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"Acting Jointly or In Concert" – Lack of Clarification and Guidance Has Created Unnecessary Legal Wrangling, Particularly in Contested Transactions; A New Path Forward is Needed

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1. INTRODUCTION[1]

In the realm of contested transactions in Canada – namely, unsolicited take-over bids and proxy contests – the phrase "acting jointly or in concert" has led to much legal uncertainty and unnecessary litigation costs for market participants. It is our contention that securities regulators should provide clarity regarding the meaning of these words.

The stakes can be quite significant if a finding of "acting jointly or in concert" is made, including the imposition of public disclosure obligations, increased costs and delays in completing a transaction, potential liability for breach of securities legislation, an impact on the ability to successfully complete a take-over bid or the inability to vote on certain matters. For example, such a finding could:

- trigger obligations under the take-over bid regime (including with respect to the obligation to prepare a valuation in connection with an insider bid);[2]

- require disclosure under the early warning system (including with respect to future intentions);[3]

- make it more difficult, if not impossible, to meet the statutory minimum tender condition for a take-over bid and therefore prevent the successful completion of a take-over bid;[4] and

- result in the requirement that a person's shares be excluded from voting in approving business combinations or related party transactions. This is the case because the votes of joint actors of an interested party or of a related party of certain interested parties (as such terms are defined under securities laws) are not permitted to be counted for purposes of a "majority of the minority" vote.[5]

Since its introduction in Canadian securities legislation more than 50 years ago, the phrase "jointly or in concert" or "acting jointly or in concert" has never been strictly defined. Despite numerous requests by market participants for clarification or guidance over the years,[6] securities regulatory authorities have not provided a clear definition. In fact, quite to the contrary, securities regulators have declined to provide additional guidance on the basis that a finding of "acting jointly or in concert" is fact-specific.[7] Unsurprisingly, as one commentator to a proposed instrument dealing with take-over bids once pointed out, the failure to clarify the concept, and the open-endedness of the existing language under securities legislation, has caused uncertainty and the vagueness has led to legal wrangling over the years.[8]

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[1] The opinions expressed herein, particularly in 5 and 6 below, are those of the authors and should not be attributed to McMillan LLP or its clients.
[2] See the second and third paragraphs under 2 below for a more detailed discussion.
[3] See the seventh and eighth paragraphs under 2 below for a more detailed discussion.
[4] See the fourth paragraph under 2 below for a more detailed discussion.
[5] See the sixth paragraph under 2 below for a more detailed discussion.
[6] See also 3.4 below.
[7] *Notice of Final Rule under the Securities Act, Ontario Securities Commission Rule 62-504 Take-Over Bids and Issuer Bids*, OSC Notice (2007) 30 OSCB (Supp-6) (14 December 2007) at 7, online: <http://www.osc.gov.on.ca/documents/en/Securities-Category6/rule_20071214_62-504_take-over-bids.pdf>.
[8] See footnote 144 below.

This paper will begin by highlighting the importance of the phrase "acting jointly or in concert" and how it is used in securities legislation. Next, this paper will outline the legislative history of "jointly or in concert" and "acting jointly or in concert", including relevant commentary that was collected and considered in connection with proposed legislative changes. Following that, this paper will provide an in-depth analysis of relevant jurisprudence. By examining the legislative history, together with the guiding principles that can be gleaned from the jurisprudence, and by identifying factual circumstances that are critical to a finding of "acting jointly or in concert", we will propose what we believe to be a more cogent and clear basis upon which to make a finding of "acting jointly or in concert": whether two or more persons reach an agreement or understanding as a result of which they actively seek to implement a specific transaction or to bring about a planned outcome, and such persons have a commonality of commercial or financial interest in respect of that specific transaction or planned outcome. We will then suggest a legislative definition that we believe is a suitable response to the numerous requests for clarification by market participants over the past 35 years. Our hope is that the draft statutory language will, at the very least, ignite a healthy debate that will eventually lead to a modification to the current legislative language.

2. THE IMPORTANCE OF A FINDING OF ACTING JOINTLY OR IN CONCERT

A finding of "acting jointly or in concert" has significant implications and can trigger various obligations under Canadian securities laws. Below, we set forth the key implications.

Under National Instrument 62-104 – *Take-Over Bids and Issuer Bids* [9] ("**NI 62-104**"), "offeror's securities" are defined as "securities of an offeree issuer beneficially owned, or over which control or direction is exercised, on the date of an offer to acquire, by an offeror or any person acting jointly or in concert with the offeror".[10] Thus, if two or more persons are acting jointly or in concert, their security holdings will be aggregated in determining the applicability of the take-over bid rules, which are engaged when such holdings, in aggregate, equal 20% or more of a class of voting or equity securities.[11]

In addition, persons acting jointly or in concert with the person making a non-exempt take-over bid or issuer bid, or with a control person of the person making the bid, are classified as "offerors" in Division 1 of Part 2 of NI 62-104, which provides for restrictions on offerors with respect to acquisitions and sales of securities during, before and after a take-over bid.

Under subsection 2.29.1(c) of NI 62-104, an offeror is precluded from taking up any securities deposited under its bid until more than 50% of the securities of the class subject to the bid, not including the securities beneficially owned, or controlled or directed, by the offeror and persons acting jointly or in concert with the offeror, is tendered.[12]

Under Multilateral Instrument 61-101 – *Protection of Minority Security Holders in Special Transactions*[13] ("**MI 61-101**"), insider bids trigger disclosure obligations and a formal valuation requirement, unless an exemption from such valuation requirement can be relied on.[14] An insider bid includes a take-over bid made by a joint actor with: (i) an "issuer insider"[15] of the offeree issuer; (ii) an associate or affiliate of an "issuer insider" of the offeree issuer; (iii) an associate or affiliate of the offeree issuer; or (iv) any person who, within a 12-month period, was any of the foregoing.[16]

Furthermore, pursuant to MI 61-101, an issuer that is a joint actor with a related party of the issuer is also caught under certain categories of related party transactions, which are subject to formal valuation[17] and "majority of the minority" voting requirements,[18] unless an exemption, as applicable, can be relied upon. Pursuant to MI 61-101: (i) if an issuer

[9] *Take-Over Bids and Issuer Bids*, OSC NI 62-104 (5 May 2016), online: <http://www.osc.gov.on.ca/documents/en/Securities-Category6/ni_20160505_62-104_take-over-bids.pdf > [*NI 62-104*].
[10] *Ibid* at s 1.1.
[11] *NI 62-104*, *supra* note 9.
[12] *Ibid*.
[13] *Protection of Minority Security Holders in Special Transactions*, OSC MI 61-101 (9 May 2016), online: <http://www.osc.gov.on.ca/documents/en/Securities-Category6/rule_20160509_61-101_special-transactions.pdf> [*MI 61-101*].
[14] *Ibid* at ss 2.2, 2.3 and 2.4.
[15] *Ibid* at Part 2 ("[i]ssuer insider" is defined in section 1.1 of MI 61-101 generally to mean a director or senior officer of the issuer, a director or senior officer of an issuer insider or a subsidiary entity of the issuer, or a 10% shareholder of the issuer).
[16] *Ibid* at 1.1.
[17] *Ibid* at s 5.4.
[18] *Ibid* at s 8.1.

purchases or acquires, as a joint actor with a related party, an asset from a third party and the proportion of the asset acquired by the issuer is less than the proportion of the consideration paid by the issuer; or (ii) if an issuer sells, transfers or disposes of, as a joint actor with the related party, an asset to a third party and the proportion of the consideration received is less than the proportion of the asset sold, transferred or disposed, the related party transaction rules will apply.[19] In determining whether "majority of the minority" approval has been obtained in respect of a related party transaction or a business combination, the issuer, any interested party and any related party of certain interested parties in the transaction, as well as any joint actors of the interested party or related party of such interested parties, are precluded from voting.[20]

