

# Torys on Litigation and Dispute Resolution

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## OSC Confirms High Standard for Reviewing a TSX Decision

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On August 26, 2009, the Ontario Securities Commission dismissed a request by a significant unitholder of InterRent Real Estate Investment Trust to reverse a decision of Toronto Stock Exchange and intervene to stop a private placement of InterRent units from proceeding.<sup>1</sup> The OSC's decision confirms that only in rare circumstances will it exercise its power to review a TSX decision.

InterRent applied to TSX for approval of a private placement of up to 9.3 million units, representing 49% of InterRent's issued and outstanding units. The private placement was one of several transactions proposed by InterRent that also included entering into an agreement that would result in externalization of all of the REIT's property management services. TSX's listings committee permitted the private placement without requiring a vote of InterRent's unitholders, but required that the proposed property management agreement (which could be viewed as a "transformative" transaction) be submitted to the unitholders for approval. Unitholders under the private placement are entitled to participate in that vote.

NorthWest Value Partners Inc., InterRent's largest unitholder, complained to TSX that the private placement would materially affect control of InterRent and that unitholder approval should therefore be required. TSX received and considered extensive submissions from NorthWest on this issue. In reaching its decision not to require unitholder approval, TSX relied in part on representations by InterRent and others that there were no ownership or voting agreements among the subscribers to the private placements or between the subscribers and the proposed third-party property manager. TSX concluded that, under the circumstances, the subscribers were not intending to act together to materially affect control of InterRent.

NorthWest sought review by the OSC of TSX's listing decision. NorthWest's principal allegation was that TSX made fundamental errors and overlooked material evidence in determining that the private placement would not materially affect control of InterRent. NorthWest also argued before the OSC that full disclosure of the identities of the subscribers to the private placement was required to allow the OSC to review and assess TSX's decision.

The OSC held a preliminary hearing to consider whether it should defer to TSX in these circumstances. In a short decision that will be supplemented later by full reasons, the OSC deferred to the TSX decision and dismissed NorthWest's request for review.

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<sup>1</sup> The authors represented TSX before the OSC.

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The OSC confirmed that it will intervene in a TSX decision only in rare circumstances and an applicant faces a heavy burden in proving that intervention is justified. The OSC found that NorthWest did not establish any basis for review: TSX considered the relevant information and assessed the relevant considerations, including whether this was an appropriate case for it to exercise its discretion to require unitholder approval of the private placement. The OSC concluded that TSX followed a fair process, set out the rationale for its decision in carefully articulated reasons and reached a decision that was reasonable in the circumstances. The OSC therefore concluded that it had a sufficient basis to defer to TSX. The OSC declined to order disclosure of the names of the subscribers to the private placement, finding that in the circumstances this disclosure was not necessary and that on balance it was more important to protect investor privacy.

In support of its request for review, NorthWest relied on an OSC decision released earlier this year in which the OSC reversed a decision of the TSX and required HudBay Minerals to obtain shareholder approval prior to completing its proposed acquisition of Lundin Mining. The HudBay decision had led to widespread speculation that the OSC has become more receptive to fairness complaints from activist shareholders. The InterRent decision confirms that only in rare circumstances will the OSC intervene in a TSX decision. This should provide a greater degree of certainty for issuers planning and completing transactions.<sup>2</sup> **1**

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<sup>2</sup> Immediately following the release of the OSC's decision, NorthWest moved before the Ontario Superior Court of Justice for an injunction to prevent the closing of the private placement. The Court dismissed NorthWest's motion.