Unofficial English Translation

FINANCIAL MARKETS ADMINISTRATIVE TRIBUNAL

CANADA
PROVINCE OF QUEBEC
MONTRÉAL

FILE NO.: 2019-012

DECISION NO.: 2019-012-001

DATE: August 11, 2019

BEFORE: **Mtre. LISE GIRARD**
Mtre. ELYSE TURGEON
Mtre. JEAN-PIERRE CRISTEL

TRANSAT A.T INC.
Applicant
v.
GROUP MACH ACQUISITION INC.
and
GROUP MACH INC.
Respondents
and
AUTORITÉ DES MARCHÉS FINANCIERS
and
AIR CANADA
Impleaded parties

DECISION

The Tribunal has come to a majority decision rendered by Mtre. Lise Girard and Mtre. Elyse Turgeon as set out below.

Mtre. Jean-Pierre Cristel expressed his dissent in the opinion that appears after the majority decision.

MAJORITY DECISION OF MTRE. LISE GIRARD AND MTRE. TURGEON ELYSIS

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Majority decision

[1] On August 6, 2019, the Financial Markets Administrative Tribunal ("Tribunal") received an application from Transat A.T. Inc. ("Transat") to issue cease orders in connection with the mini-tender initiated on August 2, 2019, by Group Mach Acquisition Inc. ("Mach") for 6,900,000 Class B voting shares of Transat, or approximately 19.5% of the issued and outstanding shares.

[2] The Tribunal held a *pro forma* hearing the same day. The hearing took place by preference on August 8, 2019. The matter was taken under advisement.

[3] Mach's offer to purchase was the subject of a press release on August 2, 2019, entitled "Mach Announces $14.00 Per Share Offer to Purchase Class B Voting Shares of Transat."[1]

[4] This offer is conditional on Mach receiving proxies to exercise the voting and dissent rights of all shares deposited pursuant to the offer to purchase, even if more than 19.5% of the Class B shares are deposited and before they are taken up and paid for.

[5] This offer to purchase follows a final arrangement agreement between Transat and Air Canada providing for the purchase by Air Canada of all of Transat's issued and outstanding shares, which agreement was the subject of a press release on June 27, 2019.

[6] A special meeting of Transat shareholders is scheduled for August 23, 2019, at 10 a.m. to vote on the arrangement.

[7] Mach's offer is made with the stated objective of defeating the arrangement between Transat and Air Canada. Shareholders have until 5:00 p.m. on August 13, 2019, to deposit their shares under Mach's offer. The expiry date is August 23, 2019, at 5:00 p.m., that is, after the vote on the arrangement.

[8] Mach is challenging this application for cease orders and requests that the Tribunal give shareholders the choice to either accept or decline its offer, as it is the only other option currently available in the market according to them.

[9] The Autorité des marchés financiers ("AMF") is of the opinion that the Tribunal's intervention is justified and necessary and that, because of the clearly abusive nature of the offer, the Tribunal should issue a cease trade order with respect to Mach's offer to purchase and prohibit the use of proxies and mandates obtained from shareholders who deposited their shares pursuant to the offer.

[10] The Tribunal will therefore have to determine whether Mach's offer as structured, designed and disseminated to shareholders and capital markets constitutes an abusive offer contrary to the public interest. If it does, it will have to determine whether it should issue the cease orders sought.

[11] The Tribunal finds that Mach's mini-tender, as structured, designed and disseminated, is abusive towards shareholders and capital markets in general. It must

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1 Exhibit P-1, press release of August 2, 2019.

therefore, in the public interest, prohibit activities to trade in securities in connection with this offer and prohibit the use of proxies obtained following the deposit of the shares pursuant to that offer.

BACKGROUND

The parties

[12] Transat is an international tourism company specializing in vacation travel that is headquartered in Montréal. Its Class A variable voting shares and Class B voting shares trade on the Toronto Stock Exchange.

[13] Group Mach Inc., a private corporation, is a developer and independent property owner in Quebec. Group Mach Acquisition Inc. is a wholly owned subsidiary of Group Mach Inc. and is a holding company that invests in a number of sectors.

[14] Air Canada is a Canadian air carrier with securities listed on the Toronto Stock Exchange.

[15] Transat's main regulatory authority is the Autorité des marchés financiers.

Arrangement with Air Canada

[16] On June 27, 2019, Transat and Air Canada entered into a final arrangement agreement providing for the acquisition by Air Canada of all issued and outstanding shares of Transat at a price of $13 per share.

[17] The Transat Board of Directors, on the unanimous recommendation of a special committee, unanimously determined that the arrangement is in the best interest of Transat and its stakeholders and is fair to Transat shareholders.

[18] A special meeting of Transat shareholders is scheduled for August 23, 2019, at 10 a.m. so that shareholders can vote on the arrangement.

[19] The Board of Directors unanimously recommended that Transat shareholders vote in favour of the resolution to approve the arrangement at the meeting. If approved, the arrangement would then be submitted to the Superior Court of Québec for approval during a hearing scheduled for August 28, 2019.

Mach's offer

[20] In January 2019, Mach expressed interest in Transat. Transat and Mach held multiple exchanges between that time and the arrangement with Air Canada. No agreement was reached with Mach.[2]

[21] At around 3:00 p.m. on Friday, August 2, 2019, Mach issued a press release entitled "Mach Announces $14.00 Per Share Offer to Purchase Class B Voting Shares of Transat."[3] This press release reads as follows:

> Group Mach Acquisition Inc. offers holders of Class B Voting Shares of Transat A.T. Inc. $14.00 per Share payable in cash for not less than 6,900,000 Class B Voting Shares of Transat, representing approximately 19.5% of the issued and outstanding Class B Voting Shares (the "Offer").[4]
>
> [Emphasis added]

[22] This press release states that as a condition of the offer:

> . . . depositing shareholders are required to appoint representatives of Mach as their nominee and proxy for the Special Meeting in respect of all Class B Voting Shares deposited pursuant to the Offer.[5]

[23] In it, Mach states its intention to vote "all Class B Voting Shares tendered to the Offer against Transat's proposed plan of arrangement with Air Canada."[6]

[24] The press release specifies that the shareholders depositing their shares pursuant to the offer will be required to appoint representatives of Mach as proxies for the special meeting in respect of all shares deposited, "regardless of the number of Shares actually taken up and paid for by Offeror."[7]

[25] Under the heading "Reasons to Accept the Offer," the press release adds that the offer "generates near term liquidity" and that if the conditions are met or waived, "Shareholders of Deposited Shares will receive the Purchase Price within three business days following August 23, 2019."[8]

[26] The purpose of Mach's offer is clearly stated in this press release, which is to defeat the arrangement between Transat and Air Canada:

> The purpose of the Offer is for Mach to vote the Deposited Shares against the Proposed Arrangement and to provide holders of said Shares with a

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2 Exhibit P-5, Transat Circular, pp. 35 to 45.
3 Ibid.
4 Ibid.
5 Ibid.
6 Ibid.
7 Ibid.
8 Ibid.

> significant Purchase Price premium in cash no later than within three business days after August 23, 2019, subject to the terms of the Offer.[9]
>
> Take-up if fully subscribed – The Offer is for not less than 6,900,000 Shares (representing approximately 19.5% of the issued and outstanding Shares). In the event that greater than 6,900,000 Shares are tendered to the Offer and the terms and conditions of the Offer are waived or satisfied, as applicable, under no circumstances will the Offeror take up less than 6,900,000 Shares.

[27] At 5:53 p.m. on Friday, August 2, Mach filed on SEDAR (i) a circular soliciting proxies for the meeting ("Mach Circular"), (ii) the mini-tender and (iii) a letter of transmittal.

[28] The mini-tender is for 6.9 million Class B voting shares of Transat, representing approximately 19.5% of issued and outstanding shares, at a price of $14 cash per share.

[29] The offer is made to registered holders of Class B shares of Transat as of July 17, 2019, the record date for the purposes of the August shareholders' meeting.

[30] The offer therefore does not apply to all holders of Class B shares, but rather only those able to vote at that meeting.

[31] The offer is also not presented to holders of Class A shares of Transat or holders of convertible securities of Transat.

[32] The offer sets a deadline of August 13, 2019, at 5:00 p.m. for Transat shareholders to deposit their shares. The offer provides that the deposit deadline may be changed to such earlier or later time or times and date or dates which may be established by Mach in accordance with Section 6 of the offer, "Variation or Change of the Offer." It further provides that "the Offeror will make a public announcement regarding the number of Shares deposited under the Offer as promptly as practicable following the Deposit Deadline"[10].

[33] After the deposit deadline, the offer states that Mach will provide an update in a press release concerning the number of shares deposited, including whether proportionate take-up will apply.

[34] If more than 19.5% of the issued and outstanding shares are deposited under Mach's offer, Mach will proceed with a proportionate reduction by taking up only 6.9 million Transat shares on the expiry date of August 23 at 5 p.m. Only those shares will then be paid for three business days after the expiry date.

[35] At the same time, Mach is expected to publicly announce the number of shares taken up if the terms and conditions of the offer are satisfied or waived at the expiry time[11].

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9 Ibid.
10 Exhibit P-3, Mach's offer, p. 7.
11 Ibid.

[36] Mach's offer states that "[u]nder no circumstances will [it] acquire more than 19.9% of the Shares pursuant to the Offer." If it is subsequently determined that the 6.9 million shares subject to the offer "represent more than 19.9% of the Shares as of the date of the Offer, the Offer will be amended in order to ensure that the Offer is not a take-over bid pursuant to *Regulation 62-104 respecting Take-Over Bids and Issuer Bids*."[12]

[37] The offer is subject to the conditions listed in Section 5 titled "Conditions of the Offer":

> **5. Conditions of the Offer**
>
> Notwithstanding any other provision of the Offer and subject to Law, the Offeror shall have the right to withdraw the Offer and not take up or pay for any Shares deposited under the Offer, if the following conditions are not satisfied or waived by the Offeror in whole or in part at or prior to the Expiry Time or such earlier or later time during which Shares may be deposited under the Offer:
>
> (a) there shall have been validly deposited under the Offer and not withdrawn at the Expiry Time 6,900,000 Shares which represents approximately 19.5% of the issued and outstanding Shares (on a non-diluted basis), together with any associated SRP Rights (the "**Minimum Tender Condition**");
>
> (b) the Deposited Shares under the Minimum Tender Condition are Shares held by the depositing Shareholders as of the Record Date;
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> (c) the Proposed Arrangement is not approved by the requisite number of Voting Shares at the Special Meeting;
>
> (d) none of the Deposited Shares under the Minimum Tender Condition will have been deposited under a letter of transmittal for the Proposed Arrangement;
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> (e) none of the Deposited Shares under the Minimum Tender Condition will have been the subject of a Deemed Withdrawal;
>
> (f) there shall not be threatened, instituted or pending any action, suit or proceeding by any Governmental Entity in any jurisdiction, or by any other person in any jurisdiction, before any court or governmental authority or regulatory or administrative agency in any jurisdiction or otherwise, in either case (i) preventing or prohibiting the ability of the Offeror to proceed with, make or maintain the Offer or to take up, and pay for the Shares deposited under the Offer; (ii) to cease trade, enjoin, prohibit or impose material limitations or conditions on the purchase by or the sale to the Offeror of the Shares, the right of the Offeror to own or exercise full rights of ownership

[12] *Idem*, p. 6.

of the Shares; (iii) which would materially and adversely affect the ability of the Offeror to proceed with the Offer and/or taking up and paying for any Shares deposited under the Offer; (iv) challenging, or seeking to make illegal, delay or otherwise directly or indirectly restrain or prohibit the voting of the Deposited Shares by the Offeror at any meeting of shareholders of Transat, including the Special Meeting; or (v) seeking material damages or that otherwise, or in the sole judgment of the Offeror, has or may have a material adverse effect on the Shares or the business, income, assets, liabilities, condition (financial or otherwise), properties, operations, results of operations or prospects of Transat or Mach, or any of their respective subsidiaries, partners or affiliates taken as a whole, or has impaired or may materially impair the contemplated benefits of the Offer to Mach;

(g) there shall not exist any prohibition at Law against the Offeror making or maintaining the Offer or taking up and paying for any Shares deposited under the Offer;

(h) any change or changes shall not have occurred (or any development shall not have occurred involving any prospective change or changes) in the business, assets, liabilities, properties, condition (financial or otherwise), operations, results of operations or prospects of Transat or its subsidiaries or affiliates that, in the sole judgment of the Offeror, has or may have material adverse significance with respect to Transat or Mach;

(i) the Offeror shall have determined in its sole judgment that, on terms satisfactory to the Offeror that the Shareholder Rights Plan does not and will not adversely affect the Offer or the Offeror, either before or on consummation of the Offer, or the acquisition by the Offeror of any Shares under the Offer; and

(j) Transat shall not have entered into any agreement or have undertaken or announced any action which could have a material adverse impact on the Offer.

The foregoing conditions are for the exclusive benefit of the Offeror. The Offeror may assert any of the foregoing conditions at any time, regardless of the circumstances giving rise to such assertion (including, without limitation, any action or inaction by the Offeror giving rise to any such assertions). The Offeror may waive any of the foregoing conditions in its sole discretion, in whole or in part, at any time and from time to time, both before and after the Expiry Time, without prejudice to any other rights which the Offeror may have.

Each of the foregoing conditions is independent of and in addition to each other of such conditions and may be asserted irrespective of whether any other of such conditions may be asserted in connection with any particular event, occurrence or state of facts or otherwise. The failure by the Offeror at any time to exercise or assert any of the foregoing rights shall not be deemed to constitute a waiver of any such right, the waiver of any such right with respect to particular facts or circumstances shall not be deemed to constitute a waiver with respect to any other facts or circumstances, and each such right shall be deemed an ongoing right which may be asserted at any time and from time to time by the Offeror. Any

> determination by the Offeror concerning any event or other matter described in the foregoing conditions will be final and binding for all purposes.
>
> Any waiver of a condition or the withdrawal of the Offer will be effective upon written notice, or other communication confirmed in writing, by the Offeror to that effect to the Depositary at its principal office in Toronto, Ontario.
>
> The Offeror, promptly after giving any such notice, shall issue and file a press release announcing such waiver or withdrawal, and shall cause the Depositary, if required by Law, as soon as practicable thereafter to notify the Shareholders, in the manner set forth in Section 9 of the Offer, "Notices and Delivery", and shall provide a copy of the aforementioned notice to the TSX. If the Offer is withdrawn, the Offeror will not be obligated to take up or pay for any Deposited Shares, and the Depositary will promptly return all documents tendered to the Depositary under the Offer including certificates or DRS Statements representing Deposited Shares and Letters of Transmittal and related documents to the parties by whom they were deposited. See Section 10 of the Offer, "Return of Shares".

