to approve an alternative transaction. This in turn increased the risk that the transaction might fail and negatively impact Pembina's reputation and share price.

[250] Both IPL and Pembina relied on the evidence showing that the Break Fee was fairly negotiated between them along with all of the other terms of the Pembina Arrangement. The quantum under discussion varied as other terms were settled, and Pembina pointed out that its unwillingness to enter into an arrangement agreement without a break fee was demonstrated by the fact that it first raised the issue with IPL over two months before it made its initial offer. IPL reiterated its success in the negotiations, given that it got Pembina to agree to both a lower break fee than originally sought, and a reciprocal break fee in IPL's favour.

[251] IPL noted that in relying on the *CW Shareholdings* Test, Brookfield suggested that a bid must represent "excess value realized" for shareholders before it is appropriate to agree to a break fee. However, the Court referred only to "better value", which IPL argued is not the same as price alone. It pointed to its reliance on the advice of its financial advisors and all of the factors it considered in determining that the Pembina Arrangement offered better value, as set out previously.

[252] Pembina similarly argued that Brookfield misinterpreted the *CW Shareholdings* Test and that its offer represented better value for IPL shareholders than the Brookfield Offer. It cited considerations comparable to those cited by IPL, including the liquidity of the Pembina Shares IPL shareholders would receive in exchange for their IPL Shares.

[253] IPL disagreed with Brookfield's contention that the Break Fee was not an auction stimulator because Brookfield was already at the table. The possibility of a break fee attracted Pembina, and Pembina's involvement created an auction that led to higher offers from both Pembina and Brookfield.

[254] Concerning quantum, IPL noted that Brookfield conceded in its written submissions that at 4.2% of equity value, the Break Fee fell within the range set by precedent transactions of comparable size. However, in IPL's view, because it had significant debt and was in the same industry as Pembina, the better measure was the Break Fee's percentage of IPL's enterprise value (2.3%). Enterprise value takes a target's debt and equity into account rather than just the offer price, and therefore reflects both the scale of the target's operations and the risk borne by the bidder in light of the target's debt load and capital structure.

[255] Pembina pointed out that data compiled by its financial advisor, Scotia Capital, indicated that the amount of the Break Fee was below the precedent range. It further pointed out that even Brookfield's expert, Osler, had acknowledged during cross-examination that enterprise value is the more appropriate measure where, as here, the target corporation is highly leveraged and involved in the same industry as the bidder.

[256] As for Brookfield's complaint that IPL agreed to the Break Fee without first seeking an improved Brookfield Offer or asking whether Brookfield would require its own break fee, IPL emphasized the Brookfield communications that had indicated it expected a break fee among other "customary" deal protections. Further, IPL said it never reached the stage at which it would have had a reason to inquire further, because Brookfield's bid was never "in the lead" on or after May 29, 2021. There was no evidence to support Brookfield's contention that the Special Committee should have known Brookfield was willing to pay more than what was set out in either "***BEST AND FINAL OFFER***", and IPL argued that the ASC should not protect Brookfield from its own bad business decision not to make its true best offer when it had the opportunity to do so.

[257] In sum, IPL denied that the Break Fee was an improper defensive tactic intended to protect an inferior bid. It argued that Brookfield did not demonstrate otherwise, or to show that the Break Fee was so abusive of shareholders and the capital market that it warranted a cease-trade order that would deprive IPL shareholders of the opportunity to choose the Pembina Arrangement.

[258] In Pembina's submission, the Break Fee accomplished exactly what was intended. Despite the chilling effect of Brookfield's near-20% economic interest in IPL, the Break Fee brought another bidder to the table and stimulated an auction, which resulted in greater value for IPL shareholders than the Brookfield Offer. Until the IPL Board decided to proceed with the Pembina Arrangement, there was no agreement on the Break Fee and IPL remained free to accept a better offer from Brookfield, had Brookfield presented one.

(c) Staff

[259] Like IPL, Staff noted that an order cease trading the Pembina Arrangement to prevent payment of the Break Fee would deprive IPL shareholders of the opportunity to make a choice between the Pembina Arrangement and the Brookfield Offer. Such an order would only be appropriate if we determined that the Break Fee was a clear abuse of the public interest, and in Staff's view, it was not. They recommended that we focus on satisfying ourselves that: (i) IPL shareholders were not denied their right to tender to the Brookfield Offer; (ii) the IPL Board was mindful of that right when it agreed to the Break Fee; and (iii) market participants have assurance that a target board cannot inappropriately deny shareholders the right to tender to an offer the board does not endorse.

[260] Like Pembina, Staff submitted that the Break Fee met the *CW Shareholdings* Test. First, the evidence strongly suggested that the Break Fee was necessary to induce the Pembina offer, given the risk Pembina faced in making a white knight offer when there was an extant bid by a hostile offeror with substantial resources and a significant toehold position. Second, there was no reason to dispute the IPL Board's conclusion that it should support the Pembina Arrangement. Third, this panel could conclude that the Break Fee struck a reasonable commercial balance between its potential negative effect as an auction inhibitor and its potential positive effect as an auction stimulator as long as we were satisfied that the quantum of the Break Fee was within the acceptable range, and that the IPL Board only agreed to the Break Fee after a robust auction process that focused on maximizing shareholder value.

[261] As a percentage of equity value, Staff contended that while the Break Fee was at the higher end of the established range, it was likely justifiable given the level of risk that Pembina assumed. Staff also submitted that the evidence showed that the IPL Board reasonably relied on professional advice and conducted an auction that resulted in a better deal for shareholders.

[262] Accordingly, Staff were of the view that there was no evidence of a flawed process that would justify the conclusion that we should not defer to the IPL Board's business judgment or that the Break Fee was contrary to the public interest.

4. Analysis and Conclusion

[263] As discussed, a break fee is not improper or unusual. It is a common term in Canadian M&A transactions, and can serve as a legitimate deal protection measure. The evidence suggested that Brookfield was aware of this, as its early correspondence specifically contemplated a break fee, and its later correspondence contemplated "[c]ustomary . . . deal protections" – which was reasonably interpreted by the IPL Board as including a break fee. Moreover, the evidence showed that Brookfield has had the benefit of break fees in some of its previous transactions.

[264] However, also as discussed, where the quantum of a specific break fee is excessive in the circumstances, it may draw scrutiny as an improper defensive tactic. As stated in *CW Shareholdings (Comm. #2)* (at para. 52):

> Although break-up fees have become a more or less usual feature of the take-over bid landscape, the quantum of a specific fee could, in our view, result in the agreement to pay such a fee being an improper defensive tactic. However a break-up fee in an appropriate amount could, in our view, be

> properly agreed to by a target company if it were necessary to agree to it in order to induce a competing bid to come forward. As a result, we are unable to conclude, without entering into an examination of the factual background, that the mere existence of the break-up fee constitutes an improper defensive tactic.

[265] In other words, the determination is highly fact-specific. While there is no fixed minimum or maximum break fee, a target board of directors could be at risk of breaching its fiduciary duty if it agrees to a break fee so large it deters other bidders or deters the board from considering other offers.

[266] In terms of remedies, we agreed with IPL that we do not have the jurisdiction to reduce or eliminate the Break Fee as Brookfield suggested. Section 198 of the Act allows us to make a variety of orders in the public interest, but an order varying contractual terms between private parties is not among them. The only suitable remedy here would have been a cease-trade order under s. 198, if warranted in the circumstances.

[267] However, we were satisfied that the Break Fee met each element of the *CW Shareholdings* Test. As Brookfield acknowledged in its written submissions, the evidence of the parties involved in the negotiations was clear: Pembina would not have made a competing bid without the Break Fee. In addition to the usual reasons for seeking a break fee – including compensation for time and resources expended, opportunity costs, and the risk to a bidder's reputation and share price – Pembina faced additional risk and a greater possibility of a failed transaction in these circumstances. We agreed that Pembina made an offer in the face of a hostile bid by a party with substantial resources and a significant toehold position in IPL that presumably opposed any deal but its own. Further, we agreed that the negotiations themselves were risky for both IPL and Pembina, given that each disclosed confidential information to a competitor in the same industry.

[268] Other than its objection to the size of the Break Fee, Brookfield's primary point of contention appeared to be whether the Pembina Arrangement met the second part of the *CW Shareholdings* Test and represented a better value for shareholders than the Brookfield Offer. Brookfield maintained that the Brookfield Offer was superior, but the evidence included detailed information about the IPL Board's assessment of the value of a combination with Pembina, and why it concluded that the Pembina Arrangement was preferable. We saw no reason to dispute that assessment. We agreed with the Court in *Re Sterling Centrecorp Inc.* (2007), 159 A.C.W.S. (3d) 323 (Ont. S.C.J.) (at para. 59):

> The concept of "maximizing shareholder value" as that term is used in the cases referred to above, does involve a number of factors including price. In my view, "maximizing shareholder value" does not necessitate accepting the merest possibility of a higher [price] and ignoring other factors that may contribute to that value.

[269] Choosing to endorse the Pembina transaction was a reasonable exercise of the IPL Board's business judgment, based on the results of the Strategic Review and the advice of its professional advisors. We should give deference to that decision. As the OSC panel stated in *VenGrowth*, "[i]t is not the role of the [securities regulator] to assess the business or financial merits of any proposed transaction or transactions" (at para. 34).

[270] In this regard, we noted that even though Osler disagreed that the Pembina Arrangement was better than the Brookfield Offer, he acknowledged that if the IPL Board were satisfied that it was, it was appropriate for IPL to agree to a break fee to secure the transaction. He also acknowledged that both J.P. Morgan and TD Securities were qualified financial advisors, and it was appropriate for the IPL Board to rely on their advice.

[271] Further, we were satisfied that the Break Fee reflected a reasonable commercial balance between its potential negative effect as an auction inhibitor and its potential positive effect as an auction stimulator. We accepted that because of its size and the uncertainties around Brookfield's interest in IPL, it was likely that IPL lost some of the bargaining power it may otherwise have had. Nonetheless, the Break Fee was negotiated down from Pembina's original position, and the Special Committee succeeded in making it a reciprocal obligation. It conducted an auction to satisfy itself it had found the best deal possible, and the agreed conditions for paying the Break Fee were not unusual.

[272] Most importantly, we were satisfied that the Break Fee did not inhibit the auction or deprive IPL shareholders of the opportunity to choose between the two proposed transactions. Brookfield remained at liberty to improve its offer further. IPL had no obligation to instigate a break fee discussion with Brookfield before agreeing to the Break Fee with Pembina.

[273] As for the size of the Break Fee, we agreed with Quinn that because the circumstances surrounding a transaction are so variable, one should not place too much reliance on precedents. That said, precedents can serve as a guide as to the size of the break fees that other commercial actors have found sufficient to stimulate an auction and protect a desirable transaction without depriving shareholders of their right to choose.

[274] Here, we were satisfied that in the circumstances, enterprise value was the better measure for the reasons described earlier: IPL was highly leveraged and in the same industry as Pembina. At 2.3% of IPL's enterprise value, the Break Fee was below average and well within the precedent ranges suggested by the evidence. However, even at 4.2% of equity value, we found that the quantum of the Break Fee was still within reason because of the atypical risks Pembina faced in pursuing a transaction with IPL.

[275] In the result, Brookfield did not persuade us that the Break Fee was an improper defensive tactic warranting the exercise of our public interest jurisdiction. It was abusive of neither investors nor the capital market. To the contrary, if we had granted the relief sought by Brookfield and cease traded the Pembina Arrangement, IPL shareholders would have been deprived of one of their two choices.

[276] We therefore dismissed this part of the Brookfield Application.

D. Fairness of the Strategic Review

1. Additional Background and Evidence

(a) General

[277] In addition to its specific submissions about the IPL SRPs and the Break Fee, Brookfield's application materials included a number of references to other aspects of the Strategic Review and

its interactions with IPL that it considered part of an unfair "seven month long campaign of delay, avoidance, and obfuscation" designed to "thwart [Brookfield's] attempts to unlock value for the benefit of all IPL shareholders". We understood that Brookfield made these points – which are detailed further below – in further support of its submission that the Pembina Arrangement should be cease traded.

[278] On IPL's behalf, McKenzie denied that the approach or any of the steps taken by the Special Committee during the Strategic Review were intended to frustrate the Brookfield Offer. In her view, the safeguards put in place by the Special Committee were meant to promote a fair, competitive, and effective process, the goal of which was to achieve the highest value for IPL shareholders. She described the Strategic Review as full and fair, and explained that the Special Committee not only evaluated third party offers and alternatives during the Strategic Review, but also undertook a comprehensive review of IPL's standalone prospects and intrinsic value to inform its evaluation of any proposals made.

[279] As one of the financial advisors involved, Quinn was similarly of the view that IPL ran a full and fair Strategic Review process, since it did a full market canvas, made sure bidders all had equal access to information, and gave the bidders multiple opportunities to make their best offers.

(b) Expert Evidence

(i) Brookfield

[280] Osler did not address Brookfield's allegations of unfairness except as they related to the IPL SRPs and the Break Fee. However, he did provide some comments concerning the key considerations an investment banker would advise a target board to consider when choosing between competing acquisition proposals: the value offered to shareholders, the certainty of that value (if not payable in cash), transaction timing, and the risk of non-completion.

(ii) IPL

[281] Plewes indicated that he had been asked to comment on IPL's approach to and execution of its Strategic Review. He cited IPL's March 8 Directors' Circular, in which IPL stated that the mandate of the Strategic Review was to:

> . . . evaluat[e] a broad range of options, including exploring a possible corporate transaction . . . strategic alternatives may include, but are not limited to, possible change of control transactions or asset sales with one or more third parties, partnerships with strategic or financial partners or remaining independent and pursuing [IPL's] existing strategy as a stand-alone entity.

[282] In his view, this was a full and expansive mandate "consistent with the form of mandate given to a special committee charged with exploring all potential alternatives that may be available to maximize shareholder value". Further, in his opinion:

> The formation of a Special Committee, the retention by the Special Committee of independent legal counsel and an independent financial advisor, a public announcement of the Strategic Review [p]rocess, and moving quickly with respect to all of the foregoing are best practices and indicative of an intention on the part of the [IPL] Board and the Special Committee to execute the stated Strategic Review [p]rocess mandate purposefully.

[283] Plewes observed that IPL granted Brookfield access to IPL's confidential information, and that the terms of such access can be difficult to negotiate with an unsolicited bidder. That IPL did so suggested to him that the Special Committee considered it to be in the best interests of IPL's shareholders for Brookfield to participate fully in the Strategic Review process without being subject to an informational disadvantage.

[284] Plewes concluded:

> In my opinion, the approach to the Strategic Review [p]rocess was sound, consistent with market practice and well-executed. It achieved its stated purpose of surfacing value maximization alternatives for the [IPL] Board to consider, negotiate and, as was deemed appropriate, ultimately recommend to the shareholders of IPL, resulting at this juncture in the Pembina Arrangement. The Strategic Review [p]rocess was managed so that whichever, if either, of the [c]ompeting [p]roposals or other potential offers that the [IPL] Board ultimately elected to pursue would be finalized on an expedited basis pursuant to an arm's length negotiation of certain key transaction terms, including a termination fee.

[285] In cross-examination, Plewes agreed that in a full and fair strategic review process, a target company's directors should consider all relevant information, act in no more haste than the circumstances require, treat all bidders fairly (with as much of a level playing field as possible), and not prejudge the outcome. He also agreed that an auction should continue until the target company's board is satisfied that it has the bidders' best and final offers.

2. Applicable Law

[286] As cited previously, s. 1.1(2) of NP 62-202 identifies as a secondary objective of the take-over bid regime in Canada the provision of "a regulatory framework within which take-over bids may proceed in an open and even-handed environment". Shareholders of the target company must be free to make a fully informed decision, and management must not frustrate an open take-over bid process.

[287] In *Cara Operations*, the OSC panel said the following about fairness in the take-over bid context (at paras. 58-59):

> First, there is the principle of procedural fairness for all: bidders, potential bidders, existing shareholders, management and those whose business fortune is tied to any one of these groups. The rules of the game should be clear and consistently applied to encourage bidders to come forward. And the game must be played in an acceptable timeframe.
>
> A fair process with clear rules and timelines for take-over bids is in the best interest of shareholders generally: it encourages bidders to come forward and gives shareholders opportunities to realize upon their investment at optimum values.

