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In a Win for Shareholders, B.C. Securities Commission Provides Joint Actor Guidance for Proxy Contests

Authors: Patricia L. Olasker, Aaron J. Atkinson and Jonathan Bilyk

Important guidance on "acting jointly or in concert" in a proxy contest was provided by the British Columbia Securities Commission (Commission) in *NorthWest Copper Corp.* (December 22, 2023). The Commission declined to find a joint actor relationship between a dissident and another shareholder, notwithstanding that the shareholder had funded the dissident's proxy contest to replace an incumbent board and had selected one of the nominees included in the dissident's slate. Most notably, the Commission held:

- A party alleging a joint actor relationship must provide clear, convincing and cogent evidence to support a finding of a joint actor relationship, not mere speculation or inference.
- A high bar to a joint actor finding is necessary in order not to stifle the "free flow of information and opinion among shareholders," even if that means that some joint actors "will fly under the radar."

Background

Early Warning Reporting and Joint Actor Allegations

NorthWest relates to a proxy contest launched in connection with the 2023 annual meeting of shareholders of NorthWest Copper Corp. (NWST), a mineral-exploration company listed on the TSX Venture Exchange. NWST alleged that three of its shareholders were acting jointly or in concert to replace NWST's incumbent directors and that they failed to comply with the early warning reporting (EWR) rules. Those rules require a shareholder to report when it has acquired, whether alone or with its joint actors, 10% or more of an issuer's shares.

Whether a person is acting jointly or in concert is a question of fact, although there are circumstances in which persons may be presumed or deemed to be joint actors. Importantly for proxy contests, there is a presumption of joint acting between persons who have an agreement, commitment or understanding to vote securities jointly or in concert.

Key Facts

While the Commission noted that two of the three shareholders, being the dissident and the dissident's supporter (Shareholder #2), may have been acting with a view to a common goal, their aggregated holdings in NWST were, without the third shareholder's holdings (being the largest of the three), insufficient to reach the EWR regime's 10% threshold. The Commission's reasons thus focused on whether the largest shareholder (Shareholder #3) was acting jointly or in concert with either the dissident or Shareholder #2.

Set out below are the principal facts relevant to the Commission's findings.

- In April 2023, Shareholder #2, having already shared concerns regarding NWST's management with the dissident, spoke with Shareholder #3 about the possibility of replacing one or two of NWST's incumbent directors.
- In May, Shareholder #2 informed Shareholder #3 that a dissident slate was being formed, and Shareholder #3 proposed his personal lawyer for the slate.
- Later in May, the dissident notified NWST that he planned to nominate a competing slate of directors at NWST's upcoming annual meeting. The dissident disclosed that he was not acting jointly or in concert with any other person.

- In June, the dissident contacted Shareholder #3's counsel to ask if Shareholder #3 would contribute to the costs of the dissident's proxy solicitation. Shareholder #3 agreed, deposing later that he provided the funds because he wanted to keep his options open; having invested millions of dollars in NWST, he considered it prudent to invest a further $50,000 to $100,000 to protect his interest. Shareholder #3 made no commitment to support the slate.
- In July, NWST contacted Shareholder #3 to negotiate a support agreement in which he would be required to support the incumbent board and provide NWST with equity financing in exchange for his nominee being named in management's slate. The two other shareholders were not aware of these negotiations.
- In August, the dissident delivered a new notice of his intention to nominate a slate of directors at the annual meeting. The dissident noted that he was not acting jointly or in concert with any person "except as disclosed below," referring ostensibly to the disclosure in his notice that the "cost of any solicitation in respect of the nominees will be borne by the nominating shareholder and [Shareholder #3]."
- On learning of the funding arrangement, NWST terminated its discussions with Shareholder #3.
- Later in August, the dissident contacted Shareholder #3 directly for the first time and solicited his support for the dissident slate.
- NWST requested the dissident to complete EWR filings disclosing that he was acting jointly with persons who collectively owned 10% or more of NWST's shares. After he refused, NWST brought its complaint to the Commission.

Key Findings

Early Warning Reporting Not Triggered on Mere Formation of Group

The Commission confirmed that the mere formation of a joint actor group whose collective ownership satisfies the 10% early warning threshold does not require the filing of an EWR report. Rather, a group's EWR obligation is triggered only when a group member subsequently acquires shares of the issuer. The formation of a group that includes a person who is *already an EWR filer* in respect of the issuer, however, would require such person to update its report if the formation of the group constitutes a change of a material fact contained in its existing report.

