
# BRITISH COLUMBIA SECURITIES COMMISSION HOLDS THAT THE BAR FOR A FINDING OF PARTIES "ACTING JOINTLY OR IN CONCERT" IS SET RELATIVELY HIGH

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**Categories:** Insights, Publications

On December 22, 2023, a panel (the "**Panel**") of the British Columbia Securities Commission (the "**Commission**") released the reasons for its ruling made on September 9, 2023 dismissing the application brought by Northwest Copper Corp. (the "**Company**") against Grant Sawiak, Tony Ianno, and John Kimmel (collectively the "**Respondents**") alleging the Respondents failed to comply with the early warning requirements set out in National Instrument 62-104 – *Take-Over Bids and Issuer Bids* ("**NI 62-104**") and National Instrument 62-103 – *The Early Warning System and Related Take-Over Bid and Insider Reporting Issues* ("**NI 62-103**"). In its application, the Company had sought orders from the Commission to prohibit the Respondents from voting their shares to elect directors of the Company at an upcoming annual general meeting ("**AGM**"), require that the Respondents cease trading in the Company's shares for six months and direct Mr. Sawiak to comply with the early warning requirements.

The decision is noteworthy for holding that the bar for a finding of parties "acting jointly or in concert" is appropriately set relatively high.

**Background**

According to evidence submitted in connection with the application, Mr. Ianno began expressing concern about the Company and certain of its directors as early as October 2022. In April 2023, Mr. Ianno expressed concerns about the Company's management and direction to Mr. Sawiak. The following month, he informed Mr. Kimmel about the formation of a potential dissident slate, offering Mr. Kimmel a chance to nominate a board representative. Mr. Kimmel suggested Adam Manna, his personal lawyer and corporate counsel to his company, for the role.

On May 19, 2023, Mr. Sawiak sent a nominating shareholder's notice in accordance with the Company's advance notice provisions and four days later, he announced by news release a dissident slate of directors for the upcoming AGM. Neither the notice nor the news release referenced any joint actors, and the notice explicitly stated that Mr. Sawiak was not acting jointly or in concert with any other person or company.

In response, the Company postponed its AGM and, on the same day, informed Mr. Sawiak's counsel of its belief that Mr. Sawiak was acting jointly with shareholders, including Messrs. Ianno and Kimmel, without proper disclosure. At the time, Mr. Sawiak held approximately 0.39% of the Company's issued and outstanding shares, while Messrs. Ianno and Kimmel held, directly and indirectly, approximately 3.64% and 7.9% of the shares, respectively.

The Company's allegations that the Respondents were acting in concert were primarily based on conversations the CEO and a director of the Company had with Messrs. Ianno and Sawiak as well as meetings they had with another large shareholder.

In response to the Company's letter, Mr. Sawiak's counsel, without denying that Mr. Sawiak was acting jointly or in concert with other shareholders, stated that the burden lay with the Company to prove that he was acting jointly or in concert with these individuals.

In early June 2023, at Mr. Sawiak's request, Mr. Kimmel agreed to contribute to the costs of the proxy fight.

In July and August 2023, without the knowledge of Messrs. Sawiak or Ianno, Mr. Kimmel also engaged in separate negotiations with the Company. These discussions involved a potential agreement where the Company would allow Mr. Kimmel to nominate a director on their slate in exchange for his support for management's slate. During his talks with the Company, Mr. Kimmel asserted that he was not part of any group and was solely acting in his own interests to gain board representation.

However, on August 4, 2023, the Company abruptly terminated its negotiations with Mr. Kimmel upon learning from an amended advance notice filed by Mr. Sawiak that Kimmel was funding Mr. Sawiak's proxy solicitation. Four days later, Mr. Sawiak announced and publicly filed the amended advance notice which disclosed that Mr. Kimmel was funding the solicitation costs.

Later that month, the Company filed an application with the Commission against the Respondents, claiming that the three individuals, who held more than 10% of the Company's issued and outstanding common shares, failed to comply with the early warning requirements outlined in NI 62-103 and NI 62-104 while acting jointly and in concert in their efforts to reshape the Company's board of directors. Subsequently, Mr. Sawiak filed a preliminary application on the basis that the concept of "acting jointly or in concert" had no application to the solicitation of proxies aimed at voting an alternate slate of directors and, therefore, the Respondents had no obligation to issue an early warning report under the circumstances.