3. Arguments of the Parties

[288] Brookfield and IPL were the only parties that made submissions on the fairness of their interactions and the general conduct of the Strategic Review.

(a) Brookfield

[289] Brookfield argued that IPL did not conduct the Strategic Review or the auction fairly, contrary to the IPL Board's obligation to ensure shareholders realized the best value on their

investments. It claimed that IPL "played favourites" between Brookfield and Pembina throughout, and denied McKenzie's claim that the Strategic Review process was "full, fair, competitive and effective".

[290] In support of these contentions, Brookfield pointed to the following:

- While the IPL Board told Brookfield in January 2021 that a valuation of at least $24 per IPL Share was a "condition precedent" to negotiations, there was no indication that IPL told Pembina the same thing.

- IPL delayed granting Brookfield access to the IPL data room for 93 days, claiming that it needed to offset Brookfield's "head start". However, Brookfield denied that it had a head start, as it had access only to IPL's public information prior to entering the data room, just like any other bidder. By contrast, IPL granted Pembina access to the data room the day after Pembina indicated it was interested in an all-share transaction.

- Prior to allowing Brookfield to access the data room, IPL required Brookfield to sign a Pre-NDA before it would negotiate a Definitive NDA. It did not require Pembina to enter into a Pre-NDA.

- IPL indicated that any Definitive NDA would have to include a standstill provision precluding Brookfield from revoking or increasing the February 22 Offer without the approval of the Special Committee. Brookfield argued that this was another improper defensive tactic, as it provided the Special Committee with a veto over an enhanced Brookfield Offer.

- While IPL entered into a confidentiality agreement with Pembina that allowed IPL reciprocal access to Pembina's data room, IPL never sought to enter into a confidentiality agreement with Brookfield that would allow it to do due diligence on BIPC – even though BIPC Shares were part of the Brookfield Offer.

- IPL started negotiating the terms of a draft arrangement agreement with Pembina on May 25, 2021, but did not have comparable negotiations with Brookfield at any time. Brookfield acknowledged that it had not complied with IPL's requirement that bidders submit a mark-up of IPL's draft template arrangement agreement, but pointed out that Pembina had not done so either. Further, IPL did not go back to Brookfield to ask for its form of arrangement agreement, nor did it ever tell Brookfield that its failure to provide a mark-up was prejudicial to its offer.

- On May 27, 2021, McKenzie met with Brookfield to discuss its latest offer, and indicated that the Special Committee preferred cash consideration to BIPC Shares. The next day, she told Brookfield's representatives that IPL viewed BIPC Shares as equivalent to cash. However, IPL did not ask for cash consideration from Pembina and instead agreed to an all-share transaction.

- Although the IPL Board had publicly touted the long-term value of the HPC, it said it was not interested in Brookfield's proposal to offer IPL shareholders a continuing interest in the asset through the HPC GrowthCo. IPL then touted the benefits of IPL shareholders continuing to have an interest in the HPC under the Pembina Arrangement.

- McKenzie was instructed by the Special Committee on the evening of May 30, 2021 to contact Pembina and seek an improved offer, but it did not instruct her to contact Brookfield. McKenzie said that the Special Committee thought the May 30 Offer was as high as Brookfield was prepared to go, but Brookfield contended that there was no reason for the Special Committee to have thought so.

- After Brookfield submitted its further improved May 31 Offer, IPL did not come back to discuss the offer or to try to negotiate an even better bid. Although the May 30 Offer and the May 31 Offer each stated that they represented Brookfield's "***BEST AND FINAL OFFER***", Brookfield argued that IPL should have known that did not mean Brookfield could not make further improvements.

- IPL abruptly ended the Strategic Review the evening of May 31, 2021. It had previously indicated that the process would continue until the expiry of the Brookfield Offer on June 7, 2021.

- On June 2, 2021, Brookfield announced its intention to improve its bid even further, but the IPL Board continued to recommend the Pembina Arrangement.

(b) IPL

[291] IPL argued that its Strategic Review process was a success for its shareholders, as it resulted in improved offers from Brookfield, found an alternative transaction superior to the Brookfield Offer, and increased the price of IPL Shares on the TSX. It described the Brookfield Application as "[s]our grapes" that was at its core a criticism of the IPL Special Committee for believing Brookfield when it described its May 30 Offer and its May 31 Offer as "***BEST AND FINAL***". In IPL's submission, "perceived slights in a private negotiation" are insufficient to engage the panel's public interest jurisdiction, which should be reserved for cases involving conduct that is clearly abusive of shareholders and the integrity of the capital market.

[292] IPL further argued that Brookfield's submissions erroneously implied that Brookfield was somehow legally entitled to "the *exact same* communications, access, information and negotiation points that Pembina received, and at the same time" (original emphasis). IPL denied that Brookfield had any such entitlement.

[293] Concerning the specific issues Brookfield raised, IPL took the position that any delay in gaining access to the data room was Brookfield's fault for not seeking access earlier, and for not entering into the Pre-NDA and Definitive NDA sooner. Once Brookfield executed the Definitive NDA, it was given access to the data room the next day.

[294] McKenzie pointed out that in addition to the information in the data room, Brookfield received a detailed presentation from IPL management, four additional sessions with management to discuss specific commercial and technical matters, access to a detailed financial model for IPL's business, and a site visit to the HPC. IPL and its advisors also responded to hundreds of questions and supplemental information requests from Brookfield and its advisors over the course of approximately 12 days.

[295] However, McKenzie acknowledged that IPL had not wanted to let Brookfield into the data room too early, as it was concerned about a chilling effect on other potential bidders who perceived that Brookfield had an undue advantage. Brookfield indicated that as early as January 2021, it had already engaged external consultants, conducted a detailed analysis, and only required three to four weeks for confirmatory due diligence. IPL wanted to even the playing field for other potential bidders to encourage the best offers possible, and give them time to catch up to Brookfield's "head start".

[296] As for the conditions it imposed before allowing Brookfield to access the data room, IPL's position was that the conditions were necessary to safeguard its interests and protect the integrity of the Strategic Review. The IPL Board had been told by its advisors that allowing a hostile bidder into a target company's data room was unusual and risky. It was on their advice that IPL sought to protect the confidentiality of Definitive NDA negotiations by requiring Brookfield to enter into the Pre-NDA. If it had not done so and the negotiations were unsuccessful, Brookfield would have been at liberty to disclose the negotiations to the market, which IPL feared may have had a negative effect on the Strategic Review.

[297] IPL was also concerned that Brookfield would alter its offer in a manner prejudicial to IPL and its shareholders by using information that was disclosed in the data room, or that it would access the data room and then announce that it was only going to increase its bid by a nominal amount. IPL feared that this could have created a negative market perception of its value that would discourage other bidders from getting involved and decrease its share price. IPL offset these concerns by seeking the standstill provision, which it considered equivalent to the standstill provisions in the non-disclosure agreements it had entered into with other interested parties.

[298] In any event, McKenzie pointed out, IPL and Brookfield ultimately agreed that instead of the standstill IPL originally sought, Brookfield would refrain from increasing its offer for a one-year period unless it planned to offer at least $17.95 per IPL Share or more, and made the increased offer no sooner than the close of business on May 27, 2021.

[299] IPL explained that it did not enter into draft agreement negotiations with Brookfield as it did with Pembina because Brookfield failed to provide the mark-up requested in the data room process letter. Pembina addressed that requirement by submitting its own draft agreement that accomplished the same thing – it provided a starting point for negotiations on definitive terms. IPL disputed that it had an obligation to go back to Brookfield to prod it for its form of agreement.

[300] Concerning its request for a cash offer from Brookfield and not from Pembina, IPL pointed out that IPL and Brookfield are very different companies, whereas IPL and Pembina are

competitors in the same industry. This made a share-for-share transaction with Pembina an attractive way to maximize shareholder value that was not possible with Brookfield.

[301] As for Brookfield's suggestion that the IPL Board had made a valuation of at least $24 per IPL Share a "condition precedent" to negotiations, IPL stated that its January 25, 2021 letter to Brookfield had only said $24 "was the level at which the IPL Board was willing to engage in *pre-emptive and exclusive* discussions with Brookfield, without doing a prior market canvass" (emphasis added).

[302] IPL also pointed to the distinct nature of Brookfield's and Pembina's businesses in response to Brookfield's complaints about how IPL addressed the HPC. In IPL's view, Brookfield's proposal to preserve for IPL shareholders a 3% interest in the asset through the stand-alone HPC GrowthCo was fundamentally different than the 28% interest in the HPC that IPL shareholders would have retained after a combination with Pembina. While the Pembina Arrangement would have kept the HPC as a strategic asset within an integrated midstream business comparable to IPL's, Brookfield's HPC GrowthCo proposal would not.

[303] IPL disagreed that it ended the auction abruptly, without regard for whether Brookfield would make another improved offer. McKenzie reiterated that not only did Brookfield's May 30 Offer and May 31 Offer each state that it was a "***BEST AND FINAL OFFER***", but both also had a short deadline for reply. IPL therefore assumed that a sophisticated party like Brookfield meant what it said and did not think it was willing to offer more.

[304] In addition, IPL's fact witnesses said that before moving ahead with the Pembina Arrangement, IPL contacted Brookfield to advise that IPL was prepared to proceed with another proposal, and invited Brookfield to provide any other information it wanted the Special Committee to consider before it formally agreed to the competing proposal. In IPL's view, this gave Brookfield another opportunity to improve its last offer, and fair warning that the auction was coming to an end. IPL further pointed out that even if it did not ask Brookfield for a further offer, there was nothing preventing Brookfield from submitting one.

[305] IPL also noted that in the Definitive NDA, Brookfield acknowledged and agreed that IPL "reserve[d] the right, in its sole discretion, to accept or reject any potential counterparty proposal or offer and to reject any and all proposals made by [Brookfield] or its Representatives", and to terminate discussions and negotiations with Brookfield at any time.

4. Analysis and Conclusion

[306] As a starting point (and referring to factors cited in *Neo* at para. 119), we were satisfied that the Special Committee was comprised of qualified independent directors whose primary objective was achieving the best deal possible for IPL and its shareholders. It retained and relied on professional advisors as necessary, articulated and executed its mandate to find and consider options (including the *status quo*), and succeeded by finding a second option and negotiating higher bids. After implementing what it considered appropriate safeguards, the Special Committee even took the unusual step of allowing a hostile bidder into IPL's data room in the hope of encouraging a better offer.

[307] We were not persuaded that the Special Committee or the IPL Board did anything untoward in their handling of the Strategic Review process.

[308] The evidence was clear that IPL negotiated differently with Brookfield than it did with Pembina in some respects. However, we agreed with IPL that Brookfield and Pembina are very different companies involved in different businesses with different circumstances. Even within the Strategic Review, the two were positioned differently and had a different relationship with IPL. One was a hostile bidder with an outstanding offer to shareholders on the table, and the other was a solicited bidder that entered the process later as a white knight and proposed a plan of arrangement with IPL Board support. One was also a financial buyer while the other was a strategic buyer – which explains why IPL viewed the Brookfield Offer less favourably than an all-share transaction with Pembina.

[309] In our view, it was neither unexpected nor improper for IPL to communicate with the two parties in different ways. We did not interpret IPL's conduct as suggestive of an intent to prejudice Brookfield's position, which in turn could have prejudiced IPL's own shareholders. IPL gave logical business reasons for the decisions it made, and we were satisfied that Brookfield's "perceived slights" (as IPL described them) were exactly that – merely perceived. We found no basis to conclude that the IPL Board deliberately "played favourites" or had improper motives.

[310] Although NP 62-202 speaks of creating "an open and even-handed environment" in the take-over bid context, it does not indicate that all parties must be treated exactly the same in all respects – and we were not directed to any authority suggesting that there is such a requirement. To the contrary, in *Rogers*, the Court observed that, "[a] potential acquiror is not owed a duty by the target board nor is there any requirement that the acquiror be permitted to dictate terms" (at para. 20). The Court then went on to cite an American decision in which the US Court held that, "'[t]he hostile offeror is not entitled to have Boards of Directors smooth his path to control'" (*ibid.*).

[311] In *CW Shareholdings (Ont. Gen. Div.)*, the hostile bidder's complaints about the process undertaken by the target board were similar to some of those raised by Brookfield, including complaints about access to the target's data room and the target's failure to contact the hostile bidder for a better offer before entering into an alternative agreement with another bidder. The Court rejected all of these complaints, and specifically concluded that the target had no obligation to contact the hostile bidder for another offer – the target board made a "business and negotiating judgment call", and was entitled to do so (at paras. 67-70; see also *Pente* at para. 65).

[312] We were of the view that the same applied in this case. There was no reasonable basis to conclude that IPL should have been prescient and known that Brookfield's self-described "***BEST AND FINAL OFFER***" was not actually its best and final offer. IPL was not obliged to go back looking for a further offer, just as it was not obliged to seek out Brookfield's proposed form of arrangement agreement. If anything, Brookfield should have known from its communications with IPL representatives on May 30 and 31, 2021 that the auction was coming to an end and it had limited time to respond further (*Pente* at para. 65). Indeed, we found Brookfield's attempt to characterize itself as a "David" rather than a "Goliath" in its negotiations with IPL to be bordering on the absurd.

[313] In short, we were not persuaded that anything about the conduct of the IPL Board prior to, or the conduct of the IPL Board or the Special Committee during, the Strategic Review could be characterized as abusive of shareholders or the capital market warranting an exercise of our public interest jurisdiction. Even if we, Brookfield, or another board or special committee would have proceeded differently, this does not mean that the IPL Board or the Special Committee erred or misconducted itself. As the Court held in *Rogers*, a target board must act reasonably, but should not be second-guessed if it chooses among several reasonable alternatives (at paras. 18-19).

[314] We therefore dismissed the Brookfield Application on this ground as well.

VIII. THE IPL APPLICATION AND THE PEMBINA APPLICATION

A. Additional Legal Principles

1. CSA Proposals and Amendments

(a) History

[315] The history of amendments and proposed amendments to MI 62-104 *Take-Over Bids and Issuer Bids* (**MI 62-104**; now NI 62-104), NP 62-203, and NI 62-103 was relevant to the Swap issue in this matter.

[316] On March 13, 2013, the CSA published for comment proposed amendments to MI 62-104, NP 62-203, and NI 62-103 (the **March 2013 Proposal**, cited as (2013), 36 O.S.C.B. 2675), including a proposal to decrease the early warning threshold from 10% to 5%. The most relevant proposals for present purposes concerned the disclosure of certain "empty voting" and "hidden ownership" arrangements (at pp. 2678-2679):

> We believe that changes to the scope of the early warning framework are required in order to ensure proper transparency of securities ownership in light of the increased use of derivatives by investors.
>
> A sophisticated investor may be able, through the use of equity swaps or similar derivative arrangements, to accumulate a substantial economic interest in an issuer without public disclosure and then potentially convert this interest into voting securities in time to exercise a vote (this is referred to as "hidden ownership").
>
> It is also possible for an investor, through derivatives or securities lending arrangements, to hold voting rights in an issuer and possibly influence the outcome of a shareholder vote, although it may not have an equivalent economic stake in the issuer (this is referred to as "empty voting").
>
> These types of arrangements may not be disclosed under current securities law requirements since these requirements are generally based on the concept of beneficial ownership of, or control or direction over, voting or equity securities. The disclosure of these arrangements would be helpful in maintaining transparency and market integrity.
>
> We are therefore proposing amendments intended to include certain types of derivatives that affect an investor's total economic interest in an issuer for the purposes of determining the early warning reporting threshold trigger. For the purposes of early warning reporting disclosure, the Proposed Amendments would require disclosure of an investor's economic interest in an issuer as well as its voting interest in the case of securities lending arrangements. An investor would also have to disclose that it has entered into related financial instruments and other arrangements with respect to the securities of the issuer, if this is the case.