[38] An essential condition of the deposit of shares pursuant to the offer is that the shareholder must appoint Mach as its proxy and agent, authorizing it to:

> (a) vote at the meeting against the arrangement with Air Canada in respect of all shares deposited under its offer, "regardless of the number of Deposited Shares actually taken up and paid for" by Mach upon the expiry time on August 23, 2019, at 5:00 p.m. after the meeting;
>
> (b) exercise their right of dissent against the arrangement in order to trigger the ability for Air Canada to terminate the arrangement if dissent rights are exercised with respect to more than 10% of the voting shares.

[39] In particular, Mach reserves the right to withdraw the offer and not take up or pay for the shares deposited pursuant to the offer if any condition of the offer is not satisfied or waived by the expiry time on August 23, 2019, at 5:00 p.m.:

> The Offeror reserves the right to withdraw the Offer and to not take up and pay for any Shares deposited under the Offer if any condition of the Offer is not satisfied or waived at or prior to the Expiry Time. Subject to the terms and conditions of the Offer, the Offeror will take up the Shares deposited under the Offer at the Expiry Time and pay for such Shares no later than within three Business Days following the Expiry Date.[13]
>
> Subject to Law, the Offeror expressly reserves the right in its sole discretion to, on, or after the Expiry Date, terminate or withdraw the Offer and not take up or pay for any Shares if any condition specified in Section 5 of the Offer, "Conditions of the Offer", is not satisfied or, where such condition may be waived, is not waived, by giving written notice thereof or other communication confirmed in writing to the Depositary at its principal office in Toronto, Ontario. If the Offer is withdrawn by the Offeror, the Offeror will

[13] *Idem*, p. ii.

> promptly return any Deposited Shares of the Shareholders. Subject to the Pro Rata Condition, the Offeror will not, however, take up and pay for any Shares deposited under the Offer unless it simultaneously takes up and pays for all Shares then validly deposited under the Offer and not withdrawn.[14]

[40] In addition, Mach reserves the right to extend or change the offer as follows:

> **6. Variation or Change of the Offer**
>
> The closing of the Offer is at the Expiry Time, subject to extension or variation in the Offeror's sole discretion, or as set out below, unless the Offer is withdrawn by the Offeror.
>
> The Offer will not be extended past the Expiry Time if all conditions of the Offer are satisfied or waived at or prior to the Expiry Time, including that there shall have been deposited a minimum of 6,900,000 Shares as at the Expiry Time, representing approximately 19.5% of the issued and outstanding Shares based on Transat's publicly available information as at the date of the Offer.
>
> Subject to the limitations set out below, the Offeror reserves the right, in its sole discretion, at any time and from time to time while the Offer is open (or at any other time if permitted by Law), to vary the Offer (including, without limitation, by extending the Deposit Deadline or the Expiry Date or, where permitted by Law, abridging the period during which Shares may be deposited under the Offer where permitted by Law).
>
> If, before the Expiry Time or after the Expiry Time but before the expiry of all rights of withdrawal with respect to the Offer, the terms of the Offer are varied, including any reduction of the period during which securities may be deposited under the Offer pursuant to Law, or any extension of the period during which securities may be deposited under the Offer pursuant to Law, and whether or not that variation results from the exercise of any right contained in the Offer, the Offeror will promptly issue and file a news release announcing the number of Deposited Shares under the Offer as at the date of any such variation. Any notice of variation of the Offer will be deemed to have been given and to be effective on the day on which it is delivered or otherwise communicated to the Depositary at its principal office in Toronto, Ontario.
>
> If at any time before the Expiry Time, or at any time after the Expiry Time but before the expiry of all rights of withdrawal with respect to the Offer, a change occurs in the information contained in the Offer, as amended from time to time, that would reasonably be expected to affect the decision of a Shareholder to whom the Offer is being made to accept or reject the Offer (other than a change that is not within the control of the Offeror or of an affiliate of the Offeror), the Offeror will promptly issue and file a news release of such change and send a notice of change to the Depositary

[14] *Idem*, p. 8.

("**Notice of Change**"). Any Notice of Change will be deemed to have been given and to be effective on the day on which it is delivered or otherwise communicated to the Depositary at its principal office in Toronto, Ontario.

During any extension or in the event of any variation of the Offer or change in information, all Shares previously deposited and not taken up or withdrawn will remain subject to the Offer and may be taken up by the Offeror in accordance with the terms hereof. An extension of the Expiry Date of the Offer, a variation of the Offer or a change information does not, unless otherwise expressly stated, constitute a waiver by the Offeror of its rights under Section 5 of the Offer, "Conditions of the Offer". Subject to the Pro Rata Condition, if the consideration being offered for the Shares under the Offer is increased, the increased consideration will be paid to all depositing Shareholders whose Shares are taken up under the Offer, whether or not such Shares were taken up before the increase.

If there is a further extension of the Offer past the Expiry Date, the Offeror will announce the number of Shares deposited under the Offer as at the date of such extension. Furthermore, the Offeror will continue to provide the market with timely updates by way of press release, and any material updates to the terms of the Offer will be disseminated by way of notice mailed to each Shareholder.

[41] The terms of the offer with respect to proxies and dissent rights are as follows:

Power of Attorney

The execution of the Letter of Transmittal (or, in the case of Shares deposited by book-entry transfer, by the making of a book-entry transfer) irrevocably constitutes and appoints effective at and after the time that Deposited Shares are tendered under the Offeror (the "**Effective Time**"), each director and officer of the Offeror and any other Person designated by the Offeror in writing as the true and lawful agent, attorney, attorney-in-fact and proxy of the holder of the Deposited Shares (which said Deposited Shares together with any and all Distributions (as defined below) which may be declared, paid, accrued, issued, distributed, made or transferred thereon, hereinafter referred to as the "**Effective Shares**" with respect to such Effective Shares, with full power of substitution and re-substitution (such powers of attorney, being coupled with an interest, being irrevocable), in the name of and on behalf of such Shareholder to:

(a) register or record the transfer and/or cancellation of such Effective Shares on the appropriate registers maintained by or on behalf of Transat;

(b) instruct the Intermediary of a beneficial shareholder to appoint Alfred Buggé, Executive Vice-President, Mergers & Acquisitions of Mach and Vincent Chiara, President of Mach, as the proxyholders in respect of the Deposited Shares and to vote against the Arrangement Resolution at the Special Meeting;

(c) whether or not such shares are registered in the Offeror's name, vote, execute and deliver as and when requested by the Offeror, any instruments of proxy, authorization or consent in form and on terms satisfactory to the Offeror in respect of any and all of such Effective Shares, revoke any such instrument, authorization or consent previously given, or designate in any such instrument, authorization, requisition, resolution, consent or direction, any Person or Persons as the proxy of such Shareholder or proxy nominee or nominees of such Shareholder in respect of such Effective Shares for all purposes including, without limitation, in connection with any meeting (whether annual, special or otherwise or any adjournment or postponement thereof, including, without limitation, the Special Meeting) of holders of relevant securities of Transat;

(d) execute, endorse and negotiate for and in the name of and on behalf of such Shareholder, any and all cheques or other instruments representing any Distribution payable to or to the order of, or endorsed in favour of, a holder of such Effective Shares and/or designate in any instruments of proxy any Person(s) as the proxy or the proxy nominee(s) of such Shareholder in respect of such Distributions for all purposes;

(e) exercise any rights of a holder of Effective Shares with respect to such Effective Shares, including all Dissent Rights associated with such Effective Shares in accordance with the *Canada Business Corporations Act* as modified by the Proposed Arrangement; and

(f) execute all such further and other documents, transfers or other assurances as may be necessary or desirable in the sole judgment of the Offeror to effectively convey Effective Shares to the Offeror, all as specified in the Letter of Transmittal.

. . .

In accordance with the terms of the Letter of Transmittal, a Shareholder that validly deposits Shares pursuant to the Offer (each, a "**Deposited Share**"), will appoint representatives of Mach as its nominees and proxy in respect of all Deposited Shares for any meeting of holders of relevant securities of Transat (whether annual, special or otherwise or any adjournment or postponement thereof, including the Special Meeting). For greater certainty, notwithstanding the Pro Rata Condition, upon tendering of the Deposited Shares under the Offer a Shareholder agrees that said Shares shall be voted against the Arrangement Resolution pursuant to the foregoing proxy, and if required, instruct an Intermediary of a beneficial owner to appoint the Shares to Alfred Buggé, Executive Vice-President, Mergers & Acquisitions of Mach and Vincent Chiara, President of Mach, as the proxyholder and to vote against the Arrangement Resolution at the Special Meeting.

> In accordance with the Pro Rata Condition, the Offeror will promptly return, following the Deposit Deadline, any Shares of the depositing Shareholders in excess of 6,900,000 or 19.5% of the issued and outstanding Shares.[15]

> ***Rights of Dissent***
>
> All Shareholders depositing Shares pursuant to this Offer will, in addition to appointing a representative of Mach as its nominee and proxy, also assign such representative the power to exercise all Dissent Rights associated with such Shares.
>
> Dissent Rights may be exercised up to 48 hours (excluding Saturdays, Sundays and statutory holidays) prior to the commencement of the Special Meeting. Mach may decide to exercise the Dissent Rights for the Effective Shares following the Deposit Deadline. The Arrangement Agreement expressly provides that Air Canada may terminate the Proposed Arrangement if Dissent Rights have been validly exercised (or, if exercised, remain outstanding) with respect to more than 10% of the issued and outstanding Voting Shares.
>
> If the Offer does not close, the Depositing Shares will be returned as soon as practicable to the holder of said shares (see “Return of Shares” under Section 10 of the Offer) and the holder will be able at its discretion to withdraw or maintain the exercise of Dissent Rights in accordance with the procedures set forth in the Transat Circular.[16]

[42] The offer as presented to the shareholders provides that Mach may vote all of the shares deposited pursuant to its offer, which may exceed 19.5% of Class B shares, and then withdraw and not take up its offer, even if it exercised the voting and dissent rights attached thereto.

[43] In the “Questions and Answers About the Offer” section, the response to the question "Why deposit your Shares to the offer?" is as follows:

> The Offer provides holders of Shares with <u>certainty of value</u> and an opportunity to receive liquidity <u>at a significant cash premium</u> within three Business Days after the Expiry Date of August 23, 2019, subject to terms and conditions of the Offer.[17]

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15 *Idem*, pp. 9–11.
16 *Idem*, p. 11.
17 *Idem*, p. 2.

[44] In this same section, the response to the question “What is the purpose of offer and what are Mach’s intentions?” describes Mach’s intentions as follows:

> The Purpose of the Offer is for Mach to vote the Deposited Shares against the Proposed Arrangement and to purchase the Shares at a significant Purchase Price premium in cash no later than within three business days after August 23, 2019, subject to the terms of the Offer.
>
> Mach opposes the Arrangement Resolution for the following reasons:
>
> • Mach believes that the proposed acquisition by Air Canada under the Proposed Arrangement greatly undervalues Transat.
>
> • The sale process undertaken by the board of directors of Transat (the “Transat Board”) has been flawed in many respects, most significantly, by the Transat Board’s failure to respond to, or discuss with Group Mach Inc., its superior proposal dated June 25, 2019 at a price of $14.00 cash per Voting Share.
>
> • The Offer generates near term liquidity. If the conditions of the Offer are met or waived, Shareholders of Deposited Shares will receive the Purchase Price within three business days following August 23, 2019.
>
> • The Transat Circular confirms that the Proposed Arrangement is expected to be completed early in 2020 (without providing specifics about the meaning of “early 2020”) and that holders of Voting Shares may have to wait a considerable time, and possibly past the outside closing date of June 27, 2020, before receiving any purchase price under the Proposed Arrangement due to the time required to obtain key regulatory approvals.
>
> • Transat is a strong company with a significant value proposition, which includes new Airbus fleets in contrast to the indefinitely grounded Boeing 737 Max 8 fleets included in Air Canada’s portfolio.
>
> • The closing of the Proposed Arrangement will significantly reduce competition in Canada’s airline industry which has historically been dominated by the two largest domestic airlines, including Air Canada.
>
> • No binding guarantees have been provided by either Air Canada or Transat that the closing of the Proposed Arrangement will not result in job losses for either company or any of their subsidiaries.
>
> • No binding guarantees have been provided by Air Canada that Transat’s banner and head office shall be permanently preserved.
>
> **If the Offer is successful, Mach intends to work with other stakeholders and shareholders to advocate for improved corporate governance, management accountability and financial performance**

> **at Transat, with a view to maximizing returns for Transat shareholders**.
>
> Mach has no intention of launching a formal hostile take-over bid for all Voting Shares. Mach will not submit a "Superior Proposal" as defined in the Arrangement Agreement as long as the current Transat Board is in place. To the extent the Proposed Arrangement is not approved by the requisite number of Voting Shares at the Special Meeting, we look forward to the opportunity of working with stakeholders of Transat, including the Key Shareholders and any new members of the Transat Board to protect the best long term interests of the Company as a strong and independent global leader in the leisure travel industry by advocating for improved corporate governance, management accountability and financial performance.[18]
>
> [Emphasis added]

[45] In response to the question "How will deposited shares be voted?", Mach states the following in its offer:

> As a condition of take up and payment of the Shares, a depositing Shareholder is required to appoint the Offeror as its nominee and proxy for the Special Meeting in respect of all Shares deposited pursuant to the Offer (the "Deposited Shares") by August 13, 2019, regardless of the number of Deposited Shares actually taken up and paid for by Offeror.
>
> Upon deposit, the depositing Shareholder will appoint, or instruct the Intermediary of a beneficial Shareholder to appoint, Alfred Buggé, Executive Vice President, Mergers & Acquisitions of Mach and Vincent Chiara, President of Mach, as the proxyholders in respect of the Deposited Shares and to vote against the Arrangement Resolution at the Special Meeting and assign all other rights, including Dissent Rights (as defined below), over the Deposited Shares in favour of the Offeror notwithstanding (i) any Pro Rata Condition (as defined below) and (ii) that the take-up and payment of Deposited Shares occurs within three Business Days following the Expiry Time (as defined below).
>
> **THE OFFEROR INTENDS TO VOTE ALL DEPOSITED SHARES AGAINST THE ARRANGEMENT RESOLUTION.[19]**

[46] Regarding the right of dissent, Mach responds as follows to the question "Will any dissent rights be exercised?":

> Mach may also decide to exercise Dissent Rights associated with any Deposited Shares under the Proposed Arrangement following the Deposit Deadline. The Arrangement Agreement expressly provides that Air Canada

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18 *Idem*, pp. 2–3.