**Rules Related to Early Warning Requirements**

NI 62-104 requires that 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 such, that when combined with

the "acquiror's securities" of that class, constitute 10% or more of the outstanding securities of that class, must abide by certain early warning requirements contained in NI 62-103.

NI 62-104 defines an acquiror as a person who acquires a security, other than by way of a take-over bid or an issuer bid. An acquiror's securities is defined as 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.

While NI 62-104 does not define "acting jointly or in concert", section 1.9(1) states that a person is deemed to be acting jointly or in concert with an offeror or acquiror if, as a result of any agreement, commitment or understanding with them, or with anyone else acting jointly or in concert with them, they acquire or offer to acquire securities of the same class as those subject to the offer to acquire. Additionally, a person is presumed to be acting jointly or in concert with an offeror or acquiror if, as a result of any agreement, commitment or understanding with the offeror, acquiror, or another person acting jointly or in concert with them, they intend to exercise jointly or in concert any voting rights attached to any securities of the offeree issuer.

**Key Findings**

*The concept of "acting jointly or in concert" is not solely limited to take-over bids or issuer bids*

The Panel confirmed that the concept of "acting jointly or in concert" extends beyond take-over bids and issuer bids and is applicable to proxy solicitations aimed at voting an alternate slate of directors.

The Panel clarified that although the only mention of "acting jointly or in concert" found in the *Securities Act* (British Columbia) is in relation to take-over bids and issuer bids under section 98, this doesn't limit its applicability solely to those contexts nor does it imply that NI 62-103 and NI 62-104 should be interpreted strictly in the context of furthering the provision of section 98.

While the Panel noted that Canadian securities commissions had not previously addressed whether the application of the concept of "acting jointly or in concert" is limited to take-over or issuer bids, the issue had been considered and dismissed by the Alberta Court of Queen's Bench in *Genesis Land Development Corp. v Smoothwater Capital Corporation*, 2013 ABQB 509.

Taking into account the decision in *Genesis,* the plain meaning of the language used in NI 62-104, and the principle of giving a broad and liberal interpretation to securities legislation, the Panel concluded that the concept of "acting jointly or in concert" also extends to proxy solicitations for the purpose of voting on alternative slates of directors, even in the absence of a take-over bid or issuer bid. In reaching this decision, the Panel also considered the Canadian Securities Administrators' (the "**CSA**") intentions as reflected in its March 2013 notice accompanying certain proposed amendments to NI 62-103 and NI 62-104 where the CSA indicated

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.

*Acquisition trigger: if parties are acting jointly and in concert there must be a subsequent acquisition of additional shares to trigger early warning reporting requirements*

The Company argued the mere act of becoming a joint actor with other shareholders and forming a group, who together have 10% or more of the voting securities of any class of an issuer, or securities convertible into such, is sufficient to trigger the disclosure requirement under NI 62-104.

The Panel, however, concluded that on the plain meaning of the words used in NI 62-104, the initial early warning requirements are only triggered when, after the parties begin acting jointly and in concert, there is an acquisition of securities by one of the joint actors which increases the group's holdings to 10% or more of the outstanding securities of that class.

The Panel acknowledged that while this interpretation may exclude some forms of joint action from the early warning requirements, the exclusion is not an absurd outcome nor is it a compelling reason to reject the plain meaning of the provision.

*The standard of proving parties are acting jointly or in concert is high*

The Panel found that the bar for a finding that parties are acting jointly or in concert is appropriately set relatively high. Determining whether parties are acting jointly or in concert involves balancing the need for disclosure of shareholder blocks against the free flow of information and opinion among shareholders of a public company. Accordingly, the Panel noted 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."

The accusing party has the burden of proving, on a balance of probabilities, that the parties were acting jointly and in concert. While the Panel held that it can consider circumstantial evidence, it must carefully balance the strength of the circumstantial evidence against the reasonableness of other explanations that might explain the same circumstance. Circumstantial evidence will be particularly scrutinized where the opposing party can provide credible and plausible alternative explanations for the evidence presented.

*"Acting jointly and in concert" requires parties to work together to achieve a joint specific purpose*

Referencing case law, the Panel held that a formal agreement is not required to find that parties are joint actors. However, there must be evidence to support a finding that parties have acted jointly or in concert.