[317] Based on that reasoning, the proposal was to create a new definition of "equity equivalent derivative", so that "certain equity derivative positions that are *substantially equivalent* in economic terms to conventional equity holdings" would be included in the early warning threshold calculations (at p. 2679; original emphasis). A Swap would have been included in that new definition, along with "other derivatives that provide the party with the notional 'long' position with an economic interest that is substantially equivalent to the economic interest the party would have if the party held the securities directly" (*ibid.*). This would address various transparency concerns (*ibid.*):

> In [Swaps] and similar derivative instruments, the counterparty (typically, a dealer) will in many cases have a strong economic incentive to hedge its obligations under the arrangement through holding the reference securities and may decide to vote in accordance with its client's wishes or to make the securities available to the client on request.
>
> Hidden ownership strategies can significantly undermine the early warning regime since an investor may have *de facto* access to securities held by the derivative counterparty but avoid a disclosure obligation which has traditionally been premised on *de jure* ownership or control.
>
> The fact that a substantial block of securities has been "tied up" (i.e., is being held by counterparties to a substantial undisclosed equity derivative position), and is therefore not available to market participants, may be highly relevant information to market participants.

[318] In evidence were several comments received by the CSA in response to the March 2013 Proposal. Relevant comments included:

- reporting an equity equivalent derivative position could lead to over-reporting if the swap investor were interested only in the economic position and not in future ownership of the underlying securities;
- "Investors with only a synthetic position in a security should not be required to disclose their positions, or be prevented from adding exposure to those positions, as there would be no value to such information to other persons investing in the ordinary course";
- requiring EWR disclosure of derivative products used solely for hedging long positions "could allow the market to deduce certain investment strategies which could be detrimental to institutional investors";
- the swap investor typically will not have ownership rights or voting rights in the underlying securities, and reporting requirements would be better based on voting rights;
- hedging by the swap dealer could take the form of further derivative transactions, which could multiply the reporting requirements and lead to over-reporting;
- consideration would have to be given to the breadth of an underlying index or basket of securities if the equity equivalent derivative concept were to be used as a basis for disclosure;

- "market integrity is compromised when synthetic exposure is swept into actual ownership disclosure regimes";

- "Full disclosure of the material deal terms should not be required if the stated purpose of the transaction does not relate to soliciting proxies, changes to the board or any other events that underlie the CSA's policy concerns";

- while supported in concept, the CSA's proposed definition of equity equivalent derivatives was too uncertain and imprecise; and

- the CSA's approach seemed logical if "the equity equivalent definition captures instruments that are substantially equivalent in economic terms to conventional equity holdings".

[319] On October 10, 2014, the CSA announced that it would not be proceeding with the proposed decrease of the early warning threshold from 10% to 5%, nor with the proposed inclusion of equity equivalent derivatives in determining the threshold (see CSA Notice 62-307 *Update on Proposed Amendments to Multilateral Instrument 62-104 Take-Over Bids and Issuer Bids, National Instrument 62-103 Early Warning System and Related Take-Over Bid and Insider Reporting Issues and National Policy 62-203 Take-Over Bids and Issuer Bids*).

[320] The CSA's February 25, 2016 revised notice of amendments (see (2016), 39 O.S.C.B. 1745) stated that it was not appropriate at that time to proceed with the proposal to include equity equivalent derivatives in the early warning threshold calculation (at p. 1748):

> . . . a number of commenters submitted that there is no clear evidence to suggest that derivatives are used in Canada as a means to accumulate substantial economic positions in issuers without public disclosure to exert influence over the issuers or voting outcomes. Instead, these commenters contended that investors use derivatives for risk management purposes or as part of a trading strategy. Some commenters also expressed concern that the inclusion of "equity equivalent derivatives" within the early warning threshold calculation would create a significant compliance burden. The commenters cautioned that this change may render the early warning threshold calculation unduly complex and onerous for investors and, moreover, would not provide relevant information to the market.

[321] As mentioned, s. 3.1 was added to NP 62-203, effective May 9, 2016.

(b) Puri's Comments

[322] Puri highlighted the importance of the EWR and the CSA's comments that the EWR levels the playing field so that investors are aware of an entity's accumulation of shares and potential take-over bid intentions. She noted that investors could be harmed by selling their shares at a lower price than if that information were disclosed and reflected in the market price.

(c) Mitts' Comments

[323] Mitts emphasized that swap investors do not have the voting rights for the referenced securities. He opined that the particular circumstances affect the important balance between allowing the stealthy acquisition of a block of securities and requiring greater transparency for an

acquisition – that balance typically results in mandatory disclosure once an ownership threshold is crossed.

[324] Mitts also stated:

> As a core purpose of mandatory position disclosure is to ensure that information regarding block holdings is made available to shareholders in a timely fashion, the use of cash-settled [Swaps] to evade position disclosure prior to launching an unsolicited take-over bid raises substantial public policy concerns.

2. *Sears* Decision

(a) History

[325] *Re Sears Canada Inc.* (2006), 35 O.S.C.B. 8781, appeared to be the only securities commission decision in Canada discussing Swaps in a comparable context.

[326] In *Sears*, a subsidiary of Sears Holdings Corporation (**Sears Holdings**) offered to acquire all outstanding common shares of Sears Canada Inc. (**Sears Canada**), with a plan for a subsequent take-private transaction that would require approval of a majority of the minority of the shares not taken up by Sears Holdings. Sears Holdings applied to the OSC for orders against several entities, including Pershing Square Capital Management L.P. (**Pershing**), alleging various breaches of the Ontario Act. Through investment funds, Pershing had an 11.6% economic interest in Sears Canada, comprised of 5.2% of the outstanding Sears Canada shares and a 6.4% economic interest through Swaps (the **Sears Swaps**; percentages approximate).

[327] The evidence showed that Pershing had sold all of its shares in Sears Canada between October 2005 and December 8, 2005 (the bid was announced on December 5, 2005). Pershing then started to enter into some Sears Swaps. Pershing's intention when entering into the Sears Swaps was to minimize its exposure to Canadian taxes while maintaining an economic interest in Sears Canada. In the months after Sears Holdings announced the take-over bid, Pershing entered into additional Sears Swaps (and purchased and sold Sears Canada shares).

[328] Pershing issued an April 7, 2006 news release when its ownership of Sears Canada shares (excluding its economic interest in Sears Swaps) exceeded 5%, which was the EWR reporting threshold during the course of an active take-over bid.

[329] Sears Holdings alleged that Pershing used the Sears Swaps to retain control or direction over the referenced Sears Canada shares and to "park" the referenced shares so they would not be voted in the minority approval of the take-private transaction. Sears Holdings also alleged that Pershing failed to disclose its Sears Swap holdings to the public.

[330] The OSC panel accepted Pershing's tax rationale for entering into the first set of Sears Swaps. It also accepted that Pershing entered into a second set of Sears Swaps (after the take-over bid was launched in February 2006) to avoid antagonizing the chairperson of Sears Holdings, with whom one of the principals of Pershing wished to conduct future business. The panel concluded that there was no evidence that Pershing had any control or direction over any of the Sears Swap referenced shares (or any right to terminate the Sears Swaps before expiration), and that Pershing had not contravened the Ontario Act by not reporting its interest in the Sears Swaps.

[331] Sears Holdings further contended that Pershing's conduct was abusive of the capital market, such that the OSC should exercise its public interest jurisdiction against Pershing, even in the absence of breaches of Ontario securities laws. Pershing argued that Swaps are normal economic transactions, commonly entered into by an investor seeking an economic benefit without ownership.

[332] The OSC panel found in Pershing's favour in the circumstances (at paras. 110-111):

> Based on the evidence we heard and in light of [Pershing's] explanation as to the reason [it entered into the Sears Swap transactions], we have concluded that there is insufficient evidence to support a finding that Pershing's conduct in this regard was abusive of the capital markets so as to invoke our public interest jurisdiction under [the Ontario Act].
>
> This finding is based on the evidence and circumstances of this case. We wish to underscore that there might well be situations, in the context of a take-over bid, where the use of swaps to "park securities" in a deliberate effort to avoid reporting obligations under the [Ontario Act] and for the purpose of affecting an outstanding offer could constitute abusive conduct sufficient to engage the [OSC's] public interest jurisdiction. This is not such a case.

[333] In our view, the crucial aspect of that cited hypothetical is the possibility that Swaps could be deliberately used to avoid reporting obligations and to affect an outstanding offer.

(b) Puri's Comments

[334] Puri stated that following the *Sears* decision, "Canadian law firms and industry experts have cautioned market participants about the improper use of derivative instruments to avoid public disclosure requirements under the take-over bid rules".

(c) Mitts' Comments

[335] Mitts also referred to *Sears* (specifically, the comment that the use of Swaps could constitute abusive conduct in some circumstances). He noted that the CSA's conclusion not to include Swaps routinely in the calculation of beneficial ownership (except as provided in NP 62-203 at s. 3.1, as set out previously) did not show a lack of concern by the CSA about potential abuse, but indicated that the CSA considered it important to examine the particular circumstances of each case.

[336] Mitts set out a framework of six factors he considered important in the US context for assessing whether the use of Swaps in a particular instance was for the purpose of evading or circumventing reporting requirements. Brookfield pointed out that this framework had apparently not been formally applied or endorsed by the US Securities and Exchange Commission (the **SEC**) as at the date of the Hearing. Although these factors were generally informative, a comprehensive assessment of whether such factors should be applied in securities laws in Alberta (or across Canada) is a policy matter not appropriate to undertake during the adjudication of a specific application. Accordingly, we did not address those factors here.

3. Empty Voting and Hidden Ownership

(a) Overview

[337] In a Swap, the economic interest in the referenced securities is separated from the voting rights – the swap investor has the former and the swap dealer (if hedging by owning the referenced securities) has the latter. This results in "empty voting" because the swap dealer has voting rights but no economic interest comparable to that of regular shareholders. "Hidden ownership" is the corollary, as the swap investor has economic exposure to securities (with no voting rights) and that economic interest is concealed unless disclosure is otherwise required or is voluntarily made.

[338] Empty voting and hidden ownership can lead to complex and potentially troubling issues in the take-over bid context, as happened here.

(b) Puri's Comments

[339] Although she did not use the terms "empty voting" or "hidden ownership", Puri did discuss those potential harms to target shareholders. For example, she stated that both investor protection and capital market policy would benefit from including the Swap Shares when calculating Brookfield's beneficial ownership of IPL Shares. She also noted that a swap dealer's identity and the key terms of a Swap would be relevant in determining if a swap investor had control or direction over the referenced securities.

(c) Mitts' Comments

[340] Mitts noted that a long-standing relationship between certain swap parties could give the swap dealer an incentive to vote referenced securities in the interests of the swap investor. Mitts also stated that such a potential conflict of interest would be heightened if the swap investor were to launch a hostile take-over bid for the company whose securities are the subject of Swaps because the incentive of the offeror (and swap investor), who wants to pay the lowest possible price, is opposed to that of the regular shareholder, who wants to receive the highest possible price.

[341] Mitts viewed as possibly substantial the resulting pressure for the swap dealer to vote hedged securities consistent with the swap investor's interest. He further noted that even a swap dealer abstaining from voting on a transaction could affect the result because such abstention may vary "the number of shares required to achieve a majority of the votes of independent shareholders". Such factors can cause market uncertainty.

4. Materiality

[342] The concept of materiality is relevant to IPL's and Pembina's assertions that Brookfield made inadequate disclosure of the IPL Swaps in the Brookfield Offer and other documents, including news releases and communications to IPL shareholders.

[343] NI 62-104 and Form 62-104F1 address the required contents of a take-over bid circular. In addition to specified topics, Item 23 of Form 62-104F1 requires a description of "any material facts concerning the securities of the offeree issuer", as well as any other matter not disclosed in the circular or previously generally disclosed that is known to the offeror and "would reasonably be expected to affect the decision of the security holders of the offeree issuer to accept or reject the offer". Item 26 of Form 62-104F1 requires a certificate from the offeror stating that the circular "contains no untrue statement of a material fact and does not omit to state a material fact that is

required to be stated or that is necessary to make a statement not misleading in the light of the circumstances in which it was made".

[344] Section 1(gg) of the Act defines a material fact as "a fact that would reasonably be expected to have a significant effect on the market price or value of the securities".

[345] In *Re Osum Oil Sands Corp.*, 2021 ABASC 81, an ASC panel discussed materiality in the context of s. 92(4.1) of the Act, which is comparable to the requirement in Form 62-104F1 (at paras. 100-101):

> We are satisfied that the materiality standard in the present context is comparable to that used in the disclosure and misrepresentation context; . . . we rely on the discussion of materiality as set out in recent decisions by panels of the ASC. In *Re Rustulka*, 2020 ABASC 93 at paras. 234-[235], an ASC panel stated:
>
> > The last element addresses the materiality of a misstatement or omission. As explained in *Re Fauth* (2018 ABASC 175 at para. 258):
> >
> > > The inquiry as to whether or not a statement or omission "would reasonably be expected to have a significant effect on the market price or value of a security" may be usefully restated as an inquiry into "whether there is a substantial likelihood that such facts would have been important or useful to a reasonable prospective investor in deciding whether to invest in the securities on offer at the price asked" [*Re Arbour Energy Inc.*, 2012 ABASC 131 at para. 765, citing *Re Capital Alternatives Inc.*, 2007 ABASC 79 at para. 239 and *Sharbern* [*Holding Inc. v. Vancouver Airport Centre Ltd.*, 2011 SCC 23] at para. 61]. . . .
> >
> > With respect to how this element may be proved by Staff, the panel in . . . *Aitkens* explained (. . . at para. 137):
> >
> > > . . . "[c]ommon-sense inferences . . . may suffice in certain cases" (*Arbour* at para. 764, citing *Sharbern* . . . at paras. 58 and 61). While investors' evidence with respect to the impact the information may have had on their investment decisions may be considered (see, for example, [*Re*] *Aurora*[, 2011 ABASC 501] at para. 146), neither that evidence nor expert evidence on market price or value is required to meet the legal test (*Arbour* at paras. 763-[766]; see also *R. v. Zelitt*, 2003 ABPC 2 at paras. 32-34, distinguishing, *inter alia*, *R. v. Coglon*, [1998] B.C.J. No. 2573 (British Columbia Supreme Court)). That is because an ASC panel is itself an expert tribunal with the specialized knowledge and experience necessary to "draw inferences as to the objective view of a reasonable investor" (*Arbour* at para. 765).
>
> Accordingly, we examine the evidence to determine what, if any, information was not disclosed by Waterous and whether there was a substantial likelihood that any such information would have been important or useful to a reasonable Osum shareholder in deciding whether to tender that shareholder's Osum Shares to the Offer.

[346] We were satisfied that the same principles applied in this case when we considered whether Brookfield should have made additional disclosure about certain aspects of the IPL Swaps in the Brookfield Offer documents, as well as in news releases and communications to IPL shareholders.

B. Additional Background and Evidence

1. Swap Agreements

[347] The two Swap Agreements governing the IPL Swaps were standard ISDA 2002 Master Agreements between BMO and Brookfield (each through a different Brookfield limited partnership). They were both dated as of April 24, 2020. Two associated IPL Swap Letter Agreements were also in evidence, both dated June 15, 2020. The IPL Swap Letter Agreements stated that BMO could hedge the IPL Swaps by acquiring IPL Shares or otherwise, and that if BMO hedged by acquiring IPL Shares, Brookfield would not have "any right to vote, or direct or influence the voting, acquisition or disposition of" such IPL Shares, nor could Brookfield control the unwinding of the BMO hedge. However, the IPL Swap Letter Agreements provided that Brookfield could terminate all or a portion of the IPL Swaps at its option and, as noted by counsel for IPL's Special Committee, Brookfield could control when Swap Shares would likely re-enter the market because BMO (or other hedging swap dealers) would likely sell Swap Shares when Brookfield chose to terminate the IPL Swaps.