19 *Idem*, p. 3.

> may terminate the Proposed Arrangement if Dissent Rights have been validly exercised (or, if exercised, remain outstanding) with respect to more than 10% of the issued and outstanding Voting Shares. See "Rights of Dissent" under Section 4 of the Offer.
>
> If the Offer does not close, the Deposited Shares will be returned as soon as practicable to the holder of said Shares (see "Return of Shares" under Section 10 of the Offer) and the Shareholder will be able at its discretion to withdraw or maintain the exercise of Dissent Rights in accordance with the procedures set forth in the Transat Circular.[20]

[47] With respect to the withdrawal of the deposit of shares and revocation of proxies, the mechanism is summarized as follows in the question section:

> **CAN I WITHDRAW MY DEPOSITED SHARES OR REVOKE PROXIES?**
>
> Deposited Shares may be withdrawn by the depositing Shareholder any time prior to the Offeror taking up and paying for the Deposited Shares. Presuming all conditions of the Offer are met or waived, the Deposited Shares shall be taken up and paid for no later than within three Business Days after the Expiry Time on August 23, 2019.
>
> Any proxies solicited by the Offeror in connection with the Special Meeting, other than proxies in respect of Shares taken up and paid for by the Offeror under the Offer, may be revoked at any time by the Shareholder providing instructions to its investment dealer, broker or other nominee or by simply subsequently submitting a vote in favour of the Proposed Arrangement. See "Take Up and Payment for Deposited Shares" under Section 3 of the Offer.[21]

ANALYSIS

Issues

[48] The issues are as follows:

1. Does Mach's offer as structured, designed and disseminated to shareholders and capital markets constitute an abusive offer contrary to the public interest?

2. If so, must the Tribunal make the cease orders sought?

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[20] *Idem*, p. 3.
[21] *Idem*, p. 4.

Question 1: Does Mach's offer as structured, designed and disseminated to shareholders and capital markets constitute an abusive offer contrary to the public interest?

The Law

[49] The Tribunal must rule on an application for a cease trade order under the *Securities Act*[22] and the *Act respecting the regulation of the financial sector*[23] (ARFS), in respect of Mach's mini-tender.

[50] It is recognized that the *Securities Act* is a law of public order aimed at protection that is regulatory in nature, the purpose of which is to ensure the integrity and efficiency of the securities market, protect the public and maintain public confidence in those markets:

> « It is important to note from the outset that the Act is regulatory in nature. In fact, it is part of a much larger framework which regulates the securities industry throughout Canada. Its primary goal is the protection of the investor but other goals include capital market efficiency and ensuring public confidence in the system: David L. Johnston, Canadian Securities Regulation (1977), at p. 1. »[24]
>
> [Emphasis added]

[51] In this regard, the Tribunal has already recognized in another case that the public interest in the field of securities [translation] "transcends the individual interests of some investors"[25] and that the effective functioning of the market and the public's confidence in it must guide it in its interventions:

> [Translation]
>
> I believe that the public interest in the securities industry transcends the vested interests of some investors. The tribunal must also consider the effective functioning of the market and the investing public's confidence in it. Efficient and ethical financial markets are critical to a country's prosperity by promoting an appropriate allocation of resources from an economic standpoint, thereby allowing all citizens to benefit from this collective wealth, either directly or indirectly, upon their well-deserved retirement.[26]
>
> [Emphasis added]

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22 CQLR, c. V-1.1.
23 CQLR, c. E-6.1.
24 *Pezim* v. *British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557, 589.
25 *Autorité des marches financiers* v. *Dominion Investments (Nassau) Ltd. (Dominion Investments Ltd.)*, 2008 QCBDRVM 4.
26 Idem.

[52] The AMF's mission with respect to the *Securities Act* is consistent with these objectives of investor protection and market efficiency:

> « 276. The Autorité des marchés financiers established under section 1 of the Act respecting the regulation of the financial sector (chapter E-6.1) is responsible for the administration of this Act and shall discharge the functions and exercise the powers specified thereunder.
>
> In addition, the Authority's mission is
>
> (1) to promote efficiency in the securities market;
>
> (2) to protect investors against unfair, improper or fraudulent practices;
>
> (3) to regulate the information that must be disclosed to security holders and to the public in respect of persons engaging in the distribution of securities and in respect of the securities issued by these persons;
>
> (4) to define a framework for the activities of the professionals of the securities market and organizations responsible for the operation of a stock market.»[27]

[53] Moreover, a broad interpretation that takes into account economic realities must be given to this type of protective legislation:

> « Such remedial legislation must be construed broadly, and it must be read in the context of the economic realities to which it is addressed.
>
> […]
>
> The legislation is not aimed solely at schemes that are actually fraudulent but rather relates to arrangements that do not permit the customers to know exactly the kind of investment they are making. »[28]
>
> [Emphasis added]

[54] The Tribunal's authority to issue a cease trade order, particularly to prohibit an offer to purchase shares, is based on section 265 of the *Securities Act*. This section provides that the Tribunal may prohibit any activity in respect of a transaction in securities and any activity in respect of a transaction in a particular security:

> « **265.** The Financial Markets Administrative Tribunal may order a person to cease any activity in respect of a transaction in securities.

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27 S. 276 of the *Securities Act*.

28 *Pacific Coast Coin Exchange* v. *Ontario Securities Commission*, [1978] 2 S.C.R. 112, 127–128.

> The Financial Markets Administrative Tribunal may, furthermore, order any person or category of persons to cease any activity in respect of a transaction in a particular security. […] »

[55] The Tribunal's discretion to intervene in this regard must be exercised in the public interest, as provided for in the second paragraph of section 93 of the ARFS:

> « **93.** The function of the Tribunal is to make determinations with respect to matters brought under this Act, the Money-Services Businesses Act (chapter E-12.000001) and the Acts listed in Schedule I. Except where otherwise provided by law, the Tribunal shall exercise its jurisdiction to the exclusion of any other tribunal or adjudicative body.
>
> The Tribunal shall exercise its discretion in the public interest.»
>
> [Emphasis added]

[56] The Tribunal's intervention on the basis of the public interest exists whether or not securities legislation has been breached, as has been repeatedly recognized by the courts and recently reaffirmed by the Court of Appeal of Quebec in the decision in *Fibrek*.[29]

[57] In this regard, the Supreme Court of Canada acknowledged in *Committee for the Equal Treatment of Asbestos Minority Shareholders* v. *Ontario (Securities Commission)*[30] that the power of securities commissions to intervene in the public interest is wide and discretionary. However, it is not unlimited and must be based on the objectives of the legislation. The analysis should not focus only on the fair treatment of investors, but should also consider the effect of an intervention on the efficiency of financial markets and public confidence in those markets:

> « 39 Section 127(1) of the Act provides the OSC with the jurisdiction to intervene in activities related to the Ontario capital markets when it is in the public interest to do so. The legislature clearly intended that the OSC have a very wide discretion in such matters. The permissive language of s. 127(1) expresses an intent to leave it for the OSC to determine whether and how to intervene in a particular case:
>
> **127.** (1) The Commission may make one or more of the following orders if in its opinion it is in the public interest to make the order or orders . . . . [Emphasis added.]
>
> 40 The breadth of the OSC's discretion to act in the public interest is also evident in the range and potential seriousness of the sanctions it can impose under s. 127(1). Furthermore, pursuant to s. 127(2), the OSC has an

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29 *AbitibiBowater inc. (Resolute Forests)* v. *Fibrek inc*., 2012 QCCA 569, para. 33.

30 *Committee for the Equal Treatment of Asbestos Minority Shareholders* v. *Ontario (Securities Commission),* [2001] 2 S.C.R. 132.

> unrestricted discretion to attach terms and conditions to any order made under s. 127(1):
>
> (2) An order under this section may be subject to such terms and conditions as the Commission may impose.
>
> 41 However, the public interest jurisdiction of the OSC is not unlimited. Its precise nature and scope should be assessed by considering s. 127 in context. Two aspects of the public interest jurisdiction are of particular importance in this regard. First, it is important to keep in mind that the OSC's public interest jurisdiction is animated in part by both of the purposes of the Act described in s. 1.1, namely "to provide protection to investors from unfair, improper or fraudulent practices" and "to foster fair and efficient capital markets and confidence in capital markets". Therefore, in considering an order in the public interest, it is an error to focus only on the fair treatment of investors. The effect of an intervention in the public interest on capital market efficiencies and public confidence in the capital markets should also be considered.»[31]
>
> [Emphasis added]

[58] Therefore, the Tribunal's jurisdiction to intervene in the public interest is based on two main objectives: protect investors against improper, fraudulent or unfair practices, and in order to promote fair and efficient capital markets and maintain confidence in them.

[59] The Supreme Court of Canada adds in *Asbestos* that orders made in the public interest are not intended to be remedial or punitive, but rather protective and preventive. It also points out that no breach of the Act is necessary for intervention to take place:

> « 42 Second, it is important to recognize that s. 127 is a regulatory provision. In this regard, I agree with Laskin J.A. that "[t]he purpose of the Commission's public interest jurisdiction is neither remedial nor punitive; it is protective and preventive, intended to be exercised to prevent likely future harm to Ontario's capital markets" (p. 272). This interpretation of s. 127 powers is consistent with the previous jurisprudence of the OSC in cases such as Canadian Tire, supra, aff'd (1987), 59 O.R. (2d) 79 (Div. Ct.); leave to appeal to C.A. denied (1987), 35 B.L.R. xx, in which it was held that no breach of the Act is required to trigger s. 127. It is also consistent with the objective of regulatory legislation in general. The focus of regulatory law is on the protection of societal interests, not punishment of an individual's moral faults: see R. v. Wholesale Travel Group Inc., [1991] 3 S.C.R. 154, at p. 219.
>
> 43 Furthermore, the above interpretation is consistent with the scheme of enforcement in the Act. The enforcement techniques in the Act span a broad spectrum from purely regulatory or administrative sanctions to serious criminal penalties. The administrative sanctions are the most frequently used sanctions and are grouped together in s. 127 as "Orders in the public interest". Such orders are not punitive: Re Albino (1991), 14 O.S.C.B. 365. Rather, the purpose of an order under s. 127 is to restrain future conduct that is likely to be prejudicial to the public interest in fair and efficient capital markets. The role of the

[31] Idem.

> OSC under s. 127 is to protect the public interest by removing from the capital markets those whose past conduct is so abusive as to warrant apprehension of future conduct detrimental to the integrity of the capital markets: Re Mithras Management Ltd. (1990), 13 O.S.C.B. 1600. In contradistinction, it is for the courts to punish or remedy past conduct under ss. 122 and 128 of the Act respectively: see D. Johnston and K. Doyle Rockwell, Canadian Securities Regulation (2nd ed. 1998), at pp. 209-11.»[32]
>
> [Emphasis added]

[60] In *Canadian Tire Corp. (Re)*,[33] the Ontario Securities Commission (OSC), in a joint case with the Commission des valeurs mobilières du Québec (CVMQ), made it clear that securities commissions could intervene based on public interest, even in the absence of a breach of the Act, where there is clear abuse of shareholders in particular and of capital markets in general:

> « […] The Legislature deliberately has given the Commission a broad and unfettered power to move quickly to intervene in the capital markets to stop a trade or a transaction which it deems to be contrary to the public interest. The ambit of the Commission's power under section 123 is not hedged or confined by particular examples or by particular criteria, as is true elsewhere in the Act. Rather, the Legislature has vested in the Commission the power to intervene where it has been demonstrated that such intervention is necessary to fulfil the Commission's mandate to regulate the capital markets in the public interest. […]
>
> There are, however, situations which call for regulatory intervention to prevent an abusive transaction that will have a deleterious effect on a class of investors in particular, or on the capital markets in general. In those cases, the Commission would not be acting in accordance with the power and responsibility vested in it by the Legislature if it did not use its cease trade power under section 123. […]
>
> Equally clearly in our view, the Commission should act 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 Act, the regulations or a policy statement. Such occasions may be rare, but the power is there in section 123 and it ought to be used in appropriate circumstances. […]
>
> To invoke the public interest test of section 123, particularly in the absence of a demonstrated breach of the 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

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32 Idem.

33 *Canadian Tire Corp. (Re)*, 1987 LNONOSC 47.

> 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 Commission'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. »[34]
>
> [Emphasis added]

[61] In analyzing a transaction for which an intervention is requested in the public interest, compliance with the Act must not be interpreted from a technical perspective; rather, the Tribunal must look for the real intent behind the operation and analyze its effects on the animating principles of the legislation.

[62] To paraphrase the OSC in *Canadian Tire*, transactions structured in a manner that clearly aims to avoid the fundamental principles underlying securities regulations will be closely scrutinized and intervention may be taken in appropriate cases:

> «That statement is important as outlining the basic approach that the Commission is prepared to take to a transaction in an appropriate case, particularly when a takeover bid is concerned. That is not to say that the terms of the Act or policy statements or the by-laws of the self-regulatory organizations, cannot be relied upon as they are written. It is to say, however, that transactions that are clearly designed to avoid the animating principles behind such legislation and rules will be scrutinized closely by the Commission and intervention will be ordered in appropriate cases.»[35]
>
> [Emphasis added]

[63] In the same joint case, the CVMQ reiterated the legislature's intent that it be vested with broad authority to act quickly in situations it considers contrary to the public interest:

> [Translation]
> The legislature has deliberately given the Commission a broad and unfettered power to move quickly to intervene in the financial markets to stop a transaction which it deems to be contrary to the public interest. The scope of the Commission's power under section 265 is not hedged or confined by particular examples or by particular criteria, as is true for other sections. Rather, the legislature has vested in the Commission the power to intervene where it has been demonstrated that such intervention is necessary to fulfil the Commission's mandate to regulate the financial markets in the public interest.
>
> The criteria based on which the power to make a cease order must be exercised are the public interest, referred to in section 316 of the Act, and the Commission's mission, as defined in section 276 of the Act; in particular,

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34 *Idem,* pp. 73, 76, 90 and 91.

35 *Idem,* pp. 77–78.

