PURCHASING CONVERTIBLE SECURITIES: GETTING MORE THAN YOU BARGAINED FOR

James E.A. Turner
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There has been a recurring question under the *Securities Act* (Ontario) (the "OSA") as to whether an offer to purchase securities which are convertible into voting or equity securities constitutes an indirect bid for the securities which are issuable on exercise of the conversion right.[1] If such an offer is an indirect bid then the take-over bid rules would apply if the aggregate number of securities issuable upon exercise of the conversion right, when aggregated with the offeror's direct holdings of such securities, equals or exceeds 20%. In that event, the purchase of the convertible securities could be completed only pursuant to a formal offer made for the underlying voting or equity securities (unless a take-over bid exemption was available).[2] Conversely, purchasing the convertible securities without making such an offer would be an illegal bid and would potentially subject the acquiror to the full range of sanctions under the OSA.

My own view is that an offer for a convertible security which entitles the holder to acquire treasury securities does not constitute an indirect bid for the unissued underlying securities. That view is based on a review of the various draft amendments proposed to the take-over bid rules leading up to the 1987 amendments, on the express treatment under the take-over bid regime of the OSA of convertible securities and on an analysis of the nature of such an indirect offer.

Proposals to Amend the Take-over Bid Regime

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1 This paper focuses on convertible securities which entitle the holder to acquire treasury securities and not currently outstanding securities. With respect to the latter, however, see footnote 10 below.

2 Note that the take-over bid rules could apply directly to the purchase of convertible securities if those securities are themselves voting or equity securities but not if they are simply convertible into voting or equity securities. It is clear that the definition of a "take-over bid" under the OSA does not apply to the latter securities. Arguably, there may be circumstances in which it would be appropriate to apply the take-over bid rules to the direct purchase of securities which are convertible into voting or equity shares in order to protect the interests of the holders of such securities. It is probably sufficient, however, that securities regulators have the discretion to intervene in the public interest where there is an abuse.

With respect to the proposed amendments to the take-over bid rules, I have attached as Schedule A a summary of those proposals as they relate to the treatment of convertible securities. In short, it was originally proposed that the take-over bid rules expressly "look through" convertible securities to the underlying voting or equity securities to determine whether a take-over bid was being made for the underlying securities. That concept was dropped from the take-over bid amendments actually implemented in 1987 because, I believe, of a number of conceptual difficulties in applying the take-over bid rules on a "look through" basis. Those difficulties include how to value the conversion right imbedded in a convertible security in order to be able to translate the consideration offered for a convertible security into a value for the underlying securities (for purposes of the identical consideration rule or to determine the availability of a take-over bid exemption), how to treat out-of-the-money convertible securities (which may never, in fact, be converted), whether to apply the take-over bid rules on a fully diluted or partially diluted basis and how to deal with circumstances where an offeror may not be purchasing the convertible security as a strategic matter in order to acquire the underlying shares or even with the intention of acquiring such shares.[3] One of the real difficulties in applying the take-over bid provisions on a "look through" basis is adopting a single approach which makes sense when applied to the many different forms of convertible securities that may be outstanding and the many different circumstances in which convertible securities may be acquired.

Exemptive Orders Granted by the Commission

There have been a few exemption orders issued by the Ontario Securities Commission (the "Commission") which bear on this topic and which suggest that a purchase of a

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[3] Note that convertible securities may include convertible debentures, convertible preference shares, warrants, options or a class of securities which is inter-convertible into another class of securities. There will be a number of factors which determine the value of each of these securities including, in the case of convertible debentures and preference shares, the interest or coupon rate applicable to the principal amount of the instrument and the credit worthiness of the issuer. A conversion right has value (distinct from any additional value which the security to which it is attached may have) which will vary based on the exercise price relative to the market price of the underlying security and the length of the exercise period. To state the obvious, an option exercisable at any time over the next 10 years at the current market price of the underlying security has significant value even though the exercise price is at the current market price.

convertible security may be an indirect bid for the underlying shares.[4] I don't intend to review those orders here. Some of them can be distinguished on the basis that the purchase of the convertible securities was linked to a direct acquisition of the securities issuable upon exercise of the convertible security. Overall, however, the Commission's position is both unclear and inconsistent on this topic. While there may be suggestions in the exemption orders that the Commission considers an offer to acquire a convertible security to be an indirect offer for the unissued underlying shares,[5] in my view, none of those orders are determinative of the issue. To the extent that the orders reflect the proposition that an acquisition of a convertible security is an indirect bid, they are wrong in law, based on the applicable provisions of the OSA (although, in fairness, the issue would not have been fully canvassed in connection with the granting of discretionary orders; exemptive orders issued by the Commission, based as they are upon an application by a party requesting specific exemptive relief, should not be viewed as, and are not, authoritative).