Much like the definition of "offeror's securities," Part 5 of NI 62-104 defines "acquiror's securities" 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".[21] Section 5.2 of NI 62-104 requires that when an acquiror's securities constitute 10% or more of the outstanding voting or equity securities of any class of a reporting issuer, the acquiror becomes subject to the early warning reporting obligations under NI 62-104 and National Instrument 62-103 – *The Early Warning System and Related Take-Over Bid and Insider Reporting Issues*[22] ("**NI 62-103**").[23] Pursuant to section 5.4 of NI 62-104, this threshold is lowered to 5% when a take-over bid or issuer bid is outstanding.[24] Accordingly, a shareholder may become subject to the early warning reporting system even if the shareholder itself holds less than 10% or 5%, as applicable, of the outstanding voting or equity shares of a reporting issuer – if the shares held by its joint actors, when aggregated with its own shareholdings, equal or exceed the 10% or 5% threshold. Furthermore, the obligation to issue a news release and file an early warning report for every subsequent acquisition or disposition of 2% or more of the outstanding securities of a class also applies to the acquisition or disposition of securities by both the acquiror and its joint actors.[25]

Finally, NI 62-103 also provides a less onerous alternative monthly early warning reporting system for an "eligible institutional investor" (as defined in section 1.1 of NI 62-103).[26] However, an eligible institutional investor that is otherwise entitled to rely on the alternative monthly reporting system can be disqualified from being able to use such system if the investor or any of its joint actors take any of the enumerated actions in section 4.2 of NI 62-103, one of which is making or intending to make a formal bid for securities of the reporting issuer.[27] The forms of early warning report (Form 62-103F1) and alternative monthly report (Form 62-103F2) also require an acquiror to disclose any plans or future intentions of not only itself but its joint actors as well.[28]

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[19] *Ibid* at s 1.1.
[20] *Ibid* at s 8.1(2).
[21] *NI 62-104*, *supra* note 9 at s 5.1.
[22] *The Early Warning System and Related Take-Over Bid and Insider Reporting Issues*, OSC NI 62-103 (9 May 2016), online: <http://www.osc.gov.on.ca/documents/en/Securities-Category6/ni_20160509_62-103_early-warning-system-take-over-bids.pdf> [*NI 62-103*].
[23] *NI 62-104*, *supra* note 9.
[24] *Ibid*.
[25] *Ibid*.
[26] *NI 62-103*, *supra* note 22 at Part 4.
[27] *Ibid*.
[28] *Ibid* at Appendix E and Appendix F.

3. LEGISLATIVE HISTORY

The legislative history and evolution of the phrase "jointly or in concert" has spanned more than 50 years, commencing with the introduction of provisions in Ontario securities legislation pertaining to take-over bids. Below is a review of the legislative history that is critical to understanding the meaning to be given to the phrase "acting jointly or in concert".

3.1 1966 Act

On July 8, 1966, *The Securities Act, 1966* (Ontario)[29] (the "**1966 Act**") received royal assent and on May 1, 1967, the part of the 1966 Act dealing with take-over bids came into force. Prior to such time, take-over bids had not specifically been provided for in Ontario's securities legislation. The 1966 Act defined "offeror" as:

> "a person or company, other than an agent, *who makes a take-over bid*, and includes two or more persons or companies, (i) whose take-over bids are made *jointly or in concert*; or (ii) who intend to exercise *jointly or in concert* any voting rights attaching to the shares for which a take-over bid is made".[30] [emphasis added]

No guidance, definition or clarification was provided with respect to the phrase "jointly or in concert".

The 1966 Act also defined "offeror's presently owned shares" (measuring aggregated securities subject to an offer for purposes of calculating whether the take-over bid threshold of 20% of the outstanding equity shares was exceeded, thereby triggering a take-over bid) as follows:

> "equity shares of an offeree company beneficially owned, directly or indirectly, on the date of a take-over bid by the offeror or an *associate of the offeror*".[31] [emphasis added]

The shares held by an offeror's associate were treated no differently than shares held by the offeror. The term "associate", where used to indicate a relationship with a person, was defined to include a company in which such person beneficially owned, directly or indirectly, more than 10% of the equity voting rights of the company's shares, any trust or estate in which such person had a substantial beneficial interest, or any relative or spouse of such person or any relative of such spouse that, in each case, resides in the same home as such person.[32]

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[29] SO 1966, c 142 [*1966 Act*].
[30] *Ibid* at s 80(e).
[31] *Ibid* at s 80(f).
[32] *Ibid* at s 1 (it is interesting to track the development of the concept of "associate" over time under Ontario securities legislation. It has always caught persons or companies that beneficially own, directly or indirectly, voting securities carrying over 10% of the voting rights attached to all voting securities of a company, trusts and estates and spouses and relatives who reside in the same home of such person). See also *Securities Amendment Act, 1978*, SO 1978, c 47 (the concept was expanded to include partners); *An Act to amend certain Ontario Statutes to conform to section 15 of the Canadian Charter of Rights and Freedoms*, SO 1986, c 64 at s 63(1) (definition was broadened to include any relative of that person and any person of the opposite sex to whom that person is married or with whom that person is living in a conjugal relationship outside marriage, regardless of place of residence); *An Act to revise the Credit Unions and Caisses Populaires Act and to amend certain other Acts relating to financial services*, SO 1994, c 11 at s 350 (definition expanded to include such relative or person of the opposite sex to whom that person is married or with whom that person is living in a conjugal relationship outside marriage and once again had to share the same home as the person in order to constitute an associate).

3.2 1978 Amendment

On June 23, 1978, amendments to the 1966 Act, *An Act to Revise the Securities Act* (Ontario)[33] (the "**1978 Amendment**"), received royal assent. Pursuant to the amendments, the definition of "offeror" was slightly varied to explicitly provide that each joint actor who makes an offer would be deemed an offeror:

> "a person or company other than an agent, who makes a take-over bid or an issuer bid and where two or more persons or companies make offers, (i) jointly or in concert, or (ii) intending to exercise jointly or in concert any voting rights attaching to the securities acquired through the offers, then each of them shall be deemed to be an offeror if the offer made by any of them is a take-over bid".[34]

In addition, "offeror's presently owned shares" was modified to "offeror's presently owned securities" and its definition was updated to include the concept of "jointly or in concert":

> "voting securities of an offeree company beneficially owned, directly or indirectly, on the date of a take-over bid by the offeror or associates of the offeror and *where two or more persons or companies make offers*, (i) *jointly or in concert*, or (ii) intending to *exercise jointly or in concert any voting rights* attaching to the securities acquired through the offers, includes the voting securities owned by all of such persons or companies and their associates".[35] [emphasis added]

Once again, no definition, clarification or guidance was provided with respect to the phrase "jointly or in concert". Also, as was the case in the 1966 Act, unless a person or company made an offer or was an associate of an offeror, their securities would not be aggregated with securities of an offeror for purposes of determining whether a take-over bid was being made, regardless of any other factors.[36]

3.3 Practitioners Report

In 1981, at the request of the Ontario Securities Commission ("**OSC**"), a group of three senior securities practitioners (the "**Committee**") began a review of the existing take-over bid legislation and issued a report in September 1983 (the "**Practitioners Report**") regarding the results of the review.[37] The Practitioners Report made a number of recommendations and included draft statutory provisions to implement such recommendations (the "**Draft Provisions**").

