

Commission emphasizes take-over bid regime predictability in ESW/Optiva decision

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On February 23, 2021, the Ontario Securities Commission (the Commission) released the [reasons](#) for its order of September 14, 2020, dismissing the application for exemptive relief brought by ESW Capital Inc. (ESW), the largest shareholder of Optiva Inc. (Optiva), from the mandatory 50% minimum tender requirement under the Canadian take-over bid regime.

Since May 2016, formal take-over bids under National Instrument 62-104 *Take-Over Bids and Issuer Bids* have been subject to a mandatory minimum tender requirement of more than 50% of the outstanding securities of the class that are subject to the bid, excluding those beneficially owned by the bidder and its joint actors.

ESW sought an exemption from the mandatory minimum tender requirement before it would formally launch an unsolicited offer to acquire the outstanding shares of Optiva not already owned by ESW. Optiva's proposed bid price was at a 122% premium to the 20-day volume-weighted average price and a 92% premium to the 10-day closing high. Rival shareholders Maple Rock Capital Partners Inc. and EdgePoint Investment Group Inc., insiders that collectively owned 40.5% of Optiva and whose interests ESW alleged were not aligned with minority shareholders, were expected to reject ESW's offer. Since ESW's 28% stake had to be excluded from the calculation, Maple Rock and EdgePoint's shareholders were sufficient to block ESW's bid from meeting the 50% mandatory minimum tender requirement unless a discretionary exemption was granted. ESW proposed that the minimum tender requirement should be a majority of the shares held by shareholders other than ESW, Maple Rock and EdgePoint.

In dismissing ESW's application, the Commission followed its earlier [decision](#) in *Aurora Cannabis Inc. (Re)* in which it rejected an application to shorten the 105-day minimum tender period, emphasizing the essential role of predictability of take-over bid regulation in order to ensure that market participants know with reasonable certainty what rules govern the bid environment. Absent exceptional circumstances or improper or abusive conduct, exemptive relief will not be granted. The Commission also noted that the three significant shareholding blocks pre-existed the proposed take-over bid and, consequently, Optiva's shareholders held their positions with knowledge of this dynamic.

One of the consequences of the 50% minimum tender condition under the bid regime is that it enhances the leverage of major shareholders vis-a-vis the bidder and the target. In its reasons, the Commission noted that this could result in bids not being made at all or shareholders being deprived of the ability to respond to a bid. Market participants will note that the extraordinary premium in this case was insufficient to justify the granting of exemptive relief.