> one of the elements of that mission is "to protect investors against unfair, improper or fraudulent practices."[36]
>
> [Emphasis added]

[64] In *Sterling Centrecorp Inc. (Re),*[37] the OSC noted that intervention in the public interest must be exercised with caution and that the Commission must have regard to all the facts, all the circumstances and interests at play, and the effect of the order sought on those interests:

> « **212** The Commission's "public interest" jurisdiction is broad and powerful, and must be exercised with caution, as recognized in the *Re Canadian Tire* decision. When considering the exercise of this jurisdiction, the Commission needs to have regard to all of the facts, all of the policy consideration at play, all of the underlying circumstances of the case, and all of the interests affected by the matter and the remedy sought. As described above, section 91 of the Act and Rule 61-501, fundamentally, must be interpreted to ensure protection of the minority. […]»[38]
>
> [Emphasis added]

[65] The Tribunal reiterated this in *Fibrek.*[39]

[66] In the same vein, in *Sears Canada Inc.*,[40] the OSC reiterates the principles from *Canadian Tire* and notes that more than a complaint of unfairness is required. Demonstration of an effect on capital markets in general is needed. Moreover, the OSC indicates that its conclusion, that the maneuvers are coercive and abusive of the minority shareholders, is based on a detailed analysis of Sears' overall conduct:

> « **302** The Commission's public interest jurisdiction is derived from the broad mandate conferred upon it under the Act to provide protection to investors from unfair, improper, or fraudulent practices and to foster fair and efficient capital market and confidence in their integrity (section 1.1 of the Act). […]
>
> **304** The frequently cited *Canadian Tire* decision established that the Commission can and will intervene on public interest grounds even if there is no breach of the Act, the regulations or Commission policies. In such circumstances, the Commission's public interest jurisdiction will be invoked where necessary to prevent an otherwise abusive transaction from occurring. Accordingly, the standard for intervention in such circumstances is more than a complaint of unfairness and will generally involve some

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36 *C.T.C. Dealer Holdings Limited*, (1987) 18 B.C.V.M.Q. no. 14, p. A22.
37 *Sterling Centrecorp Inc. (Re)*, 2007 LNONOSC 537.
38 Idem.
39 *AbitibiBowater inc. (Produits forestiers Résolu)* v. *Fibrek inc*., 2012 QCBDR 17, para. 101.
40 *Sears Canada Inc. et al*., 2006 ONSEC 13.

> showing of a broader impact on the operation of the capital markets (*Re Canadian Tire Corp*. […]
>
> **306** The parties in this case, including Commission Staff, all agreed that in the absence of any contravention of Ontario securities law, a finding that the conduct of Sears Holdings in relation to their Offer was abusive of the capital markets would be required in order to warrant an order being made to cease trade the Offer under section 127 of the Act.
>
> **307** In view of the fact that we have found that the Vornado Agreement and the Support Agreements were entered into in contravention of subsection 97(2) of the Act, it is unnecessary for us to make a finding that the conduct of Sears Holdings in connection with their insider bid or the bid itself was "abusive" in order to support the exercise of our public interest jurisdiction under section 127 of the Act.
>
> **308** Although it is unnecessary for us to do so, we find that elements of the conduct of Sears Holdings in pursuing their Offer were coercive and abusive of the minority shareholders of Sears Canada and the capital markets generally. Our finding in this regard is based on the detailed analysis and assessment of the conduct of Sears Holdings considered in totality as described in detail above. »[41]
>
> [Emphasis added]

[67] In *Magna International Inc. et al. (Re)*,[42] the OSC emphasizes that it is entitled to intervene on public interest grounds, even if conduct is technically in compliance with securities law requirements, but is inconsistent with the animating principles underlying those requirements. In addition, it states that a transaction may be abusive if it is artificial or defeats the reasonable expectations of investors:

> « 183 The Supreme Court of Canada has confirmed the Commission's broad jurisdiction to intervene on public interest grounds where doing so would further the purposes of the Act. However, the Court noted that the Commission's jurisdiction is constrained by the purposes of the Act and the regulatory nature of section 127. The primary purpose of an order under section 127 is to restrain future conduct that is likely to be prejudicial to the public interest in fair and efficient capital markets (Asbestos, supra at paras. 42, 43 and 45; see also Patheon, supra at para. 114).
>
> 184 The Commission has held that it is entitled to intervene on public interest grounds in conduct that is technically in compliance with securities law requirements but that is inconsistent with the animating principles underlying those requirements **or** is abusive of investors or the capital markets. The

41 *Idem*, paras. 301, 302, 304 and 306 to 308.

42 *Magna International Inc. et al. (Re)*, 2010 ONSEC 14, paras. 183–185.

> Commission may find conduct to be abusive if a proposed transaction is artificial and defeats the reasonable expectations of investors or shareholders (Re Canadian Tire, supra; Re H.E.R.O., supra at p. 3776; Re Financial Models (2005), 28 OSCB 2184 and Patheon, supra at para. 116).
>
> 185 The Commission recognized in Re Canadian Tire that it should act to restrain a transaction that is clearly abusive of shareholders and of the capital markets, whether or not that transaction constitutes or involves a breach of Ontario securities law. The Commission's mandate under section 127 is not, however, to intervene in transactions under some rubric of ensuring fairness. To invoke its public interest jurisdiction, in the absence of a demonstrated breach of securities law or the animating principles underlying that law, a transaction must be demonstrated to be abusive of shareholders in particular, or of the capital markets in general. A showing of abuse is something different from, and must go beyond, a complaint of unfairness (See Re Canadian Tire, supra and Re Canfor Corp. (1995), 18 OSCB 475, 487). »[43]
>
> [Emphasis added]

[68] Furthermore, in *H.E.R.O. Industries Ltd. (Re)*,[44] the OSC instructs us that although one may be outside of the regulatory framework, a commission can intervene when conduct is abusive, particularly where there is an attempt to misuse a regulatory exemption with the aim of defeating a rival's offer when the rival cannot respond through the same mechanism. The OSC concludes that the conduct was abusive and that the markets could expect participants, such as the one involved in this case, to adhere to both the letter and the spirit of the Act:

> « One of the fundamental policy objectives underlying Part XIX is the equality of treatment of offerees by those who seek control through a take-over bid. Achievement of this policy objective is represented in Part XIX by a variety of specific rules, such as those in section 96 requiring identical consideration and prohibiting collateral benefits which have the effect of conferring upon one offeree a "consideration of greater value" than that offered to other offerees. […]
>
> To us, such a result appears to be manifestly (1) unfair to the public minority shareholders of H.E.R.O., who lose the opportunity to tender their shares to the Gordon bid at a substantial premium (all of which, correspondingly, ends up in the pockets of New Frontiers). The result is (2) also clearly unfair to Gordon, since the specific rules in Part XIX that are designed to ensure equality of treatment of offerees, as noted above, prevented it from making use of the private agreement exemption in the way that Middlefield did. It seems quite unfair that Middlefield should be able to use the exemption in clause 92(1)(c) to defeat the bid of its rival, Gordon, when Gordon could

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43 *Idem*.

44 *H.E.R.O. Industries Ltd. (Re) (1990)*, 13 O.S.C.B. 3775, pp. 14 and 20.

> not respond in kind. Finally, Middlefield's conduct seems to us to be (3) clearly abusive of the integrity of the capital markets, which have every right to expect that market participants like Middlefield will adhere to both the letter and the spirit of the rules that are intended to guarantee equal treatment of offerees in the course of a take-over bid, no matter by whom the bid is made. »
>
> [Emphasis added]

[69] Furthermore, in *Biovail Corporation et al.*,[45] the OSC held that in certain circumstances, even in the absence of abuse, intervention may be required if conduct is contrary to the animating principles underlying securities legislation:

> « [382] In our view, where market conduct engages the animating principles of the Act, the Commission does not have to conclude that an abuse has occurred in order to exercise its public interest jurisdiction. […]»
>
> [Emphasis added]

[70] However, beyond the general principles underlying securities legislation, there are also animating principles to support the legislative regime governing offers to purchase and the solicitation of proxies.

[71] The regime on take-over bids is provided for in *Regulation 62-104 respecting Take-Over Bids and Issuer Bids*[46] ("Regulation 62-104") and is coupled with *Policy Statement 62-203 respecting Take-Over Bids and Issuer Bids.*

[72] Policy Statement 62-203 summarizes how Canadian securities authorities interpret and apply certain provisions of the bid regime, and sets out the following main objectives of the take-over bid framework:

> « - equal treatment of offeree issuer security holders,
>
> - provision of adequate information to offeree issuer security holders, and
>
> - an open and even-handed bid process. »[47]

[73] With regard to these principles, the OSC states, in *Patheon Inc. (Re)*[48] that it can intervene in the public interest where the take-over bid rules have been complied with, but the animating principles underlying them have not:

> « 105 In our view, the term "consideration" used in subsections 97(1) and 97.1(1) of the Act should be interpreted broadly in accordance with the

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45 *Biovail Corporation et al.*, |2010 LNONOSC 729, para. 382.
46 *Regulation 62-104 respecting Take-Over Bids and Issuer Bids*, CQLR, c. V.1.1, r. 35.
47 *Policy Statement 62-203 respecting Take-Over Bids and Issuer Bids*, item 2.1 General.
48 *Patheon Inc. (Re)*, 2009 LNONOSC 589.

> regulatory objectives of the take-over bid regime contained in the Act. One of the principal animating objectives of that regime is the fair and equal treatment of public shareholders when a formal bid is made. That principle underlies and is the reason for many of the specific provisions of the Act applicable when a formal bid is made (see the commentary in paragraph 116 of these reasons).
>
> 116 There should be no doubt in the minds of market participants that the Commission will intervene in the public interest where the take-over bid rules have been complied with but the animating principles underlying those rules have not.
>
> […]
>
> 120 In our view, the issues raised by this matter directly engage the animating principles underlying our take-over bid regime. As discussed above, those principles focus on the fair and equal treatment of shareholders when a formal bid is made. We believe that the circumstances before us are quite different from those in Re Canadian Tire Corp. (1987), 10 O.S.C.B. 857 and other similar Commission decisions where it was clear that the relevant offer or transaction fully complied with the Act (or, in the case of Sears, was assumed to be in full compliance). Here, we have real concerns that subsections 97(1) and 97.1(1) of the Act may have been contravened, that public shareholders are not being treated fairly and equally in connection with the Offer and that there may not be sufficient time for public shareholders to consider the disclosure to be made to shareholders of the matters before us and of our decision. Those are all issues that, in our view, directly engage our public interest jurisdiction under section 127 of the Act. »[49]
>
> [Emphasis added]

[74] The Tribunal acknowledges that its role is not to assess the financial terms or the opportunity offered by one offer or another and that this choice is ultimately up to the shareholders, as stated by various securities commissions with respect to take-over bids:

> « The Commission has clearly stated in the past that it is not its role to assess the financial terms or desirability of a particular offer or transaction. That is the role of shareholders. [The] shareholders are capable of making the relevant choices. As stated by the Commission in *Canadian Jorex* [at 6]:
>
> > « we have every confidence that the shareholders of a target company will ultimately be quite able to decide for themselves, with the benefit of advice they receive from the target board and others, including their own advisers, whether or not to dispose of their

[49] *Idem*, paras. 116 and 120.

> shares and, if so, at what price and on what terms. And to us the public interest lies in allowing them to do just that. » »[50]

> « Canadian decisions in this field recognise that a fundamental right of ownership of shares is the right to sell the shares as the owner sees fit — a right not lightly to be thwarted. »[51]

[75] However, this freedom of choice for shareholders ends where abuse of capital markets in general begins.

[76] With respect to the regime for soliciting proxies in connection with an acquisition, it was recognized that the same concerns apply as in a take-over bid in terms of investor protection:

> « [36] When considering the exercise of its public interest jurisdiction, the Commission must have regard to "all of the facts, all of the policy consideration[s] at play, all of the underlying circumstances of the case, and all of the interests affected by the matter and the remedy sought" (Sterling Centrecorp, supra, at para. 212).
>
> [37] Further, as stated in Patheon, the Commission's public interest jurisdiction "allows us to intervene in a take-over bid even if there is no breach of the Act, the regulations or any policy statement". […]
>
> [38] A proxy solicitation in connection with a merger or acquisition transaction raises the same investor protection issues as a take-over bid.
>
> […]
>
> [59] Accordingly, the right of shareholders to revoke a proxy or other voting authority, such as the Support Agreements, in circumstances such as those before us, is fundamental to protecting the interests of those shareholders. In our view, the principles underlying the take-over bid and proxy solicitation provisions of the Act require that a shareholder be able to make an informed decision as to how to vote, and that a shareholder be able to change that decision, if the shareholder wishes to do so. The Support Agreements by their terms prevent a shareholder from choosing between competing proposals or transactions. Accordingly, in our view, the solicitation of the Support Agreements, and the terms of those agreements, undermine one of the animating principles of the Act.
>
> [60] In our view, the solicitation of the Support Agreements in these circumstances, and the voting of the Subject Shares under those

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50 *Baffinland Iron Mines Corp. (Re)*, (2010) 33 OSCB 11385, para. 34.

51 *Afexa Life Science inc. (Re),* 2011 ABASC 532, para. 36.

> agreements, is contrary to the public interest and engages our public interest jurisdiction under section 127 of the Act. »[52]
>
> [Emphasis added]

[77] In sum, all of these principles, as well as the objectives underlying the regulatory regime governing take-over bids, are considered in the analysis of the undersigned.

[78] In particular, they allow the undersigned to assess, in the public interest, the risks involved in a mini-tender that falls just below the prescribed threshold for qualification as a take-over bid, as the offer provides a mechanism for controlling a percentage of securities well above that threshold.

[79] The Tribunal's intervention in the public interest will also be required when conduct, or a transaction analyzed in its entirety, is abusive of shareholders and financial markets in general, taking into account all the facts, all the circumstances and interests at play, and the effect of the orders sought.

Application of the facts to the law

[80] It is therefore in this context that the undersigned must assess whether it is in the public interest to intervene with respect to the proposed offer as structured, designed and disseminated to the public, and especially whether the proposed transaction is abusive and coercive of investors and with regard to the efficiency of financial markets.

Elements considered

[81] In order to place this debate in context, the undersigned list the elements considered in assessing this case.

[82] First, the undersigned wish to point out that their analysis does not include any opportunity assessment of Mach's offer or Air Canada's arrangement.

[83] The analysis of the undersigned focuses on the structure, design and dissemination of Mach's offer in relation to concerns of public interest, investor protection and financial market efficiency.

[84] Second, this is an unprecedented offer in Canada. The parties were not able to submit previous similar cases to the Tribunal.

[85] Mini-tenders are a reality of financial markets, but Mach's is novel.

[86] As the OSC did long ago in *Cablecasting*[53] when faced with an unusual type of financial structure, the Tribunal should be more inclined to exercise its jurisdiction in the public interest.

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52 *GrowthWorks Canadian Funds Ltd. et al.*, 2011 ONSEC 17.

53 *Cablecasting Limited (Re)*, [1978] O.S.C.B. 37.

[87] The legislative and regulatory corpus in place in this area is complex. It strikes a balance that supports the efficient functioning of financial markets.

[88] This ever-evolving corpus may contain a legal gap or loophole that justifies the use of the Tribunal's jurisdiction in the public interest to prevent potential abuse.