As noted above, it is clear from the history of the proposed amendments to the OSA (leading up to the take-over bid amendments to the OSA which became effective on June 30, 1987) that the take-over bid rules were generally not intended to "look through" convertible securities to the underlying unissued securities. There were specific amendments proposed to the OSA which would have expressly done that (see Schedule A for a detailed review of those proposals), but those provisions were not implemented. It is inconceivable that those provisions would have been

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4 For a more detailed review of those orders, see "Legal Developments in Canadian M&A Practice", William M. Ainley, Insight Information Co., Mergers, Takeovers and Acquisitions, Strategies for Creating Value and Growth, May, 2000.

5 In connection with proceedings before the Commission in respect of the proposed acquisition by Noranda Inc. of convertible debentures and warrants to purchase common shares of Falconbridge Limited, the Commission considered whether the term "indirect acquisition" in section 92 of the OSA encompassed the purchase of convertible securities, thereby rendering such purchase a take-over bid. In those proceedings, then Commission Chairman Stanley Beck is quoted as having expressed the view that excluding offers to purchase convertible securities from the definition of "take-over bid" would enable offerors "to drive a coach and four" through the basic principles of Part XX of the OSA. See P. Koval, "Indirect Offers - The Lessons of Recent Experience" in *Going Private: Asset Swaps, Indirect Takeovers and Coat-tails* (Canadian Institute, 1989). I would argue that in any transaction where an offeror is driving "a coach and four" through the basic principles of the OSA, the Commission has adequate authority to intervene based on its public interest jurisdiction. It is also worth noting that Mr. Beck was Chairman of the Commission from May 1, 1985 to February 29, 1988. Accordingly, he was Chairman when Bill 68 and its successor, Bill 156, were introduced and when the current provisions of the OSA became effective. See Schedule A.

deleted if the intention had been to adopt the "look through" approach (either generally or through the indirect bid provision in section 92 of the OSA). This conclusion is supported by the fact that convertible securities are expressly dealt with in certain of the take-over bid provisions of the OSA, such as the early warning provision in section 101 and the deemed beneficial ownership rule in section 90 of the OSA, and not elsewhere.

Early Warning/Deemed Beneficial Ownership

The early warning provision in section 101 of the OSA expressly applies to aggregate securities issuable on exercise of a convertible security. Section 101 was enacted as an alternative to reducing the take-over bid threshold from 20% to 10% and, accordingly, reflects a very similar formulation to that contained in the definition of a "take-over bid". While one can speculate that the inclusion of convertible securities in section 101 was a compromise instead of applying the take-over bid rules generally to convertible securities, that proposition is not apparent from the draft legislation leading up to the 1987 amendments. It is clear that the provisions expressly treating the purchase of a convertible security as an indirect bid were dropped prior to the addition of "convertible securities" to section 101. The latter was a last minute change reflected in Bill 156 without explanation.

With respect to the deemed beneficial ownership rule in section 90 of the OSA, it is also interesting to note that subsection 90(3) of the OSA expressly deems unissued securities to be outstanding for purposes of that section. The absence of such a provision applicable to an offer to acquire convertible securities suggests strongly that the legislative scheme does not "look through" convertible securities to aggregate the unissued underlying securities. The existence of the deemed beneficial ownership provision itself suggests that this is the right conclusion. Note that the deemed beneficial ownership provision requires an offeror in certain circumstances to aggregate unissued securities which the offeror has the right to acquire but does not provide that the acquisition of a right to acquire a security is itself the acquisition of the underlying unissued security. This is a key distinction.

I would argue that the treatment of convertible securities reflected by the current deemed beneficial ownership rule and the early warning provision is an elegant solution to the problems associated with a "look through" approach to convertible securities. Those provisions

take into account the number of securities which may be issued on exercise of a convertible security while avoiding the problems related to determining the effective price which may eventually be paid for the underlying security. As a result, if a holder of convertible securities acquires a single additional share in the market, the shares issuable pursuant to convertible securities are aggregated to determine whether the take-over bid threshold has been reached. Similarly, if a person triggers section 101 when securities issuable on exercise of convertible securities are aggregated, the market is aware of that person's potential holding as a result of compliance with that provision. At the same time, one does not have to assume the actual exercise of the convertible securities (which may never occur) or determine whether by purchasing convertible securities a premium is, in effect, being paid for the unissued securities if the conversion right is eventually exercised.

