BRITISH COLUMBIA SECURITIES COMMISSION
Securities Act, RSBC 1996, c. 418

Citation: NorthWest Copper Corp., 2023 BCSECCOM 602 Date: 20231222

NorthWest Copper Corp., Grant Sawiak, Tony Ianno and John Kimmel

Panel	Gordon Johnson	Vice Chair
	Marion Shaw	Commissioner
	Karen Keilty	Commissioner
Hearing date	September 13, 2023	
Submissions completed	September 13, 2023	
Date of Ruling	September 14, 2023	
Date of Reasons	December 22, 2023	

Appearing

James Renihan Tyler Morrison	For NorthWest Copper Corp.
Ken McEwan Saheli Sodhi	For John Kimmel
Rory McGovern	For Tony Ianno
Jay Naster	For Grant Sawiak
Karen Blok Gordon Smith Nazma Lee Laura Lam	For the Executive Director

Reasons for Ruling

I. Introduction

[1] On August 23, 2023, NorthWest Copper Corp. (NWST) applied to the Commission under section 114 of the *Securities Act*, RSBC 1996, c. 418 (the Act), for various orders related to the alleged failure of Grant Sawiak (Sawiak), Anthony Ianno (Ianno) and John Kimmel (Kimmel) (collectively the Respondents) to abide by the early warning disclosure requirements contained in National Instrument 62-104 *Take-Over Bids and Issuer Bids* (NI 62-103) and National Instrument 62-103 *The Early Warning System and Related Take-Over Bid and Insider Reporting Issues* (NI 62-104).

[2] The matter relates to the scheduled 2023 annual meeting of the shareholders of NWST (AGM). A shareholder, Sawiak, had announced his intention to nominate for election at the AGM directors different from those proposed by NWST's management. What followed was a proxy fight, which led to these proceedings before the Commission.

[3] NWST alleged that Sawiak was acting jointly or in concert with Kimmel and Ianno, that the three of them together held more than 10% of the outstanding shares of NWST and were therefore required to make public "early warning" disclosure of their joint action, and that they had failed to do so. NWST sought orders from the Commission prohibiting the Respondents from exercising voting rights attached to their shares with respect to the election of directors at the AGM, requiring that they cease trading in NWST's shares for six months, and directing Sawiak to comply with the early warning rules.

[4] The Respondents assert that they are not joint actors and accordingly were not required to comply with the early warning rules.

[5] On September 13, 2023, we heard NWST's application. At the hearing, each of the individual Respondents, NWST, and the executive director was represented by counsel and made written and oral submissions. Each of the Respondents submitted affidavit evidence and was cross-examined on his affidavit. NWST submitted the affidavit evidence of its interim president and chief executive officer, David Moore (Moore), and of a director, Lew Lawrick (Lawrick). Moore and Lawrick were cross-examined on their affidavits.

[6] The executive director did not address the evidence, but provided submissions with respect to the legal test for determining whether parties are acting jointly or in concert, the appropriate principles for consideration in determining whether the test was met, and the appropriate remedy.

[7] On September 14, 2023 we issued our ruling (2023 BCSECCOM 451) dismissing NWST's application, with reasons to follow. These are our reasons.

II. Background

A. The parties

[8] NWST is a mineral exploration company headquartered in Vancouver. Its shares are listed on the TSX Venture Exchange. The Commission is its principal regulator.

[9] As at September 8, 2023, NWST had 190,177,280 common shares issued and outstanding.

[10] Sawiak is a shareholder of NWST. He is a retired securities lawyer. As of September 1, 2023, Sawiak and his wife owned 753,165 shares in NWST, representing approximately 0.4% of NWST's total outstanding common shares.

[11] Kimmel is a shareholder of NWST. Kimmel holds shares personally and through his company, Churchill Industries Inc. (Churchill), which, among other activities, carries on business as a provider of commercial loans. As of August 4, 2023, Kimmel controlled 15,656,263 shares of NWST, representing approximately 8.2% of NWST's total outstanding common shares. Adam Manna (Manna), who is not a party to these proceedings, is Kimmel's personal lawyer and corporate counsel to Churchill.

[12] Ianno is a shareholder of NWST. As of September 1, 2023, Ianno owned 7,407,922 shares of NWST, representing approximately 3.9% of NWST's total outstanding common shares. In 2011, Ianno entered into a settlement with the Ontario Securities Commission (OSC) in which he admitted that he had engaged in certain trades that had the effect of maintaining and/or increasing the closing price of the shares of a company with which he was involved, and that his conduct was contrary to the public interest. He was banned from trading securities (subject to certain exemptions) and prohibited from being an officer or director of a public company, both for a period of five years. He also made a payment of $100,000 to the OSC.

[13] It is common ground that the shareholdings of the Respondents, if taken together, represent greater than 10% of the outstanding common shares of NWST, and that none of the Respondents has issued or filed any notices or reports pursuant to the early warning system in connection with the AGM.

B. Events relating to the AGM and this proceeding

[14] On April 14, 2023, NWST filed a Notice of Meeting and Record Date for the AGM, which was to be held on June 23, 2023, with a record date of May 10, 2023.

[15] On May 19, 2023, in compliance with the advance notice provisions contained in NWST's Articles, Sawiak delivered to NWST notice that he planned to nominate a competing slate of directors at the AGM. On May 23, 2023, Sawiak announced by news release that a competing slate of directors was being proposed to replace the current directors at the AGM. Neither the nominating shareholder's notice nor the news release made any reference to Kimmel or Ianno. The notice specifically stated that "the nominating shareholder is not acting jointly or in concert with any other person or company in connection with the foregoing."

[16] On May 29, 2023, NWST announced the postponement of the AGM until September 6, 2023, without announcing whether the record date would also be postponed. The reason given for the postponement was to allow NWST additional time for the appropriate consideration of the disclosure made by Sawiak in his May 23, 2023 news release.

[17] Also on May 29, 2023, counsel to NWST wrote to Sawiak's counsel to assert that it had reason to believe that Sawiak was acting jointly or in concert with others and was required to disclose that fact. Sawiak declined to do so.

[18] On June 7, 2023, NWST filed a final Short Form Base Shelf Prospectus permitting the offering of securities with a total offering price of up to $50 million. On June 8, 2023, NWST announced by news release that the Commission and the OSC had issued receipts for that prospectus.

[19] Following a request made by Sawiak to Manna in early June, Kimmel agreed on June 9, 2023 to contribute to the costs of the proxy fight.

[20] On June 15, 2023, with reference to the prospectus filed by NWST, counsel for Sawiak wrote to the Commission to provide notice to the Commission and to the board of directors of NWST that if NWST were to issue new securities on or prior to a new record date for the postponed AGM, it was his intention to bring an urgent application to the Commission pursuant to section 161(1)(b) of the Act for an order cease-trading any

securities issued and/or an order pursuant to section 161(1)(d)(vii) prohibiting the holder from voting any such securities at the AGM, on the basis that the securities were issued in order to manipulate the election process.

[21] On July 28, 2023, NWST filed a new Notice of Meeting and Record Date for the AGM, postponing it to September 6, 2023, with a record date of August 4, 2023.

[22] On August 4, 2023, Sawiak delivered to NWST a new nominating shareholder's notice. The new notice disclosed that the "cost of any solicitation in respect of the nominees will be borne by the nominating shareholder, and Mr. John Kimmel." It also modified the statement in the original notice that Sawiak was not acting jointly or in concert with any other person to say "except as disclosed below, the nominating shareholder is not acting jointly or in concert with any other person or company…".

[23] On August 8, 2023, NWST issued a news release announcing that the meeting would be postponed to September 19, 2023. The record date remained unchanged at August 4, 2023.

[24] On August 11, 2023, counsel for NWST again wrote to Sawiak to demand that he disclose that he was acting jointly or in concert with others whose shareholdings, together with Sawiak's own, exceed 10% of NWST's common shares. Sawiak again declined to do so.

[25] On August 23, 2023, counsel for NWST wrote to the Commission to complain that Sawiak has sought to gain an undue advantage in the upcoming proxy fight by withholding information from the market, specifically, the information that the Respondents were acting jointly or in concert and that that fact should have been disclosed in compliance with the early warning requirements of NI 62-103 and NI 62-104. In its letter, NWST applied to the Commission under section 114 of the Act for an order prohibiting the Respondents from exercising voting rights attached to their shares with respect to the election of directors at the AGM, requiring that they cease trading in NWST's shares for six months, and directing Sawiak to comply with the early warning rules or, alternatively, an order that Sawiak be required to comply with all applicable securities laws and publicly disclose his joint actors prior to the AGM.

[26] On August 25, 2023, counsel for Sawiak provided the Commission with a pre-hearing conference memorandum in which he encouraged the Commission, in considering NWST's application, to address, as a threshold question of law, whether the concept of acting jointly or in concert has any application to the solicitation of proxies for the sole purpose of voting on an alternative slate of directors. He said that if, as he maintains, it does not, then a conclusion to that effect would render moot any evidence or argument that the Respondents were acting jointly or in concert.

[27] On August 29, 2023, counsel for NWST wrote to the Commission to encourage it to proceed to a full hearing on its August 23, 2023 application without first considering Sawiak's preliminary application.

[28] On September 1, 2023, counsel for Sawiak provided the Commission with a preliminary application in writing pursuant to section 3.4 of BC Policy 15-601 *Hearings*, seeking an order dismissing NWST's August 23, 2023 application on the basis that as a matter of

law, the concept of acting jointly or in concert has no application to the solicitation of proxies for the purpose of voting on an alternate slate of directors and therefore there could be no requirement for the respondents to issue an early warning report in these circumstances.

[29] The panel chose to deal with Sawiak's preliminary application in the context of the hearing of NWST's application.

C. Events associated with the claim of joint action

October–December 2022: Ianno's discussions with Moore and Lawrick

[30] In October and November 2022, Ianno and Moore, who was not then a director or officer of NWST, engaged in conversations in which they discussed mutual concerns about the short-selling of NWST's shares and about the distraction of the attention of certain directors of NWST by their other business activities. Their accounts of some elements of those conversations differ.

[31] Moore's evidence was that in a call on October 3, 2022, Ianno said that he had over 70 million shares of NWST, including those of Kimmel, who he said was aligned with him, provided a list of the principal shareholders and their shareholdings, and mused about calling a special shareholder meeting to replace certain directors. Ianno agreed that the call took place, but denied that he made any reference to controlling 70 million shares, being aligned with Kimmel, or calling a shareholder meeting. Moore took contemporaneous notes of the call. While those notes are brief and somewhat cryptic, they tend to support Moore's recollection.

[32] In late November 2022, Ianno called Moore again. According to Moore's evidence, Ianno claimed then to control 72.5 million shares and said that Kimmel was prepared to acquire a further 10 million shares from certain unnamed Korean shareholders. Moore deposed that Ianno also mentioned the possibility of a proxy fight. Ianno agreed that the call took place, but denied that he made any reference to a proxy fight or having control over 72.5 million shares. Ianno deposed that he only suggested that "someone like Mr. Kimmel" would consider buying NWST shares from whoever was selling a block. Moore also took contemporaneous notes of that call. Again, those notes tend to support Moore's recollection.