2. IPL Swap Disclosure to IPL

[348] Baker stated that Brookfield first disclosed to IPL that it was a significant IPL shareholder in a November 4, 2020 conversation with Bayle and Kousinioris, and disclosed to IPL that it was IPL's largest shareholder in its November 11, 2020 letter suggesting a potential strategic acquisition. Baker acknowledged that the first time Brookfield told IPL that Brookfield's economic interest was about 20% was in the December Proposal (dated December 18, 2020). Baker thought it was in a conversation at approximately the same time as the December Proposal that he told Bayle that Brookfield was not required to disclose the almost 20% combined interest and voluntarily chose not to disclose it, after which Bayle "thanked us for not doing it". According to Baker, Bayle also expressed surprise at the size of Brookfield's position. McKenzie could not confirm or refute some of Baker's statements, but agreed with that general timing, stated that IPL first learned of the IPL Swaps in December 2020, and noted that she herself was surprised to learn of the size of the interest that Brookfield had acquired without having made public disclosure. It was irrelevant to our decision whether certain of that information was communicated from Brookfield to IPL in November or December.

[349] McKenzie stated that IPL's primary concern with the IPL Swaps in December 2020 and January 2021 was understanding what Brookfield's almost 20% interest was and what disclosure obligations IPL might have once it had knowledge of that material fact. IPL did not ask Brookfield any questions about the IPL Swaps in December or January, and was satisfied with Brookfield's IPL Swap disclosure at that time. She also stated that IPL started thinking in late January 2021 about the impact Brookfield's economic interest could have on the process if Brookfield were to pursue a take-over bid.

[350] Castaldo and McKenzie stated that there was no need for IPL to discuss any IPL Swap concerns with Brookfield after the Supplemental SRP was in place (because the plan prevented Brookfield from increasing its IPL Swap interest or purchasing additional IPL Shares without first

terminating some of its existing IPL Swaps). McKenzie also noted that although some additional information about the IPL Swaps was provided by Baker in his affidavits, that information had not been provided to IPL earlier.

3. IPL Swap Public Disclosure and Associated Concerns

[351] As noted, by mid-June 2020, Brookfield's aggregate interest in IPL exceeded 10%, but the February 10, 2021 news release issued by Brookfield announcing its intention to make a hostile bid for IPL was the first public disclosure of the extent of Brookfield's ownership of IPL Shares and economic interest through the IPL Swaps. The news release stated in part:

> Brookfield . . . is currently the largest investor in IPL with an aggregate economic interest in 84,341,555 IPL Shares, representing approximately 19.65% of the issued and outstanding shares of IPL on an undiluted basis. Brookfield . . . began to accumulate a position in [IPL] for investment purposes beginning in March 2020.
>
> This position is comprised of beneficial ownership and control of an aggregate of 41,848,857 IPL Shares, representing approximately 9.75% of the issued and outstanding IPL Shares on an undiluted basis, and in addition, a cash-settled [Swap] that provides Brookfield . . . with economic exposure to an aggregate of 42,492,698 IPL Shares. The [Swap] affords economic exposure comparable to beneficial ownership but does not give Brookfield . . . any right to vote, or direct or influence the voting, acquisition, or disposition of any IPL Shares.

[352] Similar information about the IPL Swaps was included in Brookfield's February 22 Offer documentation, which disclosed that:

- In March 2020, Brookfield began acquiring IPL Shares.
- In June 2020, Brookfield "began acquiring exposure to the economics of [IPL] Shares through [Swaps] with an ISDA swap dealer (which swap exposure does not give Brookfield any right to vote, or direct or influence the voting, acquisition, or disposition of any [IPL] Shares by the ISDA swap dealer)".
- Brookfield continued to accumulate IPL Shares and additional economic exposure through IPL Swaps until October 2020.
- Brookfield beneficially owned 41,848,857 IPL Shares (approximately 9.75%) as of February 22, 2021.
- Under the IPL Swaps, Brookfield had economic exposure to 42,492,698 IPL Shares, but did not have "any right to vote, or direct or influence the voting, acquisition, or disposition of any [IPL] Shares" held by the ISDA swap dealer.

[353] Brookfield's February 22, 2021 letter to IPL shareholders described Brookfield as "the largest single investor in IPL, with an aggregate economic interest of 19.65%". That document did not mention the IPL Swaps or the amount (shares or percentage) of Brookfield's beneficial ownership of IPL Shares. However, it specifically referred to Brookfield acquiring IPL Shares starting in March 2020 (thus strengthening the impression that Brookfield's interest was composed of beneficial IPL Share ownership).

[354] The June 4 Offer documentation also referred to the IPL Swaps and Brookfield's economic interest in IPL (in addition to its beneficial interest):

- Brookfield stated that the trading value of the Pembina Arrangement's share consideration was "likely to be impacted by the overhang of newly issued shares". Brookfield described itself as an IPL shareholder "with an ~20% economic interest in IPL" (explaining the IPL Swaps in a footnote using similar language to that in the earlier disclosure) and said it intended to vote against the Pembina Arrangement.

- Brookfield stated that if the Pembina Arrangement succeeded, Brookfield would have an approximate $1.6 billion economic interest in Pembina and "would look to exit at the earliest opportunity".

[355] Baker acknowledged that an accompanying June 4 letter to IPL shareholders did not distinguish between the two components of the approximately 20% economic interest, but explained that that was "because it had been previously disclosed a number of times".

[356] In the Baker Affidavit, Baker explained:

> Brookfield . . . does not have legal ownership of the IPL . . . Shares that are subject to the . . . Swap and there is no agreement for such shares to be returned to or otherwise made available to Brookfield . . . to be voted or tendered. Similarly, Brookfield . . . has no understanding or arrangement with the swap dealer on how that dealer might exercise its rights from the IPL . . . Shares it owns, assuming it is inclined to at all.

[357] IPL's disclosure gave the market additional context for the IPL Swaps and raised some issues. For example, the March 8 Directors' Circular stated:

- IPL's Strategic Review was announced February 18, 2021 (after Brookfield's public disclosure of the IPL Swaps in its February 10 news release). By the March 8 Directors' Circular date, IPL had already "received inquiries from, and ha[d] initiated contact with[,] a number of third parties".

- IPL said Brookfield's IPL Swap disclosure in the February 22 Offer contained errors or misleading statements, and that the IPL Swaps raised significant public policy concerns. Specifically:

  > . . . the Brookfield [Offer] fails to disclose the particulars of the [IPL Swap] including its date(s), the identities of the parties including the unnamed ISDA swap dealer, and its terms and conditions, including the nature and extent of Brookfield's economic exposure to [IPL] Shares, its expiry or termination date(s), and whether it may be early terminated or extended by Brookfield or the [swap dealer]. Nor does the Brookfield [Offer] disclose the nature and extent of any business or other relationships between the members of the [Brookfield group] and the ISDA swap dealer, which may motivate the ISDA swap dealer to tender the [IPL] Shares referenced in the [IPL Swap] to the [Brookfield Offer] or

> otherwise act in accordance with the wishes of the [Brookfield group] with respect to the referenced [IPL] Shares.
>
> Further, Canadian securities laws require that if a change occurs in the information contained in a take-over bid circular that would reasonably be expected to affect the decision of the security holders of the offeree issuer to accept or reject the bid, the offeror must promptly (i) issue and file a news release, and (ii) send a notice of the change to every person to whom the bid was required to be sent.
>
> . . .
>
> The Canadian securities regulatory authorities have previously expressed concerns with strategies (which they describe as "hidden ownership strategies") whereby a sophisticated investor may use derivatives such as the [IPL Swap] to accumulate a substantial economic position in a public company without public disclosure and then potentially convert this interest into voting securities. Among other things, such hidden ownership strategies may significantly undermine the early warning disclosure regime under Canadian securities laws (i.e., the general requirement to disclose a 10% holding), as an investor in a [Swap] may have *de facto* access to securities held by the derivative counterparty. The lack of disclosure of such accumulations disadvantages other shareholders and market participants. In a previous instance, a Canadian securities regulatory authority commented that "***there may be situations where in the context of a take-over bid, where the use of swaps to 'park securities' in a deliberate effort to avoid reporting obligations under the [Ontario Act] and for the purpose of affecting an outstanding offer could constitute abusive conduct sufficient to engage the [OSC's] public interest jurisdiction***". [emphasis added by IPL]

[358] IPL's June 9 Directors' Circular stated:

- IPL's Supplemental SRP had "the effect of treating certain derivative transactions, including the [IPL Swaps] being utilized by Brookfield, as equivalent to beneficial share ownership for purposes of the 20% triggering threshold in the Supplemental [SRP]".

- Brookfield had failed to remedy the IPL Swap errors and misrepresentations as alleged by IPL in the March 8 Directors' Circular.

[359] In their respective applications, IPL and Pembina reiterated the concerns expressed in the March 8 Directors' Circular and the June 9 Directors' Circular that Brookfield should have disclosed certain additional information about the IPL Swaps.

[360] Burrows stated that he was concerned with the IPL Swap disclosure in Brookfield's February 10, 2021 news release because it looked to him like Brookfield had found a way to get around the 10% early warning threshold. In his view, Brookfield was over the 10% threshold, which could have been a significant disadvantage to Pembina in pursuing IPL. Burrows was not aware whether Swap particulars such as those sought here had been disclosed in any earlier Canadian M&A transactions, but he also was not aware of Swaps being used this way in such a transaction before.

[361] McKenzie set out several examples of media reports that confused IPL shareholders and prospective IPL bidders by apparently conflating Brookfield's ownership of IPL Shares and its economic interest in the Swap Shares:

- A February 10, 2021 Financial Post article stated that Brookfield was "currently the largest shareholder in [IPL], with 19.65 per cent of the outstanding float".

- A February 11, 2021 NS Energy article stated that Brookfield "holds a stake of around 19.65% in [IPL], which makes it the single largest investor in the latter".

- A February 12, 2021 Financial Post article (by the same writer as the February 10 Financial Post article) described Brookfield as "own[ing] nearly 20 per cent of [IPL]".

- A February 22, 2021 yahoo!finance article stated that Brookfield had already "acquired a 19.65% economic interest in [IPL]" and was IPL's "top shareholder".

- A May 6, 2021 Oil Sands Magazine article stated that "Brookfield already owns a 20% stake in [IPL]."

- A June 1, 2021 Motley Fool Canada article stated that Brookfield "actually scooped up just below a 20% stake in [IPL] during the pandemic market crash".

[362] Baker stated that Brookfield did not receive any shareholder inquiries for clarification about Brookfield's IPL Swap disclosure. Referred to the media excerpts cited above, he stated that Brookfield believed its disclosure was clear regarding its IPL Share ownership and IPL Swap holdings, and therefore did not correct any media reporting.

[363] In contrast, McKenzie stated that she believed IPL media relations personnel tried on numerous occasions "to help the press to understand the distinction" between Brookfield's two types of interest. McKenzie also stated that IPL worked with some larger institutional shareholders that had been confused about Brookfield's beneficial interest and economic interest.

[364] The Brookfield June 4 News Release contained wording criticized by IPL and Pembina:

> As IPL's largest shareholder, with 9.75% ownership of IPL shares and a total economic interest in [IPL] of 19.65%, we are not supportive of the all-share [Pembina Arrangement] and intend to vote against it. In the event the [Pembina Arrangement] is successful, Brookfield . . . will become a significant shareholder in Pembina with up to an approximately C$1.6 billion economic interest ("**Brookfield Block**"). Brookfield . . . does not intend to be a long-term investor in Pembina. The Brookfield Block, in addition to the shares then held by event-driven funds and any other institutional shareholders who lack desire to own shares in Pembina, will therefore create a substantial and protracted overhang on [the Pembina Shares]. The IPL Board and its advisors ought to have considered these obvious factors in making its determination of the value of the all-share consideration offered in the [Pembina Arrangement]. [original emphasis]

[365] Baker explained that the term "Brookfield Block" described "the combined position of Pembina [S]hares and other economic interests that Brookfield . . . would end up holding if the

Pembina Arrangement [were] approved by shareholders and completed". He said it was not used in the context of "blocking" the Pembina Arrangement, but would only arise if the Pembina Arrangement were completed.

[366] Brookfield's June 18, 2021 news release (the same day the IPL Application and Pembina Application were filed) also used the term "Brookfield Block", there describing Brookfield's "C$1.6 billion economic interest" as being part of "a substantial and protracted overhang on [the Pembina Share] price", should the Pembina Arrangement succeed.

[367] Brookfield's June 21 Offer post-dated the Applications and contained no disclosure relevant to the IPL Swaps.

[368] On behalf of IPL, Quinn stated that TD Securities was told by prospective buyers that they were not interested in bidding for IPL because Brookfield's disclosure of an almost 20% economic interest had created the impression that Brookfield "effectively already had control or had 'won'". He concluded that this had a chilling effect on the process and made it more challenging for IPL to obtain competing offers. McKenzie made similar statements. She clarified that such parties were not confused by the composition of Brookfield's interest, but were reluctant to participate in the process because of Brookfield's large economic interest. She also noted a concern that IPL shareholders may have not voted on the Pembina Arrangement, as they could have assumed that the Brookfield Offer "was a done deal".

[369] IPL pointed out that as of the date of the Hearing, Brookfield still had not publicly disclosed details about the IPL Swaps. Materials containing some of those details were provided to the panel for the Hearing, but were not provided to the public.

[370] Baker was cross-examined on Brookfield's decision to keep its total economic interest below 20% and its IPL Swaps below 10%. He confirmed that the IPL Swaps were kept below 10% perhaps in part to avoid triggering an early warning reporting requirement for BMO and further stated:

> . . . I think us stopping where we did, there's a couple of reasons. One is from an economic perspective. We invested a fair bit of capital, and we're kind of getting up, you know, to almost a billion dollars in invested capital.
>
> So from an exposure perspective, where we didn't have certainty in terms of, you know, being able to execute on a transaction, I think we were getting, you know, close to a limit where we felt we didn't want to go a lot more.
>
> At that point in time we were also starting to engage with IPL, and, because of that, we felt it was important from -- you know, being transparent with them and trying to do something with them over time, that we weren't acquiring more [IPL Swaps] when we were having those conversations with them. We didn't feel that was appropriate.
>
> And, look, from an optics perspective, when we step back and -- we understand the prominence of the 20 percent threshold in the market and we felt optically, you know, staying below that 20 percent threshold was probably better than going over it, even though with the [IPL Swaps] we had every, you know, option and availability or right to do that.

4. BMO's Swap Activities

[371] Brookfield did not present direct evidence from anyone at BMO, but Baker referred to discussions he had with a BMO representative. Also in evidence were some BMO documents relating to the IPL Swaps, including the Swap Agreements and the IPL Swap Letter Agreements.

[372] Baker stated that Brookfield used BMO as the swap dealer because Brookfield had agreements in place from previous Swaps with BMO, and BMO had the "ability to manage the stake in the IPL [Shares] in the market". Baker also stated that the extent of Brookfield's relationship with BMO in the past had nothing to do with Brookfield's decision to use BMO for the IPL Swaps and BMO NB as a financial advisor for the acquisition of IPL.

[373] According to Baker, he understood from the BMO representative that BMO's business unit responsible for Swap transactions had hedged a portion of its position in the IPL Swaps by entering into subsequent transactions with other swap dealers it did not identify. BMO also told Baker that it "does not have the right to vote or tender 9.9% of IPL [Shares] while subject to these subsequent transactions". Baker also stated that Brookfield did not enter the IPL Swaps "for the purpose of affecting a change of control transaction, to exert pressure on IPL, or to affect any voting outcome". He understood from BMO that it "does not vote or tender shares that hedge its equity swap positions at the direction or under the influence of its swap counterparties or their affiliates", that BMO "acts in its own commercial interests", and that BMO had "no formal, informal or other understanding with Brookfield . . . under which Brookfield . . . may direct or obtain the vote or tender of any [Swap] Shares".

[374] During his cross-examination, Baker confirmed that Brookfield did not have a contractual arrangement with BMO regarding whether BMO would vote the Swap Shares or not, and said: "We understand their practice is to not vote shares." This appeared to be Baker's understanding from the conversation or conversations he had with BMO personnel. Although Baker said that he understood BMO would act "in its own commercial interests", there was no other evidence that BMO would refrain from voting any Swap Shares, nor was there any evidence as to what any other swap dealers would choose to do with any Swap Shares they may have held.

5. BMO NB's Engagement as Financial Advisor

[375] The BMO Engagement Letter stated that BMO NB (defined in the BMO Engagement Letter as BMO CM) was to provide Brookfield with financial advisory services in connection with its proposed acquisition of IPL. BMO NB would earn the BMO Completion Fee if Brookfield were to close an acquisition of IPL.