Determining the Indirect Bid Price

If the acquisition of a convertible security is an indirect bid for the underlying shares, then the effective purchase price being paid for the underlying shares must be determined (in order to apply the identical consideration rule or to determine the availability of a take-over bid exemption). A question of principle is whether and to what extent the purchase price paid for the convertible securities should be added to the exercise price for the underlying securities to determine the indirect bid price. The Commission has suggested that aggregating such amounts is the right approach.[6] One may well ask, however, why as a matter of principle the price paid for the convertible security should be added to the exercise price paid for the underlying shares (particularly when there is a separate value in the conversion right and when such amounts are paid to different persons). In considering this question, does it change the analysis if the conversion right is exercised immediately after acquisition of the convertible securities or only after a period of two years?

Where the convertible security has value apart from the conversion right, such as where the security is a convertible debenture or preference share, determining the indirect price for the underlying securities is more difficult. In that case, one would have to determine the value

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[6] See In The Matter of Trizec Equities Limited (1984) 7 OSCB 2033 ("Trizec Equities").

of the convertible security independent of the conversion right and subtract that value from the price paid for the convertible security. Any difference would be the value of the conversion right, which would then be added to the exercise price of the convertible security to determine the effective price being paid for the underlying security (if one accepts the latter as the proper approach).

Perhaps the better question is whether the amount paid for the conversion right is bona fide or whether it is an attempt to pay an excessive premium to the holder of the convertible security. With respect to the latter, the Commission has clearly stated that it will intervene in a transaction where a control premium is being paid in circumstances where shareholders are not participating.[7]

Indirect Bid Provision

While the analysis under "Proposals to Amend the Take-over Bid Regime" above applies equally to the indirect take-over bid provision in section 92 of the OSA, one must nonetheless consider whether that provision is sufficiently broad to apply to the purchase of convertible securities.

Section 92 provides as follows:

> "For the purposes of this Part, a reference to an offer to acquire or to the acquisition or ownership of securities or to control or direction over securities shall be construed to include a direct or indirect offer to acquire or the direct or indirect acquisition or ownership of securities, or the direct or indirect control or direction over securities, as the case may be." [8]

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[7] See Re Asbestos Corp. Ltd., (1988) OSCB 3419 where the Commission stated that "if we find that the transactions in question, while not a take-over bid as strictly defined, had the economic effect of transferring control of ACL at an excessive premium not available to shareholders generally, we would then consider the application of sanctions under [subsection 127(1)3]".

[8] Except in the Province of Quebec, the indirect bid provision in each of the other Canadian jurisdictions which have a take-over bid regime is essentially identical to this provision. The indirect bid provision in Quebec is much narrower and is more similar to the "true target" provision proposed in the Practitioners' Report referred to in Schedule A. It applies only where securities of a company are acquired which are not traded on an organized market where that company has an interest in another company whose securities are traded on an organized market (see section 114 of the *Securities Act* (Quebec)).

Section 92 is intended to be a general anti-avoidance provision. By its terms, however, it keys off of whether an offer is an indirect offer to acquire or an indirect acquisition of particular securities. Section 92 has been applied by the Commission to the acquisition of shares of a holding company which in turn holds shares of a reporting issuer. This is a circumstance which was intended to be caught by the section (based on the former "true target" provisions of the OSA and common sense). In a paper which I prepared some years ago while I was at the Commission, I expressed my views as to how the indirect bid provision operates where an offer is for shares of a holding company.[9] As noted above, however, based on the various proposals leading up to the 1987 amendments to the take-over bid regime, it is clear, in my view, that the indirect bid provision was not intended to apply to convertible securities.