[33] On cross-examination, Moore agreed that he did not actually think that Ianno owned or controlled all those shares, but took Ianno to mean that he had influence over their holders.

Private placement by NWST

[34] Lawrick deposed that in December 2022, Lawrick and Peter Bell, then the President of NWST, told Ianno that the company was planning a private placement financing, as it needed money. Lawrick deposed that Ianno urged them to wait for drill results, saying that if they agreed to hold off, he could arrange for Kimmel to provide a lead order of at least $1,000,000.

[35] In January 2023, Lawrick advised Ianno, who advised Kimmel, that NWST had decided to proceed with the private placement. Kimmel decided to participate in it. According to the evidence of Lawrick, Ianno negotiated the terms of the private placement on behalf of Kimmel and advised Lawrick that his own investment in the private placement was funded by Kimmel. It was Kimmel's evidence that his decision to participate in the private

placement was made after reviewing and considering the terms of the financing with his counsel, and that the only individual authorized to represent Kimmel and to negotiate the terms of his subscription was Manna. Kimmel also referenced a $500,000 loan his company had provided to Ianno, which NWST alleged was directly connected to Ianno's participation in the private placement. Kimmel asserted that the loan extended to Ianno was a standard commercial loan provided by Churchill in the ordinary course of its business, neither contingent on nor tied to any specific purpose.

[36] Lawrick deposed that Ianno had obtained from Kimmel and passed on to NWST Kimmel's signed subscription agreement, from which NWST inferred that Ianno had negotiated the subscription agreement on Kimmel's behalf. Kimmel countered that Ianno had done so because of some urgency by NWST to complete the financing, and that it was evident that NWST knew that it was Manna and not Ianno who represented Kimmel, because after Ianno sent Kimmel's signed subscription agreement to NWST, NWST's CFO and corporate secretary contacted Manna directly to obtain further information needed to complete the agreement.

Further discussions in March 2023

[37] Moore deposed that he met with Ianno on or around March 6, 2023, at which time Ianno said that he controlled over 86 million shares and had the support of UBS for up to $100 million. While Ianno denied making either of those statements, Moore's contemporaneous notes tend to support Moore's recollection.

[38] Moore further deposed that he spoke with Ianno by telephone on March 23, 2023, and that Ianno told him that:

a. Ianno had "recruited" Sawiak to help him make changes to NWST's board of directors;
b. Sawiak was a former securities lawyer;
c. Sawiak and Ianno planned to present a dissenting slate of shareholder nominees and possibly rely on an exemption allowing them to solicit 15 shareholders;
d. the new board would include Sawiak, Moore, a Churchill representative, and Lawrick as chair; and
e. Kimmel was prepared to purchase a further 700,000 shares in NWST and that "they had a plan to take the company private, with financing backing from UBS of up to $100 million".

While Ianno denied making those statements, Moore's contemporaneous notes tend to support Moore's recollection.

[39] Kimmel's undisputed evidence is that he was neither aware of nor privy to any of the conversations between Moore and Ianno, he never considered himself to be in a group with Ianno, and at no point did Ianno have control or direction over his shares.

[40] Kimmel deposed that he met with UBS investment bank, which managed most of his private wealth portfolio, including his stake in NWST, in early 2023. Kimmel deposed that while he recalls that a UBS representative raised, unprompted, the possibility that given NWST's small size, Kimmel could take it private, he did not discuss the terms or amount of any potential financing by UBS.

[41] Moore deposed that on March 24, 2023, he had a call with another NWST shareholder, Dick Atkinson (Atkinson), in which Atkinson is said to have:

a. informed Moore of his plan to liquidate his shares, or alternatively, to sell 1,000,000 shares to Kimmel; and
b. stated there was a plan for an alternative board slate.

[42] There are no notes of this conversation in evidence, nor evidence from Atkinson. Although Moore states that it was "clear" to him that Atkinson had been speaking with Ianno, this appears to be speculation, rather than something communicated by Atkinson.

April–May 2023: discussions about board representation and the dissident slate

[43] Ianno first spoke with Sawiak about his concerns with NWST's management and direction in early April 2023. Both before and after Ianno first spoke with Sawiak, Ianno had been engaged in discussions with Lawrick and Moore about potential changes to the board and concerns about the company's direction.

[44] Lawrick deposed that Ianno told Lawrick in mid-April that NWST would be hearing from Sawiak. On April 21, 2023, Sawiak met with Lawrick to express his concerns about NWST's performance and his desire to engage in discussions with NWST to change the composition of the board. Lawrick deposed that in that meeting, Sawiak pitched Lawrick on joining a "group" that was seeking to make changes to NWST's board. According to Lawrick's evidence, Sawiak's group proposed to nominate Lawrick as chair of the board.

[45] Between April 26 and May 5, 2023, Sawiak and Lawrick exchanged a large number of text messages, the language of at least some of which can easily be read to suggest that decisions regarding a potential proxy fight were being made jointly by Sawiak and Ianno.

[46] In or around late April 2023, Ianno approached Kimmel and raised the possibility of replacing one or two current incumbent directors on NWST's board. Kimmel deposed that by that time, he had become dissatisfied with NWST's performance and management, and so expressed interest in having a representative on the board.

[47] On or about May 2, 2023, Ianno and Lawrick met in Toronto. Their recollections of the meeting differ:

a. Lawrick said that Ianno told him that if NWST did not agree to place two of his group's nominees on the board, there would be a proxy fight led by Sawiak. According to Lawrick, Ianno said that Sawiak might be one of the group's nominees and that Manna might be another; and
b. Ianno said that there was no dissident slate of directors at that time, nor any "group". Ianno said that he mentioned that Kimmel may want a representative on the board as he was a large, supportive shareholder, to which Lawrick responded that the board would be interested in interviewing Kimmel's proposed representative and Sawiak.

[48] Kimmel's undisputed evidence (corroborated by Ianno) is that he was not privy to or aware of this meeting or the discussions between Lawrick and Ianno.

[49] According to Sawiak's evidence, he decided to solicit proxies for an alternative slate after he was unable to negotiate changes to the board with Lawrick. In an email on May 4, 2023, Sawiak advised Lawrick that while Sawiak would be the person soliciting the proxies, it would not be his slate, but would reflect the consensus of holders of a substantial number of shares of NWST, including himself and Ianno.

[50] Moore deposed that on May 7 and 8, Moore (who had by then been appointed interim President and CEO in place of Peter Bell) offered to make a presentation to Ianno, Kimmel and others to explain NWST's plans for the future. Ianno declined the offer, responding that he had "enough votes to win" any proxy fight, and would instead be updated by Sawiak on discussions that Sawiak was having with NWST's chair. Ianno did not dispute Moore's recollection.

[51] Moore deposed that on May 10, 2023, he again called Ianno to say that NWST hoped to avoid a proxy fight. His evidence was that Ianno reiterated that he had the votes to win. Ianno did not dispute Moore's recollection.

[52] Kimmel deposed that later in early May 2023, he learned from Ianno that a potential dissident slate was being put together and that there was an opportunity for Kimmel to have a representative on the board. He deposed that that was the first time he became aware of any potential dissident slate, and that he subsequently proposed Manna as his nominee.

[53] Moore deposed that on May 26, 2023, he had another call with Atkinson in which Atkinson was said to have told Moore that:

a. he had lost faith in the current board and was selling his shares;
b. Ianno had contacted him to broker a sale of 1,000,000 shares to Kimmel in March 2023; and
c. Ianno and Kimmel had asked him to act as their "advisor", which he declined, and asked him to vote in support of their proposed slate at the AGM, which he verbally agreed to do.

[54] There are no notes of that conversation in evidence, nor any direct evidence from Atkinson. Kimmel deposed that he purchased some further NWST shares at around that time, but that he does not know Atkinson and has never met or spoken with him.

May 2023: notice and postponement of the AGM

[55] On May 19, 2023, Sawiak gave advance notice to NWST of his intention to nominate a competing slate of directors at the AGM set for June 23, 2023. In that notice, Sawiak disclosed that he was not acting jointly or in concert with any other person in connection with the solicitation of proxies. On May 23, 2023, Sawiak issued a press release announcing his alternate slate of directors for election at the AGM.

[56] Kimmel's uncontradicted evidence was that apart from proposing Manna to Ianno as a nominee for a board seat, Kimmel had never met, was not familiar with, and was not involved in selecting any of the proposed directors on the dissident slate. That was corroborated by the evidence of Sawiak, who deposed that he alone selected the nominees for the dissident slate, after speaking with several shareholders.

[57] In response to Sawiak's advance notice, on May 29, 2023, NWST announced that it would postpone the AGM to September 6, 2023—without providing a new record date—to "allow for the appropriate consideration of the preliminary disclosures" made by Sawiak.

[58] On that same day, NWST sent a letter to Sawiak's legal counsel, alleging for the first time that he had been working jointly or in concert with Ianno and Kimmel. NWST made similar allegations against Sawiak over the following months, during which time NWST and Sawiak exchanged correspondence on their legal positions and the disclosures made.

[59] Despite alleging Kimmel's involvement as a joint actor, NWST did not raise such allegations to Kimmel directly until it filed this application. Kimmel deposed that beyond what is contained in some of the public press releases, he had no knowledge of the communications between the parties setting out their legal positions.

June 2023: Kimmel contributes to the costs of Sawiak's proxy solicitation

[60] In early June 2023, Sawiak approached Manna asking if Kimmel could contribute some costs towards his proxy solicitation. Kimmel deposed that despite having made no commitment to voting in favour of either the dissident slate or management's slate, he agreed to contribute to the costs of Sawiak's proxy solicitation in order to keep his options open. Kimmel testified that having invested millions of dollars in NWST, he considered it wise to invest a further $50,000 to $100,000 to protect his position.

[61] Kimmel contributed to the costs of Sawiak's proxy solicitation on June 9, 2023, and June 30, 2023.

[62] Kimmel deposed that beyond agreeing to contribute some costs towards the solicitation and proposing Manna as a nominee on the dissident slate, he had no other involvement in Sawiak's proxy solicitation.

Discussions with other shareholders

[63] Moore deposed that on June 16, 2023, he had a call with another NWST shareholder, Michael Kosowan (Kosowan), in which Kosowan was said to have advised Moore that he had met with Ianno and Kimmel at their request, and that they had discussed their plans for NWST and invited Kosowan to join the proposed slate of directors, which he declined.

[64] Kimmel deposed that he and Ianno had met with Kosowan in June 2023, when Kosowan sought to meet with Kimmel to discuss Kimmel's potential investment in other companies with which Kosowan was involved, and that there was only a brief discussion toward the end of the meeting about NWST.

[65] There are no notes of Moore's conversation with Kosowan in evidence, nor any direct evidence from Kosowan.

