CURRENT DEVELOPMENTS
Share Buybacks

QUESTIONS AND ANSWERS

Question - Greg Burton (ANU Law School):

Obviously, from the tenor of the remarks, I would agree with most of what Mr Emerson said should be applied here, and disagree with most of what Greg Brigden has said. But, the main argument, it seems to me, is the absurdity of treating share repurchases and possibly financial assistance differently to other financial management powers when the same results can be achieved by other means. I mean, after the Posiedon case we allow companies to buy nesteggs in each other, and we have s.36(5) in the Act, and I would just like to ask Greg Brigden if he does adopt, if he thinks we should continue to relgulate like this, would he go even further and reverse those results, because that seems to be the logical corollary of what he is saying?

Response - Greg Brigden:

I would not like to stop new regulations because from what I have heard about Canada, provided our regulators can get some teeth and that it applies to all shareholders and our management is adequate, I think share buyback powers can be developed. A lot more thought has got to go into it. The BHP-Elders-Bell Resources deal I regard as unfair to the vast majority of shareholders because they targeted one specific shareholder and bought his shares back and then cancelled them.

Question - Bede King (Chairman):

If I could just ask a question of Garfield Emerson. A comment that was made yesterday regarding the matter of reports being provided by independent financial advisors to either boards defending a takeover, or the party making the offer, and the divergence that appears between the reports from the so-called two financial experts. Is there a similar problem emerging in Canada in relation to where the company is going to use a so-called independent financial report to justify the offer it is making? And secondly, to follow on from that, have there been challenges mounted by minority share groups in relation to situations where companies have offered to buy back some shares?

Response - Garfield Emerson:

I think it is quite right that there is some scepticism that can be made with respect to the independence of financial advisors and the nature of the reports that they provide to companies that retain them over time. Well one of the issues that I think that is being dealt with in that regard is to attempt to provide full disclosure in the documents, not only of the relationship of the financial advisor to the company, but also to disclose fully the fees that it has obtained and received in connection with past services. In addition, the securities law requires that there be a full disclosure of the analysis and rationale upon which the financial advisor arrived at his result. The theory behind that is to allow the market itself to assess the reasonableness of the judgment of the financial advisor in arriving at the valuation. Clearly, different financial advisors can come to different results. It is not up to a regulator to determine which valuation is the correct amount, but rather to require that the market has full disclosure of all the material facts that were relevant in a person in coming to that decision, so the market can then make its own assessment of whether or not the offer, and indeed the valuation, is appropriate or not and whether they disagree with it and will or will not tender.

One thing that we have seen recently is that there have been a number of going private transactions where foreign corporations have partially owned Canadian subsidiaries and are making issuer bids or going private transactions in order to acquire 100 percent. This, of course, happened after the October market crash where you have had depressed market prices. What has happened a little bit is that, because of the disclosure obligations, the Canadian shareholders and financial institutions are not tendering to those offers because they recognise that they are being made to some extent at prices that are taking advantage of the current market situation with the result that these corporations are not succeeding in acquiring their minority interests or taking the company private, unless they pay up for the amount that the shareholders consider they want. This is notwithstanding that there may be valuation reports that are higher or less than the amount that is bid for.

As a result of this increased activity following the market crash the Ontario Securities Commission is investigating not only the degree of disclosure in public documents, which I think is not been adequate in the past, but also is actually testing the independence of certain financial advisors in making the valuation in the first place. Because of the 21 day time period during which these offers must be outstanding, there is plenty of opportunity for minority shareholders who disagree either with the process of the disclosure or the independence of the financial advisor, to test that before the Securities Commissions and our Securities Commission is very responsive to those requests.