6. Puri Report

[376] As noted, IPL retained Puri to provide expert opinion evidence concerning the IPL Swaps.

[377] Overall, Puri considered that undisclosed use of Swaps could be abusive of the capital market in some circumstances, and that Brookfield's IPL Swap conduct here could be seen as abusive of securities regulation, specifically take-over bid regulation.

[378] Puri considered that Brookfield's public disclosure about its IPL Shares and IPL Swaps was "confusing, contradictory and non-transparent, and inconsistent with public policy

objectives". Those concerns were based on Brookfield's disclosure that it had no right to direct or influence the voting of the Swap Shares, while characterizing itself as having an economic interest in IPL of almost 20% and having a "Brookfield Block" in connection with the Pembina Arrangement. Puri stated that it was difficult to assess the accuracy of Brookfield's public disclosure relating to the IPL Swaps because Brookfield did not identify the swap dealer or the terms and conditions of the IPL Swaps.

[379] Puri also noted her concern with a comment made by Osler, Brookfield's expert witness. Osler stated that "almost 20% of the IPL [Shares] have no economic incentive to vote in favour of the Pembina [Arrangement]". Puri queried if this meant that Osler knew about the terms and conditions of the IPL Swaps, as well as any understandings between Brookfield and the (at the time) unidentified swap dealer. However, we disregarded Puri's query, as we concluded that Osler's comment could be viewed as a simple recognition that the IPL Swaps, if hedged, would result in the separation of economic interest from voting rights in the Swap Shares.

[380] Puri suggested that the panel may want to consider whether Brookfield should have disclosed when its beneficial ownership of IPL Shares plus its economic interest in the IPL Swaps first reached the 10% early warning threshold. She also suggested that the panel may want to consider whether Brookfield's silent aggregation of close to a 20% economic interest in IPL was acceptable conduct for a market participant (for Brookfield or for others in the future). We disregarded these comments, as we found that they (and other similar comments) strayed outside the realm of expert opinion.

[381] Puri agreed with other evidence indicating that Brookfield would have avoided paying a premium for its 19.65% economic interest because the market was not aware that Brookfield was accumulating that position in IPL. Puri noted that non-disclosure may have been in Brookfield's best interest, but such actions by Brookfield – and others in the future – could risk undermining securities regulatory objectives in general and take-over bid regulatory objectives in particular.

7. Mitts Report

(a) Scope

[382] Mitts described his expert report as discussing "the role and impact of [Swaps] in connection with the unsolicited take-over bid by [Brookfield for IPL Shares]".

[383] As noted, Mitts referred to the OSC panel's decision in *Sears*. He also commented on US cases and various articles. He opined that Swaps are being used with increasing frequency and coming under increased regulatory scrutiny in the US. He cited a May 6, 2021 comment by SEC Chair Gensler that SEC staff are considering whether to include Swaps in new disclosure requirements.

(b) US Decision in *CSX*

[384] The US case *CSX Corp. v. Children's Inv. Fund Mgmt. (UK) LLP*, 562 F. Supp. 2d 511 (S.D.N.Y. 2008); aff'd in part, vacated in part, and remanded in part on appeal 654 F.3d 276 (2d Cir. 2011) was discussed in the Mitts Report and became the subject of questioning during Mitts' cross-examination.

[385] In *CSX*, the defendants (one of which was **TCI**) were two hedge funds that amassed a large economic position in CSX Corporation (**CSX**) as swap investors (or long parties) with certain swap dealers (or short parties), and failed to make the required 5% early warning threshold disclosure (akin to our 10% threshold). The two then launched a proxy fight for control of CSX. The trial judge did not find it necessary to conclude that the defendants beneficially held some or all of the referenced securities because the relevant US securities law deemed beneficial ownership when an arrangement is part of a plan or scheme to avoid disclosure requirements (at p. 517; see also p. 552).

[386] The trial judge discussed some characteristics of Swaps that were also raised during this Hearing, including: (1) a swap investor has no right to vote; (2) a swap dealer often hedges by purchasing referenced securities; (3) Swap terms are negotiated between the counterparties, including termination and unwinding provisions; and (4) a swap investor may benefit from concealing its interest until it is ready to disclose.

[387] The trial judge discussed the broad meaning of beneficial ownership in the context of the 5% disclosure threshold, including that the legal right to vote may not be determinative because the swap investor may have economic or other power to direct the swap dealer's voting. The trial judge also stated that a determination of beneficial ownership had to take into account practical realities (at p. 547).

[388] The trial judge found it inevitable that the swap dealers would hedge by buying CSX securities and that TCI knew that (at p. 542), concluding that TCI had the ability to cause – or, at the very least, to influence – the swap dealers to buy or sell referenced securities, as they would do so when TCI entered or unwound Swaps (at p. 546). Also, TCI could unwind the Swaps at any time and receive CSX securities instead of cash, which gave TCI significant leverage over CSX (at p. 542).

[389] On appeal, the majority decided that a narrow point not relevant to this matter needed to be remanded for the trial judge to make a specific finding.

C. Arguments of the Parties

1. IPL and Pembina

[390] IPL contended that the key issue was whether Brookfield's conduct was abusive of IPL's other shareholders and the integrity of the capital market in all of the circumstances, including:

- the timing of Brookfield's IPL Swap acquisitions;
- the timing and content of Brookfield's disclosure of the IPL Swaps; and
- Brookfield's use of the phrase "Brookfield Block" in disclosure and, potentially, to affect voting.

[391] IPL alleged that Brookfield's conduct was abusive in three ways:

- it undermined the EWR by acquiring an economic interest in IPL of almost 20% while deliberately not triggering the 10% EWR reporting threshold;

- it made misleading disclosure regarding its interest in IPL and only disclosed the IPL Swaps at the time of its initial take-over bid offer to increase its chance of success; and

- it could influence BMO's voting of Swap Shares against the Pembina Arrangement, and knew that holders of Swap Shares may abstain from voting on the Pembina Arrangement, which would effectively enhance the voting power of Brookfield's IPL Shares, particularly given IPL's historic low voter turnout – either outcome would hinder a fair and informed shareholder vote.

[392] Pembina's submissions were similar, but phrased differently. Pembina argued that Brookfield's use of the IPL Swaps had "three dangerous effects" – "hidden ownership, improper influence and 'empty voting'". As a result, according to Pembina, "Brookfield has deceived the market, supressed the price of IPL Shares, frustrated an auction process, and kept its bid cheap, all at the expense of IPL shareholders". Pembina argued that Brookfield's use of the IPL Swaps contravened the EWR and take-over bid rules and created public policy issues, thus undermining shareholder democracy and capital market integrity. According to Pembina, those effects were more damaging here because IPL had a large number of retail investors relying on the ASC's protection.

[393] IPL emphasized that Brookfield chose BMO as the swap dealer at least in part because of BMO's position as a market maker for IPL Shares, meaning that BMO already "had a significant enough portion that it would be able to hedge stock without significantly moving the market". IPL also noted Brookfield's and BMO's other significant relationships, including BMO's shareholdings in various Brookfield entities, BMO's lending activities with Brookfield, and BMO's securities-related activities with Brookfield (including recent underwriting and investment banking). IPL argued that Brookfield had been entertaining pitches from investment banking syndicates during the time that Brookfield was entering into the IPL Swaps, meaning that Brookfield was at least considering a take-private transaction at that time.

[394] Pembina made similar arguments, also emphasizing that Brookfield, despite its extensive relationship with BMO, had not publicly disclosed BMO as the swap dealer. IPL and Pembina were both concerned that Brookfield retained BMO NB as its financial advisor for the IPL acquisition and agreed to the BMO Completion Fee despite the existing IPL Swaps and other relationships between Brookfield and BMO. While Brookfield had said it had significant relationships with other banks too, Pembina argued that the competition gave BMO even more of an incentive to please Brookfield.

[395] IPL maintained that Brookfield had breached the take-over bid requirements in the Act or the regulations, thus making available remedies under s. 179 of the Act. In the event we did not conclude that Brookfield had breached the Act or the regulations, IPL argued that our s. 198 public interest powers are sufficiently broad to allow us to make the orders sought (relying on *ARC Equity*

at paras. 63-65), on the basis of Brookfield's clearly abusive behaviour or conduct violating the animating principles of the take-over bid regime.

2. Brookfield

[396] Brookfield characterized its IPL Swaps as a "bet" that gave Brookfield no control over any securities. Brookfield criticized IPL's and Pembina's arguments as tactical attempts to give Pembina an advantage in the battle for IPL. Brookfield contended that IPL and Pembina could each have earlier raised concerns with the IPL Swaps, the IPL Swaps did not contravene Alberta securities laws, and Brookfield's use of the IPL Swaps was not clearly abusive of the capital market.

[397] Brookfield argued that it was not obliged under securities laws to stop its accumulation of IPL Shares and IPL Swaps, to notify IPL about the IPL Swaps (either in November 2020, as Brookfield stated, or December 2020, as IPL stated), or to disclose publicly details of its IPL Shares and IPL Swaps on February 10, 2021 (when Brookfield issued its news release announcing its intention to make the February 22 Offer). Brookfield submitted that its goal in entering the IPL Swaps was not to avoid the EWR reporting requirements or affect IPL shareholder voting, but to increase its economic exposure to IPL. Brookfield emphasized that it could not vote the Swap Shares and claimed to have only a limited knowledge of BMO's hedging activities related to the IPL Swaps. As Baker stated, Brookfield had "no knowledge of what [BMO] will or will not do, and is not counting on it doing or not doing anything". Brookfield submitted that it disclosed the fact that it had no ability to vote, or to direct or influence the voting of, any Swap Shares, and did not have to disclose all the evidence supporting that disclosure.

[398] Brookfield stated that it complied with the EWR, its IPL Swap disclosure was not materially misleading, and the remedies sought by IPL and Pembina were inappropriate. Brookfield emphasized that the EWR sets out a bright line test, with which it complied. Brookfield contended that granting the relief sought by IPL and Pembina would generate uncertainty about the EWR and the take-over bid framework.

3. Staff

[399] In the context of the IPL Swaps, Staff provided submissions on:

- the panel's power to grant the remedies sought;
- whether the panel should cease trade the Brookfield Offer; and
- whether the panel should grant the Proposed Voting Order, the Proposed Disclosure Order, or the Proposed Minimum Tender Order.

[400] Staff focused on the background and purpose of the EWR, including the CSA's decision not to expand the EWR to include "equity equivalent derivatives", such as Swaps. Staff generally suggested caution, indicating that some of the IPL Swap issues of concern may be better addressed through policy development.

D. Analysis

1. Hidden Ownership and Empty Voting

(a) Hidden Ownership

[401] As noted, hidden ownership concerns arise when Swaps are used to accumulate an economic interest with no public disclosure. Those concerns are magnified as the size of the economic interest increases, and further magnified by the potential conversion of that economic interest into voting securities. As the entity with the hidden ownership would control the timing of any such conversion, there is the possibility of abuse in some circumstances.

[402] Conversion could be accomplished directly by converting Swaps into the referenced securities, if contemplated under the terms of the particular swap agreement. Alternatively, a swap investor could effect conversion indirectly by terminating the Swap and then purchasing referenced securities either on the market or from the swap dealer (if the swap dealer had hedged by purchasing the referenced securities and was selling them after the swap investor terminated the Swap). Either way, the swap investor would control the timing of conversion.

[403] The evidence here was that by June 18, 2020, Brookfield's aggregate economic interest in IPL reached 10%, and by October 5, 2020, Brookfield had accumulated an aggregate economic interest of 19.65% in IPL through the combination of its beneficial ownership of 9.75% of IPL Shares and its 9.9% economic exposure from the IPL Swaps. The extent of Brookfield's economic interest in IPL was not publicly disclosed until February 10, 2021 when Brookfield issued a news release announcing its intention to make the February 22 Offer. Had Brookfield's beneficial ownership increased by only 0.25% of the outstanding IPL Shares before launching its take-over bid in February 2021, it would have reached the 10% early warning threshold and been required to disclose its position. Here, Brookfield effectively doubled its economic exposure to IPL Shares without triggering the IPL Share price premium that might have been expected had it reached the 10% threshold through IPL Share purchases rather than IPL Swaps.

(b) Empty Voting

[404] Also as noted, empty voting occurs when voting rights and economic interests are separated so that the holder of the voting rights may not have the same economic interest as regular beneficial shareholders. The effect of this separation is the same in the context of tendering, as the holder of the ability to tender may not have the same economic interest as regular beneficial shareholders.

[405] The difference in economic interests could affect how the holder with the right to vote or tender decides to vote, tender, or abstain, to the possible detriment of regular beneficial shareholders. This concern is exacerbated in the take-over bid or plan of arrangement context, as the existence and future direction of the target company are at stake – with the success or failure of such proposals potentially depending on those holding empty voting or tendering rights.

[406] Here, Brookfield was a shareholder of IPL and had a further economic interest through the IPL Swaps. However, Brookfield's interests as a 9.75% shareholder were different than those of regular beneficial IPL shareholders – Brookfield was interested in acquiring IPL at the lowest price per IPL Share, while regular beneficial IPL shareholders were interested in Brookfield paying the highest price per IPL Share. Regular beneficial IPL shareholders may also have evaluated the Pembina Arrangement on different criteria than would Brookfield, although it is possible that their

interests could have been aligned on that. The evidence was that BMO would vote (or, presumably, tender) in its own commercial interests, but there was no specific evidence as to how those interests would lead it to vote or tender the Swap Shares under its control.

2. Effect of Hidden Ownership and Empty Voting

[407] Given those circumstances, there were two issues. First, whether Brookfield was required to disclose its combination of a 9.75% beneficial ownership interest and a 9.9% economic interest to avoid contravening the EWR requirements (if so, such disclosure should have occurred in June 2020, when Brookfield reached the 10% threshold). Second, whether Brookfield's use of the IPL Swaps was clearly abusive of investors and the capital market.

(a) EWR Disclosure

[408] The EWR does not generally require Swaps to be included when reporting beneficial ownership of 10% or more. As mentioned, there is guidance in s. 3.1 of NP 62-203 (which we note is a policy, not a rule) that a swap investor may be considered to have beneficial ownership of referenced securities if that swap investor has the ability to obtain the referenced securities or to direct the voting of them.

[409] We were satisfied that Brookfield did not have the legal right to control or direct the voting of Swap Shares held by BMO. We were also satisfied that Brookfield did not have a contractual right to influence BMO's voting decisions for its Swap Shares. To the contrary, the evidence was that BMO would act in its own commercial interests when making decisions related to such voting. Therefore, Brookfield was not *required* to include any of its 9.9% economic interest in the IPL Swaps when determining its beneficial ownership for EWR reporting purposes.

[410] However, the issue of whether the existence and extent of the relationship between Brookfield and BMO could have influenced BMO's voting decisions for its Swap Shares is important here. This is a different consideration than whether Brookfield itself exercised direct influence over BMO and is discussed below in the disclosure context.

[411] There was evidence indicating that BMO entered into further transactions with other swap dealers, but there were no specifics. Brookfield had no involvement in any such transactions and appeared to have no knowledge of them, including the identity of any additional swap dealers. Swap Shares held by any of those other swap dealers also had the voting rights separated from the economic interests, and there was no indication that Brookfield had any influence over the voting decisions of other swap dealers. For the purpose of required EWR reporting, we were satisfied that Brookfield did not need to include its interest in any Swap Shares held by BMO or counterparty swap dealers.

[412] We concluded that Brookfield did not have an obligation under Alberta securities laws to report when its combined holdings of IPL Shares and economic exposure to IPL through the IPL Swaps exceeded 10% on June 18, 2020, nor an obligation to make such disclosure on any later date. Earlier we discussed the CSA initiative that could have resulted in changes to this aspect of the EWR, but such changes were ultimately not made.

[413] Given our conclusion that Brookfield was not required to file EWR reports, we need not address contentions that its disclosure under the EWR (such as under s. 3.1 of NI 62-103) was inadequate.

(b) General Disclosure of IPL Swaps

(i) Background

[414] IPL and Pembina contended that the fairness of the bid process and the Strategic Review was compromised by problems with Brookfield's IPL Swap disclosure, including the lack of detail about the relationship between Brookfield and BMO, the "Brookfield Block" statement, and misunderstandings in the media.