July–August 2023: negotiations between Kimmel and NWST

[66] Kimmel deposed that in July 2023, he received two calls from Moore, who wanted to discuss a potential deal to obtain Kimmel's support for himself and NWST's incumbent board. He deposed that in particular, on these calls:

a. Kimmel advised Moore that he was dissatisfied with NWST's performance and its share price decline;

b. Moore explained that the company was looking to raise money for future drilling. Kimmel advised that he would be willing to invest more into NWST (including the entire amount of the proposed $5 million financing) if it stopped the company from issuing more shares and diluting its stock;
c. Kimmel advised Moore that he was not part of any group, but was strictly looking out for his own interests; and
d. Moore suggested that NWST and Kimmel could reach an agreement whereby Manna would be part of the management's board nominees, in exchange for Kimmel's support and financing.

[67] On July 17, 2023, Moore sent Kimmel a letter agreement proposing terms for a voting support agreement and related financing, and asked Kimmel to execute and return the letter agreement if the terms were acceptable. The proposed terms included that:

a. two current board members would resign by July 21, 2023, and NWST would appoint Manna and Terrence Lyons (Lyons) to fill the vacancies;
b. NWST would nominate Manna and Lyons for election to the board at the upcoming AGM and at NWST's annual meeting in 2024 (the 2024 AGM), and would solicit proxies in their favour;
c. Manna would be appointed to the Audit Committee, the Corporate Governance Committee, and the Chief Executive Officer Search Committee of NWST;
d. Kimmel would agree to vote any shares under his control in favour of all of NWST's director nominees at the AGM and at the 2024 AGM; and
e. Kimmel would agree not to become involved with an unsolicited take-over bid or proxy context involving NWST until after the 2024 AGM.

[68] Because Kimmel was out of the country in late July and early August, Manna retained Shimmy Posen (Posen), a lawyer with Garfinkle Biderman LLP, to negotiate the terms of the voting support agreement and related financing with NWST on Kimmel's behalf.

[69] Kimmel deposed that the negotiations between NWST and Kimmel (through counsel) continued through late July and early August 2023, and by August 4, 2023, Kimmel believed they were very close to reaching a deal, with draft agreements and blacklines having been exchanged.

[70] On July 20, 2023, Posen conveyed to NWST Kimmel's concern that if the dissident slate were elected at the AGM, Kimmel might be left with a very substantial holding in NWST without representation, and sought to negotiate terms accounting for that risk.

[71] The terms of the draft agreement as of August 2, 2023 included that:

a. Manna and Lyons would be appointed as directors until the next AGM;
b. NWST would nominate Manna and Lyons as directors at the upcoming AGM and the 2024 AGM, with Kimmel being entitled to propose a replacement in the event Manna ceased to be a director;
c. NWST intended to complete a non-brokered private placement financing up to $5,300,000, and agreed to ensure that Kimmel would be able to purchase units worth $2,500,000 at a certain pricing;
d. Kimmel would vote his shares in favour of management's board nominees and against other nominees at any meeting through the 2024 AGM;
e. NWST would issue a press release after entering into the agreement, to be reviewed by Kimmel;

f. Kimmel would not engage in certain activities—alone or "jointly or in concert" with any other person—relating to the election of directors of NWST; and
g. Kimmel would have a right to participate in subsequent financings.

[72] On August 4, 2023, on learning that Kimmel had contributed to the costs of Sawiak's proxy solicitation, NWST abruptly terminated negotiations with Kimmel. Kimmel deposed that had negotiations continued and an agreement been reached, he was fully prepared to accept the voting support agreement and support management's slate.

[73] Prior to NWST filing this application, neither Sawiak nor Ianno was aware that Kimmel was negotiating a voting support agreement with NWST, which would have resulted in him voting against Sawiak's dissident slate.

[74] On August 8, 2023, Sawiak issued a press release announcing that he had delivered an amended advance notice to NWST and publicly disclosed the amended advance notice. The amended advance notice disclosed that Kimmel was contributing to the costs of Sawiak's proxy solicitation, as was required by the applicable disclosure rules.

[75] On August 15, 2023, Sawiak contacted Kimmel for the first time and solicited his support for the dissident slate at the AGM.

III. Applicable regulatory requirements

[76] NI 62-104 sets out, among other things, the circumstances in which an early warning report is required. NI 62-103 sets out the required content of an early warning report when a person is required by NI 62-104 to provide one.

[77] Section 5.2 of NI 62-104 states:

> **Early warning**
> 5.2(1) An acquiror who acquires beneficial ownership of, or control or direction over, voting or equity securities of any class of a reporting issuer, or securities convertible into voting or equity securities of any class of a reporting issuer, that, together with the acquiror's securities of that class, constitute 10% or more of the outstanding securities of that class, must
>
> (a) promptly, and, in any event, no later than the opening of trading on the business day following the acquisition, issue and file a news release containing the information required by section 3.1 of National Instrument 62-103 *The Early Warning System and Related Take-Over Bid and Insider Reporting Issues*, and
>
> (b) promptly, and, in any event, no later than 2 business days from the date of the acquisition, file a report containing the information required by section 3.1 of National Instrument 62-103 *The Early Warning System and Related Take-Over Bid and Insider Reporting Issues*.

[78] Section 5.1(1) of NI 62-104 states:

> In this Part,
> "acquiror" means a person who acquires a security, other than by way of a take-over bid or an issuer bid made in compliance with Part 2;
>
> "acquiror's securities" means securities of an issuer beneficially owned, or over which control or direction is exercised, on the date of the acquisition or

disposition, by an acquiror or any person acting jointly or in concert with the acquiror.

[79] NI 62-104 does not define "acting jointly or in concert." Instead, section 1.9(1) of NI 62-104 sets out a deeming provision and a presumption:

> **Acting jointly or in concert**
> 1.9 (1) In this Instrument, it is a question of fact as to whether a person is acting jointly or in concert with an offeror or an acquiror and, without limiting the generality of the foregoing,
>
> (a) the following are deemed to be acting jointly or in concert with an offeror or an acquiror:
>
> (i) a person that, as a result of any agreement, commitment or understanding with the offeror, the acquiror or with any other person acting jointly or in concert with the offeror or the acquiror, acquires or offers to acquire securities of the same class as those subject to the offer to acquire;
>
> (ii) an affiliate of the offeror or the acquiror;
>
> (b) the following are presumed to be acting jointly or in concert with an offeror or an acquiror:
>
> (i) a person that, as a result of any agreement, commitment or understanding with the offeror, the acquiror or with any other person acting jointly or in concert with the offeror or the acquiror, intends to exercise jointly or in concert with the offeror, the acquiror or with any person acting jointly or in concert with the offeror or the acquiror any voting rights attaching to any securities of the offeree issuer;
>
> (ii) an associate of the offeror or the acquiror.

IV. The preliminary application

[80] Sawiak raised as a threshold matter the argument that the early warning regime does not apply to proxy solicitation for the purpose of voting on an alternate slate of directors.

[81] Section 98 of the Act provides that a "person must not make a take-over bid or an issuer bid, whether alone or acting jointly or in concert with one or more persons, except in accordance with the regulations."

[82] A "regulation" is defined by section 1(1) of the Act to include a Commission rule. NI 62-104, which was adopted as a Commission rule, sets out requirements respecting take-over bids and issuer bids.

[83] Sawiak argued that since section 98 is the only section of the Act that references the concept of "acting jointly or in concert", whether shareholders are acting jointly or in concert can be a relevant consideration only in the context of a take-over bid. Accordingly, he argued, NI 62-103 and NI 62-104, which rely on that concept, must have been adopted solely in furtherance of section 98.

[84] As further support for his contention that the early warning regime in NI 62-103 and NI 62-104 does not apply in the context of a proxy battle aimed at voting on an alternate

slate of directors, Sawiak pointed to the fact that there is another regime, that established by National Instrument 51-102 *Continuous Disclosure Obligations* (NI 51-102), that governs disclosure in the proxy solicitation process. Sawiak argued that because NI 51-102 does not include the phrase "acting jointly or in concert", the concept does not apply to communications between shareholders for the purpose of soliciting proxies to elect directors.

[85] While NWST's submissions did not address that issue, the executive director expressly countered it by saying that while NI 51-102 does not include the phrase "acting jointly or in concert", Part 9 of NI 51-102 contains disclosure requirements that are applicable to proxy solicitations beyond the early warning requirements in section 5.2 of NI 62-104. The executive director submitted that NI 51-102 provides an additional disclosure regime that applies in the context of proxy solicitation even where those acting jointly with others do not cumulatively hold 10% or more of an issuer's outstanding shares. In that regard, the executive director pointed to provisions in Form 51-102F2, the form setting out the required contents of an information circular where one is required to be delivered, that contemplate disclosure of the persons by whom the solicitation is made, including those acting alone or with others.

[86] Referring to section 184(1) of the Act, which gives the Commission the power to make rules "for the purpose of regulating trading in securities or derivatives, or regulating the securities industry or derivatives industry", NWST said, and the executive director agreed, that the Commission's rule-making power encompasses rules that apply to proxy fights and voting arrangements between shareholders, and that the Commission is entitled to make rules that deal with multiple matters.

[87] NWST argued, and the executive director agreed, that in interpreting those regulations, regard must be had to section 8 of the *Interpretation Act*, RSBC 1996, c. 238, which instructs that every enactment "must be give such, fair, large and liberal construction and interpretation as best ensures the attainment of its objects."

[88] That analysis is consistent with the decision of the Supreme Court of Canada, in *Pacific Coast Coin Exchange Ltd. v. Ontario Securities Commission*, [1978] 2 SCR 112, where the Court said at page 127 that securities legislation is remedial, "must be construed broadly, and it must be read in the context of the economic realities to which it is addressed. Substance, not form, is the governing factor."

[89] To illustrate the objects of the legislation, NWST pointed to statements made by the Canadian Securities Administrators (CSA) in a March 2013 notice accompanying proposed amendments to NI 62-103 and NI 62-104, where the CSA said that the objective of early warning disclosure is not only to allow investors to predict possible take-over bids, but also to anticipate proxy-related matters, and that it is important that investors be informed about concerted plans to change a company's board of directors.

[90] As far as we are aware, Sawiak's argument has not been considered by any Canadian securities commission. As noted by NWST, however, it was considered and rejected by the Alberta Court of Queen's Bench in *Genesis Land Development Corp. v. Smoothwater Capital Corporation*, 2013 ABQB 509. In that case, a group of shareholders working together to change an issuer's board of directors argued that the early warning system did not apply to them, because it only applied to take-over bids and issuer bids. The Court rejected that argument, holding at paragraph 19 that the early

warning system "must be interpreted to require disclosure of persons acting jointly or in concert with an acquiror if there is any 'agreement, commitment or understanding' to exercise voting rights."