Early Warning Reporting Applies to Joint Actors Who Solicit Proxies

The Commission rejected the shareholders' argument that the EWR regime is intended to capture joint actor relationships only as they exist in connection with a take-over bid, noting that the EWR language addresses the acquisition of securities generally and that the Canadian Securities Administrators (CSA) have clearly stated that the purpose of the EWR regime is to allow investors to predict not only possible take-over bids but also proxy-related matters. These considerations, together with an earlier judicial decision from Alberta (*Genesis Land Development Corp. v Smoothwater Capital Corporation*), formed the basis for the Commission's conclusion 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." Nonetheless, the Commission did call on the CSA to make this clearer in the legislation.

Factors Relevant to a Finding of a Joint Actor Relationship in the Context of a Proxy Contest

The Commission found an absence of a "common specific purpose" between the three shareholders "that extended to any form of mutual understanding" about how they would vote their shares. Although the Commission found that Shareholder #2 and Shareholder #3 had discussed their concerns about NWST's management, the Commission held that the mere alignment of concern does not constitute a "plan of action or a commitment to pursue" a course of action. To the Commission, Shareholder #2's objective appeared to have been to replace the entire incumbent board, whereas Shareholder #3 appeared to have been "motivated to place his own representative on the board by whatever means presented themselves."

The fact that Shareholder #3 was negotiating with NWST "for a totally different result" cut against the argument that he was engaged in a common enterprise with the two other shareholders. Shareholder #3's financial contribution to the dissident's solicitation was not

evidence that he was involved in the planning or preparation of the solicitation. The Commission concluded that the money spent by Shareholder #3 on the solicitation was of "no particular consequence to him," and it accepted Shareholder #3's testimony that he was simply keeping his options open. Ultimately, this undermined NWST's central argument that Shareholder #3 would not have agreed to foot the bill for a proxy contest without also intending to vote in favour of the dissident slate.

A Joint Actor Finding Requires "Clear, Convincing and Cogent Evidence"

The Commission declined to make an inference of joint action on the basis of circumstantial evidence. In addition to the funding arrangement between Shareholder #3 and the dissident, NWST pointed to other instances of alleged coordination between Shareholders #2 and #3. This included the fact that Shareholder #2 facilitated Shareholder #3's participation in an earlier NWST private placement by sending Shareholder #3 the subscription agreement for the financing (there was no evidence that Shareholder #3 authorized Shareholder #2 to negotiate on his behalf) and that Shareholder #3's commercial loan company had extended financing to Shareholder #2, which allowed Shareholder #2 to purchase NWST shares in the same private placement (the funds were advanced under an ordinary commercial loan and not tied to any specific use).

In addition, during conversations between NWST management and Shareholder #2 over the course of 2023 and earlier, the latter intimated a degree of cooperation between himself and Shareholder #3, including by way of his references to controlling a sizable block of shares and to Shareholder #3 desiring representation on the board. The Commission noted that while it was possible that Shareholder #2 thought he had an understanding with Shareholder #3 that Shareholder #3 would support the dissident slate, what either the dissident or Shareholder #2 thought about their relationship with Shareholder #3 was irrelevant to the analysis—"if [Shareholder #3] 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."

The Commission concluded that "before drawing an inference that something must be so, [the Commission] must balance the strength of circumstantial evidence against the reasonableness of other explanations that might explain the same circumstance." In the face of Shareholder #3's credible and plausible alternative explanations for the evidence relied on by NWST, the Commission concluded that NWST failed to demonstrate on a balance of probabilities that the three shareholders actively worked together to achieve a joint purpose.

Ultimately, for the Commission, a low bar to establishing joint acting would have a chilling effect on shareholder democracy:

> 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 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.

Takeaways

- The free flow of information and opinion among shareholders is an important feature of the public markets, and the application of the joint actor rules should not create a climate that stifles discussion among shareholders.
- EWR obligations are not triggered on the mere formation of a group whose collective ownership satisfies the 10% EWR threshold. Rather, EWR obligations are triggered only upon the subsequent acquisition of a share of the issuer by a member of the group.
- The mere alignment of concern does not constitute a plan of action or commitment to pursue a course of action.
- A joint actor finding is ultimately fact-dependent and must be based on clear, convincing and cogent evidence. For persons to be found acting jointly or in concert in connection with the solicitation of proxies for voting on a dissident slate, generally such persons must be found to be operating with a common specific purpose and with a form of mutual understanding about how shares will be voted.

Key Contacts: Patricia L. Olasker, Aaron J. Atkinson and Sébastien Roy