[415] In the March 8 Directors' Circular, IPL pointed specifically to Items 15, 16, and 23 of Form 62-104F1 as requiring Brookfield to make additional disclosure in the Brookfield Offer:

- Item 15 of Form 62-104F1 requires an offeror to disclose any agreements, commitments, or understandings "relating to the bid" that the bidder has with another security holder of the offeree issuer. The disclosure is to cover the purpose, date, and terms of any such agreement, as well as the identity of the parties;

- Item 16 of Form 62-104F1 requires an offeror to disclose particulars of any agreements, commitments, or understandings that relate to the bid or could affect control of the target issuer and would reasonably be considered material by an offeree security holder; and

- Item 23 of Form 62-104F1 requires an offeror to describe: (1) "any material facts *concerning the securities* of the offeree issuer"; and (2) any other matter known to the offeror, not generally disclosed, and "that would reasonably be expected to affect the decision of the security holders of the offeree issuer to accept or reject the offer" (emphasis added).

[416] Given our conclusion below that the Brookfield Offer failed to comply with the requirements of Item 23 of Form 62-104F1, we did not need to address IPL's contention that the Brookfield Offer also did not comply with Items 15 and 16.

[417] We rejected Brookfield's contention during oral submissions that the IPL Swaps were merely a "bet" that the IPL Share price would increase in the future and that Swaps in general have nothing to do with securities. To the contrary, the IPL Swaps and the facts surrounding them clearly concerned the securities of IPL. Swaps are typically hedged by the purchase of the referenced securities, and those referenced securities can then be dealt with, for example, by voting or tendering. Further, Brookfield's own public disclosure described the IPL Swaps in terms of the number of IPL Shares they represented.

(ii) Context

[418] We earlier outlined the law relating to material facts and materiality. Here, the question was essentially "whether there is a substantial likelihood that [the omitted] facts would have been important or useful to a reasonable prospective investor in deciding whether to invest in the

securities on offer at the price asked" (*Aitkens* at para. 138, citing *Arbour* at para. 765 and *Sharbern* at para. 61) – or, in these circumstances, whether to tender the IPL Shares at the price offered. We were required to determine if general or specific information about the IPL Swaps was material such that Brookfield was required to include it in the Brookfield Offer.

[419] IPL contended that Brookfield should have disclosed the purpose of the IPL Swaps, Brookfield's future intention, and agreements that altered Brookfield's economic exposure – in other words, aspects of the IPL Swaps that IPL submitted would be important or useful to reasonable investors. Specifically, IPL submitted that the following information was material and should have been disclosed in the Brookfield Offer:

- the date each IPL Swap was acquired;
- the identity of the swap dealer – BMO;
- the relationship between Brookfield and BMO, including all fee arrangements;
- how BMO was hedging the IPL Swaps, including the number of IPL Shares held by BMO;
- any restrictions on BMO's ability to deal with or vote its IPL Shares, and whether BMO gave Brookfield assurance that BMO would not vote its IPL Shares;
- terms and conditions of the IPL Swaps, including the nature and extent of Brookfield's economic exposure to IPL Shares and any option Brookfield had to acquire IPL Shares; and
- the expiry or termination dates and events for the IPL Swaps, including any that may have given BMO an incentive to tender its Swap Shares to the Brookfield Offer, and any early termination rights held by Brookfield.

[420] As set out above, there was evidence presented relating to possible harms to IPL shareholders and the capital market stemming from Brookfield's lack of disclosure:

- some prospective buyers declined to consider bidding on IPL because they had the impression Brookfield "effectively already had control or had 'won'", although not all of those parties were necessarily confused about the nature of Brookfield's IPL Swap interest;
- some institutional IPL shareholders were confused about Brookfield's beneficial interest and economic interest in IPL;
- various media reports described Brookfield as owning, or having a stake of, almost 20% in IPL, with no mention that 9.9% of that was an economic interest with no voting rights (this seemed most likely to have affected retail IPL shareholders); and

- there was no way for prospective buyers, IPL shareholders, or media to know that Brookfield had an extensive pre-existing relationship with its swap dealer (because BMO was not identified as such), including that BMO NB was to receive the BMO Completion Fee if the Brookfield Offer were to succeed – either or both of which could influence BMO's dealings with its Swap Shares.

(iii) Discussion

(A) Disclosure – Brookfield Offer, IPL Shareholder Letters

[421] Brookfield's first public disclosure of the IPL Swaps was in the February 10, 2021 news release announcing its intention to make the February 22 Offer. Brookfield mentioned its total economic interest, then briefly explained its IPL Swaps. In both that news release and the February 22 Offer, Brookfield noted that it had no right to vote or to direct or influence voting, acquisition or disposition of any Swap Shares. That was confirmed during the Hearing by wording in the IPL Swap Letter Agreements between Brookfield and BMO.

[422] In its February 22, 2021 letter to IPL shareholders (accompanying the February 22 Offer), Brookfield described itself as "the largest single investor in IPL, with an aggregate economic interest of 19.65%". Brookfield's June 4, 2021 letter to IPL shareholders (accompanying the June 4 Offer) also did not distinguish between the two components of Brookfield's interest in IPL. The IPL Swaps aspect was disclosed in the June 4 Offer, but with even less clarity than the relevant disclosure in the February 22 Offer.

[423] Baker explained that Brookfield's June 4, 2021 letter to IPL shareholders did not distinguish between the two types of interest it held because the information "had been previously disclosed a number of times". We rejected that explanation. To the contrary, the lack of disclosure in that letter – sent to the IPL shareholders intended to be protected by the take-over bid regime – highlighted Brookfield's pattern of not giving in a direct way even the basic information about the nature of its interest in IPL or its relationship with BMO.

[424] The same was true for the February 22, 2021 letter from Brookfield to the IPL shareholders. We also noted that although the February 22, 2021 letter stated that Brookfield started to acquire IPL Shares in March 2020, it did not mention the IPL Swaps at all, thus implying that Brookfield's almost 20% interest in IPL was held directly in IPL Shares. The negative consequences of these two letters to IPL shareholders were heightened because short letters to shareholders are more likely to be read by retail investors than is a lengthy offering circular.

[425] We concluded that Brookfield's disclosure in the February 22, 2021 and June 4, 2021 letters to IPL shareholders was a deliberate and tactical attempt by Brookfield to imply to IPL shareholders that Brookfield held or controlled almost 20% of the outstanding IPL Shares. This could have led IPL shareholders to perceive the Brookfield Offer as having a greater chance of success than if Brookfield had clearly disclosed in those documents that it had only a 9.75% voting interest in IPL. This was material information, as it would have been useful to reasonable IPL shareholders in deciding whether to tender to the Brookfield Offer (and, eventually, whether to vote in favour of or against the Pembina Arrangement).

(B) Disclosure – June 4 News Release

[426] The Brookfield June 4 News Release was concerning. It defined Brookfield's $1.6 billion and 19.65% economic interest in IPL as the "Brookfield Block". Brookfield correctly noted that the term was used in the context of Brookfield's anticipated approach in the event the Pembina Arrangement succeeded, not in the context of voting on the Pembina Arrangement or tendering to the Brookfield Offer. However, we concluded that the wording was carefully structured to create the impression that the entire 19.65% interest was against the Pembina Arrangement (and thus perhaps also in favour of the Brookfield Offer). In other words, we find that Brookfield deliberately conveyed to the public that Brookfield was potentially in a position to block the Pembina Arrangement from succeeding.

[427] In the same news release, Brookfield further stated that the Brookfield Block of 19.65% IPL Shares, as well as IPL Shares held by "any other institutional shareholders who lack desire to own shares in Pembina", would create a substantial overhang on the Pembina Shares. That implied that the unidentified holder of the 9.9% of IPL Shares comprising part of the Brookfield Block "lack[ed] desire to own shares in Pembina". That was inconsistent with Brookfield's claims that the circumstances would not influence BMO; instead, it created the impression that the 19.65% would vote as a block.

[428] We concluded that the wording in the Brookfield June 4 News Release was a deliberate and tactical attempt by Brookfield to imply to IPL shareholders that Brookfield could (or would) use its 19.65% economic interest in IPL to decrease the chance that the Pembina Arrangement would succeed and increase the chance that the Brookfield Offer would succeed. Reasonable IPL shareholders would have considered this misleading because Brookfield had only a 9.75% voting interest in IPL. Reasonable IPL shareholders would also have considered that information to be material or useful when deciding whether to tender to the Brookfield Offer and whether to vote in favour of or against the Pembina Arrangement.

(C) Disclosure – Relationship with BMO

[429] The problems set out above concerning specific documents were compounded by certain of Brookfield's disclosure (or lack thereof) in the various Brookfield Offers regarding the nature of its relationship with BMO – the unidentified swap dealer – and the potential conflict of interest that the relationship created.

[430] Brookfield publicly disclosed that it had no voting rights in connection with the IPL Swaps and no right to direct or influence the swap dealer. This was confirmed in the documentary evidence before us. Baker stated that he learned from a BMO representative on June 25, 2021 that BMO would act in its own commercial interests when dealing with the Swap Shares. We accepted all of that evidence, including the hearsay evidence Baker relayed from his conversation with the BMO representative.

[431] However, there is a difference between Brookfield having the right to direct or influence BMO's voting decisions and Brookfield creating circumstances in which BMO's own commercial interests would likely align with Brookfield's, thus having the effect of influencing BMO.

[432] Here, Brookfield did not disclose the identity of BMO as the swap dealer, the dates of the IPL Swaps, the extensive relationship between Brookfield and BMO, and the BMO Completion Fee payable to BMO NB if the Brookfield Offer were to succeed. The circumstances potentially gave BMO a reason to tender its Swap Shares to the Brookfield Offer, to vote against the Pembina Arrangement, or both.

[433] Even assuming Brookfield did not realize until June 25, 2021 (the date of the conversation between Baker and the BMO representative) that BMO would act in its own commercial interests in dealing with Swap Shares, Brookfield knew from the time it entered into the Swap Agreements with BMO on April 24, 2020 that Brookfield had an extensive pre-existing relationship with BMO. That relationship became more significant once the IPL Swaps program started, and even more significant once Brookfield retained BMO NB as its financial advisor for the acquisition of IPL and agreed to pay the associated BMO Completion Fee.

[434] Therefore, Brookfield created a situation in which up to 9.9% of the IPL Shares had an incentive to vote or tender in a way that was consistent with Brookfield's interests – or at least in a way that was not necessarily aligned with the interests of regular IPL shareholders. As discussed elsewhere, there was hearsay evidence that BMO had hedged at least some of the IPL Swaps by entering into its own Swaps with other swap dealers; however, Brookfield did not adduce any reliable or detailed evidence of such hedging.

[435] We reviewed the wording of Brookfield's disclosure, the details it did not disclose, its failure to respond to the call in the March 8 Directors' Circular for additional disclosure, and the fact that the letters from Brookfield to IPL shareholders did not distinguish between Brookfield's two types of interest in IPL (nor explain the significance of that distinction). We also reviewed the evidence of how Brookfield's disclosure was interpreted by at least some potential bidders, institutional investors, and members of the media.

[436] We concluded that Brookfield knew its relationship with BMO could lead BMO to tender or vote its Swap Shares in a way that aligned with Brookfield's interests. Although Brookfield had no legal right to influence BMO's voting or tendering decisions, the entire context of their relationship could itself influence how BMO would deal with its Swap Shares. Brookfield did not disclose the extent or possible ramifications of that relationship.

[437] We concluded that certain details about the IPL Swaps and Brookfield's relationship with BMO were material, as that information would have been useful to reasonable IPL shareholders in deciding whether to tender to the Brookfield Offer (and, later, whether to vote in favour of or against the Pembina Arrangement). The information was also material because of the possibility that BMO (or subsequent swap dealers) may have refrained from voting, with the added factor that IPL's historically low voter turnout could make Brookfield's 9.75% of the IPL Shares more significant if most or all of the Swap Shares were not voted. (We were not persuaded by Brookfield's contention that it was not responsible for IPL's historic voter turnout and, thus, that low turnout should not be used as a reason to criticize Brookfield's disclosure.)

[438] Finally, we were not persuaded by Brookfield's argument that IPL and Pembina made insufficient efforts to learn more about the IPL Swaps before filing the IPL Application and the

Pembina Application, respectively. This was irrelevant to Brookfield's obligation to make adequate disclosure in accordance with NI 62-104 and Form 62-104F1. What Brookfield did or did not discuss with IPL or Pembina (or both) at any point during the process was also irrelevant. Although Brookfield did give information and explanations in the course of this Hearing, that was not public disclosure and does not assist Brookfield.

[439] We concluded that Brookfield failed to comply with the disclosure required by NI 62-104, specifically, Item 23 of Form 62-104F1.

(c) Clearly Abusive

(i) Entire Context

[440] As stated in *ARC Equity* (at para. 77), determining whether conduct is clearly abusive requires an examination of the facts and circumstances as a whole. Here, that included the entire context for our earlier conclusions that: (1) Brookfield was not required to file a report under the EWR because it did not meet or exceed the 10% beneficial ownership threshold; and (2) Brookfield's disclosure in the Brookfield Offer did not comply with the requirements of NI 62-104 and Form 62-104F1.

(ii) EWR Threshold

[441] Brookfield stopped just short of the 10% threshold for mandatory reporting of its beneficial ownership of IPL Shares. Brookfield then increased its economic exposure to IPL by entering into the IPL Swaps, stopping just short of a 10% IPL Swap stake and of a 20% total economic interest. Brookfield argued that it had legitimate reasons for keeping under those thresholds. As noted, according to Baker, Brookfield was considering other options for its investment in IPL and did not decide to pursue a take-over until January 2021 – and, in the meantime, it was aware of the "optics" of staying below 20% total. Brookfield therefore submitted that its use of the IPL Swaps was not a "deliberate effort" to avoid any reporting obligations.

[442] We concluded that Brookfield realized that reaching 10% beneficial ownership would: trigger disclosure requirements; pique the interest of IPL, IPL shareholders, and other capital market participants; remove Brookfield's potential advantage in a future attempt to acquire control of IPL; and likely lead to an increase in the price of IPL Shares and less favourable terms on which Brookfield could enter into further IPL Swaps, purchase additional IPL Shares, or structure its take-over bid for IPL. It was in Brookfield's interest to avoid the EWR.

[443] Given Brookfield's size, complexity and sophistication, we were satisfied that Brookfield or its advisors would have been aware of the 2013 to 2014 CSA take-over bid regime proposals and policy discussions. Brookfield or its advisors would also have been aware of the CSA's conclusion that equity equivalent derivatives would continue to be exempt from the EWR's 10% reporting requirement, and the rationale stated in 2016 that there was at that time no clear evidence that Swaps were being used to accumulate substantial economic positions without disclosure "to exert influence over the issuers or voting outcomes". Further, we were satisfied that Brookfield or its advisors would have been aware of the *obiter* comment in the *Sears* decision stating (at para. 111) that the use of Swaps "in a deliberate effort to avoid reporting obligations under the [Ontario Act] and for the purpose of affecting an outstanding offer could constitute abusive conduct".

[444] Even if we had reached a different conclusion about Brookfield's knowledge at the time it engaged in the IPL Swaps and disclosure, Brookfield would have known of the CSA's policy concerns and the concerns expressed in the *Sears* decision by early March 2021 at the latest, as both were referred to in the March 8 Directors' Circular. Although that was too late to affect Brookfield's EWR threshold disclosure, Brookfield would have known by early March of the hidden ownership and empty voting concerns with Swaps, the conflict in which Brookfield had placed BMO, the potential for affecting IPL's ability to seek other options for its shareholders, and the corresponding need for Brookfield to improve its disclosure.

[445] Further, Brookfield said it received pitches from "most investment banks" for several months before engaging BMO NB and its other financial advisor. Those pitches, according to Baker, were about advising Brookfield in the event of a take-private transaction of IPL, as IPL was widely considered to be a potential target. Although Brookfield stated that it was normal for an entity of its size to receive such pitches, Baker had acknowledged that those particular pitches concerned IPL. Therefore, the pitches would have increased Brookfield's awareness of the interest surrounding IPL and the significance of a take-over bid or other transaction in that environment. This also meant that Brookfield would have been aware of that context at the time it entered into the Swap Agreements, the IPL Swap Letter Agreements, and the IPL Swaps, as well as when it reached 9.75% beneficial ownership of IPL Shares, then reached a 10% economic interest and ultimately a 19.65% economic interest, each through a combination of IPL Share purchases and IPL Swaps.

