

Torys on Mergers and Acquisitions

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Shareholder Approval Issues in the Spotlight Following OSC Decision

By [Michael Siltala](#) and [Cornell Wright](#)

The Ontario Securities Commission has ruled that HudBay Minerals must obtain shareholder approval prior to completing its proposed acquisition of Lundin Mining. This decision could have significant implications for future public company transactions involving the issuance of shares.¹

TSX rules currently require shareholder approval of transactions involving the issuance of 25% or more of a company's outstanding shares. This requirement does not apply to a listed company that is acquiring another public company, provided that the transaction does not materially affect control of the listed company. TSX also retains the discretion to require shareholder approval, taking into account the effect that the transaction may have on the quality of the marketplace, depending on various factors.

TSX did not require HudBay to obtain shareholder approval for the acquisition. TSX determined, and the OSC agreed, that the transaction did not materially affect control of HudBay. TSX also chose not to exercise its discretion to require a vote. In reviewing this aspect of TSX's decision, the OSC determined that it was entitled to give this issue fresh consideration. The OSC ruled that, in this case, "fair treatment of shareholders is fundamentally more important than any consideration as to 'deal certainty' in assessing the impact of the transaction on the quality of the marketplace." Among the issues and concerns the OSC considered, on the basis of the evidence at the hearing, were (i) the economic impact of the transaction on HudBay's shareholders; (ii) the high level of dilution (100%); (iii) the proposed reconfiguration of HudBay's board of directors; and (iv) the parties' efforts to complete the transaction before a requisitioned meeting of HudBay shareholders to consider the replacement of the HudBay board.

In 2007, TSX sought public comment on whether the rules should specify a maximum dilution level above which shareholder approval should automatically be required. Other major stock exchanges, including the NYSE and London, have similar requirements. The OSC has put this issue back in the spotlight by expressing its view that public companies should be required in certain circumstances to obtain shareholder approval before proceeding with highly dilutive transactions involving the issuance of shares. 

To discuss these issues, please contact the authors.

For media calls, please contact [Stuart Wood](#), Director, Marketing & Business Development, 416.865.8205.

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¹ Torys LLP represented TSX at the hearing before the OSC.