The Practitioners Report noted that, under the 1978 Amendment, the joint actor concept in the definition of "offeror" operated to expand the group of persons who are subject to the requirements of the legislation. That is, two or more persons or companies, making offers jointly or in concert or making offers intending to exercise voting rights jointly or in

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[33] SO 1978, c 47 [*1978 Amendment*].
[34] *Ibid* at s 88(l)(h).
[35] *Ibid* at s 88(l)(i).
[36] See *Saunders v Cathton Holdings Ltd*, 1996 CanLII 2220 (BCSC) (the British Columbia Supreme Court referenced the *Securities Act*, RSO 1980, c 466, which consolidated the Act including the *1978 Amendment*, supra note 33, regarding the defined terms "take-over bid", "offeror's presently owned securities" and "offeror", and held that any construction of the phrase "acting jointly or in concert" must have included the concept that all such persons or companies make offers to acquire securities and on appeal the British Columbia Court of Appeal confirmed that the securities legislation did not contemplate persons acting jointly or in concert unless they made offers).
[37] Ontario Securities Commission, *Report of the Committee to Review the Provisions of the Securities Act (Ontario) Relating to Take-Over Bids and Issuer Bids* (Toronto: Ontario Securities Commission, 1983) [*Practitioners Report*].

concert, were each deemed to be an offeror if the offer made by any of them is a take-over bid.[38]

The Practitioners Report recommended taking a broader approach to "acting jointly or in concert" than what existed in securities legislation at the time.[39] Instead of focusing on joint actors that make offers, the Draft Provisions weaved the concepts of "acting jointly or in concert", associates and affiliates throughout to broaden the concept of "acting jointly or in concert".[40] The Draft Provisions also clarified the rules of conduct in connection with a take-over bid or issuer bid that a joint actor must comply with.[41] This was done with the intention that the specific enumeration of the parties who are subject to the rules would make the application of those rules more certain and reduce abuses that could result from take-over bids that might be made through undisclosed joint actions or from unannounced joint actions that may accompany a public take-over bid.[42]

The Practitioners Report took exception to the fact that the existing legislation neither defined or provided guidance to the phrase "jointly or in concert". The Committee sought to clarify the concept by creating a non-exhaustive definition, the focus of which was to ensure that all persons or companies who are effectively engaging in a common investment or purchase program, whether in support of or in opposition to a take-over bid, were required to abide by the rules that govern securities transactions prior to, during and subsequent to the bid.[43]

The Practitioners Report recommended that two classes of persons be deemed as acting jointly or in concert with an offeror in connection with an offer to acquire,[44] and beyond that left the scope of the concept to judicial development. The Committee noted that a deeming provision could be conclusive or presumptive,[45] yet the deeming provisions in the Draft Provisions were silent as to whether they were conclusive or presumptive. On

[38] *Ibid* at ss 3.15 and 3.25.
[39] *Ibid*.
[40] *Ibid*.
[41] *Ibid* at s 3.26.
[42] *Ibid* at s 2.06.
[43] *Ibid* at s 3.27. See also United Kingdom, Council for The Securities Industry, *The City Code on Take-overs and Mergers*, (London, UK: Issuing Houses Association, 1968) [*Code*]. The Committee likely referred to the Code in the United Kingdom when preparing the Practitioners Report, including its policy discussions and Draft Provisions which came into existence in 1968. The Code was amended over the years and notable amendments were in 1972 and 1974 for our purposes. In 1972, the definition of persons acting in concert was added to the Code and captured individuals or companies who actively co-operate to attain a common objective in relation to a take-over or merger transaction. In 1974, the Code was further modified to define persons acting in concert as individuals or companies who, pursuant to an agreement or understanding (whether formal or informal) actively co-operate, through the acquisition by any of them of shares in a company, to obtain or consolidate control of that company (and for purposes of the foregoing, a holding, or aggregate holdings, of shares carrying 30% or more of the voting rights constituted control of a company). The 1974 amendment also added a presumption (without prejudice to the general application of the definition) that certain classes of persons are acting in concert unless the contrary is established: a company, its subsidiary and associated companies, its parent and fellow subsidiary companies, and companies of which such company is an associated company (for this purpose ownership or control of 20% or more of the equity share capital of a company will be regarded as the test of associated company status).
[44] *Practitioners Report*, *supra* note 37 at s 88(2) which reads: "(2) Acting jointly or in concert. Without limiting the meaning of 'acting jointly or in concert', in this Part each of following persons or companies shall be deemed to be 'acting jointly or in concert' with an offeror in connection with an offer to acquire: (a) any person or company who, as a result of any agreement, commitment or understanding (whether formal or informal), co-operates with the offeror, any associate or affiliate of the offeror, or any other person or company acting jointly or in concert with the offeror, by acquiring or offering to acquire, directly or indirectly, voting securities or convertible securities of the issuer whose securities are subject to the offer to acquire, whether or not any such person or company has an interest or potential interest (whether commercial, financial or personal) in the outcome of such offer to acquire; provided, however ... ; and (b) any person or company who intends to exercise jointly or in concert with the offeror, any associate or affiliate of the offeror, or any other person or company acting jointly or in concert with the offeror, any voting rights attaching to any securities of the offeree issuer beneficially owned or to be beneficially owned, directly or indirectly, after the expiration of the bid, whether or not there is any agreement, commitment or understanding (whether formal or informal) to such effect."
[45] *Ibid* at s 3.30.

balance, we believe that it is reasonable to assume that the deeming provisions in the Draft Provisions were meant to be presumptive.[46]

The first class of deemed persons appeared in subsection 88(2)(a) of the Draft Provisions, and was proposed to include those who cooperate with an offeror in making offers to acquire voting securities. It required that both an acquisition and an agreement, commitment or understanding (whether formal or informal) exist between the purported joint actor and the offeror or an associate or affiliate of the offeror.[47] It was noted that an agreement to tender or an agreement not to tender would not, by itself, make the agreeing party a joint actor, because there would not necessarily be an offer to acquire.[48] This subsection also included an exception for a registered dealer acting solely in an agency capacity with an offeror to acquire and who neither executes principal transactions for its own account in the class of securities sought nor is performing services beyond a customary dealer's functions.[49]

The second class of persons deemed to be acting jointly or in concert appeared in subsection 88(2)(b) of the Draft Provisions, and was proposed to include those who intend to exercise jointly or in concert with an offeror, or any associate or affiliate of the offeror, any voting rights attached to securities that are subject to an offer to acquire securities beneficially owned or to be beneficially owned after the expiration of the bid (whether or not there is any formal or informal agreement, commitment or understanding).[50] The exclusion of the need for an agreement, commitment or understanding would likely raise evidentiary issues and is somewhat puzzling, but no discussion was raised in respect of this point.

The Draft Provisions also replaced the term "offeror's presently owned securities" with "offeror's voting securities", which was proposed to mean:

> "voting securities of the issuer beneficially owned, directly or indirectly, or over which control or direction is exercised, on the date of the offer to acquire, (i) by the offeror and by each associate *and affiliate* of the offeror and (ii) by any person or company who is *acting jointly or in concert* with the offeror".[51] [emphasis added]

Broadening the calculation of an offeror's securities to include the securities of its affiliates (and not just its associates), and those acting jointly or in concert with the offeror, would result in more persons potentially being caught by the rules applicable to take-over bids.

The Draft Provisions had the effect of conclusively deeming associates and affiliates as joint actors, while creating a presumption that persons intending to buy shares together, or agreeing to vote securities beneficially owned or to be beneficially owned after the bid, would be joint actors.

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[46] *Ibid* (after much consideration, the Committee decided not to propose extensive definitions of "acting jointly or in concert", which would have enumerated certain parties who would be conclusively or presumptively deemed to have been acting jointly or in concert. We believe that if the Committee had intended the deeming provision to be conclusive, this would have been explicitly provided for in the Draft Provisions). See also footnotes 56 and 57 below.
[47] *Ibid* at s 3.28.
[48] *Ibid* (no carve-out for agreements to tender to take-over bids which are referred to herein as "lock-up agreements" was explicitly proposed in the Draft Provisions).
[49] *Ibid* at s 3.29.
[50] *Ibid* at s 3.28.
[51] *Ibid* at s 88(1)(n).