[89] It is the Tribunal's mission to intervene in situations that are not provided for by the legislature, but that are contrary to the public interest.

[90] To conclude otherwise would mean that any new developments by market participants might never be the subject of an intervention in the public interest.

[91] Third, it is important to note that, in the case at hand, some of the concerns identified by the undersigned perhaps do not warrant the Tribunal's intervention on their own. It is the analysis of all the concerns that in itself creates an abusive situation.

[92] In *Canadian Tire,* it was noted that when looked at in isolation, some of the elements of the offer were not artificial. However, when viewed as a whole based on the objective sought, the artificial nature of the offer became apparent:

> «Counsel for the Billeses argued that there is nothing artificial about bidding $160.24 for 49% of the outstanding common shares of Tire. The offer is at a fixed price for a maximum number of shares. It in no way depends on a formula. There is real value of $160.24 for the shares that will be tendered and taken up under the offer, and an assumed value, according to the best advice of the Billeses' financial advisors, of $12.00 for their remaining common shares. Those are both real economic values, and there is no artificiality in the transaction.
>
> Looked at in isolation, the contention of counsel for the Billeses is perfectly true. But looked at in the context of the evidence, of what the Billeses wanted to accomplish, of how the formula was arrived at and the transference of the formula from the Notice under the Aldamar agreement into the Billeses' Lock-up agreements and then the movement from there to a fixed price under the Offer that would acomplish exactly the same economic goal, their argument takes on a completely different colouration.
> …
>
> The evidence, and it is clearly the reality, is irrefutable that the transaction was structured to accommodate the desire of the Billeses to sell their entire control position without triggering the coattail. The Offer is so structured to accomplish that and, in that sense, may fairly be characterized as artificial, in that it appears on its face to be a bid for only 49% of the outstanding common shares at a fixed price. That is simply not the reality of the situation, and the Billeses recognized it, their professional advisors recognized it, their fiscal gents recognized it, the Dealers recognized it, their professional advisors recognized it, and their fiscal agents recognized it. And perhaps most importantly, the marketplace recognized it and hence, the intervention of the Class A shareholders in this case.

> C. The Public Interest
>
> In these circumstances, we have no hesitation in saying that this transaction is contrary to the public interest, as that term is used in section 123 of the Act. When the public market is sold some $100 million of Class A non-voting shares consequent upon a reorganization that, among other things, provides takeover protection to those shares and the controlling shareholders, some three years later, devise a scheme in conjunction with those who wish to obtain control of the Corporation, to circumvent the coattail while, in effect, receiving the full price for their shares, regulatory intervention to stop an abusive transaction is called for. A transaction such as is proposed here is bound to have an effect on public confidence in the integrity of our capital markets and on public confidence in those who are the controllers of our major corporations. If abusive transactions such as the one in issue here, and this is as grossly abusive a transaction as the Commission has had before it in recent years, are allowed to proceed, confidence in our capital markets will inevitably suffer and individuals will be less willing to place funds in the equity markets. That can only have a deleterious effect on our capital markets and, in that sense, it is in the public interest that this Offer be cease traded along with the Billeses' tendering of their common shares to the Offer.»[54]
>
> [Emphasis added]

[93] In addition, the undersigned acknowledge that it is usually desirable for a shareholder to have multiple offers to choose from and to have the freedom to choose from among them. However, the shareholder still needs time to make an informed decision, and the information that is disseminated and transmitted must be not only complete, but also coherent, truthful and clear.

[94] Moreover, in the opinion of the undersigned, the shorter the timeframe, the more stringent the requirements for completeness, coherence and clarity of this information.

[95] Fourth, the undersigned do not support the argument made by Transat and Air Canada that Regulation 62-104 should apply in this case because the offer is designed to allow Mach to obtain over 20% of the voting rights for the outstanding Class B shares, despite the fact that only 19.9% of the securities can be retained at the end of the exercise.

[96] It is the view of the undersigned that this offer entails less than 20% of Transat securities and is therefore not subject to the requirements of Regulation 62-104. This does not mean that nothing governs transactions below 20%.

[97] Despite a lack of regulation for offers of less than 20%, the principles of investor, market and public interest protection that gave rise to the regulation may serve as a guide in the Tribunal’s interpretation.

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54 *Canadian Tire*, supra, note 33, pp. 86–88.

[98] Canadian securities authorities have already addressed this issue by publishing the following in September 1999 regarding mini-tenders, namely *CSA Staff Notice - 61-301 - Staff Guidance on the Practice of "Mini-Tenders"*[55]:

> « Staff will continue to monitor mini-tenders and in the event that a mini-tender is conducted in a manner or in circumstances which are prejudicial to the public interest, Staff will recommend to CSA members that appropriate action be taken which could include seeking a cease-trade order in respect of the mini-tender or the person or company making the mini-tender.»

[99] In that notice, CSA staff expressed concerns about a certain type of mini-tender, which was defined as an offer comprising “significantly less than 20% of the . . . shares” at a price below the market price. At the time, the CSA encouraged investors to take great caution in dealing with such an offer.

[100] Staff expressed concern that an investor might be confused by the nature of such an offer, which is very similar to a take-over bid. This confusion could be seen as abusive of capital markets. Staff therefore suggested that the offeror of such an offer should provide a minimum of information to solicited shareholders to prevent shareholders from misunderstanding the nature of the offer.

[101] At the hearing, Mach submitted that it had met those expectations in designing its offer and that those were the only requirements it had to meet.

[102] As noted above, a lack of regulation or opinion on a subject should not be construed as preventing a public interest issue from being raised.

[103] Lastly, there should be some restraint before intervening, especially if there is full, true and plain disclosure. Moreover, it is appropriate for the Tribunal to intervene in a situation that it clearly considers coercive and abusive.

[104] The public interest and protection considerations at the heart of the basis for securities regulation go beyond the private considerations of the parties to such an offer.

[105] It was therefore on the basis of these considerations that the undersigned conducted their analysis and identified their concerns, which they classify into different categories.

Time limits

[106] On Friday, August 2, 2019, at 3 p.m., the offer was announced in a press release, and the offer to purchase and related information were subsequently filed on SEDAR at 5:53 p.m.

[107] The period for shareholders to deposit their shares in response ends at 5 p.m. on August 13, 2019, or such earlier or later time or times and date or dates which may be established by Mach.

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[55] Weekly Newsletter: 1999-12-10, Vol. XXX, no. 49.

[108] Quebec shareholders therefore have 11 days, including 4 weekend days and 7 business days, to evaluate the offer. No additional time is provided in the event that Mach decides to change its offer.

[109] During this period, shareholders must review the documentation, seek legal or financial advice, and make an informed decision as to whether or not to deposit their shares under this offer. They must ensure that this decision is made within that timeframe.

[110] Counsel for Mach argued before the Tribunal that they could not do this any other way given that the Air Canada arrangement was only announced publicly on June 27, 2019, and that the meeting regarding that arrangement was scheduled for August 23 at 10 a.m. They are also convinced that the information provided is easy to understand and that this information only adds to the Air Canada arrangement, of which they have been aware since the end of June.

[111] These constraints cannot be borne by the affected shareholders by chipping away at the minimum time required for them to become informed of the offer and make a free and informed decision.

[112] Regulation 62-104 reviewed in 2016 stipulates that the minimum time limit for deposit in a take-over bid is at least 105 days and 35 days in some cases. The offeror cannot take up any securities deposited in response to the bid before the expiry of the 35 days from the date of the offer.

[113] Although this regulation does not apply in the case at hand, the undersigned note that it does apply to any offer involving more than 20% of an issuer's securities. In that sense, the legislature's stated intent is indicative here of the time that is typically required for an investor to make a free and informed decision in the context of a take-over bid.

[114] To shed light on the issue of time limit, the Tribunal also briefly examined U.S. regulations and found that they regulated certain mini-tenders, particularly those involving 5% or less of an issuer's securities, and that pursuant to those regulations, a minimum of 20 days was considered sufficient.[56]

[115] However, in a regulated bid context, the decision that a shareholder must make pursuant to an offer is exactly the same as that which a shareholder must make in response to Mach's offer, that is, whether or not to deposit its, his or her shares.

[116] In the case at hand, the shareholder must not only examine Mach's offer in making a decision, but also understand that it entails a solicitation of proxies and the assignment of a right of dissent, all in interaction with the Air Canada arrangement, which adds to the complexity.

[117] By choosing to extend its offer to all Class B shareholders, Mach was also targeting, among others, retail shareholders, as mentioned in its notes and authorities.[57]

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56 Section 14(d) of the *Securities Exchange Act of 1934*, Regulation 14D.

57 Mach notes and authorities, para. 73.

[118] In such circumstances, this reinforces the need for an adequate time limit to allow such shareholders to receive documentation and make an informed decision in such a complex environment.

[119] In the view of the undersigned, and although the Act does not specify a time limit within which the investor can make an informed decision, this cannot detract from the application of the basic concept of public interest provided for in securities law to the effect that the offeror of an offer must allow shareholders sufficient time to make an informed decision.

[120] In the offer at hand, even though Mach gives shareholders an opportunity to subsequently withdraw their deposit, this cannot be a valid reason for imposing such a short time within which to make a decision.

[121] In the recent decision in *Central GoldTrust (Trustees of) (Re)*,[58] the OSC notably determined that the time period was insufficient to allow unitholders to make a reasoned judgment. In exercising its public interest jurisdiction, however, it ordered amendments to the disclosure and granted them an additional 15 days to review the documents:

> « 54 Further, the Applicants submitted that the timing of the November 4th Variation did not allow adequate time for unitholders to receive the respective notices of variation in the mail, review and make a reasoned judgment concerning the changes or enough time to instruct their brokers to withdraw their units from the Sprott Bids […]
>
> 65 The November 4th Variation did not contain adequate disclosure about the consequences to unitholders of the amendments made therein. It is not in the public interest that investors be required to make a choice whether or not to tender to the Sprott Bids without further disclosure. We are therefore exercising our public interest jurisdiction to require adequate disclosure if the Sprott Bids are to proceed. As a result, we issued the Order as set out in paragraph 6 of these reasons […]
>
> 66 We also ordered that Sprott shall not exercise any rights in relation to the Letters of Transmittal before the expiration of 15 days from the date on which Sprott issues the notice(s) of change in information required by our Order [...]
>
> 67 In our view, an additional 15 days will provide investors with adequate time to review the new disclosure and make an informed decision whether they wish to tender to the Sprott Bids or exercise their withdrawal rights, as the case may be. »[59]
>
> [Emphasis added]

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58 *Central GoldTrust (Trustees of) (Re),* 2015 LNONOSC 733.

59 *Idem*.

[122] In *Mithras Management Ltd. (Re)*, the OSC pointed out that the purpose of the take-over bid provisions is to ensure the fair treatment of shareholders and to give investors a reasonable amount of time to consider the terms of an offer and to provide them with adequate information for making an informed decision as to whether they accept or reject the offer made to them:

> « In these circumstances, we have no hesitation in adopting the purposive principles of interpretation advanced by Staff Counsel. It should be clear to all that the underlying purpose of Part XIX of the Act is the protection of the integrity of the capital markets in which take-over bids are made, and in particular the protection of investors who are solicited in the course of a take-over bid. Those purposes are carried out through provisions which, among other things, attempt to ensure that equal treatment is accorded to all offerees in a bid, that offerees have a reasonable time within which to consider the terms of a bid, and that adequate information is available to offerees to allow them to make a reasoned decision as to whether to accept or reject a bid. These provisions exist to protect investors, of course, but their over-arching purpose is the protection of the integrity of the capital markets in which those investors have placed their money -- and their trust. »[60]
>
> [Emphasis added]

[123] In the opinion of the undersigned, the time limit of Mach's offer is coercive in that it is too short and forces shareholders to act quickly for fear of losing, among other things, an "opportunity" presented to them in certain documents, which is the "certainty of value" and a significant premium over the competing transaction.

[124] It puts pressure on shareholders to act quickly for fear of losing something. On the other end, meanwhile, Mach retains several ways out for itself, while reserving the right to nonetheless use the voting rights and not take up shares after exercising those rights, if applicable.

[125] It is the opinion of the undersigned that this sort of practice cannot be tolerated in the public interest. This time limit is also abusive and coercive in view of the important interests at stake.

[126] Under the circumstances, the undersigned consider that the time limit of 11 days given to shareholders by Mach to deposit shares is insufficient to allow free and informed decision-making.

Structure of the offer

- **Overall**

[127] An analysis of the offer's structure reveals that Mach will be able to obtain voting, dissent and distribution rights in excess of 19.5% of Transat shares, rights which it will be

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60 *Mithras Management Ltd. (Re)*, (1990), 13 O.S.C.B. 1600, p. 17.

able to exercise before and during the meeting scheduled for August 23 at 10 a.m. It would even be able to collect 100% of the votes in Class B shares, but ultimately pay for only 19.5% of the shares attached to those votes.

[128] Through the various terms and conditions at Mach's sole discretion, the latter could also end up not paying for any of these shares, while having exercised the voting rights attached thereto. This creates a potential leverage effect on control over the target of the offer.

[129] On the face of the offer documents and the accompanying documents, Mach clearly states that the primary purpose of the offer is to have the arrangement rejected during the vote on August 23, 2019.

[130] This offer is structured to avoid the application of the legislative provisions applicable to bids by covering only 19.5% of securities, thereby depriving shareholders of the protections afforded by this regulation.

[131] However, beyond that circumvention, this offer makes it possible to collect, by August 13, up to 100% of the voting rights of Class B shareholders eligible to vote on Air Canada's arrangement on the morning of August 23, even though at the expiration of the mini-tender on August 23 at 5 p.m., it could take up and pay for only up to 19.5% of the shares, returning the excess shares to their owners. Worse still, it could at its discretion not take up any shares if one of the conditions materialized.

[132] Because of the proceedings brought before the Tribunal by Transat, Mach is already in a position where it can invoke the satisfaction of a condition to its offer. According to the wording of its offer, Mach can at any time invoke a satisfied condition to withdraw its offer, regardless of the circumstances that gave rise to it.

[133] In exchange for participating in the offer, Mach offers shareholders the option to receive $14 per share. This will be determined after the vote on the arrangement. If the number of shares deposited exceeds 19.5% and the conditions of the offer are satisfied, the shares will be purchased on a pro-rated basis, the whole payable within a short time after the closing of the offer.

[134] In addition, due to the structure of the offer, the consideration offered to shareholders is uncertain until a press release from Mach informs them of the number of shares deposited and whether they will receive $14 or an amount that has been diluted because the contributions exceed 19.5%.