In reaching that conclusion, however, one of the key points is that if one applies the indirect bid provision to the acquisition of a convertible security, one is applying the take-over bid rules to a subscription for unissued shares of the relevant issuer.[10] That does not logically make sense given that a direct subscription for unissued securities does not constitute a take-over bid. A subscription is not a take-over bid because the take-over bid rules apply only to offers for outstanding voting or equity securities. One of the reasons why a subscription does not constitute a bid is that any exercise price paid on a subscription accrues equally to the benefit of all

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9 "The Cookie War - Take-over Bids for Russell Holdings/Treats", James E.A. Turner, April 13, 1988. For a broader application of an indirect bid concept see Atco Ltd. (1980) OSCB 412. I assume that if the purchase of convertible securities is treated as an indirect bid for the underlying unissued shares, the private agreement exemption (in subsection 93(1)(c) of the OSA) would be potentially available to exempt that offer from the take-over bid rules as it would be for an indirect bid through a holding company. If that is the case, I assume that the proper legal analysis in such circumstances is that the indirect bid is being made to one holder (the issuer), is not being made generally to shareholders (although the offer for the convertible securities may be made generally to the holders of those securities) and that a premium of more than 15% would be paid only where the effective price paid on the indirect bid exceeds a 15% premium to the "market price" (as defined in the OSA) of the underlying securities.

10 There is, of course, the possibility that a security may be convertible into or exchangeable for outstanding voting or equity securities. It is clear that the take-over bid rules would apply to the exercise of such a right; see footnote 6 above. In the Trizec Equities decision, the Commission concluded that a take-over bid does not occur on the acquisition of an option to purchase outstanding securities but only upon the exercise of that option (although the key issue in the decision was when one determines the premium for purposes of whether a follow-up offer is required). The decision did not, however, explicitly discuss the question of whether an acquisition of an option is an indirect bid. The decision pre-dates section 92 of the OSA but was made at a time when a "take-over bid" was defined as an offer to purchase "directly or indirectly". The subsequent Commission decision in The Enfield Corporation (1990) 13 OSCB 3364 ("Enfield") dealt with a put option and affirmed the analysis in the Trizec Equities decision. At the time of the Enfield decision, section 92 was contained in the OSA.

shareholders through their shareholdings in the issuer.[11] It is, in my view, wrong to treat the acquisition of a convertible security as an indirect bid for the underlying unissued securities when, if that subscription was made directly, it would not constitute a take-over bid. (I assume that no one would in any event treat a subscription for a convertible security to be an indirect bid for the underlying shares. If that is the case, then the key distinction must be that the convertible security is being acquired from a third party.) That conclusion contrasts with the analysis in applying the indirect bid provision to a holding company which owns outstanding securities of another issuer. In that circumstance, the acquiror is indirectly acquiring the outstanding securities held by the holding company and would, for instance, be entitled to rely on the private agreement exemption if the indirect acquisition was at no more than a 15% premium to the market price of the relevant securities (and met the other conditions to that exemption). I would add that to read back into the take-over bid regime through section 92 a concept which was expressly excluded from the legislative scheme is to extend the reach of section 92 too far.

The conclusion that an acquiror of a convertible security can exercise a conversion right to acquire treasury securities and increase its holding without engaging the take-over bid rules is not offensive on policy grounds. There is no general prohibition under the OSA on a person acquiring more than 20% of the securities of a class other than by formal offer. If there are take-over bid exemptions (including the private agreement exemption) which permit the accumulation of shares above the 20% threshold without a general offer, what policy reason is there for prohibiting a person from increasing its equity interest through the acquisition and exercise of convertible securities? I would argue that the acquisition of a convertible security is much less likely to be offensive than a private agreement acquisition of outstanding shares. In addition to the fact that the proceeds of a subscription accrue to the benefit of all shareholders of an issuer, the board of directors of an issuer will have authorized the issuance of the convertible securities and, in doing so, will have considered the potential effect on dilution and, presumably,

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[11] The Trizec Equities decision confirms this interpretation and indicates that in connection with a change of control as a result of an issue from treasury "(i) a premium offer is not being made to offeree shareholders which would necessitate certain procedural and substantive rules to reduce the pressure on shareholders and (ii) all shareholders are treated equally in that the purchase of shares from treasury enures to the benefit of all shareholders". This analysis is not as compelling where the convertible security is purchased from a third party.

control. One would expect in any event that the total number of shares which could be issued on exercise of convertible securities is unlikely to be sufficient to materially affect control.

I would add that if one is to impose such far reaching consequences on an acquiror of convertible securities as an obligation to make a formal offer for all of the outstanding securities of another class, there should be clear language doing so. No such clear language is contained in the OSA.