[91] The Court in *Genesis* said at paragraph 6 that although NI 62-104 largely deals with take-over bids and issuer bids, Part 5 of the regulation, which imposes the early warning obligation, "specifically applies to persons who acquire shares other than by way of a take-over bid or issuer bid, and mandates early disclosure if an acquiror…acquires beneficial ownership of, or control or direction over, securities of a reporting issuer that would constitute 10% or more of the outstanding securities of a class." The Court referred to the CSA's statements, referenced above, and to the principle that securities legislation is to be construed broadly in concluding at paragraph 17 that it is "surely not in keeping with the purpose of the Part 5 provisions to interpret them as narrowly as suggested by the Respondents, which would allow multiple shareholders who are acting together, each with a less than 10% interest, to avoid the requirements of early disclosure." Finally, the Court noted at paragraph 18 that the suggestion that the early warning requirement applied only in the context of a take-over bid was inconsistent on its face with section 1.9(1)(b), which presumes two people to be acting jointly if they have an agreement to vote their shares together.

[92] Sawiak cited the decision of the Alberta Court of Queen's Bench in *Karnalyte Resources Inc. v. Phinney*, 2020 ABQB 119, saying that the Court there had rejected *Genesis*. As noted by NWST, *Karnalyte* actually concerned a proxy fight where the respondent shareholders conceded that the early warning rules applied to shareholders who were acting jointly or in concert in an effort to replace the board of directors. Their defence was that on the facts, they were not acting jointly or in concert. The company in *Karnalyte* had sought to rely on *Genesis* to argue that an individual holding proxies for 10% or more of a company's outstanding shares must file an early warning report. The Court said that *Genesis* did not stand for that principle, since the law is clear that a proxy does not confer on the proxyholder a beneficial interest in or legal control over the shares. The Court in *Karnalyte* cannot be said to have rejected the *Genesis* decision.

[93] Another case cited by Sawiak was *Kingsway Financial Services Inc. v. Kobex Capital Corp.*, 2016 BCSC 460. In that case, Kingsway had argued that a company and its president could be taken to be acting jointly or in concert because they had a common alignment of general interests. The Court held at paragraph 35 that "Section 98 of the *Securities Act* plainly requires that the 'acting jointly or in concert' be for the specific purpose of a take-over bid." Sawiak argued that the Court had held, by implication, that two parties are not acting jointly or in concert unless they are doing so for the specific purpose of a take-over bid. NWST submitted that the language used by the Court in *Kingsway* simply reflected the fact that the circumstances at issue did in fact involve a take-over bid. We agree that the Court's statement, made in the context of a take-over bid, does not preclude the application of the concept of acting jointly or in concert to a proxy solicitation, since that question did not arise for consideration in *Kingsway*.

[94] So far as we are aware, the Alberta Court's decision in *Genesis* has not otherwise been judicially considered and it has not been considered by any other Canadian securities commission.

[95] The executive director submitted that if the panel were to conclude that the early warning regime is not engaged because section 5.2 only applies to take-over bids, we might

consider whether, given the purposes and principles animating the Act's disclosure regime, the public interest requires disclosure where persons whose holdings exceed 10% act jointly or in concert to solicit proxies for the purpose of voting on an alternate slate of directors.

[96] Neither Kimmel nor Ianno made written submissions with respect to the preliminary application.

[97] Sawiak ultimately conceded in oral argument that the early warning requirements could arise under section 5.2 if it were established that the parties were acting jointly or in concert to install a new board of directors, provided that one or more of the joint actors had subsequently acquired shares to trigger the disclosure obligation.

[98] The members of the CSA, including the Commission, have adopted a broad array of local, multilateral and national instruments and policies governing the securities industry. Those rules are contained in a framework, the national numbering system, that is intended to sort them by subject matter and to make it clear in what circumstances they apply. In fairness to Sawiak, we note that it is not unreasonable for parties to think that if they are not making a take-over bid or proposing a special transaction, but simply soliciting proxies for a shareholder meeting, they need not consider the application of a set of rules contained in a national instrument titled "Take-Over Bids and Issuer Bids," which is itself contained in Part 6 of CSA framework, the part reserved for "Takeover Bids and Special Transactions."

[99] Nevertheless, taking together the *Genesis* decision, the plain meaning of the language used in section 5.2 of NI 62-104, the principle that securities legislation should be given a large and liberal interpretation, and the intentions of the CSA as reflected in its March 2013 notice, we find that the concept of acting jointly or in concert does apply to proxy solicitation for the purpose of voting on an alternate slate of directors, even in the absence of a take-over bid or issuer bid. We would encourage the CSA to make that clearer in the language of the relevant provisions when it has an opportunity to do so.

[100] We turn then to the consideration of the parties' submissions on the main issue, whether in fact the Respondents were acting jointly or in concert so as to trigger the early warning requirements of Section 5.2 of NI 62-104.

V. Positions of the parties on the main issue

A. NWST

[101] NWST argued that for months the Respondents have been acting jointly or in concert to replace NWST's board of directors by means of a proxy fight at the AGM. NWST says that instead of providing the required disclosure, the Respondents have put forward Sawiak, a small shareholder, as the face of the campaign to hide the fact that the Respondents collectively hold approximately 12% of NWST's shares, and to hide Ianno's previous securities law violation.

[102] NWST identified all three Respondents as acquirors, on the basis that they have at some point all acquired shares in NWST other than through a take-over bid or issuer bid, and went on to advance the position that for the purpose of the joint actor concept as used in section 5.2 of NI 62-104, it is not necessary for the acquisition that triggered the disclosure obligation to have occurred while the individuals are joint actors. NWST argued that the disclosure obligation is triggered by an acquiror hitting the 10%

threshold, whether through a fresh acquisition or as a result of becoming a joint actor with other shareholders.

[103] NWST submitted that to interpret the rule to require that the acquisition follow the establishment of a joint actor relationship would have "absurd consequences", since it would mean that a group of shareholders, none of whom holds more than 10%, would be exempt from providing early warning disclosure (whether of a take-over bid or a proxy-related matter) if they joined forces but did not acquire or offer to acquire any additional shares.

[104] NWST also argued that in the alternative, if the acquisition did have to occur at some point after the parties began acting jointly, the Respondents would nevertheless have been caught by the early warning provision, since, NWST says, the Respondents were already acting jointly or in concert when Kimmel acquired shares from Atkinson in late March 2023.

[105] Further, NWST argued that it is not necessary for it to establish that all three Respondents are acquirors or offerors, since the joint actor concept applies to a "person" who acts jointly or in concert with an offeror or an acquiror. Thus, they say, even if Sawiak was not himself an offeror or acquiror as defined, because Kimmel and Ianno were, Sawiak can still be acting jointly or in concert with Ianno and Kimmel in making his proxy solicitation.

[106] Section 1.9(1)(b)(i) of NI 62-104 provides that a person and an acquiror or offeror are presumed to be acting jointly or in concert if they have "an agreement, commitment or understanding" to exercise their voting rights jointly or in concert. NWST submits that the breadth of that language is important, since it does not require a formal agreement to vote shares in a certain way, or even a firm commitment, but simply a mutual understanding. NWST argues that the facts demonstrate that the respondents had, at the very least, an understanding that they would exercise their voting rights at the AGM jointly or in concert to install the dissident slate.

[107] At paragraph 74 of NWST's submissions dated September 8, 2023, NWST sets out a summary of the key points it says strongly support that conclusion, as follows:

(a) Ianno first mentioned a proxy fight in November 2022, and the next month proposed that both he and Kimmel should have representation on NWST's board;
(b) Ianno brokered Kimmel's acquisition of shares in the financing in February 2023, as well as Kimmel's acquisition of shares from Atkinson in March 2023, and purchased shares of his own with a $500,000 loan from Kimmel;
(c) Ianno and Kimmel jointly met (or planned to meet) with UBS to discuss Kimmel's plans with respect to his shareholding in NWST;
(d) Ianno recruited Sawiak given his expertise with securities law, and proposed a board that would include both Sawiak and a representative of Kimmel;
(e) Ianno told NWST that Sawiak would be getting in touch with it before Sawiak had launched any proxy fight or even spoken to the company about any concerns;
(f) Sawiak admitted that he did not want Ianno to be publicly soliciting shareholders because Ianno's history of securities law violations would be a "distraction";

(g) Ianno, Sawiak and Kimmel all attempted to recruit people to join the slate of proposed directors that Sawiak ultimately put forward, sometimes jointly;
(h) Ianno and Sawiak both had discussions with NWST in which they presented themselves as aligned and making decisions together;
(i) Sawiak described his slate as being the consensus of multiple shareholders, including Ianno;
(j) right before Sawiak commenced the proxy fight, Ianno asserted that he had enough votes to win it and was thus uninterested in speaking with NWST;
(k) Ianno and Sawiak included Manna on the slate, specifically because he is Kimmel's chosen representative;
(l) Kimmel agreed to fund the costs of Sawiak's proxy solicitation;
(m) Sawiak's amended notice expressly describes him as working jointly or in concert with Kimmel; and
(n) Kimmel and Ianno have now formally provided their proxies to Mr. Sawiak.

[108] NWST argued that that set of facts "unavoidably points to an understanding that the Respondents would all vote their shares in favour of the dissident slate. It defies belief for the Respondents to deny, for example, that there was no agreement, commitment or understanding that Kimmel would vote his shares in favour of the slate when: (i) it included his representative; and (ii) he was funding the cost of soliciting proxies for that slate."

[109] NWST acknowledged that it can rely on the presumption in Section 1.9(1)(b)(i) only if it can demonstrate an "agreement, commitment or understanding" by the Respondents to exercise their voting rights jointly or in concert to vote in favour of the dissident slate, which would require Kimmel to have intended to vote that way. It argued, however, that it should be sufficient, without resorting to the presumption, to demonstrate that they were joint actors because Kimmel was involved in composing a dissident slate and in an agreement that there would be a proxy fight, and then bankrolled that proxy fight, even if he had not actually decided to vote for the dissident slate (which NWST argued would never actually have happened, because that would not be a sensible way to proceed). NWST then asked us to draw the inference that because that is not a credible story, it was not the story in this case.

[110] In response to the evidence that Kimmel had been negotiating with NWST to have his representative appointed to the incumbent slate at the same time that NWST claimed Kimmel to have been acting jointly with Sawiak and Ianno, NWST submitted that if Kimmel was already acting jointly with the others, the act of negotiating with NWST did not change that status.

[111] With respect to the evidence required to substantiate its allegations, NWST submitted that concerted action is easy to hide, but difficult to prove; accordingly, because evidence of parties acting jointly or in concert will often be circumstantial, it will be appropriate to draw inferences of joint action from that circumstantial evidence.

[112] With respect to the appropriate remedy if the panel concluded that NWST had made out its case, NWST sought orders prohibiting the Respondents from exercising voting rights attached to their shares with respect to the election of directors at the AGM, requiring that they cease trading in NWST's shares for six months, and directing Sawiak to comply with the early warning rules.

[113] NWST argued that those orders are necessary and appropriate to protect NWST's shareholders and the capital markets in general. They say that because disclosure is the cornerstone of the securities regulatory system, a willful breach of the disclosure obligation must be met with a serious response. NWST stressed that if the consequence of a breach is nothing more than an order to provide proper disclosure, accompanied by the postponement of the meeting to provide time for that disclosure, "it would be the equivalent of a mere slap on the wrist," providing no incentive for the Respondents or any other market participants to comply with the early warning system.