[135] Without knowing what they will receive for their shares, all shareholders who deposit their shares risk having their voting and dissent rights exercised by Mach's proxy.

[136] Despite Mach's assertion that a shareholder can withdraw the deposit of their shares at any time through a simple procedure, Mach may find itself exercising the voting rights of a much higher percentage of shareholders than the 19.5% for which it has agreed to pay, in order to defeat a competing offer that was made in accordance with the rules set out in Regulation 62-104 and with the guarantees provided for in those rules.

[137] In addition, Mach could also exercise the voting and dissent rights attached to the deposited shares, even if it ultimately decides to unilaterally withdraw the offer if it deems that a condition has not been satisfied.[61]

[138] Many of the conditions attached to this offer are so broad that they actually become purely at Mach's sole discretion.

[139] Good faith must be presumed. Nonetheless, the conditions mean that, ultimately, Mach can legally withdraw from this offer at its discretion, even after it has exercised the voting rights to defeat the arrangement.

[140] In addition, and based on the conditions of the offer, Mach reserves a broad right to change the mini-tender at any time and even extend it without allowing shareholders time to respond.

- **Right of dissent**

[141] In accordance with the conditions of the offer, shareholders who deposit their shares assign to Mach their right of dissent under the arrangement. According to Air Canada's bid circular, this right must be exercised before August 21.

[142] This assignment of the right of dissent is important to Mach for its stated objective of defeating the Air Canada transaction, as the arrangement expressly provides that Air Canada may terminate it if dissent rights are validly exercised in excess of 10% of shares.

[143] However, for those shareholders who deposited their shares, before they even know whether or not they will be purchased under the offer, Mach could exercise the dissent rights of those shareholders, which could lead to irreparable consequences. The exercise or non-exercise of that right creates a consequence for that shareholder.

- **Conclusions on the structure**

[144] In the opinion of the undersigned, and despite the fact that Mach's offer is a mini-tender for only 19.5% of Transat securities, which is permitted by law and not governed by the requirements of Regulation 62-104, it remains that this offer incidentally allows Mach to obtain a much larger percentage of votes against its competitor's arrangement without offering these holders the same guarantees to which they would have been entitled had the offer been based on the actual percentage of securities that it will control at the time of the vote.

[145] It will then have to return any securities above the 19.5% without paying the promised premium. It also leaves itself the discretion to not take up any of the shares it voted, if any of the conditions in Section 5 are satisfied.

[146] By virtue of its minimum deposit condition, if the shares deposited are below the 19.5% threshold, it can withdraw its offer and not take up any shares.

[147] At the hearing, Mach mentioned that it could waive the minimum deposit condition.

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61 Exhibit P-3, supra, note 10, p. 2, para. 6.

[148] This structure puts undue pressure on shareholders to choose between two offers, one with an uncertain price and an uncertain take-up, with the associated voting rights having been exercised, and the other with a certain price, but at risk of being defeated by the other offer. This process is opaque and lacks transparency for shareholders.

[149] Moreover, the use of the mini-tender to achieve those purposes is unfair to the shareholders who cannot participate, since the offer is open only to Class B shareholders with voting rights at the next special meeting.

[150] Under this structure, the more holders that participate in the mini-tender above the 19.5% threshold, the less advantageous the offer becomes for these shareholders and the more likely it is for the arrangement to be defeated.

[151] In such a situation, the only person who benefits is the offeror, who has more votes to derail the arrangement, while it could pay only proportionately for the voted shares or withdraw completely from its offer after the vote and not take up any of the shares.

[152] In the OSC decision in *Ivanhoé III* regarding coercive mini-tenders, the OSC states as follows:

> « Analysis of Issues
>
> … The Bid would have given Ivanhoe control of Cambridge, but leaving outstanding a very large minority position. The Bid was made at a price below the value range for the Shares established by Morgan Stanley in its valuation report.
>
> In its directors' circular, the Cambridge board made the following statement.
>
> "The Offer is "partial bid". A partial bid structure is inherently coercive because it forces shareholders to make a decision as to whether to accept an offer (and in respect of how many shares), reject such offer, sell into the market or maintain their position without knowing whether and to what extent other shareholders will accept such offer and without knowing the price at which the shares will settle after such offer. A shareholder may feel compelled to deposit to a takeover bid which the shareholder considers inadequate, out of a concern that in failing to do so, the shareholder may be left with illiquid or minority discounted shares. Information about tender and post-bid trading price is obviously material to a shareholder's investment decision since the extent to which any one shareholder can have its shares purchased at the Offer price, as opposed to sold in the market at the post-bid settled price, depends on the extent to which other shareholders tender their Common Shares to the Offer."
>
> In general, we agree with this statement.
>
> In our view, the Bid was coercive since it put pressure on minority shareholders to dispose of whatever shares they could before being

> locked into a minority position. There was no assurance whatsoever that Ivanhoe would ever bid for the remaining minority shares.
>
> The evidence was that, because of the already large institutional shareholdings in Cambridge, the market for Shares was a relatively illiquid one. In our view, if the Bid is successful, the market for the shares will likely become an even less liquid one.
>
> Accordingly, what the Commission described in Regal (see below) as the "fear factor" was in our view likely to exist. »[62]
>
> [Emphasis added]

[153] In the opinion of the undersigned, the offer made to shareholders with a right to vote on the arrangement is designed to create firm obligations only for the shareholders and is not very restrictive for the offeror, which can change all of its essential parameters at its sole discretion.

[154] The offer even provides that from the moment the shares are deposited, the shareholder releases Mach from all liability:

> irrevocably and unconditionally releases, acquits and forever discharges . . . Mach and Group Mach Inc. . . . of and from all actions, causes of actions, suits, claims and demands whatsoever, whether presently known or unknown, which the depositing Shareholder ever had, now has or may hereafter have against such entities and persons, or any of them, for or by reason of, or in any way arising out of any cause, matter or thing, by reason of or in connection with the undersigned having been a holder of Shares, Convertible Securities or other securities of Transat.
>
> [Emphasis added]

[155] Only the offeror's good faith can guarantee the success of the transaction. Here, this good faith was underscored by counsel for Mach a number of times during the hearing.

[156] At the hearing, it wanted to reassure the Tribunal of its ability to fund its offer by filing an exhibit to that effect. This exhibit did not relate directly to Mach's financial capacity.

[157] However, in the view of the undersigned, if proof of funding were to be provided, it would instead relate to the shareholders covered by its offer.

[158] Although this is disclosed in the information provided to the holders and the provisions of the Act are not technically breached, in our opinion, the imbalance is such

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62 *Ivanhoe III Inc. (Re)*, 1999 LNONOSC 84.

that the whole creates a situation that the Tribunal considers abusive of shareholders and of the effective functioning of capital markets.

[159] It is the view of the undersigned that such a course of action sets a dangerous precedent in securities as to the manner of opposing a take-over bid, or a plan of arrangement, to the detriment of shareholders and public confidence in financial markets.

[160] On the face of the offer documents, Mach clearly states that the primary purpose of the offer is to have the arrangement rejected during the vote on August 23, 2019. In addition, Mach offers shareholders what it calls a premium, that is, $14 per share, which is a sort of lure to enable it to achieve its ends.[63]

[161] In the opinion of the undersigned and despite the fact that there is no specific provision in the regulation preventing this type of structure, the latter, consisting of various interrelated elements that all tie into each other, raises public interest issues that must be addressed by the decision-makers, including the Tribunal.

Disclosure

[162] As part of its analysis, the undersigned had to review Mach's disclosure of the offer in the various documents released publicly and communicated to its shareholders, including the mini-tender,[64] the letter of transmittal[65] and the press release.

[163] As previously mentioned[66] by the undersigned, it is important, in the context of a bid, that the information disseminated and transmitted be not only complete, but also coherent, truthful and clear. Moreover, in the opinion of the undersigned, the shorter the timeframe, the more stringent the requirements for completeness, coherence and clarity of this information.

[164] For securities, it is well known that the information disseminated as part of securities transactions must be specific and not misleading. In this regard, the OSC decision in *Biovail* states as follows:

> « [379] Information that is publicly disclosed must be accurate and not misleading or untrue in order to accomplish the goals of our securities regulatory regime to protect investors from unfair or improper practices and to foster fair and efficient capital markets and confidence in those markets *(Re Rex Diamond, supra,* at para. 205).
>
> The Commission concluded in *Re Standard Trustco* that the issue of a misleading news release is itself injurious to capital markets.[67] »

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63 H.E.R.O., supra, note 44.
64 Exhibit P-3, supra, note 10.
65 Exhibit P-4.
66 Supra, para. [93].
67 Supra, note 45.

[165] In *GrowthWorks Canadian Funds Ltd. et al*.,[68] the OSC concluded that GrowthWorks should not have the right to exercise the voting rights attached to the shares because (i) the right to do so was obtained based on the information contained in the circular, which may not be adequate, at this stage of the process, to permit VenGrowth shareholders to make an informed decision, and (ii) the voting rights were obtained in connection with a solicitation that undermined an animating principle of the Act related to take-over bids and proxy contests that is intended for the protection of shareholders.

[166] In these circumstances, the OSC concluded that GrowthWorks should not be permitted to exercise the voting rights attached to the shares in question and to influence or determine the outcome of the VenGrowth shareholder vote.[69]

[167] In the situation at hand, where the time limit for accepting the offer is very short,[70] the press release announcing the offer to the public is of particular importance and is the first document to be released as part of the Mach offer.[71]

[168] At the time of the press release on Friday, August 2, at 3:00 p.m., Mach knew that the deadlines for its offer were very short for shareholders to deposit shares.

[169] The title of the press release is as follows:

> "Mach Announces $14.00 Per Share Offer to Purchase Class B Voting Shares of Transat"

[170] The press release goes on to state that the offer is for at least 6,900,000 voting shares, representing approximately 19.5% of Class B shares.

[171] Under the heading "Reasons to Accept the Offer," the press release adds that the offer "generates near term liquidity" and that if the conditions are met or waived, "Shareholders of Deposited Shares will receive the Purchase Price within three business days following August 23, 2019."[72]

[172] The release was followed 2 hours and 53 minutes later by the filing of the offer documents on SEDAR.

[173] In the offer filed on SEDAR, Mach states that:

> The Purpose of the Offer is for Mach to vote the Deposited Shares against the Proposed Arrangement and to purchase the Shares at a significant Purchase Price premium in cash no later than within three business days after August 23, 2019, subject to the terms of the Offer.[73]
>
> [Emphasis added]

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68 *GrowthWorks Canadian Funds Ltd. et al*., 2011 ONSEC 17.
69 *Idem*, para. 67.
70 *Idem*, para. 95.
71 Exhibit P-1, supra, note 1.
72 Exhibit P-1, supra, note 1.
73 *Idem*, p. 2.

[174] Mach also states:

> The Offer provides holders of Shares with certainty of value and an opportunity to receive liquidity at a significant cash premium within three Business Days after the Expiry Date of August 23, 2019, subject to terms and conditions of the Offer.[74]
>
> [Emphasis added]

[175] However, given that Mach's offer is intended for all Transat Class B shareholders registered before July 17, 2019, it is possible that the 19.5% threshold would be exceeded, and that a pro-rated redistribution of shares would be made. As a result, this premium may only be paid to shareholders on a limited portion of the shares they deposit.[75]

[176] The letter of transmittal attached to the offer provides that the holder "irrevocably constitutes and appoints effective at and after the time . . . that the Deposited Shares are tendered . . . each director and officer of [Mach] . . . as the true and lawful agent, attorney, attorney-in-fact and proxy of the holder of the Deposited Shares."

[177] This letter of transmittal describes the power of attorney as irrevocable on two occasions subject to the conditions set out in the offer and once unconditionally.

[178] It provides that the shareholder agrees that "no subsequent authority, whether as agent, attorney, attorney-in-fact, proxy or otherwise will be granted with respect to the Deposited Shares."[76]

[179] However, Mach's circular and mini-tender state that proxies can be revoked by telephone or notice of revocation,[77] which is contrary to the letter that accompanies it.

[180] As a result, Mach's documentation is likely to cause confusion as to revocability for shareholders who are pressured by the very short time limits in which to make a decision.

[181] Such inaccuracies in disclosure may seem innocuous, but in a context of an offer made to the public within such tight time limits as in this case, they risk misleading a shareholder seeking a certain return, even though the premium offered as certainty of value is not so certain. This contributes to the abusive nature of the offer.

Conclusion

[182] In light of the above, the undersigned consider Mach's offer as structured, designed and disseminated to shareholders and capital markets to be an abusive offer contrary to the public interest in the areas of concern we have expressed.

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74 Exhibit P-3, supra, note 10, p. 8.
75 *Idem*, p. 7.
76 Exhibit P-4, Letter of Transmittal, p. 5.
77 Exhibit P-2, Mach Circular, pp. 6 and 8, and Exhibit P-3, supra, note 10, p. 17, s. 4.

[183] In the case at hand, the short time limits allowed for informed decision-making, the structure of the offer as a whole and the lack of clarity of its disclosure mean that the offer is abusive and coercive toward shareholders and financial markets.

Question 2: If so, must the Tribunal make the cease orders sought?

[184] Transat is asking the Tribunal to make the following orders under section 265 of the Act:

> [Translation]
>
> **PROHIBIT** any securities transaction in respect of the Group Mach Acquisition Inc. offer to purchase 6,900,000 Class B voting shares of Transat A.T. Inc. as at August 2, 2019 (the "Offer to Purchase").
>
> **PROHIBIT** any transaction involving Transat securities by Group Mach Acquisition Inc. or Group Mach Inc.
>
> **PROHIBIT** Group Mach Acquisition Inc. and Group Mach Inc., through a director or officer of either entity, from using proxies and mandates obtained from any shareholder of Transat A.T. Inc. who has deposited its, his or her shares pursuant to the Offer to Purchase.

[185] The AMF supports the first and third conclusions of this application.

[186] The undersigned believe that, under the circumstances and in view of the short period between the offer, the response time, this decision and the impending special meeting, no other action could have been taken to remedy the abuse observed. Moreover, no other proposal that could address the concerns was offered to the Tribunal.

[187] The Tribunal was not in a position where it could have ordered an amendment to the disclosure or to the conditions of the offer, as the shareholders would not have learned of it within a reasonable time to make an informed decision by the August 13 deadline for deposits under Mach's offer and the date of the special meeting on August 23, 2019, for votes on Air Canada's plan.

[188] Moreover, while prohibiting transactions in connection with an offer to purchase is a far-reaching measure for the person concerned, the fact remains that, in the face of clear abuse of capital markets, quick and effective intervention is required to prevent such abuse.