[446] Overall, Brookfield succeeded in keeping the IPL Share price lower until it made the Brookfield Offer and succeeded in limiting the alternatives IPL could pursue during the Strategic Review – which could have affected IPL's ability to find the maximum value available for its shareholders. Brookfield's hidden ownership in IPL also allowed it to continue increasing its economic interest while the IPL Share price remained supressed. This, in turn, deprived other IPL shareholders of the opportunity to take advantage of the premium that typically accompanies EWR reporting.

[447] IPL cited *H.E.R.O.* (at para. 28) in contending that the effect of Brookfield's actions, not its intentions, should be determinative. Brookfield submitted that both intention and effects are relevant, citing the comment from *Sears* (at para. 111) that clearly abusive behaviour could be found in a take-over bid context if there were "a deliberate effort to avoid reporting obligations", and that Brookfield here was merely structuring its affairs to remain under the 10% EWR threshold.

[448] We were satisfied that Brookfield's intentions and the effects of its actions were aligned. We found that Brookfield was at least considering the possibility of an acquisition of IPL during the period of June through October 2020 when it entered into the IPL Swaps. Therefore, Brookfield's reason for avoiding the 10% EWR threshold was not merely to structure its affairs, but to structure its affairs to give itself an advantage in the context of a possible take-over bid.

[449] Regarding Brookfield's contention that we should not consider its behaviour to be clearly abusive because the CSA "rejected" the proposal to add equity equivalent derivatives to the EWR,

we noted that the CSA did not proceed with that proposal at the time because there was no evidence of abuse. Here, we had evidence of exactly the type of abuse about which the CSA raised concerns.

[450] In all of the circumstances, and despite Brookfield's compliance with the EWR, we found that Brookfield's use of the IPL Swaps to gain a 19.65% economic interest in IPL without making any disclosure until it made the Brookfield Offer was clearly abusive of the Alberta capital market in general and IPL shareholders in particular.

(iii) Brookfield's Disclosure Generally

[451] Our conclusions about Brookfield's intentions and the effects of its IPL Swap actions were supported by Brookfield's IPL Swap disclosure from the time it started entering into the IPL Swaps until the time of this Hearing.

[452] We need not repeat here all of the details of Brookfield's disclosure and the problems previously set out. We have already found that Brookfield's disclosure was inadequate to the point of contravening the requirements of NI 62-104. Even apart from such contraventions, Brookfield's disclosure was either deliberately obscure or Brookfield knowingly failed to correct obvious misapprehensions among the media and capital market participants.

[453] Moreover, Brookfield created a conflict of interest by having an extensive pre-existing and continuing commercial relationship with BMO, choosing BMO as the swap dealer, and engaging BMO NB as financial advisor for the acquisition of IPL (with the BMO Completion Fee being contingent on Brookfield's successful acquisition of IPL). There was no evidence that Brookfield, in making those arrangements, gave sufficient thought to the conflict of interest being created or to investigating whether BMO had any ethical walls in place to mitigate or eliminate any conflicts. The seriousness and significance of this conflict was exacerbated when Brookfield failed to make any disclosure of BMO's multiple roles. We noted, however, that there was no evidence BMO was "captive and compliant" relative to Brookfield, as alleged by IPL and Pembina.

[454] We had no hesitation finding that Brookfield used the IPL Swaps in an attempt to gain an insurmountable advantage in its quest to acquire IPL. As stated by the OSC in a different context in *Falconbridge* (at para. 59), there was a risk here of the offeror being able to entrench its position, which "could have a detrimental impact on the auction process".

[455] Brookfield compounded the effect of its IPL Swap strategy by making inadequate and strategic disclosure. Even though Brookfield did not contravene the EWR when acquiring a 19.65% economic interest in IPL without making any EWR disclosure, the IPL Swap information became material to the Brookfield Offer once made. Brookfield's failure to make proper disclosure of the IPL Swap information led to uncertainty and confusion among IPL shareholders and in the capital market generally.

[456] We also had no hesitation concluding that Brookfield's omitted disclosure would have been important or useful to others potentially interested in participating in the Strategic Review process and competing with Brookfield and Pembina for control of IPL. Such potential participants should have had all of the relevant information necessary to allow them to participate in a fair and even-handed process.

[457] Brookfield's behaviour was clearly abusive of the capital market and of IPL shareholders whose interests are intended to be protected by the take-over bid regime (i.e., the shareholders other than Brookfield and the holders of Swap Shares who did not share the same economic interest as other IPL shareholders).

(d) "Animating Principles"

[458] IPL urged us to find that Brookfield's IPL Swap conduct violated animating principles of Alberta securities laws. As mentioned, because we found that Brookfield's conduct was clearly abusive, we did not need to address the submissions on animating principles.

E. Conclusion

[459] For the reasons noted above, we concluded that Brookfield failed to meet its disclosure obligations and also engaged in conduct that was clearly abusive of IPL shareholders and the Alberta capital market in general.

F. Remedies for Disclosure Contraventions and Clearly Abusive Behaviour

1. General

[460] Brookfield contended that granting the relief sought by IPL and Pembina would generate uncertainty about take-over bids, the EWR, and the use of Swaps. In Brookfield's view, the dangers of such uncertainty were heightened here because this was in the course of a contested proceeding and the CSA had earlier declined to change the requirements for disclosure of Swaps, specifically in the EWR.

[461] Staff noted that exercising our authority during a contested application could lead to "broader and unintended consequences". However, Staff also stated that "the widespread tactical use of [Swaps] in Canadian M&A transactions would not be a positive development given our M&A [regime], overall emphasis on investor protection, informed decision-making, and allowing auctions to develop and play through to their completion for the benefit of shareholders".

[462] IPL and Pembina urged us to conclude that the circumstances here warranted our intervention, even where such intervention could be novel.

[463] In reaching our conclusions above on the substantive matters of inadequate disclosure and clearly abusive conduct by Brookfield, we were mindful of the need for caution and restraint, as set out, for example, in *ARC Equity* (at para. 69). The need for such caution and restraint applies equally, in our view, to discerning appropriate measures to take in the public interest. With that in mind, we turn to the specific orders sought here by IPL and Pembina.

2. Jurisdiction under Sections 179 and 198 of the Act

[464] We received submissions from the parties regarding the scope of our jurisdiction to make the orders sought under ss. 179 and 198 of the Act. Some of those positions evolved during the course of written and oral submissions.

[465] As noted earlier in this decision, we have the jurisdiction to make various types of orders under s. 179 of the Act, if there have been contraventions of Part 14 of the Act or of the regulations.

We have the jurisdiction to make various types of order under s. 198(1) if it is in the public interest to do so. Section 198(2) allows us to make a s. 198(1) order subject to terms and conditions.

[466] We concluded that the IPL Swap disclosure in the Brookfield Offer did not comply with the requirements in NI 62-104. We have the jurisdiction to make certain orders under s. 179 or s. 198 (or both) for that contravention, as discussed below.

[467] We also concluded that Brookfield's use of the IPL Swaps and its limited related disclosure were clearly abusive and, therefore, contrary to the public interest. We have the jurisdiction to make certain orders under s.198 for that clearly abusive conduct.

3. Orders Sought

(a) Proposed Voting Order

(i) Arguments of the Parties

(A) IPL and Pembina

[468] IPL and Pembina argued that the requirement for 66 2/3% of the IPL Shares to be voted in favour of the Pembina Arrangement at the IPL Shareholders Meeting would have been unfair in these circumstances because Brookfield's ownership of IPL Shares in conjunction with its economic interest through the IPL Swaps would have given Brookfield a blocking position. Brookfield would have voted against the Pembina Arrangement. The evidence was that BMO would have voted any Swap Shares it held in its own interests (which could include the option of not voting).

[469] According to IPL, the evidence indicated it was unlikely that BMO would vote in favour of the Pembina Arrangement. IPL and Pembina asserted that there was at least the appearance that BMO had a conflict so that its own interests might align with Brookfield's – and even if not, BMO's own interests would not be the same as those of a regular IPL shareholder. Given the historic low voter turnout at IPL shareholder meetings, the 19.65% of IPL Shares in which Brookfield had an economic interest could have formed a block, potentially depriving other IPL shareholders of meaningful choice.

[470] IPL and Pembina sought the Proposed Voting Order under s. 198 of the Act (Pembina also made a reference to s. 179). Under their proposed order, the Swap Shares would be voted in the same proportion for or against the Pembina Arrangement as all other IPL Shares voted at the IPL Shareholders Meeting except Brookfield's. This concept of a "contingent ballot" was included in ISDA's July 16, 2013 response to the CSA's March 2013 Proposal. ISDA suggested a standardized provision for inclusion in agreements between swap counterparties that would require any referenced securities held as a hedge by the swap dealer be voted on the same basis as other shareholders, excluding securities held by the swap investor. IPL and Pembina did not explain the mechanics of their proposed proportional or contingent voting in these circumstances, in which it would not be possible to identify which IPL Shares being voted at the IPL Shareholders Meeting were Swap Shares. Pembina characterized the remedy sought as novel but warranted, calling it a different way of counting votes rather than a denial of voting rights.

(B) Brookfield

[471] Brookfield argued that s. 179 of the Act does not give a panel the authority to make the Proposed Voting Order because the exercise of s. 179 remedies requires a finding that the Act has been contravened, and the s. 179 remedies are limited to those specified in s. 179(1). Brookfield stated that no order should be made under s. 198 because its conduct was not clearly abusive. Brookfield further contended that, even if the panel had jurisdiction, the Proposed Voting Order should not be made because it would interfere with shareholder democracy, there was no evidence as to how many Swap Shares were held by BMO, and there was no authority supporting this approach.

(C) Staff

[472] Staff submitted that none of the enumerated powers in s. 198 of the Act give the panel the authority to make the Proposed Voting Order.

(ii) Analysis

[473] By virtue of its non-compliance with the disclosure requirements in NI 62-104, Brookfield contravened Part 14 of the Act. While that contravention provided us with the jurisdiction to make orders under s. 179 or s. 198(1) of the Act, neither provision contemplates orders relating to voting at shareholder meetings. Therefore, we lack the jurisdiction to make the Proposed Voting Order under s. 179 or s. 198(1).

[474] We also noted concerns expressed that the Proxy Solicitation Order could enable Brookfield to solicit proxies from BMO and other swap counterparties holding Swap Shares. Brookfield denied having that intention, and its counsel offered to give his undertaking – one of two undertakings he offered during the Hearing – that Brookfield would not engage in such solicitation activities. We agreed with Staff that such proxy solicitation orders are routine, and there was no evidence here that caused us concern with this particular Proxy Solicitation Order. Had we been concerned, the offered undertaking would have provided little comfort – an undertaking purporting to bind anyone other than the person providing it is not useful.

(iii) Conclusion

[475] We do not have the jurisdiction to make the Proposed Voting Order.

(b) Proposed Brookfield Offer CTO

(i) Arguments of the Parties

(A) IPL and Pembina

[476] Pembina sought the Proposed Brookfield Offer CTO because of the abusive nature of Brookfield's inadequate disclosure. Pembina argued that such an order was appropriate because Brookfield must be presumed to have been aware of the effects of its actions.

[477] IPL did not appear to take a position on this point.

(B) Brookfield

[478] Brookfield did not specifically address the Proposed Brookfield Offer CTO, outside of its argument that it made adequate disclosure and did not engage in clearly abusive conduct, so no relief would be appropriate.

(C) Staff

[479] Staff submitted that we could make the Proposed Brookfield Offer CTO if we found clearly abusive conduct by Brookfield. However, Staff noted that would be a drastic remedy, as it would deprive IPL shareholders of the choice between the Brookfield Offer and the Pembina Arrangement.

(ii) Analysis

[480] We clearly have the jurisdiction to make the Proposed Brookfield Offer CTO.

[481] As stated in s. 1.1(2) of NP 62-202, one objective of take-over bid regulation is to "leave the shareholders of the target company free to make a fully informed decision". That principle was highly relevant here, when deciding if a bid should be permitted to continue. Cease trading the Brookfield Offer would have denied IPL shareholders the ability to decide for themselves whether to tender their IPL Shares to the Brookfield Offer.

[482] As noted, below, however, IPL shareholders were entitled to have all of the relevant information to allow them to make a fully informed decision.

[483] In the circumstances, we considered the Proposed Brookfield Offer CTO too blunt a remedy that would harm IPL shareholders by denying them a choice. The Proposed Disclosure Order and Proposed Minimum Tender Order were better tools for addressing Brookfield's disclosure contraventions and clearly abusive conduct, as discussed below.

(iii) Conclusion

[484] We declined to make the Proposed Brookfield Offer CTO.

(c) Proposed Disclosure Order

(i) Arguments of the Parties

(A) IPL and Pembina

[485] Pembina and IPL sought the Proposed Disclosure Order under s. 198 to ensure IPL shareholders would be fully informed when making decisions regarding the Brookfield Offer (including assessing the Brookfield Offer in contrast with the Pembina Arrangement).

[486] During oral submissions, IPL contended that four categories of information relating to the IPL Swaps were material and should be ordered disclosed by Brookfield:

- all information concerning BMO, as the swap dealer;
- the nature of BMO's relationship with Brookfield, including the BMO Completion Fee and other financial arrangements (or, as IPL described it, "all of the conflicts of interest that exist here");
- the dates, terms, conditions, and pricing of Brookfield's IPL Swaps; and
- the termination rights and dates, including how termination would be triggered.

[487] In its written submissions, IPL had argued for a few other types of disclosure (or described some of the disclosure being sought slightly differently), and we include those categories here for completeness:

- how BMO was hedging the IPL Swaps, including the number of IPL Shares held by BMO;
- any restrictions on BMO's ability to deal with or vote its Swap Shares, and whether BMO had given Brookfield assurance that BMO would not vote its Swap Shares;
- terms and conditions of the IPL Swaps, including Brookfield's economic exposure to IPL Shares and any option Brookfield had to acquire IPL Shares; and
- the expiry or termination dates and events for the IPL Swaps, including any that may have given BMO an incentive to tender its Swap Shares to the Brookfield Offer.

[488] Pembina also contended that certain information relating to the IPL Swaps was material:

> (a) the identity of BMO as swap dealer;
>
> (b) the terms of the swap agreement between Brookfield and BMO;
>
> (c) the financial terms between Brookfield and BMO, including any fee payable if the bid of Brookfield is successful;
>
> (d) the purpose of the [IPL Swaps], including particulars regarding why BMO stopped adjusting the swap with Brookfield in October 2020 and why the swap agreement between the parties was for an 18-month term;
>
> (e) the existence and extent of potential conflicts of interest arising [from] the fact that the [IPL] Swaps are held by an affiliate of Brookfield's financial advisor; and
>
> (f) particulars of the increased exposure of Brookfield through the [IPL Swaps] for the period between June 2020 and October 2020.

(B) Brookfield

[489] Brookfield expressed concern that an order for additional disclosure could affect swap contract economics, for example, if a swap dealer were required to be identified.

[490] Brookfield also questioned how certain information sought by the Proposed Disclosure Order would be material to IPL shareholders, including BMO's identity, the dates Brookfield and BMO entered into the IPL Swaps, the termination and extension provisions of the Swap Agreements, and how many IPL Shares were held by BMO and other swap dealers.

(C) Staff

[491] Staff acknowledged our jurisdiction to order Brookfield to make additional disclosure under ss. 179 and 198, but suggested that any such order might be too late to affect the outcome.

For example, Staff noted that it was too late for IPL shareholders to see the increase in the IPL Share price that would typically follow disclosure that Brookfield had acquired a 10% or greater interest in IPL.

[492] Staff submitted that any disclosure order the panel made should be limited to information "truly material to IPL shareholders seeking to make a reasonably informed choice between the two transactions based solely on considerations relevant to an investment decision". For example, Staff questioned whether information about the BMO Completion Fee would be material. In contrast, Staff submitted that material information might have included the obstacles that the Swap Shares might have presented to the completion of the Pembina Arrangement, including the size of any overhang on Pembina Shares.