[114] NWST referred the panel to the decision of the Ontario Securities Commission (OSC) in *Re Eco Oro Minerals Corp.*, 2017 ONSEC 23, in which the voting of certain shares was disallowed on the basis that allowing them to be voted would thwart the justified expectations of shareholders. NWST argued that allowing the Respondents to vote on the election of directors at the AGM would likewise be against the public interest.

[115] NWST also referred the panel to two decisions of Courts in the United States where, they said, the Courts made similar orders preventing the voting of shares where securities law violations were found and where it would be manifestly unfair to allow those shares to be voted in the absence of fulsome disclosure.

[116] Finally, NWST argued that a cease trade order is also appropriate as a punitive measure, since "Kimmel, in particular, has continued to trade in Northwest securities for months while covertly acting to change its board."

B. The executive director

[117] The executive director did not address the evidence, but provided submissions with respect to the legal test for determining whether parties are acting jointly or in concert, the appropriate principles for consideration in determining whether the test was met, and the appropriate remedy.

[118] Section 5.2 of NI 62-104 requires an early warning report to be filed by "an acquiror who acquires beneficial ownership of, or control or direction over, voting or equity securities of any class of a reporting issuer, or securities convertible into voting or equity securities of any class of a reporting issuer, that, together with the acquiror's securities of that class, constitute 10% or more of the outstanding securities of that class." The executive director argued that contrary to NWST's position, a plain reading of the provision requires an acquisition. It is the acquisition that triggers the disclosure requirement.

[119] Accordingly, he argued, it is important to determine when a joint actor relationship crystallized, if it did, because the early warning requirements only apply to joint actors if, after the point at which the parties began acting jointly or in concert, there was an acquisition of securities by one of the joint actors that took the group's holdings over the 10% threshold.

[120] The executive director submitted that NWST's interpretation of section 5.2 is not reasonable because it would require the panel to completely disregard the inclusion of the trigger, that is, the requirement for an acquisition, in circumstances involving joint actors. The executive director acknowledged that his interpretation may mean that some conduct falls outside the scope of the early warning requirements, but maintained that that is not an absurd consequence or a sufficient basis to reject the plain meaning of the words used in the provision.

[121] Noting that an assessment of whether two or more parties are acting jointly or in concert is inherently fact-specific, the executive director summarized the following principles, gleaned from the case law, that may assist in applying the concept of acting jointly or in concert for the purpose of soliciting proxies in order to vote on a new slate of directors:

a. The "acting jointly or in concert" must be for the specific purpose of soliciting proxies to vote on a new slate of directors, not some other general purpose: *Kingsway*, para. 35;
b. A formal agreement between the parties, while helpful in establishing joint actor status from an evidentiary perspective, is not a prerequisite to finding that persons are acting jointly or in concert: *Sears Canada Inc. et al*, 2006 ONSEC 13, para. 79;
c. The parties are more likely to be joint actors if they played an integral role in bringing about the stated purpose beyond their customary role: *Re Sterling Centrecorp Inc.*, (2007) 30 OSCB 6683, para 102;
d. Circumstantial evidence such as family relationships, communication between the parties and attendance at meetings together can be taken into account in determining whether the parties were making a concerted effort to bring about a specified objective: *Genesis*, para 25;
e. The existence of a prior business or personal relationship alone does not render the parties joint actors: *Sterling*, para 183;
f. Absent a planned result having been agreed upon, committed to or understood, there cannot be a finding of joint actors. Discussions which are tentative and inconclusive, or where ideas are raised and dropped, will not lead to a finding that the parties are acting jointly or in concert: *Drilcorp Energy Ltd v. Harry L Knutson et al* (24 March 2005), Calgary 0501-02360 (ABQB), para 7; and
g. The fact that the interests of the parties are aligned does not mean they were acting jointly or in concert: *Re DIRTT Environmental Solutions Ltd.*, 2023 ABASC 32, para 172.

[122] With respect to remedy, the executive director submitted that if the panel were to conclude that NWST had made out its case, it should not impose the orders sought by NWST, other than the order to compel disclosure.

[123] NWST argued for the deterrent effect of orders disenfranchising the Respondents at the AGM and cease-trading their shares for a period, as was done in *Eco Oro*. The executive director submitted that while deterrence may sometimes be a relevant factor in imposing section 114(1) orders, the appropriate remedy will depend on the specific facts of the matter and the conduct in issue. In this case, the executive director submitted that the potential harm to investors of non-disclosure could be addressed with a disclosure order.

[124] The executive director distinguished this case from the situation in *Eco Oro*, where the OSC, on a hearing and review, set aside a decision of the Toronto Stock Exchange to conditionally approve a private placement to certain shareholders in the midst of a proxy contest, finding that the timing of the issuance was intended to tip the balance at a contested shareholder meeting. The panel ordered Eco Oro to obtain shareholder approval of the private placement. To give effect to that order, the panel also ordered that, unless and until shareholders had ratified the private placement, the newly issued shares would be cease-traded and could not be voted at the upcoming meeting. The

executive director submitted that in so doing, the panel in *Eco Oro* had simply imposed orders aimed at putting the parties in the position they would have been in but for the conduct in issue.

[125] The executive director referred us to the decision in *Genesis*, where the applicant sought an order prohibiting the respondents from exercising their voting rights for failing to provide disclosure in accordance with Section 5.2 of NI 62-104 in circumstances similar to those in this case. In refusing that order, the Court in *Genesis* said as follows at paragraphs 69 and 70:

> [69] As noted by Morawetz J. in *Echo Energy Canada Inc v Challenge Gas Holding AB* (2008), 2008 CanLII 63183 (ON SC), 94 OR (3d) 254 (SCJ) at para. 88, "[a] shareholder's right to vote is both a necessary and fundamental right in corporate democracy." While section 180 affords this Court a wide discretion in fashioning an appropriate remedy where there has been non-compliance with securities regulation, "the surgery should be done with a scalpel, and not a battle axe": *820099 Ontario Inc v Harold E Ballard Ltd* (1992), 3 BLR (2d) 113 (Ont SCJ).
>
> [70] In the circumstances of this case, even the alternate remedy suggested by *Genesis* would result in at least a temporary disenfranchisement of shareholders. The remedy should be less drastic. It should serve to ensure that shareholders would be in the same position with respect to information as they would have been had proper and full disclosure been made, and that they be allowed sufficient time to adjust their decisions on proxies if necessary.

[126] Finally, the executive director argued that an order prohibiting voting of the Respondents' shares at the AGM would be disproportionate to the potential harm resulting from any non-disclosure, as it would result in a significant number of shares being ineligible to be voted and would likely have a material impact on the outcome of the proxy contest. The executive director observed that such an order would no doubt give NWST and its incumbent board a significant tactical advantage, and that granting it would likely be determinative of not only the outcome of the AGM but of the composition of NWST's board, which would affect the company's future direction and control.

C. Sawiak

[127] Sawiak argued that NWST is seeking to engage the Commission's jurisdiction to frustrate the ability of disaffected shareholders to exercise one of the most fundamental rights they hold: the right to elect directors. He urged the panel to dismiss the application as unduly restrictive of the rights of shareholders to raise concerns with one another and discuss possible changes in the composition of the board.

[128] As an alternative to his submissions on the preliminary issue, Sawiak argued that for Section 5.2 to apply to joint actors in the context of a proxy solicitation, there must be evidence of an acquisition made by one or more of the joint actors for the purpose of reconstituting the board of directors.

[129] In oral argument, Sawiak resiled from both his original and that alternative position, expressly agreeing with the submissions of the executive director that to trigger the disclosure requirement in Section 5.2, there must have been a subsequent acquisition of additional shares by one of the joint actors, but that acquisition need not have been made with the intention to reconstitute the board.

[130] On the facts, Sawiak argued that it was never the case that he and Ianno had an understanding with Kimmel that they would act jointly or in concert to reconstitute the board because it was clear throughout that Kimmel was simply keeping his options open.

[131] With respect to the suggestion by the executive director that should the panel conclude that the early warning regime is not engaged in the context of a proxy solicitation, it may wish instead to invoke its public interest jurisdiction to require disclosure, Sawiak argued that it would be improper for the executive director, in making submissions effectively as an intervenor in an application made pursuant to section 114 of the Act, to seek to expand the scope of potential liability to encompass an allegation that was not made by NWST.

[132] With respect to the remedies sought by NWST, Sawiak argued that NWST was seeking to disenfranchise the Respondents because it was aware that if the Respondents were permitted to vote for the dissident slate at the AGM, the incumbent board would lose that vote. Noting that NWST has repeatedly made disclosure of the facts that it contends ought to have been disclosed in an early warning report, he suggested that NWST was "following a playbook created by their counsel" to prevent shareholders from exercising their right to elect an alternative slate of directors. He urged the panel not to permit the investors' right to vote to be prejudiced.

D. Kimmel

[133] Kimmel asserted that having identified him as a swing vote, NWST now seeks to disenfranchise him, using the company's money and the Commission's resources. He emphasized that the first time it was suggested to him that he was acting jointly or in concert with others was when NWST brought its application before the Commission on August 23, 2023, after NWST had tried to secure a voting agreement from Kimmel that would require him to support management's nominees. He characterized NWST's application as a calculated effort to disenfranchise shareholders who are discontented with the company's management and direction, eliminate a dissident slate of directors in advance of the AGM, and entrench the existing board.

[134] Kimmel's submissions focused on the allegation that the Respondents were joint actors. He stressed that the presumption in section 1.9(1)(b)(i) of NI 62-104 does not obviate NWST's burden to establish that each of the Respondents was acting jointly or in concert with the others, in the face of their clear and consistent denial that they were. He cited *Sterling* at paragraph 115 for the proposition that whether a joint actor relationship has been established in fact requires a factual analysis based on the plain and ordinary meaning of the words "acting jointly or in concert", informed by the regulatory scheme and polices, and must be assessed separately in respect of each alleged joint actor.