The Practitioners Report was made available for comment until November 15, 1983. On December 13, 1983,[52] a public meeting was held in Toronto to discuss the policy issues raised by the Practitioners Report. At the encouragement of the OSC, on January 17, 1984, and July 9 and 10, 1984[53], the securities administrators of Alberta, British Columbia, Ontario and Québec met in Vancouver to discuss the Practitioners Report.[54] They received commentary, and a substantive discussion was initiated for each issue and the related recommendations from the Practitioners Report.[55]

One of the comments received in response to the Practitioners Report recommended that the draft legislation should not provide that persons be deemed to be acting jointly or in concert, and that a rebuttable presumption would be sufficient.[56] The Toronto Stock Exchange ("**TSX**"), another commentator, questioned whether or not the deeming provision in the Draft Provisions was meant to be presumptive or conclusive.[57] The TSX also raised concerns in leaving the scope of the concept of "acting jointly or in concert" to judicial development, as in its opinion, this would lead to a great deal of uncertainty and at least, initially, widespread litigation.[58] Flagging the provisions as vague, the TSX stated that such provisions could be interpreted so broadly and catch those who should not be caught from a policy standpoint. In addition, trading activity would be restricted for a large number of persons, along with uninvolved participants in the market potentially being innocently caught without any knowledge on their part that a violation occurred.[59] The TSX was also concerned that the first class of persons and companies deemed to be acting jointly or in concert in the Draft Provisions did not require a person to have any intention to assist the offeror in making a take-over bid (in other words, it queried whether knowledge of the purpose of any informal understanding had to be present).[60] Following these meetings, the regulatory authorities were to propose appropriate amendments to their respective legislatures that, for the most part, adopted the recommendations of the Practitioners Report.[61]

3.4 Predecessor Draft Legislation to the 1987 Act

On August 10, 1984, the OSC published draft securities legislation[62] (the "**1984 Draft Legislation**"), which was heavily influenced by the Practitioners Report[63] and represented significant changes from then-existing securities legislation.

As recommended by the Practitioners Report, the 1984 Draft Legislation amended the definition of "offeror" to remove references to those making joint bids.[64] The 1984 Draft

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[52] *Consensus on Amendments to Take-over Bid/Issuer Bid Rules*, OSC Notice (1984) 7 OSCB 1415 (30 March 1984) (some of the materials referenced December 12, 1983 as the date of the public meeting but those references were in error).
[53] *Ibid.*
[54] *Ibid.*
[55] *Ibid.* See generally *Public Meeting to Discuss Take-Over Bid Report*, OSC Notice (1983) 6 OSCB 4183 (2 December 1983). They referenced two reports at the meeting: *Proposals for Amendments to the Take-Over Bid Sections of the Canada Business Corporations Act* (which was inaccessible); The Securities Industry Committee on Take-Over Bids, *The Regulation of Take-Over Bids in Canada: Premium Private Agreement Transactions, Report of the Securities Industry Committee on Take-over Bids* (16 November 1983) [unpublished, archived at Ontario Securities Commission Library].
[56] Letter from Stikeman Elliot to the Ontario Securities Commission on the *Practitioners Report* (3 December 1983) [unpublished, archived at the Archives of Ontario].
[57] Letter from the Toronto Stock Exchange to the Ontario Securities Commission on the *Practitioners Report* (December 1983) [unpublished, archived at the Archives of Ontario].
[58] *Ibid.*
[59] *Ibid.*
[60] *Ibid* (this comment letter drew comparisons between the Draft Provisions and the language in the Code).
[61] *Practitioners Report*, *supra* note 37.
[62] *Proposed New Securities Act*, OSC Notice (1984) 7 OSCB 3449 (10 August 1984) [*1984 Draft Legislation*].
[63] *Ibid* at 1-392 (the pagination refers to that in the text of the *1984 Draft Legislation* which differs from the bulletin page numbering).

Legislation also attempted to clarify the concept of "acting jointly or in concert" by adding a presumption that two classes of persons were acting jointly or in concert, which was substantially similar to what was recommended in the Practitioners Report.[65]

The term "joint actor" was proposed in the 1984 Draft Legislation to "simplify the language",[66] and was defined to mean:

> "in relation, to a person or company, any *associate or affiliate of such person* or company and any person or company acting jointly or in concert with such first mentioned person or company".[67] [emphasis added]

The concept of "joint actor" appears throughout the 1984 Draft Legislation, including in the definition of "offeror's securities",[68] the provision dealing with "acting jointly or in concert",[69] and other provisions, including those restricting purchases during and subsequent to a bid.[70]

Consistent with the Practitioners Report, the commentary accompanying the 1984 Draft Legislation confirmed that the goal in providing broad guidance to the concept of joint actor – and using that concept and the concepts of associates and affiliates within the various rules – was to ensure that all persons or companies that are effectively engaging in a common investment or purchase program comply with the law.[71]

Another substantive change that appeared in the 1984 Draft Legislation was the introduction of an early warning system under securities law requiring the issuance of a press release and notification to the OSC when an offeror had acquired 10% or more of a class of voting securities, but had not yet reached the 20% threshold requiring an offeror to comply with the take-over bid rules.[72] In determining whether the 10% threshold was crossed, the "offeror's securities"[73] had to be taken into account.[74] As a result, the securities held by joint actors would be aggregated in such a calculation.

The early warning system was proposed in lieu of reducing the take-over bid threshold to 10% from 20%, as recommended in the Practitioners Report.[75] The original suggestion was made in *The Regulation of Take-over Bids in Canada: Premium Private Agreement Transactions, Report of the Securities Industry Committee on Take-over Bids*[76] due to the recognition that the accumulation of a holding of 10% was a significant development in

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[64] *Ibid* at 1-396.
[65] *Ibid* (the *1984 Draft Legislation* did not reflect the proposed language in the *Draft Provisions* for the second class of persons presumed to be acting jointly or in concert – those who intend to exercise jointly or in concert with the offeror, voting rights). See also *Practitioners Report, supra* note 37 at 88 (2)(b) (this read: "whether or not there was any agreement, commitment or understanding (whether formal or informal) to such effect", but this was not a substantive change since no agreement, commitment or understanding for the second class of persons was required).
[66] *Ibid* at 1-395.
[67] *Ibid* at 1-372.
[68] *Ibid* at 1-396.
[69] *Ibid* at 1-398.
[70] *Ibid* at 1-405.
[71] *Ibid* at 1-398.
[72] *Ibid* at 1-396.
[73] *Ibid* (offeror's securities means voting securities of the offeree issuer beneficially owned, or over which control or direction is exercised, on the date of an offer to acquire, by the offeror and any joint actor).
[74] *Ibid.*
[75] *Ibid* at 1-392, 1-396.
[76] The Securities Industry Committee on Take-Over Bids, *The Regulation of Take-Over Bids in Canada: Premium Private Agreement Transactions, Report of the Securities Industry Committee on Take-over Bids* (16 November 1983) [unpublished, archived at Ontario Securities Commission Library] (the Securities Industry Committee on Take-over Bids was composed of 12 individuals with one alternate and included individuals who provided secretarial and research support, a consultant on securities market regulation and another who focused on market policy of the TSX).

the marketplace, a signal of potential acquisition of control, and should be disclosed.[77] Also noted was the importance that any further purchases be linked to the disclosure of the acquisition and the purchaser's intentions. In the commentary accompanying the 1984 Draft Legislation, no guidance was provided on whether the joint actor concept raised different policy concerns under the early warning system than under the take-over bid provisions.