Conclusion

As a matter of proper statutory interpretation, the current take-over bid rules including section 92 do not treat the acquisition of a convertible security as an indirect bid for the unissued underlying shares. That, in my submission, is also the right conclusion from a policy perspective. It is not, however, the end of the analysis.

Public Interest Concerns

There may well be circumstances in which the acquisition of convertible securities would constitute an abuse and engage the public interest jurisdiction of securities regulators.[12] While one should be hesitant in attempting to articulate those circumstances, in my view, there are three situations in which the Commission might properly come to that conclusion.

The first is where an acquiror, in effect, pays a control premium to the holders of convertible securities in order to obtain the right to subscribe for the underlying unissued shares. In that circumstance, one of the key objectives of the take-over bid rules, being the sharing of control premiums by all shareholders, is frustrated.[13] As noted above, one of the rationales for excluding a subscription from the take-over bid rules is that all shareholders benefit equally from the subscription. Where a control premium is paid to a third party holder of convertible securities,

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[12] In Enfield (see footnote 10 above), the Commission stated " But an offeror who wishes to rely upon the option device . . . had best be prepared to satisfy the Commission, if so called upon, that there is no abusive aspect to the transaction that might warrant our intervention." One can argue that the thesis expressed in this paper is simply an application of the principles adopted by the Commission in Enfield. I am not aware, however, that the purchase of convertible securities has been viewed by regulators as a matter of particular abuse.

[13] See footnote 7 above.

rather than to the issuer itself, that may constitute grounds for regulatory intervention. Note, however, that I am referring to a control premium and not just to a higher price than might be paid for the underlying shares. I suggest that the right approach for the Commission is not to make some assessment of the value of the conversion right and then apply the take-over bid rules if the price offered exceeds that value plus the exercise price paid for the underlying shares. To the contrary, I would start from the proposition that the take-over bid rules don't apply and that an offer for convertible securities would only engage the public interest jurisdiction of the Commission where it is obvious that a control premium is being paid to a third party holder or holders of convertible securities. Needless to say that will be the rare case.

The second circumstance where I believe that the Commission could properly exercise its public interest jurisdiction is where in the course of a formal take-over bid a person acquires convertible securities as a strategic matter to block the existing bid or pre-empt a competing bidder. [14]

Thirdly, I could understand the Commission exercising its public interest jurisdiction in circumstances where the acquisition of the convertible securities is part of a linked transaction or series of transactions involving the direct purchase of the securities issuable on exercise of the conversion right. Where a purchaser in a series of linked transactions acquires 19.9% of a class of equity shares, completes a private agreement purchase to take its aggregate holdings to say 30% and then acquires convertible securities to take the potential holding to 40% on a fully diluted basis, I believe that it is open to the Commission to conclude that all three transactions are linked and should be viewed as a single offer which is required to be made to all shareholders.

Accordingly, my view is that the indirect bid provision does not and should not apply to "look through" the purchase of convertible securities to the underlying securities. Rather, the Commission should rely on the exercise of its public interest jurisdiction to intervene only in those more limited circumstances where a clear abuse may have taken place. In my view, this

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[14] This approach is consistent with that adopted by the Commission in H.E.R.O. Industries Ltd. (1990) 13 OSCB 3775.

conclusion is qualitatively different than treating the acquisition of a convertible security prima face as an indirect bid for the underlying unissued securities.

Formal Take-over Bids

This approach also appropriately deals with the case where a bidder is making a formal bid for securities, such as common shares, as well as securities convertible into common shares. It is clear that the take-over bid rules permit different forms and levels of consideration to be paid to holders of different classes of securities. The problem is that, if an offer for convertible securities constitutes an indirect bid for the underlying securities, then arguably identical consideration must be offered in connection with the indirect bid as is offered directly for the common shares.

That conclusion flies in the face of common sense.

First, as noted above, a convertible security has an imbedded additional value based on the conversion right itself. Accordingly, a bidder will usually have to pay more for a convertible security than simply the in-the-money amount. Secondly, a bidder will not often be prepared to take-up and pay for common shares under a formal bid unless it is certain it has also acquired all other outstanding equity securities and all securities convertible into equity securities. Accordingly, any additional amount paid to holders of convertible securities benefits the holders of the common shares because it increases the likelihood that the convertible securities will be tendered and the bid will succeed. More important, the market will dictate what a bidder has to pay in order to acquire sufficient securities of a class in order to be able to squeeze in the balance of those securities. A bidder has no interest in paying more to the holders of convertible securities than is necessary to accomplish that objective. Even if the holders of convertible securities use their holdings to extract a substantially higher price than might otherwise be paid for such securities, I would argue that such action should not necessarily be viewed as an abuse or engage the Commission's public interest jurisdiction.