[135] Kimmel argued that NWST's evidence in support of the alleged joint activities is at best speculative and ambiguous, and that the "key points" identified by NWST in support of a conclusion that he was acting jointly or in concert with Ianno and Sawiak are either contradicted by other direct evidence, not supportive of a finding of a joint actor relationship, or readily explainable as the conduct of shareholders acting in their own interests. Kimmel expanded on that argument as follows:

a. Kimmel deposed that he was not involved in or aware of the discussions between Ianno and Moore, and that he and Ianno did not discuss the prospect of Kimmel having a board representative until April 2023. He argued that neither Ianno's statements or subjective views (regardless of whether Moore's recollection is accurate) nor Moore's beliefs or suspicions can be relied on to draw inferences unsupported by facts and contradicted by Kimmel's direct evidence.
b. Kimmel deposed that Ianno's "role" in Kimmel's participation in NWST's financing was limited to informing Kimmel, and other shareholders, about the opportunity to participate in the financing, sending the subscription agreement to Kimmel, and returning his signature pages to NWST. Kimmel deposed that he made the decision to participate after he reviewed terms of the subscription agreement with his counsel, and NWST management subsequently communicated directly with Manna about information needed to complete Kimmel's investment. Kimmel submitted that his participation in the private placement is consistent with a significant shareholder of a company acting in his own interests to maintain his share position. Kimmel noted that he had similarly offered NWST financing while negotiating a voting support agreement with management that would have resulted in him voting against Sawiak's slate.
c. On cross-examination about his meeting and discussions with UBS, Kimmel testified that Ianno was not involved in any meetings between Kimmel and UBS. Kimmel's undisputed evidence was that a UBS representative made the unprompted suggestion, which Kimmel did not pursue, that given its small size, Kimmel could take NWST private.
d. Kimmel deposed, and it was not disputed, that he has never met Sawiak and, until Sawiak solicited his proxy via email on August 15, 2023, had never spoken with him. Kimmel argued that even if Sawiak and Ianno were acting jointly or in concert, which they both deny, Kimmel was not aware of or privy to their discussions, was not involved in "recruiting" Sawiak, and, apart from proposing that Manna be nominated, had no role in selecting the nominees on Sawiak's slate.
e. Kimmel deposed that he was not involved in and had no knowledge of Ianno's or Sawiak's discussions with Lawrick or Moore. He argued that no inference can be drawn against him arising from those discussions where he has provided direct evidence to the contrary. He submitted that his uncontradicted evidence is that Ianno first raised the prospect of an alternative slate of directors with him in early May.
f. In his evidence, Kimmel expressly denied any involvement in assembling the dissident slate apart from proposing Manna to Ianno as a nominee, and deposed that he is not familiar with the other candidates.
g. Notwithstanding Lawrick's stated belief that Ianno and Kimmel maintained a "close personal relationship", it was Kimmel's uncontroverted evidence that he has no substantive personal or professional relationship with the other Respondents. On cross-examination, Lawrick admitted that he had never met or spoken with Kimmel.
h. Kimmel deposed that he never committed to voting his shares in favour of either the dissident slate or NWST's management, and that he would have been prepared to execute a voting support agreement in favour of NWST's management if the negotiations had not been abruptly terminated by NWST.
i. Kimmel deposed that he wanted board representation. He argued that his dealings with both Ianno and NWST are consistent with that objective. Kimmel submitted that when Ianno raised the possibility of replacing one or two board

members, Kimmel expressed interest in having representation on the board; that when Ianno raised the possibility of an alternative slate, Kimmel proposed that Manna be included; and that when Moore approached Kimmel in July, Kimmel was willing to support management's slate in exchange for board representation on favourable terms.

j. Moore acknowledged on cross-examination that in the course of negotiations, Kimmel had told Moore that he was not part of any group and had asserted that he was only protecting his own interests.
k. Kimmel deposed that he agreed to contribute to the costs of Sawiak's proxy solicitation because, in his view, doing so kept his options for obtaining board representation open. He pointed to his subsequent efforts to reach a voting agreement with management to secure board representation and an investment opportunity as evidence that he was simply preserving his options, as opposed to acting jointly or in concert.
l. Kimmel deposed that despite nearing agreement on the terms of a voting support agreement that would have had him vote in favour of NWST's nominees, he never informed Ianno or Sawiak of his negotiations with NWST, and they were not aware of those negotiations until this proceeding was commenced. He also never advised NWST that he was a party to a conflicting arrangement that would have to be terminated to allow him to enter into a voting support agreement with NWST.
m. In the course of negotiations, Kimmel had expressed concern to NWST that, despite his support of management, the dissident slate may still win the proxy contest and Kimmel would be left with a substantial share position without representation, and had sought to negotiate terms accounting for that risk.
n. Kimmel submitted that NWST's submissions misconstrue Sawiak's amended notice, which discloses that Kimmel contributed to the costs of solicitation. That disclosure is required by the applicable form. He argued that it would be an absurd outcome if the mere contribution of funds to a proxy solicitation constituted an agreement or understanding to exercise voting rights to replace the board, particularly given his subsequent negotiations that would have had him supporting management's slate and providing the company with financing. He noted that disclosure respecting who bears the costs of solicitation applies regardless of whether the contributor owns any shares.

[136] Kimmel cited *Arbour Energy Inc., Re*, 2012 ABASC 131, at paras. 89-90 for the proposition that uncorroborated hearsay (such as Moore's evidence about the substance of conversations said to have occurred between certain of the Respondents and Atkinson and Kosowan) is properly treated as inherently unreliable and entitled to little if any weight, particularly where, as here, it is inconsistent with Kimmel's direct evidence.

[137] Kimmel acknowledged that circumstantial evidence was admissible, but submitted that any inferences sought from it must be reasonable and supported by evidence and not based on speculation, such as Moore's or Lawrick's suspicions or subjective beliefs. He argued that it is not open to the panel to draw an inference in the absence of any evidence to support that inference. The facts underlying an inference must be proven, not hypothetical or assumed: *Magnesen (Re)*, 2021 ABASC 129 at para. 47, citing *Walton v. Alberta Securities Commission*, 2014 ABCA 273 at paras. 26-27.

[138] Kimmel argued that NWST asks the panel to draw adverse credibility findings and make factual findings that are contrary to his uncontradicted sworn evidence. He says that the

panel cannot do so, particularly where, as here, he has provided alternate explanations which he asserts are not only equally or more plausible, but are plainly accurate.

[139] In that regard, Kimmel relied on *Karnalyte*, in which the Court rejected circumstantial evidence in favour of uncontradicted testimony in the context of a proxy battle. In that case, the applicant commenced an application against three shareholders on the basis that they had improperly solicited proxies without disclosing their joint relationship. Among other pieces of circumstantial evidence, the applicant relied on various phone records, which showed an increase in phone calls between some of the respondents during the period where they were alleged to have acted in concert. On examination, the respondents clarified each of those calls, and provided explanations which refuted the applicant's contention that "it is logical to infer that the communications …were not mere coincidence." At paragraph 117 of its decision, the Court held that:

> A court cannot draw adverse credibility findings on the basis of inferences drawn from circumstantial evidence that are contrary to the sworn and uncontradicted testimony of witnesses, particularly when an alternate explanation is equally or more plausible than the inference.

[140] Kimmel submitted that NWST failed to demonstrate that the only reasonable interpretation of the facts is indicative of an agreement to act jointly or in concert. He argued that his conduct throughout was equally consistent with him simply acting independently in his own interests.

[141] Kimmel argued that even taken at its highest, the evidence relied on by NWST is inconclusive and susceptible to multiple interpretations, and thus cannot support a finding of a joint relationship.

[142] Turning to the mechanics of Section 5.2, Kimmel, who did not make any submissions on the preliminary issue of the applicability of that section to proxy solicitation, adopted in argument the executive director's submissions that, contrary to the argument advanced by NWST, if parties are acting jointly or in concert, it is the subsequent acquisition of additional shares by one of the joint actors that triggers the disclosure requirement. Kimmel argued that to interpret otherwise would effectively read out the word "acquires " from section 5.2(1), contrary to the established principle that an interpretation that ignores terms should be rejected.

[143] Finally, with respect to remedies, Kimmel submitted that the measures requested by NWST are "grossly disproportionate, unsupported by (and indeed, out of step with) Canadian authorities, and betray the true motives of NWST's board in bringing this application." He argued that such orders could not possibly be justified in the absence, as here, of any harm to investors or to the integrity of the capital markets.

[144] He noted that in both *Genesis* and *Sterling*, cases dealing with situations where respondents were found to have acted jointly or in concert absent appropriate disclosure, the orders made were intended simply to remedy the disclosure deficiency.

[145] With specific reference to the authorities relied on by NWST, Kimmel argued that none was analogous to the present application and that, in any event, although the cases all involved more serious instances of alleged non-disclosure than the present, the remedies ordered were less draconian than the orders sought by NWST.

E. Ianno

[146] Ianno, who generally adopted the submissions of Sawiak, argued that NWST's application was meritless, advanced simply to gain an unfair voting advantage for the incumbent board in the context of a hotly contested proxy fight concerning the election of directors.

[147] Ianno echoed the arguments of the other Respondents that if the panel were to determine that the Respondents were acting jointly or in concert so as to trigger the disclosure requirement in Section 5.2 of NI 62-104 and to grant an order directing Sawiak to file an early warning report, no further remedy would be required and the AGM should not be postponed further. Ianno submitted that to grant any order that would provide an advantage to NWST's incumbent board in these circumstances would be anathema to the public interest.

VI. Analysis

[148] These were the issues before the panel:

a. if parties are acting jointly or in concert, must there be a subsequent acquisition of additional shares by one of the joint actors in order to trigger the disclosure requirement in Section 5.2 of NI 62-104;
b. were the Respondents acting jointly or in concert in this case;
c. if so, did they breach their obligation to make the early warning disclosure required by Section 5.2; and
d. if so, what remedy should be ordered?

[149] In *F.H. v. McDougall*, 2008 SCC 53, the Supreme Court of Canada stated that "there is only one civil standard of proof at common law and that is proof on a balance of probabilities": *F.H.* at para. 40. The judge's task is to determine "whether it is more likely than not" that the event at issue occurred: at para 44. The "evidence must always be sufficiently clear, convincing and cogent to satisfy the balance of probabilities test": at para. 46.

[150] The Respondents deny that they were acting jointly or in concert to exercise their voting rights at the AGM in order to install the dissident slate. The onus is on NWST to prove on a balance of probabilities that they were, and that their failure to disclose their joint acting relationship breached the early warning requirements in section 5.2 of NI 62-104.

[151] As is set out in BC Policy 15-601 *Hearings*, the Commission is not bound by the formal rules of evidence that apply in the courts. In general, the Commission will receive all relevant evidence. The weight given to any particular piece of evidence is for the panel to decide.

[152] As the Alberta Court of Appeal noted in *Walton v. Alberta (Securities Commission)*, 2014 ABCA 273, speculation is not permitted, but circumstantial evidence may assist in determining whether the test has been met. Any inferences sought to be drawn from evidence, including circumstantial evidence, must be reasonable and supported by evidence. The facts underlying an inference must be proven, not hypothetical or assumed.

The acquisition trigger

[153] Section 5.2 of NI 62-104 applies to require early warning disclosure from "an *acquiror* who *acquires* beneficial ownership of, or control or direction over, voting or equity securities of any class of a reporting issuer, or securities convertible into voting or equity securities of any class of a reporting issuer, that, together with the *acquiror's securities* of that class, constitute 10% or more of the outstanding securities of that class…" (emphasis added).

[154] A joint actor's shareholdings come into the mix by virtue of section 5.1(1) of NI 62-104, which defines "acquiror's securities" to mean securities of an issuer beneficially owned, or over which control or direction is exercised, on the date of the acquisition or disposition, by an acquiror or any person acting jointly or in concert with the acquiror.