On December 13, 1984, Bill 159 *An Act to Amend the Securities Act*[78] ("**Bill 159**") was given its First Reading in the Ontario Legislature. On December 14, 1984, the OSC published Bill 159 in an OSC Bulletin[79] and stated that "[T]he Bill embodies the principles of the 1984 Draft Legislation".[80] It was confirmed again that the proposed amendments relating to "acting jointly or in concert" were to ensure that all persons or companies that are effectively engaging in a common investment or purchase program, as described in the Practitioners Report, comply with the law[81] and that Bill 159 maintains and strengthens the principle that all shareholders of a class of securities subject to a take-over bid will be treated fairly and equally.[82] No reference was made to the fact that the "acting jointly or in concert" concept had been expanded beyond take-over bids to the early warning regime.

Though the exact language in the 1984 Draft Legislation was not adopted in its entirety, the changes to the definition of an "offeror" and the inclusion of a presumption that certain persons are acting jointly or in concert remained in Bill 159. The defined term "joint actor" did not appear in Bill 159; however, the proposed section 90 provided that every associate and affiliate of an offeror shall be deemed to be acting jointly or in concert with the offeror in respect of an offer to acquire.[83] Therefore, while embodying the principles of the 1984 Draft Legislation and having no meaningful differences with respect to "acting jointly or in concert", certain provisions were approached differently.

After its First Reading, Bill 159 was revised in response to comments from the public, other provincial securities regulators and intervening events in the marketplace.[84] This resulted in certain modifications being proposed in the Ontario Legislature as *Bill 68*, *An Act to Amend the Securities Act*[85] ("**Bill 68**"), which had a First Reading on December 3, 1985. Bill 68 sought to replace the existing code for take-over and issuer bids, and attempted to remove problems and deficiencies.[86] Section 90 was modified from its original proposed form in Bill 159 to provide that it is a question of fact whether a person is acting jointly or in concert, and instead of deeming associates and affiliates as acting jointly or in concert, such persons were presumed to be acting jointly or in concert.[87] Also, the presence of an agreement, commitment or understanding, whether formal or informal, became required

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[77] *Ibid* at 9.
[78] 4th Sess, 32nd Parl [*Bill 159*].
[79] *Securities Amendment Act, 1984, Bill 159*, OSC Notice (1984) 7 OSCB 5306 (14 December 1984).
[80] *Ibid* at 5215.
[81] Ermano Pascutto, "Regulation of Take-Over Bids and Issuer Bids: Comments on Selected Issues" (paper delivered at the *Dialogue with the OSC: Current Developments in Securities Regulation*, 27 May 1986) at 28 (Toronto: Insight, 1986).
[82] *Proposed Amendments to Take-Over Legislation*, OSC Notice (1984) 7 OSCB 5330 (19 December 1984)(the date of the notice, December 19, is two days prior to the publication of the bulletin – 21 December 1984).
[83] *Bill 159*, *supra* note 78.
[84] "Bill 68, An Act to amend the Securities Act", 1st reading, *Legislature of Ontario* Debates, 32-4, (3 December 1985) at 4964 (Hon Monte Kwinter) [*Bill 68 Hansard*].
[85] 1st Sess, 33rd Parl [*Bill 68*].
[86] *Bill 68, An Act to amend the Securities Act*, OSC Notice (1985) 8 OSCB 5167 (13 December 1985) at 5171.
[87] *Ibid* at 5182.

for the second class of persons (intending to exercise voting rights with an offeror) to be presumed to be acting jointly or in concert.[88] We were unable to find any explanation in any OSC Bulletins or Hansard,[89]or any other secondary material, for these changes.

In a transcript for *OSC Dialogue 1986*,[90] which covered developments in securities regulations on May 27, 1986, it was noted that it had frequently been very difficult to determine in particular cases whether the "jointly or in concert" test has been met and that the proposed amendments sought to clarify the concept.[91]

On November 24, 1986, there was an introduction and First Reading of Bill 156, *An Act to amend the Securities Act* [92] ("**Bill 156**") in the Ontario Legislature, which was substantially similar to Bill 68. This legislation received royal assent in February 1987 as the *Securities Amendment Act, 1987* [93] (the "**1987 Act**").

3.5 1987 Act

The 1987 Act generally reflected the draft legislation before it (particularly Bill 68 and Bill 156) and, as a result, was generally consistent with the recommendations in the Practitioners Report relating to "acting jointly or in concert", except that affiliates and associates were presumed, and not in effect conclusively deemed, to be joint actors.[94]

In this regard, subsection 90(1)[95] of the 1987 Act provided that it was a question of fact as to whether or not a person is acting jointly or in concert with an offeror, and that the following were presumed to be acting jointly or in concert with an offeror:

> "1. Every person or company who, as a result of any agreement, commitment or understanding whether formal or informal, with the offeror or with any other person or company acting jointly or in concert with the offeror, acquires or offers to acquire securities of the issuer of the same class as those subject to the offer to acquire.
>
> 2. Every person or company who, as a result of any agreement, commitment or understanding, whether formal or informal, with the offeror or with any other person or company acting jointly or in concert with the offeror, intends to exercise jointly or in concert with the offeror or with any other person or company acting jointly or in concert with the offeror any voting rights attaching to any securities of the offeree issuer.
>
> 3. Every associate or affiliate of the offeror".[96]

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[88] *Bill 68*, *supra* note 85 (this was not reflected in Bill 159 or the 1984 Draft Legislation, nor was it recommended in the Draft Provisions). See footnote 65 above.
[89] A survey was done of the following bulletins and Hansard: *Bill 68 Hansard*, *supra* note 84; (1983) 6 OSCB 3027 (15 September 1983) through (1985) 8 OSCB 5321 (13 December 1985) (the lack of commentary is not surprising given that each of Bill 159 and Bill 68 only had a First Reading).
[90] Pascutto, *supra* note 81.
[91] *Ibid* at 20.
[92] 2nd Sess, 33rd Parl.
[93] SO 1987, c 7 [*1987 Act*].
[94] *Ibid* at s 90.
[95] *Ibid* at s 90(1)(this was re-numbered as section 91 in the *Securities Act*, RSO 1990, c S.5).
[96] *Ibid*.

3.6 OSC Policy 9.1 and OSC Rule 61-501

On September 30, 1977, Policy 3-37 - *Issuer Bid – An Offer by an Issuer to Purchase, Redeem or Retire its Own Securities: Timely Disclosure*[97] was adopted to ensure that participants in the capital markets, in particular minority security holders, were consistently treated in a fair and even-handed manner.[98] It dealt with disclosure requirements with respect to going-private transactions and issuer bids, and in December of the same year, it was extended to apply to insider bids.[99] This policy was republished in 1982 as Policy 9.1 – *Going Private Transactions, Issuer Bids and Insider Bids*[100] ("**OSC Policy 9.1**"), and was still reflective of the OSC's concerns regarding disclosure, valuations and the review and approval process for insider bids, issuer bids, going-private transactions and related party transactions.[101] It set out specific requirements and recommended procedures applicable to such transactions, along with certain exemptions from the requirements.[102] On July 5, 1991, the OSC published an amended OSC Policy 9.1[103] and under Part 2, Interpretation, section 2.4 stated that securities legislation set out certain circumstances where the presumption will arise that parties are acting jointly or in concert.[104] OSC Policy 9.1 was amended again on June 26, 1992,[105] but section 2.4 did not change.