SCHEDULE A

A) Practitioners' Report

The "Report of the Committee to Review the Provisions of The *Securities Act* (Ontario) Relating to Take-over Bids and Issuer Bids" dated September 23, 1983 (prepared by Messrs. Coleman, Emerson and Jackson and referred to as the "Practitioners' Report") did not include convertible securities in the "take-over bid" definition and did not include an indirect bid provision. The report did contain a "true target" provision which applied where an offer was made for securities of an issuer (the "Parent") for which there was no published market and, as a consequence, the offeror acquired beneficial ownership or control or direction over, voting securities for which there was a published market (the "true target securities"). In that case, the offeror was deemed to have made an offer for the true target securities for a consideration based on the proportion that the value of the true target securities was of the value of all assets of the Parent. In essence, this was a more restrictive indirect bid provision than was ultimately implemented in the OSA.

The report also recommended a deemed beneficial ownership rule similar to the existing OSA provision (although it didn't expressly deem unissued securities to be outstanding as currently provided in subsection 90(3) of the OSA).

B) Initial OSC Draft Legislation

On August 10, 1984, the Commission published a discussion draft of a new Securities Act which included amendments to the take-over bid rules.[1] The draft take-over bid rules included:

(i) an express reference to convertible securities in the definition of "take-over bid";

(ii) a section providing that for purposes of calculating the percentage of outstanding shares of a class held by a person, all conversion rights

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[1] See (1984) 7 OSCB 3419.

attaching to securities acquired by that person or subject to an offer to acquire by such person were deemed to be exercised in full from the date of the acquisition or offer to acquire;

(iii) a deemed beneficial ownership rule similar to the existing provision in the OSA (although it didn't expressly deem unissued securities to be outstanding as currently provided in subsection 90(3) of the OSA);

(iv) a "true target" provision almost identical to the provision contained in the Practitioners' Report;

(v) an indirect bid provision providing that a reference to the acquisition or ownership of securities shall be construed to include the direct or indirect acquisition or ownership, as the case may be.

It is not clear why all of these provisions were necessary. Notwithstanding, the effect of items (i) and (ii) above was to expressly provide that an offer for convertible securities constituted an offer for the underlying unissued securities.

C) <u>Bill 159</u>

When Bill 159 was tabled for first reading in the Ontario legislation on December 13, 1984,[2] the Bill did not include convertible securities in the "take-over bid" definition but did contain:

(i) a provision to the effect that where an offeror makes an offer to acquire convertible securities, the offeror shall be deemed to have made an offer to acquire securities of each class into which the convertible securities are convertible and for purposes of calculating the number of securities of each class subject to the offer to acquire, the convertible securities shall be deemed to have been converted into securities of that class;

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[2] See (1984) 7 OSCB 5307.

(ii) a deemed beneficial ownership rule similar to the existing OSA provision (which included a provision deeming unissued securities to be outstanding for purposes of the section);

(iii) a "true target" provision substantially similar to the true target provision recommended in the Practitioners' Report;

(iv) an indirect bid provision providing that a reference to the acquisition or ownership of securities shall be construed to include the direct or indirect acquisition or ownership of securities.

Clearly, the effect of item (i) above was to expressly provide that an offer for convertible securities constituted an offer for the underlying unissued securities.

D) <u>Bill 68 and 156</u>

Bill 68 (which replaced Bill 159 and was published in the OSC Bulletin on December 13, 1985[3]) contained provisions which were substantially the same as the provisions ultimately adopted in the OSA. They included a deemed beneficial ownership provision as well as a general indirect bid provision. The Bill did not include convertible securities in the definition of "take-over bid" or in the early warning provision and there was no express provision (such as that in C(i) above) treating the acquisition of convertible securities as an indirect offer for the underlying unissued securities.

Bill 156 was the successor to Bill 68 (and was published in the OSC Bulletin on November 28, 1986[4]) and for all relevant purposes contained the same provisions as in Bill 68 but added an express reference to convertible securities in the early warning provision (section 100 of the Bill, now section 101 of the OSA). There was no explanation given for this change.

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[3] See (1985) 8 OSCB 5167.

[4] See (1986) 9 OSCB 6447.