[155] NWST argued that it is not necessary for the acquisition that triggered the disclosure obligation to have occurred while the individuals are joint actors; rather, the disclosure obligation is triggered by an acquiror hitting the 10% threshold, whether through a fresh acquisition or as a result of becoming a joint actor with other shareholders.

[156] We disagree. On the plain meaning of the words used in the provision, if parties are acting jointly or in concert, the early warning requirements are triggered only when as a result of a subsequent acquisition, the joint actors collectively hold 10% or more of the outstanding securities of the class. Absent an acquisition, the early warning requirements contained in section 5.2 do not apply. To hold otherwise would be to read out altogether the reference to an acquisition.

[157] We agree with the submission of the executive director that although that interpretation may leave some joint action outside the scope of the early warning requirements, that is neither an absurd consequence nor a sufficient basis to reject the plain meaning of the provision.

[158] If a joint actor relationship is found, it will be important to determine both when it came into being and whether there was a subsequent acquisition by one of the joint actors that took the group's holdings over the 10% threshold.

Acting jointly or in concert

[159] Section 1.9(1)(b)(i) of NI 62-104 provides that persons that, pursuant to an agreement, commitment, or understanding between them, … intend to exercise jointly or in concert voting rights attached to securities of an issuer are presumed to be acting jointly or in concert.

[160] It is common ground that there was no formal agreement or commitment among the Respondents to exercise their voting rights jointly or in concert to install Sawiak's dissident slate. NWST argued that it can nevertheless avail itself of the presumption, on the basis that there was an understanding among the Respondents that they would vote for the dissident slate, but that it need not do so, because the facts establish affirmatively that the Respondents were acting jointly or in concert.

[161] We agree that where the circumstances do not fall within the presumption, it is still a question of fact whether the Respondents acted jointly or in concert. However, we had

some difficulty identifying any distinction between NWST's arguments relating to the alleged understanding versus the alleged joint action. Both seemed to rely on an inference, which NWST asked us to draw from circumstantial evidence, that there was such an understanding.

[162] The key figure for present purposes is Kimmel, since any finding that the Respondents collectively owned or controlled 10% or more of NWST's outstanding common shares depends on Kimmel's shareholdings being combined with those of Sawiak and Ianno. Absent a finding that Kimmel was a joint actor with the others, Section 5.2 of NI 62-104 does not apply and NWST's application must fail.

[163] NWST argued that the facts demonstrate that the Respondents had at least a mutual understanding that they would exercise their voting rights at the AGM jointly or in concert with one another.

[164] Further, NWST argued that even if Kimmel had not formed a positive intention to vote in favour of the dissident slate, the fact that he was willing to fund the solicitation demonstrates a common aim and purpose with Ianno and Sawiak sufficient to ground a finding that they were acting jointly or in concert. In that regard, NWST argued that it is simply not credible that Kimmel would have agreed to foot the bill if he had not also intended to vote in favour of the dissident slate, an argument which essentially circles back to the alleged understanding.

[165] Much of the evidence adduced by NWST was circumstantial, and some of it was contested by the Respondents. The question for the panel was whether NWST has demonstrated that it is more likely than not that the Respondents intended to act jointly or in concert to bring about the installation of the dissident slate as NWST's new board of directors.

[166] With respect to what must be established to ground that finding, the parties cited various cases for our consideration.

[167] In *Drilcorp*, the Alberta Court of Queen's Bench found the evidence unable to support the inference of joint action where "no planned result had been agreed upon, committed to or understood."

[168] In *Sears*, an OSC panel agreed that a formal agreement was not required to find that parties were joint actors, but said that without "the proverbial smoking gun," there must be evidence to support a finding that parties have acted jointly or in concert. In that case, at para. 79, certain parties were not found to be acting jointly or in concert where they provided credible and plausible alternative explanations in response to the evidence adduced. Also in that matter, where another party did not go beyond its customary role and was acting in its own best interest, it was found not to be acting jointly or in concert with others.

[169] In *Sterling*, another OSC panel tasked with determining whether parties were acting jointly or in concert in connection with a take-over bid relied on *Sears* and *Drilcorp* to say at para. 102 that a joint actor relationship can be found if the facts establish that the parties in question played an integral role in planning, promoting and structuring the transaction to ensure its success beyond their customary role.

[170] In *Kingsway*, at para. 32, the B.C. Supreme Court cited *Genesis* for the proposition that the question is whether the parties were "making a concerted effort to bring about a specified objective". At paras 34-35 of *Kingsway*, the Court made it clear that alignment of interests is not sufficient to ground a finding of joint action.

[171] In *DIRTT*, a very recent decision of the Alberta Securities Commission, the panel concluded at para. 172 that the respondents in that case did not act jointly or in concert "with a view to attaining an agreed-upon objective." The entity in question was not involved in planning or preparing the requisition that raised the issue. Neither the fact that that entity's interests were aligned in some areas with those of the other party nor its ultimate willingness to support the alternative slate meant that they were acting jointly or in concert.

[172] That Sawiak played an integral role in the proxy solicitation is clear. He was the person soliciting proxies, and in the spring of 2023 he had numerous exchanges with Lawrick in which he proposed an alternate slate, which originally included Lawrick and Moore, for election at the AGM. NWST alleged that Ianno also played a key role as the instigator of the proxy contest, and as the liaison between NWST and Sawiak and between Sawiak and other shareholders, including Kimmel.

[173] Much of the contested evidence centred on the discussions that Ianno had with Moore and Lawrick in late 2022 and early 2023 when, NWST says, Ianno claimed to control a significant and increasing number of shares and threatened a proxy fight if NWST did not agree to the changes Ianno wanted to see on the board. In general, where Ianno's evidence conflicted with that of Moore, we found that Moore's was to be preferred, in part because Moore had taken contemporaneous notes of the discussions at issue that, while brief and cryptic, tended to support his recollections of those discussions.

[174] Regardless of what Ianno did or did not claim in his discussions with Moore and Lawrick, Ianno had no actual authority to speak for Kimmel and it was Kimmel's uncontroverted evidence that he was neither aware of nor privy to those conversations, that he never considered himself to be in a group with Ianno, and that Ianno has never had control over Kimmel's shareholdings.

[175] Relying on the statement in *Genesis* (at paras. 24-25) that evidence such as "family relationships, communication between the parties and attendance at meetings together" can be considered in determining if the alleged joint actors "were making a concerted effort to bring about a specified objective", NWST sought to establish a longstanding relationship between Ianno and Kimmel.

[176] NWST relied on what Lawrick characterized as a "close personal relationship" between Kimmel and Ianno as evidence of joint action. On cross-examination, Lawrick admitted that he had never met or spoken with Kimmel, and it was Kimmel's uncontroverted evidence that while he first met Ianno in the 1990s, their relationship has been limited to casual conversations from time to time regarding their respective investment portfolios.

[177] NWST undertook a private placement financing in February 2023. Relying on the evidence of Lawrick that Ianno had told him that he could facilitate a $1.5 million investment by Kimmel, NWST argued that Ianno had negotiated the terms of Kimmel's

participation in that financing. It was Kimmel's uncontroverted evidence that Ianno had no authority to do so, and that Ianno's role in Kimmel's investment in the financing was limited to informing Kimmel, as well as other shareholders, about the opportunity and passing along Kimmel's signed signature pages to NWST as a convenience, because NWST was anxious to complete the documentation. Kimmel deposed that if Ianno negotiated the financing with NWST, he did so on his own behalf. Kimmel deposed that his decision to participate in the financing was made after reviewing and considering with his counsel the terms proposed by NWST. Kimmel noted, too, that after Ianno sent Kimmel's signature pages to NWST, NWST contacted Manna, not Ianno, for the further information it required.

[178] As further evidence of the alleged close relationship between Ianno and Kimmel, NWST relied on the evidence of Lawrick that Ianno had told him that his own investment in the private placement was funded by Kimmel. Kimmel deposed that the loan extended to Ianno was a standard commercial loan provided by Churchill in the ordinary course of its business, and that it was neither tied to nor contingent on any particular purpose.

[179] Moore deposed that in conversations with Ianno in March 2023, Ianno had told him that his group had financial backing from UBS investment bank for up to $100 million. While Ianno denied having said that to Moore, Moore's contemporaneous notes, which include reference to UBS, tend to support Moore's recollection. On the basis of Moore's evidence and email correspondence setting up a meeting between Kimmel and UBS, NWST alleged that Kimmel and Ianno had taken part in a discussion with UBS about taking NWST private. On cross-examination about his discussions with UBS, Kimmel testified that he did meet in early 2023 with UBS, which managed most of his private wealth portfolio, including his stake in NWST, but that Ianno was not involved in any meetings between Kimmel and UBS. Kimmel's undisputed evidence was that a UBS representative made the unprompted suggestion that given its small size, Kimmel could take NWST private, but that Kimmel did not pursue that suggestion or discuss with UBS the terms or amount of any potential financing.

[180] NWST alleged that Ianno, Sawiak and Kimmel all attempted to recruit people to join the slate of proposed directors that Sawiak ultimately put forward, sometimes jointly. It was Kimmel's uncontroverted evidence that apart from proposing Manna to Ianno as a nominee for a board seat, Kimmel was not involved in selecting any of the proposed directors on the dissident slate, and that he had never met any of them, other than Manna. Sawiak also deposed that he alone selected the nominees for the dissident slate, after speaking with several shareholders.

[181] NWST relied on evidence from Moore about conversations he had with two other shareholders, Atkinson and Kosowan, to suggest that Ianno and Kimmel were jointly approaching shareholders to identify potential nominees for the dissident slate. Citing *Arbour Energy*, at paras. 89-90, Kimmel argued that there is little if any evidentiary value properly attached to that uncorroborated hearsay evidence, especially since Kimmel has adduced direct evidence contradicting it.

[182] Moore deposed that on March 24, 2023, he spoke with Atkinson, who told Moore that he had decided to liquidate his shares in NWST, and that there was a plan in place for an alternative board slate. Moore deposed that he assumed that it was Ianno who had disclosed that plan to Atkinson. Moore also described another call with Atkinson on March 26, 2023 where, he said, Atkinson told him that he had lost faith in the board and

was selling his shares, that Ianno had contacted him in March 2023 to broker a sale of 1,000,000 of his shares to Kimmel, and that Ianno and Kimmel had asked him to vote in support of their proposed slate at the AGM.

[183] Despite the fact that Moore testified on cross-examination that it was his habit to take contemporaneous notes of phone calls, there are in evidence no notes of his conversations with Atkinson and no direct evidence from Atkinson. Kimmel deposed that he purchased additional shares of NWST during that period, but that he does not know Atkinson and has never met or spoken with him.

[184] Moore also deposed that on June 16, 2023, he spoke with Kosowan, who, he said, told Moore that he had met with Ianno and Kimmel at their request, and that they had discussed their plans for NWST and invited Kosowan to join the proposed slate of directors. For his part, Kimmel deposed that he and Ianno met with Kosowan in June and that although there was a brief discussion about NWST toward the end of the meeting, the meeting was actually instigated by Kosowan, who sought to meet with Kimmel about Kimmel's potential investment in other companies with which Kosowan was involved. There are likewise in evidence no notes of Moore's conversation with Kosowan and no direct evidence from Kosowan.