Parties will be found to have acted jointly or in concert where the parties are working together to achieve a joint specific purpose. As a result, it is not sufficient for the parties to simply be aligned in interest, there must also be a concerted effort to bring about a specified objective.

In the context of soliciting proxies to nominate a new slate of directors, acting jointly and in concert necessitates that all involved parties are actively engaged and coordinated in their efforts to secure the election of the proposed dissident slate.

Consequently, the mere act of one party contributing to the costs of the proxy solicitation and proposing a director nominee on the dissident slate does not alone constitute sufficient grounds for a finding of acting jointly and in concert. If the party's actions are motivated by their own self-interest and they have made no commitment or indication of support for the dissident slate, it is unlikely that they will be found to be a joint actor.

*Mr. Kimmel was not acting jointly and in concert with the other Respondents*

Applying these principles, the Panel concluded that the Respondents were not acting jointly or in concert. The Panel solely focused on Mr. Kimmel's actions since without his support Mr. Sawiak and Mr. Ianno would not have held enough shares to trigger the early warning requirements.

The Panel did acknowledge there was adequate circumstantial evidence to warrant a careful and skeptical review of the Respondent's explanations and actions. In particular, Mr. Kimmel agreed to fund the costs of the proxy solicitation, proposed a director nominee on the dissident slate, and discussed his concerns about the Company's board with Mr. Ianno.

Nevertheless, these factors alone were not sufficient for a finding of acting jointly and in concert as the Panel found that, despite these factors, Mr. Kimmel did not share a common specific purpose with the other Respondents. The Commission accepted Mr. Kimmel's explanation that he was willing to finance Mr. Sawiak's proxy solicitation to provide Mr. Kimmel with alternative options. Mr. Kimmel's actions, characterized by his negotiations with both management of the Company and the other Respondents, indicated that he was primarily acting in his own self-interest to secure board representation through whatever means available.

The Panel noted in particular that Mr. Kimmel's negotiating with the Company for a totally different outcome than that sought by the other Respondents undermined the argument that Mr. Kimmel was engaged in a common enterprise with the other Respondents. This behaviour, and his lack of commitment to support the proposed dissident slate, led the Panel to find that, on the balance probabilities, Mr. Kimmel was not acting jointly and in concert with the other Respondents.

*Remedies: first disclosure, then disenfranchisement*


While the Panel did not have to determine remedies in this case, they did comment on the orders sought by the Company, particularly to prohibit the Respondents from voting on the election of directors at the AGM and to restrict them from trading in the Company's shares for six months.

The Panel stated that these "draconian measures" were unsupported and not aligned with Canadian authorities. They emphasized the fundamental importance of shareholders' rights to elect directors and asserted that where the harm to investors could be addressed via enhanced disclosure, this approach should be the preferred remedy over disenfranchisement. In the present case, they accepted the submission that any harm to investors could have been addressed via a disclosure order.

**Observations**

The Commission's findings that the concept of "acting jointly or in concert" is applicable to proxy solicitations and that the initial early warning requirements are only triggered when there is an acquisition of securities are entirely consistent with industry practice and are therefore not surprising.

The conclusion that the bar for a finding that parties are acting jointly or in concert is relatively high appears to be the first such statement by a securities regulatory authority. The policy reason for such a conclusion seems clear from the decision, being that the "free flow of information and opinion among shareholders of a public company" is more important than the requirement for disclosure, unless there is "*sufficiently* clear, convincing and cogent evidence that parties are acting jointly or in concert" (emphasis added). Although this comment was made in the context of a proxy fight, the reasoning appears to go well beyond such a limited application.

It is trite law (as recognized by the Commission in its decision) that the complainant has the burden of proving, *on a balance of probabilities*, that the parties are acting jointly and in concert. However, it is unclear how to reconcile this standard of proof with the Commission's key finding that the bar for establishing parties acting jointly and in concert is "relatively high". While the balance of probabilities standard always requires clear, convincing, and cogent evidence, it does not change the "height of the bar." The Commission's conclusion may make it far more difficult to prove that a shareholder is acting jointly or in concert, particularly before a securities regulatory authority where less evidence may be available to a complainant.

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**A Cautionary Note**


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