In order to reformulate OSC Policy 9.1, on May 31, 1996, the OSC published proposed Rule 61-501 – *Insider Bids, Issuer Bids, Going Private Transactions and Related Party Transactions*[106] ("**OSC Rule 61-501**"), and its proposed companion policy, with a Request for Comment. The application part of the proposed rule cross-referenced section 91 of the *Securities Act* (Ontario) in order to determine whether persons or companies are acting jointly or in concert.[107]

Additionally, the proposed companion policy included a carve-out for lock-up agreements, and agreements pursuant to which shareholders agree to vote in favour of a transaction (referred to herein as "**voting support agreements**"), from a finding of "acting jointly or in concert":[108]

> "Concern has been expressed that agreements by a shareholder to tender into a proposed take-over bid or to vote in favour of a proposed transaction, which are commonly referred to as lock-up agreements, may result in the selling shareholder being seen to be acting jointly or in concert with an acquiror. While the language of section 91 of the [Act] is broad, and the particulars of any case must be considered, the OSC is of the view that an ordinary lock-up agreement *with an identically treated shareholder* should not in and of

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[97] *Issuer Bid – An Offer by an Issuer to Purchase, Redeem or Retire its Own Securities: Timely Disclosure*, OSC Policy 3-37 (1977) OSCB 253 (November 1977).
[98] *Ibid.*
[99] *Disclosure Standards – Takeover Bid Circulars – Information Circulars – Material Information*, OSC Notice (1977) OSCB 273 (November 1977).
[100] *Going Private Transactions, Issuer Bids and Insider Bids*, OSC Policy 9.1 (1982) 4 OSCB 538E.
[101] *Ibid* at s 1.1.
[102] *Ibid* at s 1.4.
[103] *Disclosure, Valuation, Review and Approval Requirements and Recommendations for Insider Bids, Issuer Bids, Going Private Transactions and Related Party Transactions*, OSC Policy 9.1 (1991) 14 OSCB 3345 (5 July 1991).
[104] *Ibid* at 2.4 (the section states that the OSC is of the view that for an insider bid, an offeror and an insider may be viewed as "acting jointly or in concert" where an agreement, commitment or understanding between an offeror and an insider provides that the insider shall not tender to the offer or provides the insider with an opportunity not offered to all security holders to maintain a direct or indirect equity interest in the offeror, the issuer or a material asset of the issuer).
[105] (1992) 15 OSCB 2921 (26 June 1992) [*OSC Policy 9.1 1992*].
[106] *Proposed Rule and Policy Under the Securities Act (Ontario) — Insider Bids, Issuer Bids, Going Private Transactions and Related Party Transactions*, OSC Notice (1996) 19 OSCB 2981 (31 May 1996) [*Proposed Rule 61-501*].
[107] *Ibid* at s 1.2(1)(d).
[108] *Ibid* (it was proposed as section 3.2 in the original publication of the proposed companion policy and it became section 2.3(2) in the final publication).

> itself generally result in arm's length parties being seen to be acting jointly or in concert".[109] [emphasis added]

That the OSC did not consider it necessary to formally[110] provide a carve-out for lock-up agreements and voting support agreements, pursuant to which shareholders party thereto are treated identically to all other shareholders, is important to understanding the scope and limitations of the joint actor concept.

After considering all the received comments, the OSC republished the proposed OSC Rule 61-501 and companion policy for comment on January 22, 1999.[111] On May 1, 2000, OSC Rule 61-501 and the companion policy became effective.[112]

On February 28, 2003, amendments to OSC Rule 61-501 and its companion policy were released for comment,[113] and again in January 2004.[114] In 2003, the proposed amendments included incorporating the exception for lock-up agreements and voting support agreements from a finding of acting jointly or in concert in the rule itself (in the definition of "joint actor"), as opposed to being in the companion policy.[115] This amendment was proposed because, in *Re Sepp's Gourmet Foods Ltd.*[116] ("***Sepp's***"), the British Columbia Court of Appeal ignored the guidance provided in the companion policy and held that entering "into an agreement with a control group to support a proposed corporate action must be said to be acting jointly or in concert with that group".[117] As a result, the exception for lock-ups was codified in the definition of "joint actors"[118] in OSC Rule 61-501, effective, June 29, 2004:

> "'Joint actor', when used to describe the relationship among two or more entities, means persons or companies 'acting jointly or in concert' as defined in section 91 of the Act, with necessary modifications where the term is used in the context of a transaction that is not a take-over bid or issuer bid, but a security holder is not considered to be a joint actor with an offeror making a formal bid, or with a person or company involved in a business combination or related party transaction, solely because there is an agreement, commitment or understanding that the security holder will tender to the bid or vote in favour of the transaction".[119]

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[109] *Ibid.*
[110] No carve-out existed prior to this proposal and proposed Rule 61-501 offered it as guidance only in the companion policy. The Draft Provisions did not propose a carve-out either, but see the *Practitioners Report supra* note 37 at 3.28 (the Report referenced that such agreements would not, on their own, without an offer to acquire, result in a person or company being deemed to be acting jointly or in concert).
[111] *Proposed Rule 61-501 and Proposed Companion Policy 61-501CP — Insider Bids, Issuer Bids, Going Private Transactions and Related Party Transaction*, OSC Request for Comments (1999) 22 OSCB 493 (22 January 1999), online: <http://www.osc.gov.on.ca/en/SecuritiesLaw_rule_19990122_61-501_r_cp.jsp>. See also footnote 106 above.
[112] *Insider Bids, Issuer Bids, Going Private Transactions and Related Party Transactions*, OSC Rule 61-501 (2000) 23 OSCB 2719 (14 April 2000), online: <http://www.osc.gov.on.ca/en/SecuritiesLaw_rule_20000414_61-501fr.jsp> [*OSC Rule 61-501 2000*].
[113] *Insider Bids, Issuer Bids, Business Combinations and Related Party Transactions*, OSC Proposed Rule 61-501 (2003) 26 OSCB 1827 (28 February 2003), online: <http://www.osc.gov.on.ca/documents/en/Securities-Category6/rule_20030228_61-501_final-rule.pdf> (the original name for the rule, *Insider Bids, Issuer Bids, Going Private Transactions and Related Party Transactions,* substituted "business combinations" for "going private transaction" in this version of the amended rule).
[114] *Notice of Proposed Amendments to Rule 61-501 — Insider Bids, Issuer Bids, Business Combinations and Related Party Transactions and Companion Policy 61-501CP*, OSC Notice (2004) 27 OSCB 550 (9 January 2004), online: <http://www.osc.gov.on.ca/documents/en/Securities-Category6/rule_20040109_61-501_notice-insiderbids.pdf> [*OSC Rule 61-501 2004*].
[115] *OSC Rule 61-501 2000*, *supra* note 112.
[116] 2002 BCCA 108 at para 31 [*Sepp's*].
[117] *Ibid.* See also 4.4 below for a more detailed discussion.
[118] Note also that the phrase "joint actor" was proposed to replace "acting jointly or in concert" and referenced the *Securities Act* (Ontario) for the definition of "acting jointly or in concert" with necessary modifications when used in the context of a transaction that is not a take-over bid or issuer bid.
[119] *OSC Rule 61-501 2004*, *supra* note 114 at s 1.1.

3.7 NI 62-103

As previously noted, an early warning system was codified in the 1987 Act.[120] On September 10, 1993, the OSC published a Request for Comment entitled '*Proposed Refinement of the Early Warning, Insider Reporting and Take-Over Bid Regimes*'.[121] The OSC noted that market participants had adopted widely divergent approaches to the requirements and that, as a result, such market participants may be operating on a playing field that was far from even, that market expectations arising from the statutory regime may be frustrated and that the level of disclosure required was inadequate in certain respects.[122] Following a review of the comments, Staff prepared and submitted to the OSC a discussion paper identifying the various objectives of the existing regulatory requirements and alternative approaches to dealing with the issues raised in the Request for Comment.[123]

There was some debate among commentators as to the objectives of the disclosure requirement, as some were of the view that the sole or primary purpose of advising the market of the accumulation under common management of a significant number of securities of an issuer is to indicate a take-over bid may be imminent, while others believed the notification was important even if made without the purpose of changing or influencing control of the issuer.[124] In the view of the OSC, whatever the original objectives of the early warning requirements had been, disclosure of certain thresholds of ownership of Canadian public issuers is appropriate and necessary for an informed and efficient marketplace.[125] Furthermore, it was felt that the regulatory regime at the time required re-examination as to the manner in which it operated and applied to investors generally.[126]