(ii) Analysis

[493] Earlier we found that Brookfield's disclosure contravened NI 62-104 and that its use of and disclosure relating to the IPL Swaps was clearly abusive to IPL shareholders and the capital market. Disclosure is a cornerstone of securities regulation, and violations of disclosure requirements are a significant problem. However, there is a solution to disclosure problems such as those here: an order requiring Brookfield to make proper disclosure of material facts and allowing sufficient time for dissemination of that disclosure so that IPL shareholders would be able to make a fully informed decision.

[494] We acknowledge Staff's argument that an order for additional disclosure could have been too late to make a significant difference in certain respects. However, we concluded that, as at the time of the Hearing, there was still time to ensure that IPL shareholders had the required disclosure from Brookfield that should have been in the Brookfield Offer from the beginning. That additional disclosure would then allow the IPL shareholders to make a fully informed decision between the Brookfield Offer and the Pembina Arrangement, including whether to tender to the Brookfield Offer. The loss of the opportunity to make a fully informed decision was the greatest negative consequence of Brookfield's disclosure breach and clearly abusive conduct, and thus the most important to mitigate.

[495] Section 179(1)(b) of the Act gives us jurisdiction to require amendments to any take-over bid documents and the distribution of that amended information. We considered it appropriate here to order additional disclosure and the distribution of such additional disclosure under s. 179.

[496] We were not concerned with Brookfield's contention that swap contracts in general might be affected in the future by an order here that Brookfield identify BMO as its swap dealer and provide additional disclosure. Our decision and ruling are limited in effect to the particular circumstances and transaction before us. Regardless of whether our decision spurs reconsideration of some aspects of regulating Swaps, prospective offerors need to be aware that actions such as Brookfield's here could be found non-compliant with disclosure requirements, clearly abusive, and contrary to the public interest. This should not affect the use of Swaps in general, but should affect those who attempt to circumvent the cornerstone disclosure principles upon which our securities regulatory system is based and to engage in clearly abusive conduct.

[497] In our view, it was not appropriate to order all of the specific disclosure items sought by IPL and Pembina. In particular, we concluded that the following were not material in these circumstances: the specifics of BMO's hedging activities; the number of IPL Shares held by BMO; restrictions on BMO's ability to vote its IPL Shares; additional terms and conditions of the IPL Swaps; and specific expiry and termination dates and events for the IPL Swaps.

(iii) Conclusion

[498] We concluded it was appropriate to order under s. 179(1)(b) that Brookfield make additional disclosure related to the IPL Swaps – specifically, the following material information:

- the name of the swap counterparty (BMO);
- the dates of the Swap Agreements between Brookfield and BMO;
- the dates of the IPL Swap transactions pursuant to which Brookfield acquired an economic interest in IPL Shares;
- material information concerning Brookfield's commercial relationship with BMO, similar in nature to that contained in the analyst reports referred to at pages 36-40 of the transcript of the cross-examination of Baker on June 28, 2021 (see below); and
- the existence of, amount of, and conditions for the payment of the BMO Completion Fee included in the BMO Engagement Letter.

[499] Regarding the required material information concerning Brookfield's and BMO's commercial relationship, the information from Baker's June 28, 2021 cross-examination was, briefly:

- BMO undertook an underwriting liability with respect to Brookfield within the past 12 months;
- BMO provided investment banking services with respect to Brookfield within the past 12 months;
- BMO managed or co-managed a public offering of securities with respect to Brookfield within the past 12 months;
- BMO or an affiliate received compensation for investment banking services from Brookfield within the past 12 months;
- BMO or an affiliate has a financial interest in 1% or more of any class of the equity securities of Brookfield; and
- BMO or an affiliate has a financial interest in 0.5% or more of the issued share capital of Brookfield.

[500] We also ordered that Brookfield distribute this additional disclosure in accordance with the variation requirements set out in s. 2.12 of NI 62-104.

(d) Proposed Minimum Tender Order

(i) Arguments of the Parties

(A) IPL and Pembina

[501] IPL and Pembina submitted that the Swap Shares should be excluded from the Minimum Tender Condition, although they acknowledged that this was a novel form of relief.

[502] Responding to a question from the panel at the Hearing, IPL and Pembina agreed that the panel would not have jurisdiction under s. 179 to make the requested order, but that it could be done under ss. 198(1) and (2).

(B) Brookfield

[503] Brookfield argued that it would be unfair and illogical to deem the Swap Shares to be beneficially owned by Brookfield for the purposes of the Minimum Tender Condition because Brookfield did not control what decisions would be made by the holders of the Swap Shares. Brookfield also argued the panel had no jurisdiction to exclude the Swap Shares in that way.

[504] Brookfield submitted that the Proposed Minimum Tender Order would be an unreasonable response to the circumstances here, particularly since the CSA decided not to proceed with adding equity equivalent derivatives to the scope of the EWR and take-over bid regulation in general.

[505] Finally, Brookfield contended that it would be unfair to BMO (or another holder of Swap Shares) to make an order against them without notice and without their participation. In its view, this would tamper with the property rights of those parties (although Pembina countered that there are no property rights in the Swap Shares because those have been separated).

(C) Staff

[506] Staff stated that the limited remedies available under s. 179 of the Act provide no clear authority for the panel to grant the Proposed Minimum Tender Order. Although noting that s. 198(1) does not expressly include authority to make the Proposed Minimum Tender Order, Staff acknowledged that ss. 198(1) and 198(2) could be used together to allow the panel to effectively alter the statutory Minimum Tender Condition by ordering that Brookfield not take up and pay for IPL Shares under the bid unless certain conditions were met.

(ii) Analysis

[507] We were mindful of the dangers of exercising our public interest jurisdiction in the absence of finding a specific contravention of Alberta securities laws. Although we did find that Brookfield contravened the disclosure requirements during the course of the Brookfield Offer, we did not consider that linked to the mechanics of the tendering process, specifically the Minimum Tender Condition. That is, the disclosure order made to remedy the disclosure contraventions did not cure the clearly abusive way in which Brookfield used the IPL Swaps. Therefore, we considered whether the Proposed Minimum Tender Order, or an order modifying the Minimum Tender Condition, was necessary and appropriate here.

[508] In considering the appropriateness and extent of orders made in the public interest for clearly abusive conduct, we found the following statement useful (*ARC Equity* at para. 66, citing *Re Cablecasting Ltd.*, [1978] O.S.C.B. 37 at p. 43):

> If the transaction under attack was of an entirely novel nature, Commission action might seem more appropriate. Another relevant consideration in assessing whether to act against a particular transaction is whether the principle of the new policy ruling that would be required to deal with the transaction is foreshadowed by principles already enunciated in the [Ontario] Act, the regulations or prior policy statements. Where this is the case the [OSC] will be less reluctant to exercise its discretionary authority than it will be in cases that involve an entirely new principle.

[509] Brookfield's contention that the Proposed Minimum Tender Order would be inconsistent with the CSA's determination on equity equivalent derivatives missed an important point in the current context. As noted, the CSA did not proceed with the proposed addition of equity equivalent derivatives because there was no evidence at that time that Swaps were being used in a way that would undermine take-over bid regulation. However, what had not yet happened then was precisely the situation presented here – we found that Brookfield used the IPL Swaps to avoid the EWR's 10% reporting threshold and to gain a tactical advantage in the battle for control of IPL, thus engaging in clearly abusive conduct.

[510] Brookfield's conduct fit squarely within the above description from *ARC Equity* – Brookfield's use of the IPL Swaps to further the Brookfield Offer was novel, and the concerns it raised were foreshadowed by the CSA policy discussions several years ago, even though no policy changes were made at that time.

[511] We were also satisfied that it would be unfair to regular IPL shareholders to allow the Swap Shares to be included in the Minimum Tender Condition. The tendering rights of those Swap Shares were separated from the economic interest in those shares (as were the voting rights). Accordingly, in deciding whether to tender the Swap Shares, the holder of those shares would be influenced by different considerations than those influencing holders of regular IPL Shares. Similarly, there would be different considerations influencing decisions about IPL Shares beneficially held by Brookfield – which is precisely why an offeror's shares are excluded from the Minimum Tender Condition. Moreover, in the present case, BMO – which, as explained below, we deemed to have had the right to tender the Swap Shares – may have been affected by considerations stemming from BMO's extensive commercial relationship with Brookfield.

[512] We could not identify the holder or holders of the Swap Shares. That is, BMO would have engaged in hedging activities to control the risk it assumed when entering into the IPL Swaps with Brookfield. That hedging would take the form of purchasing IPL Shares (in addition to IPL Shares BMO may have already owned as a market maker) or entering into its own Swaps as a swap investor with other swap dealers. The evidence confirmed this – BMO hedged at least part of its position through ownership of Swap Shares and part through Swaps with other swap dealers. However, Brookfield tendered no evidence on how many Swap Shares were held by BMO or by other swap dealers, thus there was no way for us to determine the relative hedging positions as between BMO and any other swap dealer. Brookfield could have asked BMO for that information, and if it were considered commercially sensitive, Brookfield could also have asked for a

confidentiality order as it did for other evidence submitted for the Hearing. Brookfield chose not to seek that information, relying instead on oral hearsay that BMO's policy is not to vote hedged shares at the direction of a swap investor (here, Brookfield), but that BMO will act in its own commercial interests.

[513] We were left with the evidence that swap dealers in BMO's position would be expected to hedge the IPL Swaps, and BMO was the only identified swap dealer. Whether through deliberate obfuscation or carelessness in adducing its evidence, Brookfield left us little choice in how to treat the Swap Shares. Accordingly, we determined that the fairest approach was to deem BMO to have hedged all 9.9% of the IPL Swaps by holding or acquiring Swap Shares representing 9.9% of the issued and outstanding IPL Shares.

[514] We accepted the evidence that BMO would consider its own commercial interests in dealing with the Swap Shares. In the context of the Brookfield Offer, the choice was binary – either accept the offer and tender the Swap Shares, or reject the offer and decline to tender the Swap Shares.

[515] BMO had an extensive commercial relationship with Brookfield. In these circumstances, we believed it highly unlikely that BMO would reject the Brookfield Offer and refuse to tender the Swap Shares. Accordingly, we were prepared to assume that all of BMO's deemed holding of Swap Shares would be tendered to the Brookfield Offer. In addressing our conclusion that Brookfield's conduct was clearly abusive, we considered that the public interest called for the protection of IPL shareholders (other than Brookfield and BMO) through modification of the statutory Minimum Tender Condition to neutralize the effect of all of the Swap Shares being tendered.

[516] The depository receiving the tender of IPL Shares to the Brookfield Offer would not have been able to identify and separate Swap Shares, so they could not be neutralized by excluding them together with Brookfield's 9.75% of the IPL Shares. However, we determined that the effect of the Swap Shares could be neutralized by modifying the Minimum Tender Condition to arrive at a similar outcome.

[517] The Minimum Tender Condition prescribed by s. 2.29.1(c) of NI 62-104 requires an offeror to get the approval (by tendering) of shareholders representing more than half of the issued and outstanding shares (excluding the offeror and connected entities). As we concluded that the Swap Shares also had to be excluded from the number of IPL Shares counted toward the approval of the Brookfield Offer, adjusting the Minimum Tender Condition from the statutorily required 50% of the issued and outstanding IPL Shares not owned by Brookfield to 55% of those shares achieved the desired outcome (the **Modified Minimum Tender Condition**):

- Of the 429,219,175 issued and outstanding IPL Shares, Brookfield owned 41,848,857 IPL Shares and had an economic interest in an additional 42,492,698 Swap Shares.

- If the Swap Shares were identifiable, the Minimum Tender Condition could have been modified by requiring the tendering of more than 50% of the **Regular IPL**

Shares (the IPL Shares not owned by Brookfield and not represented by the Swap Shares) for the Brookfield offer to succeed:

- 0.50 × [429,219,175 issued and outstanding IPL Shares - (41,848,857 Brookfield-owned IPL Shares + 42,492,698 Swap Shares)] = 172,438,810 Regular IPL Shares.

- The Swap Shares were not identifiable, and thus could not be excluded from the Minimum Tender Condition together with the Brookfield-owned IPL Shares. Therefore, to achieve the same result (i.e., requiring that more than 172,438,810 Regular IPL Shares be tendered for the Brookfield Offer to succeed), the Swap Shares were added to the 172,438,810 Regular IPL Shares, and that sum was then used to calculate the Modified Minimum Tender Condition:

  - 172,438,810 Regular IPL Shares + 42,492,698 Swap Shares = 214,931,508 IPL Shares

  - 214,931,508 IPL Shares ÷ (429,219,175 issued and outstanding IPL Shares - 41,848,857 Brookfield-owned IPL Shares) = 0.55485 = approximately 55%.

- Thus, to account for the assumed tendering of all of the Swap Shares, the Modified Minimum Tender Condition required more than 55% of the issued and outstanding IPL Shares to be tendered to the Brookfield Offer, excluding the Brookfield-owned IPL Shares.

[518] Addressing Brookfield's argument about the property or other rights of holders of Swap Shares, the Modified Minimum Tender Condition affected Brookfield's Offer, but it did not preclude the Swap Shares from being tendered, nor did it deem the Swap Shares to be beneficially owned by Brookfield.

(iii) Conclusion

[519] We concluded that we have the jurisdiction under s. 198(1)(b) of the Act to order the Modified Minimum Tender Condition – that Brookfield not purchase any IPL Shares deposited under the Brookfield Offer, subject to terms and conditions ordered under s. 198(2). The condition we imposed was that more than 55% of the IPL Shares subject to the Brookfield Offer, excluding any IPL Shares beneficially owned by Brookfield or by any person acting jointly or in concert with Brookfield, had to be deposited under the Brookfield Offer and not withdrawn before Brookfield was able to purchase any IPL Shares deposited under the Brookfield Offer.

[520] We also ordered under s. 198(1)(g) and (h) of the Act that Brookfield disclose the Modified Minimum Tender Condition in accordance with the process set out in s. 2.12 of NI 62-104.

IX. ORDER

[521] As conveyed in the Order, we:

(a) dismissed the Brookfield Application; and

(b) considering it to be in the public interest to do so, ordered that:

(i) notwithstanding s. 2.29.1(c) of NI 62-104, under ss. 198(1)(b) and (2) of the Act, Brookfield shall not purchase any IPL Shares deposited under the Brookfield Offer unless more than 55% of the number of IPL Shares that are subject to the Brookfield Offer, excluding any IPL Shares beneficially owned by Brookfield or by any person acting jointly or in concert with Brookfield, have been deposited under the Brookfield Offer and not withdrawn;

(ii) under s. 198(1)(g) and (h) of the Act, Brookfield shall publicly disclose the Modified Minimum Tender Condition in accordance with the variation requirements in s. 2.12 of NI 62-104; and

(c) ordered under s. 179(1)(b) of the Act that Brookfield shall publicly disclose the following in accordance with the variation requirements in s. 2.12 of NI 62-104:

(i) the name of the swap counterparty (BMO);

(ii) the dates of the Swap Agreements between Brookfield and BMO;

(iii) the dates of the IPL Swap transactions pursuant to which Brookfield acquired an economic interest in IPL Shares;

(iv) material information concerning Brookfield's commercial relationship with BMO as set out in the Order, and, specifically (in brief), that:

- BMO undertook an underwriting liability with respect to Brookfield within the past 12 months;
- BMO provided investment banking services with respect to Brookfield within the past 12 months;
- BMO managed or co-managed a public offering of securities with respect to Brookfield within the past 12 months;
- BMO or an affiliate received compensation for investment banking services from Brookfield within the past 12 months;
- BMO or an affiliate has a financial interest in 1% or more of any class of the equity securities of Brookfield; and
- BMO or an affiliate has a financial interest in 0.5% or more of the issued share capital of Brookfield; and

(v) the existence of, amount of, and conditions for the payment of the BMO Completion Fee included in the BMO Engagement Letter.

December 21, 2021

For the Commission:

"original signed by"
Kari Horn

"original signed by"
Tom Cotter