[189] However, despite the fact that the measure ordered results in the removal of an offer from the market, in a context where abuse is observed, the effective functioning of capital markets far outweighs the vested interests of investors who may wish to take advantage of that offer.[78] Such an offer hampers the efficiency of markets and discredits them. The Tribunal has no choice but to intervene to stop such abuse.

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[78] Supra, note 25.

[190] With respect to the second conclusion proposed by Transat, counsel for Transat stated at the hearing that this was an alternative to the first conclusion. The undersigned do not consider it appropriate to issue such a prohibition, as the first conclusion is sufficient to achieve the desired objective.

[191] Under the circumstances, given that the undersigned determined clear abuse and in light of its impact on capital markets, prohibiting transactions in connection with Mach's offer is justified in the public interest.

[192] In a context where proxy solicitations raise the same issues as those of offers for purchase,[79] Mach should also be prohibited from benefiting from proxies obtained under this offer in order to prevent it from exercising the voting rights obtained under conditions that undermine the effective functioning of capital markets.

[193] This order regarding proxies applies only to those received by Mach following the deposit of shares pursuant to its offer. Our order in no way applies to any other proxies obtained by Mach outside of its mini-tender.

Publication of decision

[194] In light of Transat's ongoing disclosure obligations as a reporting issuer and the fact that its shares are currently trading on the Toronto Stock Exchange, it should be expected that the publication of this decision will follow Transat's press release.

[195] Therefore, a publication ban should be issued for this decision until Transat's press release is issued, with the understanding that it will be issued promptly by the latter before the markets open on August 12, 2019.

DISPOSITION

The Financial Markets Administrative Tribunal, pursuant to sections 93, 115.8 and 115.13 of the *Act respecting the regulation of the financial sector*[80] and section 265 of the *Securities Act*[81]:

ALLOWS in part the application filed by Transat A.T. Inc.;

PROHIBITS any securities transaction in respect of the Group Mach Acquisition Inc. offer to purchase 6,900,000 Class B voting shares of Transat A.T. Inc. as at August 2, 2019 (the "offer to purchase");

PROHIBITS Group Mach Acquisition Inc. and Group Mach Inc., through a director or officer of either entity, from using proxies and mandates obtained from any shareholder of Transat A.T. Inc. who has deposited its, his, or her shares pursuant to the offer to purchase;

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79 *GrowthWorks Canadian Funds Ltd. et al.*, supra, note 68.
80 CQLR, c. E-6.1.
81 CQLR, c. V-1.1.

ORDERS the non-publication, non-dissemination and non-disclosure of this decision until a press release is issued by Transat A.T. Inc., with the understanding that it will be issued promptly by the latter before markets open on August 12, 2019.

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Mtre. Lise Girard, Administrative Judge

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Mtre. Elyse Turgeon, Administrative Judge

DISSENTING OPINION OF MTRE. JEAN-PIERRE CRISTEL

OVERVIEW

The parties and the Tribunal

[1] Transat A.T. Inc. ("Transat") is a major international tourism company specializing in vacation travel. It is headquartered in Montréal, and its Class A variable voting shares and Class B voting shares are traded on the Toronto Stock Exchange under the symbol TRZ. Transat is an issuer subject to the *Securities Act.*[82]

[2] Group Mach Inc. is a private corporation and a major developer and property owner in Quebec.

[3] Group Mach Acquisition Inc. ("Mach") is a holding company that invests in a number of sectors. Mach is a wholly owned subsidiary of Group Mach Inc.

[4] Air Canada is Canada's largest air carrier. Its head office is in Montréal and its shares are traded on the Toronto Stock Exchange under the symbol AC. Air Canada is an issuer subject to the *Securities Act.*

[5] The Autorité des marchés financiers ("AMF") is the body responsible for enforcing the *Securities Act*. The AMF exercises the functions and powers set out in section 7 of the *Act respecting the regulation of the financial sector*,[83] in the manner provided for in section 8 of that Act.

[6] The Financial Markets Administrative Tribunal ("Tribunal") is established under section 92 of the *Act respecting the regulation of the financial sector*. The function of the Tribunal is to take decisions with respect to matters brought, in particular, under the *Securities Act*. The Tribunal exercises the discretion conferred on it on the basis of the public interest.

Nature of application

[7] In the case at hand, the Tribunal must make a determination on an application brought by Transat to urgently obtain cease orders in relation to a conditional mini-tender launched by Mach on August 2, 2019, to purchase 6,900,000 Class B voting shares of Transat ("Mach's Offer"), or approximately 19.5% of the issued and outstanding shares, at a price of $14 in cash per share. According to Mach's Offer, holders of Transat Class B shares have until 5 p.m. (Montréal time) on August 13, 2019, to deposit their shares.

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82 CQLR, c. V-1.1.
83 CQLR, c. E-6.1.

[8] Mach's Offer arises out of a final arrangement agreement between Transat and Air Canada ("Arrangement") on June 27, 2019, which provides for a conditional take-over bid ("Air Canada CTB") to purchase all of Transat's issued and outstanding shares at a price of $13 cash per share. A special meeting of Transat shareholders is scheduled for August 23, 2019, at 10 a.m. (Montréal time) to vote on the Arrangement.

Position of the parties

Transat (applicant)

[9] Transat alleges that Mach's Offer is [translation] "highly abusive, misleading and coercive" and is a [translation] "scheme" designed to defeat the Arrangement between Transat and Air Canada, thereby derailing the Air Canada CTB for Transat.

[10] Transat alleges that Mach's Offer is detrimental to Transat shareholders who, between August 2, 2019 (launch date) and August 13, 2019 (deadline for depositing shares), have only 11 calendar days, or 6 business days, to evaluate it.

[11] Transat points out that Mach's Offer, unlike Air Canada's CTB, is not for the purchase of 100% Transat shares, but a maximum of 19.9% Transat Class B shares.

[12] Transat states that Mach's Offer also aims to obtain rights related to all Transat shares to be deposited, including the right to vote at Transat's special shareholder meeting scheduled for August 23, 2019. Transat stresses that the number of shares deposited under Mach's Offer could exceed 19.9% of all Transat shares and that, therefore, Mach could exercise rights related to more than 19.9% of shares, which is, in its opinion, abusive.

[13] Transat asserts that Mach's Offer offers no guarantee or certainty that Mach will even purchase a single deposited Transat share under the terms of its offer to purchase and that, consequently, Mach could potentially obtain rights to the deposited shares for free.

[14] Transat argues that in order to maintain investor confidence and market integrity, it is in the public interest that the Tribunal urgently exercise its discretion under section 265 of the *Securities Act* and section 93 of *Act respecting the regulation of the financial sector* and make the following orders:

- Prohibit any securities transaction in respect of the Group Mach Acquisition Inc. Offer to purchase 6,900,000 Class B voting shares of Transat A.T. Inc. as at August 2, 2019;
- Prohibit any transaction involving Transat A.T. Inc. securities by Group Mach Acquisition Inc. or Group Mach Inc.
- Prohibit Group Mach Acquisition Inc. and Group Mach Inc., through a director or officer of either entity, from using proxies and mandates obtained from any shareholder of Transat A.T. Inc. who has deposited his shares pursuant to the Group Mach Acquisition Inc. Offer to Purchase.

Mach and Group Mach Inc. (respondents)

[15] Mach alleges that [translation] “Transat’s application is clearly a groundless defensive tactic” and argues that to agree to the conclusions sought by Transat [translation] “would be contrary to the public interest, would undermine the integrity of financial markets, and would be abusive and coercive of Transat shareholders by depriving them of three fundamental rights,” namely, [translation] “in this case, (i) the right to dispose of their shares on the conditions they deem appropriate, (ii) the right to exercise the voting rights attached to their shares and to give proxy as they see fit, and (iii) the right of dissent in a crucial business transaction.”

[16] March states that Mach’s Offer [translation] “does not violate securities legislation/regulations and is therefore perfectly legal.” In this regard, Mach notes that Mach’s Offer complies with *CSA Staff Notice - 61-301 - Staff Guidance on the Practice of “Mini-Tenders."*

[17] Mach asserts that the conditions of Mach’s Offer [translation] “are clearly disclosed” and stresses that its offer is conditional, as is Air Canada’s CTB. If the conditions described in these offers to purchase do not materialize, their offerors can terminate them.

[18] In this regard, Mach points out that Air Canada’s CTB offers no guarantee or certainty that Air Canada will even purchase a single Transat share deposited under the terms of its proposal because all it would take for Air Canada to decide to terminate its offer is for the regulatory authorities, including the Competition Bureau, to refuse to allow Air Canada to acquire Transat or for 10% of Transat shareholders to express their dissent.

[19] Mach argues that Mach’s Offer is beneficial to Transat shareholders because (i) it explicitly aims to prevent Air Canada’s acquisition of Transat at $13 per share since, according to Mach, it is below Transat’s actual value, (ii) while offering to purchase 6,900,000 Class B voting shares of Transat at $14 per share.

[20] Mach argues that the Tribunal [translation] “should not interfere or substitute its own view for the decision of the shareholders” of Transat and deprive them of the right [translation] “to dispose of their shares” by accepting Mach’s Offer.

[21] Mach is asking the Tribunal to dismiss the conclusions sought in Transat’s application.

Air Canada (impleaded party)

[22] Air Canada contends that Mach’s Offer constitutes a [translation] “take-over bid” within the meaning of *Regulation 62-104 respecting Take-Over Bids and Issuer Bids*.[84]

[23] Air Canada states that Mach’s Offer was designed to deliberately avoid the rules of this regulation, in particular the obligations described in sections 2.29, 2.29.1(c) and 2.31.1 and items 12, 15 and 17, which are intended to protect shareholders.

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84 Chapter V-1.1, r. 35.

[24] Air Canada notes the particular structure of Mach's Offer and indicates that its stated purpose is to derail the Air Canada CTB for Transat.

[25] Air Canada submits that if the Tribunal does not prohibit Mach's Offer, a precedent will be set that will have a significant potential impact on the market.

[26] Air Canada supports the conclusions sought in Transat's application.

Autorité des marchés financiers (impleaded party)

[27] The AMF does not consider Mach's Offer a [translation] "take-over bid" within the meaning of *Regulation 62-104 respecting Take-Over Bids and Issuer Bids*.[85]

[28] The AMF informed the Tribunal of its [translation] "concerns" with certain features of Mach's Offer.

[29] In this regard, the AMF points out that [translation] "Mach could exercise the voting rights attached to all deposited shares, regardless of the number of shares it could acquire at the end of the transaction."

[30] The AMF also indicates a [translation] "lack of clarity" on some parameters of Mach's Offer and the [translation] "possibility of losing the right of dissent for participating shareholders."

[31] The AMF also notes that [translation] "the proxies remain valid as long as they are not revoked by the shareholders" of Transat who deposit their shares pursuant to Mach's Offer.

[32] Lastly, the AMF maintains that the timeline related to Mach's Offer does not allow Transat shareholders to sufficiently evaluate this offer.

[33] The AMF indicates that the Tribunal can, in the public interest, intervene in situations that are inconsistent with investor protection or in transactions that constitute a flagrant abuse of the market, even where no law or regulation has been breached.

[34] The AMF argues that its concerns about Mach's Offer are sufficient to warrant intervention by the Tribunal and states that the latter should issue orders #1 and #3 sought by Transat, namely:

- Prohibit any securities transaction in respect of the Group Mach Acquisition Inc. Offer to purchase 6,900,000 Class B voting shares of Transat A.T. Inc. as at August 2, 2019;
- Prohibit Group Mach Acquisition Inc. and Group Mach Inc., through a director or officer of either entity, from using proxies and mandates obtained from any shareholder of Transat A.T. Inc. who has deposited its, his or her shares pursuant to the Group Mach Acquisition Inc. Offer to Purchase.

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85 Chapter V-1.1, r. 35.

Question in dispute

[35] Should the Tribunal issue, in the public interest, the cease orders sought in Transat's application?

Conclusion

[36] For the reasons set out in the following analysis, the undersigned administrative judge answers this question in the negative and therefore dismisses, in the public interest, the conclusions sought in Transat's application.

ANALYSIS

[37] In the case at hand, the Tribunal must make a determination on an application brought by Transat to urgently obtain cease orders in relation to a conditional mini-tender launched by Mach on August 2, 2019, to purchase 6,900,000 Class B voting shares of Transat ("Mach's Offer"), or approximately 19.5% of the issued and outstanding shares, at a price of $14 in cash per share.

[38] Mach's Offer arises out of a final arrangement agreement between Transat and Air Canada ("Arrangement") on June 27, 2019, which provides for a conditional take-over bid ("Air Canada CTB") to purchase all of Transat's issued and outstanding shares at a price of $13 cash per share. A special meeting of Transat shareholders is scheduled for August 23, 2019, at 10 a.m. (Montréal time) to vote on the Arrangement.

[39] According to Mach's Offer, holders of Transat Class B shares have until 5 p.m. (Montréal time) on August 13, 2019, to deposit their shares.

[40] The Tribunal held a hearing on Thursday, August 8, 2019, and given the close deadline of Tuesday, August 13, 2019, provided for in Mach's Offer, the Tribunal had little time to make a very important decision.

[41] Since stock markets were opening on the morning of Monday, August 12, 2019, the Tribunal decided that it was essential to issue a decision, with reasons, on Sunday, August 11, 2019.

[42] The Tribunal must answer the following question in dispute: should it issue, in the public interest, the cease orders sought in Transat's application?

[43] The undersigned administrative judge answers this question in the negative.

[44] To fully explain this decision, the cease orders sought by Transat should first be reiterated. They are as follows:

- Prohibit any securities transaction in respect of the Group Mach Acquisition Inc. Offer to purchase 6,900,000 Class B voting shares of Transat A.T. Inc. as at August 2, 2019;
- Prohibit any transaction involving Transat A.T. Inc. securities by Group Mach Acquisition Inc. or Group Mach Inc.

- Prohibit Group Mach Acquisition Inc. and Group Mach Inc., through a director or officer of either entity, from using proxies and mandates obtained from any shareholder of Transat A.T. Inc. who has deposited its, his or her shares pursuant to the Group Mach Acquisition Inc. Offer to Purchase.