[185] During oral argument, counsel for Kimmel noted that NWST's counsel suggested that the panel should draw inferences about Kimmel's discussion with Kosowan, despite the fact that Kimmel was not cross-examined about the details of that discussion. Reference was made to the rule in *Browne v. Dunn* (1893), 6 R. 67 H.L. Given our conclusions more generally, we do not find it necessary to determine if we should give less weight to that part of NWST's submissions or the evidence on which they were based.

[186] NWST relied on the fact that Kimmel paid the majority of the costs of the proxy solicitation as strong evidence that Kimmel was acting jointly or in concert with Sawiak and Ianno. NWST argued that it would be absurd, and is therefore not credible, to suggest that Kimmel would have done so if he had not formed a positive intention to support the dissident slate.

[187] Kimmel deposed that in early June, Sawiak approached Manna to ask if Kimmel would contribute to the costs of his proxy solicitation. Kimmel's evidence is that he had made no commitment to voting in favour of either the dissident slate or management's slate, but wanted to keep his options open, so agreed to contribute to the costs of the proxy solicitation. Kimmel's evidence is that beyond contributing to the costs of solicitation and proposing Manna as a nominee on the dissident slate, he had no involvement in Sawiak's proxy solicitation.

[188] Kimmel's evidence was that in or around late April 2023, Ianno approached him and raised the possibility of replacing one or two incumbent directors on NWST's board. By that time, Kimmel said, he had become concerned that NWST lacked direction and leadership; accordingly, he said, he expressed interest in having a representative on the board. In early May, he heard from Ianno that a potential dissident slate was being put together and that there was an opportunity for Kimmel to have a representative on the board. Kimmel subsequently proposed Manna as his nominee.

[189] Sawiak ultimately solicited Kimmel's proxy on August 15, 2023. NWST pointed to the fact that the email solicitation was entirely mechanical, containing no reasons why

Kimmel should vote for the dissident slate, as evidence that Sawiak knew that Kimmel would give Sawiak his proxy, because that was the plan all along.

[190] It seems clear that Ianno and Sawiak both had discussions with NWST in which they presented themselves as aligned and making decisions together. Sawiak described the dissident slate, which was eventually formed and announced in mid-May, as being the consensus of multiple shareholders, including Ianno.

[191] Ianno and Sawiak included Manna on the dissident slate specifically because he was Kimmel's chosen representative.

[192] It is possible that Ianno thought that he had an understanding with Kimmel that Kimmel would support the dissident slate. It is also possible that he knew or suspected that he did not have such an understanding, but was exaggerating the situation, using the idea of Kimmel's participation as a bluff in order to get what he wanted from NWST's management.

[193] Sawiak's evidence was clear: he did not believe that Kimmel would necessarily support the dissident slate, but he hoped that Kimmel would do so. As he put it on cross-examination, he understood it to be the case that if he put Manna on the dissident slate, then Kimmel might vote for it, whereas if he did not, then Kimmel would not vote for it.

[194] The problem for NWST on this application is that it does not actually matter what either Ianno or Sawiak thought about their relationship with Kimmel. If Kimmel was not himself engaged in an active and coordinated effort to achieve the result that the dissident slate would be installed at the AGM, then he was not acting jointly or in concert with the other Respondents. That point also disposes of NWST's argument that the statement regarding their joint action made by Sawiak in his amended notice of August 4, 2023 establishes the joint action. It does not.

[195] We note here the evidence summarized by Kimmel at paragraph 89 of his written submissions that supports the argument that he was not acting jointly or in concert with Ianno and Sawiak:

a. He made investments in NWST when opportunities arose, whether those opportunities were from the company or from other shareholders. He was prepared to support management's board slate and provide financing to NWST until it terminated negotiations.
b. Similarly, where opportunities to be represented on the board arose—whether because of the replacement of one or two board members, Sawiak's alternative slate, or NWST's negotiations to secure his support—he pursued those opportunities.
c. As was acknowledged by Moore, in his discussions with NWST, Kimmel told Moore that he was not part of any group, but was simply protecting his own interests.
d. He had expressed concern to NWST that despite his support of management, the dissident slate might win, leaving him with a substantial share position without representation, and had sought to negotiate terms to account for that risk.
e. Despite nearing agreement on terms of a voting support agreement that would have had him vote in favour of management's nominees, he did not inform Ianno or Sawiak of his negotiations with NWST.

[196] We found that evidence credible. Kimmel is a sophisticated investor. He maintained, and we accepted his evidence, that at all times, he was acting independently in his own interests without regard for the interests of others.

[197] It is not the case that there is no basis for NWST's application, but we must be cautious in drawing inferences from circumstantial evidence. Before drawing an inference that something must be so, a panel must balance the strength of the circumstantial evidence against the reasonableness of other explanations that might explain the same circumstance. In this way, our approach is generally aligned with that taken by the Court in *Karnalyte*.

[198] There was before us circumstantial evidence that justified a very careful and skeptical review of the Respondents' explanations, but we concluded that the Respondents, particularly Kimmel, provided credible and plausible alternative explanations for the evidence relied on by NWST in support of its allegations that the Respondents were acting jointly or in concert.

[199] Clearly, Kimmel and Ianno had discussed their concerns about NWST's board and management, but that does not constitute a plan of action or a commitment to pursue it.

[200] We do not see Kimmel as sharing a common specific purpose with the other Respondents that extended to any form of mutual understanding about how each Respondent would vote the shares he owned or controlled. Ianno's aim appeared to have evolved from getting board representation for himself, through replacing certain members of the incumbent board whom he regarded as problematic, to replacing the incumbent board entirely. Kimmel, on the other hand, appears throughout to have been solely motivated to place his own representative on the board by whatever means presented themselves.

[201] NWST argued that regardless of Kimmel's subjective state of mind, that is, whether or not he had a mutual understanding with the other Respondents that they would all vote to install the dissident slate at the AGM, it is his actions that matter to the analysis. Alternatively, the company argued, his actions demonstrate that he had such an understanding. Either way, they say, the Respondents were acting jointly or in concert.

[202] The difficulty with that argument is that when we look objectively at Kimmel's actions, we consider that the fact that Kimmel was negotiating with NWST for a totally different result undermines the argument that he was engaged in a common enterprise with Sawiak and Ianno.

[203] Moreover, despite the fact that it would not be the route chosen by every disaffected shareholder, we found credible Kimmel's explanation that he was willing to finance Sawiak's proxy solicitation simply to keep his options open. We did not take his financial contribution as evidence that he was involved, much less actively involved, in the planning or preparation of the solicitation. We concluded that the money spent on the proxy solicitation was of no particular consequence to him.

[204] We find that the bar for a finding that parties are acting jointly or in concert is appropriately set relatively high, as is reflected in the presumption and the deeming

provision set out in section 1.9(1) of NI 62-104. Disclosure of shareholder blocks is important, but so is the free flow of information and opinion among shareholders of a public company. We conclude that it is better to insist on sufficiently clear, convincing and cogent evidence that parties are acting jointly or in concert and take the risk that by doing so, some groups will fly under the radar, than to allow reliance on speculation to create a climate that stifles discussion among shareholders.

[205] In order for us to find that the Respondents were acting jointly or in concert, NWST had to demonstrate on a balance of probabilities that the Respondents actively worked together to achieve a joint specific purpose, and were not simply aligned in interest. We found that NWST has not done so.

[206] Accordingly, we need not answer the question whether there was a subsequent acquisition that would trigger the early warning requirement in Section 5.2 of NI 62-104.

Remedy

[207] On the basis of its allegation that the Respondents were secretly acting jointly or in concert to replace the board, NWST sought an order not merely requiring the Respondents to make the required disclosure, but also prohibiting them from voting on the election of directors at the AGM and requiring that they cease trading in NWST's shares for six months. NWST says that the remedy must be serious to provide market participants with a disincentive to prioritize their private interest over proper disclosure.

[208] Since we have found that the Respondents were not acting jointly or in concert, it is not necessary for us to decide on remedies in this instance. Nevertheless, we note here that had we arrived at the opposite finding, we would not have imposed the draconian measures proposed by NWST.

[209] The decision of the B.C. Court of Appeal in *Poonian v. British Columbia*, 2017 BCCA 207, at paragraph 113, makes clear that the Commission's public interest mandate underlies its authority to grant orders where a breach of securities legislation is found. Such orders are preventative and prospective, not punitive or remedial, and must be proportionate to the circumstances of the case and the objective of such orders: to protect investors from unfair, improper or fraudulent practices and maintain fair and efficient capital markets.

[210] The Respondents argued strenuously that NWST's application was brought as a means to win a proxy contest by disenfranchising dissatisfied shareholders. They characterize it as a chapter in NWST's counsel's defensive playbook, citing:

a. the timing of the application, brought at the eleventh hour on the basis of facts and circumstances known to NWST for several months;
b. the fact that the application follows an unsuccessful attempt to secure Kimmel's cooperation by means of a voting agreement;
c. the extent to which the information that NWST sought to be disclosed had already been publicly disclosed by Sawiak and NWST; and
d. the extraordinary remedies sought in the application.

[211] We agree with Kimmel that the orders sought by NWST are unsupported by and out of step with Canadian authorities. The right of shareholders to elect directors is of critical

importance. Where better disclosure would solve the problem, that, rather than disenfranchisement, should be the remedy. We accept the submission of the executive director that in this case, any potential harm to investors of non-disclosure could have been addressed with a disclosure order.

VII. Conclusion

[212] For the reasons canvassed above, we found that NWST had not satisfied its onus to prove on a balance of probabilities, on the basis of clear and cogent evidence, that Kimmel was acting jointly or in concert with Ianno or Sawiak. Kimmel did not comport himself as if he were a member of a group pursuing a common goal. Rather, we concluded that Kimmel's conduct throughout was consistent with an investor "keeping his powder dry" in the context of a proxy contest and identifying opportunities to advance his own interests. Regardless of what Sawiak and Ianno may have thought, we accepted Kimmel's evidence that at no time was he party to a mutual understanding that he would vote with them to install the dissident slate. His goal was simply to place his representative on the board, by one means or another.

[213] There is considerable evidence of a significant level of engagement between Sawiak and Ianno. It may well be that they were acting jointly or in concert with respect to the solicitation of proxies in favour of the dissident slate. However, since it does not matter to the outcome of this application whether they were or were not, we did not need to determine that issue.

[214] In the absence of a finding that Kimmel was acting jointly or in concert with the other Respondents, and specifically with Ianno, the 10% shareholding threshold in Section 5.2 of NI 62-104 was not met. That being so, the early warning disclosure requirement contained in that provision was not engaged.

[215] Accordingly, we dismissed NWST's application.

December 22, 2023

For the Commission

Gordon Johnson
Vice Chair

Karen Keilty
Commissioner

Marion Shaw
Commissioner