On October 20, 1995, the OSC published a proposed Rule, *The Early Warning System and Related Take-Over Bid, Insider Trading and Control Block Distribution Issues,*[127] which became NI 62-103 on September 4, 1998.[128] At such time, the rationale for the early warning system, as described in the notice that accompanied the then-proposed NI 62-103, was expanded:

> "The early warning system contained in the securities legislation of most jurisdictions requires disclosure of holdings of securities that exceed certain prescribed thresholds in order to ensure that the market is advised of accumulations of significant blocks of securities that may influence control of a reporting issuer. Dissemination of this information is important because the securities acquired can be voted or sold, and the accumulation of the securities may signal that a take-over bid for the issuer is imminent. In addition, accumulations may be material information to the market even when not made to change

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[120] *1987 Act*, *supra* note 93.
[121] (1993) 16 OSCB 4539.
[122] *Ibid.*
[123] This discussion paper was not publicly available at the Archives of Ontario.
[124] *Supra* note 121.
[125] *Proposed Refinement of the Early Warning Regime and the Rules Regarding Insider Reporting, Take-Over Bids and Control Block Distributions as they Apply to Investors Generally, Including Portfolio Managers and Portfolio Clients*, OSC Request for Comments (1994) 17 OSCB 4437 (16 September 1994) at 4445.
[126] *Ibid.*
[127] OSC Notice (1995) 18 OSCB 4887 (20 October 1995).
[128] OSC Request for Comments (1998) 21 OSCB 5649 (4 September 1998), online: <http://www.osc.gov.on.ca/en/SecuritiesLaw_rule_19980904_62-103_ni.jsp>. See also legislation for all the provinces which had early warning requirements in their legislation prior to the enactment of 62-103: Alberta (*Securities Act*, 1981 cS-6.1 ss 141(1), 141(2), 141(3)); British Columbia (*Securities Act*, RSBC 1996, c 418 ss 111(1), 111(2)); Manitoba (*Securities Act*, RSM 1988 ss 92(1), 92(2)); Newfoundland (*Securities Act*, RSNL 1990, c S-13 ss 102(1), 102(2)); Nova Scotia (*Securities Act*, RSNS 1989, c 418 ss 107(1), 107(2)); Ontario (*Securities Act*, RSO 1990, c S.5 ss 101(1), 101(2)) and Québec (*Securities Act*, CQLR c V-1.1 ss 147.11, 147.12).

> or influence control of the issuer. Significant accumulations of securities may affect investment decisions as they may effectively reduce the public float, which limits liquidity and may increase price volatility of the stock. Market participants also may be concerned about who has the ability to vote significant blocks as these can affect the outcome of control transactions, the constitution of the issuer's board of directors and the approval of significant proposals or transactions. The mere identity and presence of an institutional shareholder may be material to some investors".[129]

No commentary was made as to whether the expanded purpose of the early warning regime would impact the interpretation given to "acting jointly or in concert". However, notwithstanding the enhanced purpose, the triggers for disclosure and reporting obligations under the early warning regime did not change – namely, the acquisition of shares or a change in a material fact contained in the most recently filed report. On March 15, 2000, NI 62-103 came into force.

3.8 NI 62-104

On April 28, 2006, there was a Request for Comment by the Canadian Securities Administrators ("**CSA**") on proposed NI 62-104 – *Take-Over Bids and Issuer Bids and Related Forms* ("**Proposed NI 62-104**") and its companion policy.[130] Proposed NI 62-104 provided that all persons that were acting together with an offeror to either acquire or vote shares, and affiliates of an offeror, would be deemed to be acting jointly or in concert.[131] This would have resulted in only associates being presumed to be joint actors.

Proposed NI 62-104 was prepared after consideration of the approaches taken in Canadian jurisdictions and it was conceded that, at the time, most Canadian jurisdictions[132] had presumptions (and not deeming provisions) for determining whether persons were acting jointly or in concert. Historically, both British Columbia[133] and Nova Scotia[134] had provisions deeming those who acquire or offer to acquire voting securities, and persons who intend to exercise, "jointly or in concert" with an offeror or any joint actors, voting rights, to be acting jointly or in concert. By 1990, however, both Nova Scotia[135] and British Columbia[136] had changed these provisions in securities legislation to be presumptions and by this time, British Columbia had also added presumptions for affiliates and associates. As well, in Québec, securities legislation deemed companies affiliated with, and persons associated or acting in concert with, a person to be joint actors of the person.[137] In 1999, this changed to a presumption.[138]

The Request for Comment for Proposed NI 62-104 confirmed that in the regulators' view, the relationships proposed to be deemed were "of such significance that any *purchases*

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[129] *Ibid.*
[130] *CSA Notice and Request for Comment – Proposed NI 62-104 Take-Over Bids and Issuer Bids, and Related Forms and Companion Policy 62-104CP Take-Over Bids and Issuer Bids, Proposed Amendments to NI 62-103, and Proposed Repeal of CSA Policy 62-201 Bids Made Only in Certain Jurisdictions*, OSC Notice (2006) 29 OSCB 3533 (28 April 2006), online: <http://www.osc.gov.on.ca/documents/en/Securities-Category6/csa_20060428_62-104_take-over-bids.pdf> [*Proposed NI 62-104*].
[131] *Ibid* at 3551.
[132] The concept of "acting jointly or in concert" was not addressed in the securities legislation of Prince Edward Island (*Securities Act,* RSPEI 1988, c S-3), Northwest Territories (*Securities Act*, RSNWT 1988, c S-5) and the Yukon (*Securities Act*, RSY 2002, c 201).
[133] *Securities Act,* SBC 1985, c 83, s 75.
[134] *An Act to Revise the Securities Act*, SNS 1984, c 11, s 75 (2).
[135] *An Act to Revise the Securities Act*, SNS 1990, c 15, s 97 (1).
[136] *Securities Amendment Act,* 1989 SBC c 78, s 27.
[137] SQ 1984, c 41, s 40.
[138] SQ 1999, c 40, s 327.

made by persons in these circumstances should come within the ambit of the Instrument" [139] [emphasis added] (though one of the deeming provisions related only to the voting of securities). Although a deeming provision may be the subject of exemptive relief, it was intended to not be rebuttable by evidence to the contrary, unlike a presumption.[140] The Proposed NI 62-104 provided that only associates would be subject to a rebuttable presumption because of "the range of entities which have no relevant connection to the *acquisition activities of the offeror*"[141] [emphasis added] that may have otherwise been caught if associates were subject to a deeming provision. That the CSA felt the proposed provisions were appropriate, and its corresponding explanation adequate (though it focused on acquisition activities only), is noteworthy.[142] Also noteworthy is that, notwithstanding that the definition of associate relates to a range of entities that may have no connection to the acquisition of shares, its inclusion was still considered appropriate.