[45] What must then be emphasized is that, if these cease orders are made by the Tribunal, they will have significant consequences at many levels, in particular:

- for the offeror of Mach's Offer, that is, Group Mach Acquisition Inc. ("Mach"), and for the company of which it is a wholly owned subsidiary, that is, Group Mach Inc.;
- for Transat shareholders who own Class B shares, especially those who have already elected to deposit their shares in response to Mach's Offer, initiated on August 2, 2019, and for those who are currently assessing the advisability of doing so by August 13, 2019;
- the outcome of Transat shareholders' vote, to be held at their special meeting on August 23, 2019, could be significantly affected, as could the fate of Air Canada's current CTB for Transat;
- the major precedent that will be created by the imposition of such a drastic Tribunal decision with respect to a mini-tender that does not, in the opinion of the undersigned and the AMF, constitute a take-over bid within the meaning of *Regulation 62-104 respecting Take-Over Bids and Issuer Bids.*

[46] In this regard, it should first be recalled that section 1.1 of *Regulation 62-104 respecting Take-Over Bids and Issuer Bids* defines a take-over bid as follows:

> «"take-over bid" means an offer to acquire outstanding voting securities or equity securities of a class made to one or more persons, any of whom is in the local jurisdiction or whose last address as shown on the books of the offeree issuer is in the local jurisdiction, where the securities subject to the offer to acquire, <u>together with the offeror's securities, constitute in the aggregate 20% or more of the outstanding securities of that class of securities at the date of the offer to acquire but does not include an offer to acquire</u> if the offer to acquire is a step in an amalgamation, merger, reorganization or arrangement that requires approval in a vote of security holders. »
>
> [Emphasis added]

[47] In the opinion of the undersigned and in accordance with the arguments made by the AMF at the hearing on August 8, 2019, on this matter, Mach's Offer does not constitute a take-over bid within the meaning of *Regulation 62-104 respecting Take-Over Bids and Issuer Bids.* It is a mini-tender that the legislature, market regulator and government essentially chose not to regulate—at least in the specific regulatory framework of the securities market—thereby deliberately leaving the market place a much greater degree of freedom to structure and use them as an instrument for achieving specific economic objectives.

[48] Admittedly, there is the brief *CSA Staff Notice - 61-301 - Staff Guidance on the Practice of "Mini-Tenders"*. However, none of the parties alleged that Mach's Offer failed to comply with the terms of that notice. On the contrary, Mach told the Tribunal that it had made certain to structure Mach's Offer to fully comply with the terms of this pan-Canadian notice.

[49] As a result, many mini-tenders with different characteristics have been structured and conducted across Canada in recent years. In light of the arguments presented to the Tribunal by the parties during the hearing on August 8, 2019, none of these mini-tenders were subject to any cease orders issued by a market regulator or an administrative tribunal with specialized jurisdiction in this area.

[50] However, in the case at hand, the Tribunal must make a determination on an application from a company targeted by such a mini-tender, that is, Transat, in the very specific context where its management has a vested interest in the termination of Mach's Offer because its admitted purpose is to derail the CTB that Air Canada launched for Transat.

[51] For its part, Air Canada attempted to convince the Tribunal that Mach's Offer is illegal because, in its view, it constitutes a take-over bid that fails to comply with *Regulation 62-104 respecting Take-Over Bids and Issuer Bids*, particularly because it allows Mach to potentially collect and exercise more than 19.9% of voting rights on Transat share capital.

[52] In the present context, Air Canada's argument falls far short of convincing the undersigned, who reiterates that a transaction soliciting proxies, which would potentially allow 100% of the voting rights of a company's share capital to be collected, is not a "take-over bid." The fact that Mach's Offer is original in that it combines the objectives of potentially purchasing up to 19.9% of Transat shares and potentially exercising more than this proportion of votes at Transat's special meeting on August 23, 2019, does not, in the undersigned's opinion, make it a "take-over bid" within the meaning of *Regulation 62-104 respecting Take-Over Bids and Issuer Bids*.

[53] The Tribunal must respect innovation in the market place and, as long as it does not consider it to be abusive of the public interest, it must not intervene on the sole basis that a financial transaction is of a new type and that it inconveniences a competitor.

[54] Air Canada also argued that the level of protection afforded to shareholders by Mach's Offer is considerably lower than that provided for by *Regulation 62-104 respecting Take-Over Bids and Issuer Bids*, which is patently true in several respects because Mach availed itself of the freedom offered to it deliberately by the legislature, regulator and government and structured its mini-tender so that it would not be subject to the regulatory requirements of a "take-over bid."

[55] In this regard, the undersigned indicates that *Regulation 62-104 respecting Take-Over Bids and Issuer Bids* could have contained a definition of a "take-over bid"

comprising a 5% threshold instead of the current 20%, had the regulator and the government wanted it to.

[56] When confronted with this reality, Air Canada argues that the Tribunal must ensure "a level playing field" even though the legislature, market regulator and government deliberately decided that this would not be the case for mini-tenders that do not constitute "take-over bids" within the meaning of *Regulation 62-104 respecting Take-Over Bids and Issuer Bids.*

[57] In the opinion of the undersigned, it is not for the Tribunal to arbitrarily prohibit offers or to impose similar rules on all offers when the legislature, market regulator and government made a conscious decision not to do so, and it is clearly their prerogative and responsibility.

[58] It is the view of the undersigned that cease orders of the type sought by applicant Transat are not the appropriate way to establish a "level playing field" and that the demonstration of an inequality alone is insufficient to warrant intervention by the Tribunal in the public interest.

[59] Transat, for its part, argues that the Tribunal must prohibit Mach's Offer because it contains provisions that, in Transat's opinion, are so abusive of Transat shareholders and the market in general that the Tribunal must, in the public interest, issue the cease orders it is seeking, one of which seeks nothing less than to prohibit any transaction involving the securities of Transat A.T. Inc. by Group Mach Acquisition Inc. or Group Mach Inc., even those that could be carried out outside of Mach's Offer.

[60] In the opinion of the undersigned, no evidence or arguments have been presented to the Tribunal that would justify, in the public interest, a cease order of this sort.

[61] However, it is important to carefully consider the allegations of abuse contained in Transat's application, and in particular the concerns that the AMF expressed to the Tribunal regarding Mach's Offer in order to determine whether this financial transaction should be considered abusive with respect to the public interest.

[62] Since the *Canadian Tire*[86] decision, it is clearly established by the case law that the Tribunal can intervene, even in the absence of any breach of law or regulation, if it is of the opinion that a financial practice or transaction is abusive of investors or the market. In addition, the *Act respecting the regulation of the financial sector* and the *Securities Act* give the Tribunal discretion and a number of means to intervene, if necessary, to protect the public interest.

[63] However, to justify an intervention by the Tribunal of this nature in the context of the present case, it is the undersigned's opinion that there needs to be more than a mere complaint against a particularly innovative competitor that attempts to jeopardize or skillfully impede the implementation of a business plan, including a CTB. A thorough demonstration that we are dealing with a transaction that will have a deleterious and

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86 *Canadian Tire Corp. (Re),* 1987 LNONOSC 47.

widespread impact that jeopardizes overall effective functioning of the market and investor confidence is necessary.

[64] It is surprising, at least for the undersigned, that the AMF apparently chose to intervene after all the other parties to express to the Tribunal, as a mere impleaded party in this case, its concerns about Mach's Offer and to indicate to it that, in its view, [translation] "under the circumstances" [translation] "the Tribunal's intervention is justified and necessary and that it should impose cease orders no. 1 and no. 3 sought by applicant Transat."

[65] Given that the deadline for depositing Transat shares under Mach's Offer is August 13, 2019, the AMF, as market regulator, had full opportunity as of August 2, 2019, to communicate directly with Mach and to strongly suggest to it, in the public interest, that it amend its mini-tender in a way that would quickly address all the concerns expressed by the AMF to the Tribunal at the hearing on August 8, 2019. The undersigned notes that this hearing deals specifically with Transat's application and the cease orders sought by the latter.

[66] For the purposes of this application, the Tribunal has neither the means nor the mandate to act as the market regulator.

[67] The AMF's apparent lack of intervention, between the launch of Mach's Offer on August 2, 2019, and the start of the Tribunal's hearing on August 8, 2019, to quickly amend Mach's Offer in order to address its concerns leaves the Tribunal in a situation where it can only rule on the conclusions sought by Transat. The only latitude available to it is (i) to kill Mach's Offer, thereby depriving Transat shareholders of their current right to accept it, or (ii) dismiss the conclusions sought by Transat and thus let Transat shareholders decide whether or not to accept Mach's Offer, as it reads today.

[68] In the opinion of the undersigned, this is far from an ideal situation for Transat shareholders.

[69] In light of the representations made to it by Transat and the AMF, the undersigned deemed the following elements as deserving of special attention in Mach's Offer.

[70] The time limits imposed on Transat shareholders in Mach's Offer are tight. Between August 2 and 13, 2019, there is only a very short period compared to the time limits provided for in a take-over bid. However, in the opinion of the undersigned, this amount of time is more than sufficient for an institutional investor to assess and participate in it. The deadline is tight for a small shareholder. However, it should be noted that it is currently free to choose to accept or refuse to participate in Mach's Offer, whereas that choice simply disappears if the Tribunal imposes a cease order on the entire transaction.

[71] Mach explained to the Tribunal that the complex legal and financial mechanics that surround Air Canada's CTB for Transat, as with all "take-over bids," essentially dictated much of the schedule of Mach's Offer. Mach also pointed out that the short time limits in Mach's Offer essentially work against it.

[72] The conditions in Section 5 of Mach's Offer[87] are numerous and offer Mach a number of potential [translation] "escape routes" if it decides to withdraw its mini-tender and not take up or pay for the shares deposited as a result of it.

[73] Transat's application to the Tribunal to prohibit Mach's Offer is in itself the embodiment of a condition stated in clause 5(j) of this mini-tender, which could be invoked now or after Transat's special shareholders' meeting scheduled for August 23, 2019, when Mach would have exercised the voting rights of all shares deposited under its offer.

[74] Mach confirmed this to the Tribunal at the hearing on August 8, 2019, and stated that, as in any offer to purchase, the offeror reserves the right to invoke or not invoke the occurrence of one or more of the conditions set out in its offer to ultimately make a business decision.

[75] In this regard, Mach pointed out that Air Canada's take-over bid for Transat also contains many conditions allowing Air Canada to withdraw and never pay for the shares deposited under its CTB, some of which—such as the absence of approval from the Competition Bureau or a major change in Transat's financial position—might only be invoked by Air Canada in 2020.

[76] For the undersigned, it is clear that most offers to purchase, whether or not they are take-over bids within the meaning of *Regulation 62-104 respecting Take-Over Bids and Issuer Bids,* contain a considerable number of conditions, sometimes complex and dull to read, that enable the offeror to withdraw and never pay for the shares deposited as part of its offer to purchase.

[77] This is the case for both Mach's Offer and Air Canada's CTB, except that in Mach's Offer, we have a mini-tender not regulated under *Regulation 62-104 respecting Take-Over Bids and Issuer Bids* because of a fundamental choice made by the legislature, regulator and government to give much more freedom to financial market stakeholders who choose, in an open market economy, to launch mini-tenders.

[78] Since information disclosure is the fundamental principle upon which the entire regulatory framework for securities markets is based, the Tribunal must, in the opinion of the undersigned, assess whether the terms of Mach's Offer, and in particular its conditions, are disclosed in a manner that is not abusive of the shareholders to whom it is addressed and of the market place.

[79] In the opinion of the undersigned, given the particular regulatory context surrounding Mach's Offer, the terms of this mini-tender, including its conditions, and the manner in which they are described, are not abusive of the shareholders to whom it is addressed, nor of the market place. An institutional investor should not have great deal of difficulty in assessing it. For a shareholder from the general public, the degree of difficulty will be higher, but this will be the case for any take-over bid in which he chooses to participate.

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87 Exhibit P-3.

[80] Mach's Offer is innovative. It introduces in the market place a new way of structuring a mini-tender and a new methodology to attempt to defeat an ongoing take-over bid, in this case, the Air Canada CTB for Transat. Mach's Offer clearly [translation] "bothers" its initiator and the management of the target company, which has turned to the Tribunal and is attempting to convince it, in the public interest, to put an end to Mach's mini-tender.

[81] In this context and with the very short amount of time available to the Tribunal to render a decision on Transat's application, the undersigned is of the view that the Tribunal must be very prudent.

[82] The impact of a cease order on Mach's Offer would be significant on the market and would introduce *de facto* new standards to a specific segment of the market that the legislature, regulator and government deliberately decided to leave much more free. It is not in the public interest that, as result of the Tribunal decisions, uncertainty and arbitrariness take precedence over legislation and regulations in the securities market.

[83] In addition, such a cease order will have a significant potential impact on the vote of Transat shareholders on August 23, 2019, on Air Canada's CTB for Transat. In the opinion of the undersigned, the Tribunal must be careful not to interfere indirectly in a process that essentially belongs to the shareholders. It must also be careful not to deny them the right that they currently have to avail themselves of Mach's Offer.

[84] It is worth recalling that our economy is fundamentally based on a free market. It is up to the legislature, government and regulator to regulate it as they see fit in carrying out the responsibilities conferred on them by a democratic society. It is not the Tribunal's role to fulfill those responsibilities, either directly or indirectly.

[85] In the view of the undersigned, there is little doubt that the particularly innovative features of Mach's Offer will be subject to careful scrutiny by both the financial market and the regulatory authorities. Serious consideration must be given, in the public interest, as to whether or not the current regulatory framework should be changed to reflect this, and this is not something that will be done in three days.

[86] The public interest in financial markets transcends vested interests.

[87] The market is constantly evolving, particularly with the creation of new financial instruments and transactions. It is creative. This is a great strength that must not, in the public interest, be extinguished.

[88] Accordingly, having duly considered Mach's Offer and the specific context surrounding it, as well as all the evidence and arguments presented to him by the parties, the undersigned is of the view that it is not in the public interest to issue the cease orders sought by Transat.

FOR THESE REASONS

The undersigned judge of the Financial Markets Administrative Tribunal, in the public interest and under section 265 of the *Securities Act* and sections 93 and 97 (s. 2(7)) of the *Act respecting the regulation of the financial sector*:

DISMISSES the application filed by Transat A.T. Inc.

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Mtre. Jean-Pierre Cristel
Administrative Judge

Mtre. Alain Riendeau and Mtre. Vincent Cérat Lagana
(Fasken Martineau DuMoulin LLP)
Mtre. Sophie Melchers
(Norton Rose Fulbright Canada, LLP)
Counsel for Transat A.T. Inc.

Mtre. Marc Duchesne, Mtre. James D.G. Douglas and Mtre. Marie-Claude Lassiseraye Mathieu
(Borden Ladner Gervais LLP)
Counsel for Group Mach Acquisition Inc. and Group Mach Inc.

Mtre. Carl Souquet, Mtre. Valentine Jay and Mtre. François Lavigne-Massicotte
(Legal Services, Autorité des marchés financiers)
Counsel for Autorité des marchés financiers

Mtre. Marc-André Coulombe and Mtre. Nathalie Nouvet
(Stikeman Elliott LLP)
Counsel for Air Canada

Hearing date: August 8, 2019