Of the 13 commentators[143] to the Proposed NI 62-104, a number of them opposed the modification from a rebuttable presumption to a deeming provision regarding those who were acting together with an offeror to vote shares, as well as an offeror's affiliates. One commentator, however, conceded it made sense to deem an offeror's affiliates as acting jointly or in concert,[144] while other commentators felt it would not be warranted in all circumstances and, therefore, the rebuttable presumption should be preserved even for affiliates.[145] One commentator also noted that the modification would create significant uncertainty for offerors. Such commentator encouraged the CSA to clarify, by the way of a policy statement, their interpretation of the circumstances in which a presumption may or may not be reasonably rebutted.[146] Further, one commentator stated that the language lacks sufficient precision to enable a user to properly interpret the concept of "jointly or in concert", except in the clearest of situations.[147] They also took issue with the open-ended "question of fact" reference that indicated to them that the concept can be applied in a virtually unlimited manner, which, in the past, has caused uncertainty and legal wrangling.[148] Additionally, many of the commentators suggested that a specific carve-out

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[139] *Proposed NI 62-104*, *supra* note 130 at 3534.
[140] *Ibid* at 3535.
[141] *Ibid.*
[142] *Ibid.*
[143] Letters were submitted individually from e-globe x-change inc., RS Market Regulation Services Inc., CFA Societies of Canada, Davies Ward Phillips & Vineberg LLP, Fasken Martineau LLP, Fraser Milner Casgrain LLP ("FMC LLP" as it then was), McCarthy Tétrault, Ogilvy Renault LLP, Ontario Bar Association, Osler, Hoskin & Harcourt LLP, Torys LLP, Teacher's Pension Plan and Stikeman Elliott LLP to the Alberta Securities Commission; British Columbia Securities Commission; Manitoba Securities Commission; New Brunswick Securities Commission; Securities Commission of Newfoundland and Labrador Registrar of Securities; Department of Justice, Government of the Northwest Territories; Nova Scotia Securities Commission; Registrar of Securities, Legal Registries Division, Department of Justice, Government of Nunavut; Ontario Securities Commission; Prince Edward Island Securities Office; Autorité des marchés financiers; Saskatchewan Financial Services Commission; Registrar of Securities, Government of Yukon Canadian [unpublished], online: <http://www.albertasecurities.com> [*Comment Letters for Proposed National Instrument 62-104, July 2006*].
[144] Letter from FMC LLP to the CSA (28 July 2006) [unpublished], online: <http://www.albertasecurities.com> [*FMC LLP Comment Letter*].
[145] Letter from Torys LLP to the CSA (28 July 2006) [unpublished], online: <http://www.albertasecurities.com> [*Torys Comment Letter*]; Letter from Fasken Martineau LLP to the CSA (28 July 2006) [unpublished], online: <http://www.albertasecurities.com> [*Faskens Comment Letter*].
[146] Letter from Ogilvy Renault LLP (as it then was) to the CSA (28 July 2006) [unpublished], online: <http://www.albertasecurities.com> [Ogilvy LLP Comment Letter]. See also Letter from FMC LLP to the OSC (9 July 2007), online: <http://www.osc.gov.on.ca/documents/en/Securities-Category6-Comments/com_20070709_62-504_fmc.pdf> [*FMC LLP Second Comment Letter*] (FMC LLP referenced their earlier comment letter on Proposed NI 62-104, in a response to a concurrent Request for Comment on OSC Rule 62-504 – *Take-Over Bids and Issuer Bids*, (2007) 30 OSCB 3211 (6 April 2007) stating that the term "acting jointly or in concert" lacks sufficient precision to enable a user to properly interpret the concept except in the clearest of situations and suggested that interpretative guidance be provided in a companion policy to the proposed Ontario rule); *OSC Rule 62-504*, *supra* note 7 at 7 (the OSC responded that they believe the interpretation is "fact-specific" and, therefore, general guidance would not be helpful).
[147] *Comment Letters for Proposed National Instrument 62-104, July 2006*, *supra* note 143.
[148] *FMC LLP Comment Letter*, *supra* note 144.

for lock-up agreements should be inserted (it is unclear why this was not originally proposed by the CSA, as it existed prior to this date).[149]

Upon considering the comments received, the CSA decided to make affiliates and those acquiring shares with an offeror deemed to be acting jointly or in concert, while keeping a rebuttable presumption for associates and those who vote securities with an offeror.

However, in changing the acquisition of shares from a rebuttable presumption to a deeming provision, the CSA did not change the language of the clause. As a result, an offeror or acquiror was deemed to be acting jointly or in concert with a person who "as a result of any agreement, commitment or understanding 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". Accordingly, an offeror could be deemed to be a joint actor of a third party that, unknown to it, is a joint actor of one of its joint actors. The CSA likely did not consider the impact of this change and the resulting chain of persons who would thereby be deemed to be "acting jointly or in concert". It is our belief that the CSA could not have intended this result, which appears to be inconsistent with the policy rationale of the legislation.

Another change the CSA decided to make was to include a carve-out for lock-up agreements.

In 2008, these changes were adopted under Multilateral Instrument 62-104 – *Take-Over Bids and Issuer Bids* [150] ("**MI 62-104**") in all jurisdictions other than Ontario. In Ontario, they were adopted under OSC Rule 62-504 – *Take-over Bids and Issuer Bids* and section 91 of the *Securities Act* (Ontario)[151]. Ultimately, these provisions were reflected unchanged in NI 62-104, and subsection 1.9(1) of NI 62-104 provides as follows:

> "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

[149] *Ogilvy LLP Comment Letter*, *supra* note 146; *Torys Comment Letter*, *supra* note 145.
[150] *Canadian Regulators Harmonize Take-Over Bid and Issuer Bid Rules*, OSC Notice (2008) 31 OSCB 1492 (8 February 2008), online: <http://www.osc.gov.on.ca/documents/en/Securities-OSCB/oscb_20080208_3106.pdf>.
[151] *Ibid.* See also Bill 187, *Budget Measures and Interim Appropriation Act, 2007*, SO 2007, c 7 (assented to 17 May 2007).

> 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".[152]

Subsection 1.9(2) of NI 62-104 contains an exception for registered dealers acting solely in an agency capacity and not executing principal transactions in the class of securities subject to the bid or performing services beyond the customary functions of a registered dealer.[153] Also, subsection 1.9(3) of NI 62-104 contains a carve-out for lock-up agreements.[154]

3.9 MI 61-101

MI 61-101 came into force on February 1, 2008, [155] and replaced OSC Rule 61-501 and Québec's Regulation Q-27 *Respecting Protection of Minority Security Holders in the Course of Certain Transactions* (each of which were revoked on the same date).[156] MI 61-101 applied to Ontario and Québec, and was subsequently adopted by certain other provinces, including Alberta, Manitoba and New Brunswick.[157] The definition of "joint actor" in section 1.1 is substantively the same as was provided in OSC Rule 61-501:

> "when used to describe the relationship among two or more persons, means persons 'acting jointly or in concert' as determined in accordance with section 1.9 of Multilateral Instrument 62-104 *Take-Over Bids and Issuer Bids*, and in Ontario, section 91 of the *Securities Act*, with necessary modifications where the term is used in the context of a transaction that is not a take-over bid or issuer bid, but a security holder is not considered to be a joint actor with an offeror making a bid, or with a person involved in a business combination or related party transaction, solely because there is an agreement, commitment or understanding that the security holder will tender to the bid or vote in favour of the transaction".[158]

3.10 Expansion of Disclosure under Early Warning Regime

On March 13, 2013, the CSA published for comment proposed changes to the early warning system, which included reporting changes that were reflected in forms related to NI 62-103.[159] The CSA also confirmed that the objective of early warning disclosure had not changed since the introduction of NI 62-103. In requesting comments on their proposals to amend the early warning reporting requirements, the CSA noted:

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[152] *NI 62-104, supra* note 9.
[153] *Ibid.*
[154] *Ibid.*
[155] *Protection of Minority Security Holders in Special Transactions*, OSC MI 61-101 (2008) 31 OSCB 1321 (1 February 2008), online: <http://www.osc.gov.on.ca/documents/en/Securities-Category6/rule_20080201_61-101_protect-minority.pdf>.
[156] *Notice of Ministerial Approval: MI - 61-101 - Protection of Minority Security Holders in Special Transactions and Related Companion Policy 61-101CP Protection of Minority Security Holders in Special* Transactions, OSC Notice (2008) 31 OSCB 1230 (1 February 2008), online: < http://www.osc.gov.on.ca/documents/en/Securities-Category6/rule_20080201_61-101_nma-protect-minority.pdf>; *Regulation to repeal Regulation Q-27 respecting protection of minority security holders in the course of certain transactions*, (2008) GOQ II, 561.
[157] *Multilateral CSA Notice of Adoption of Multilateral Instrument 61-101 – Protection of Minority Security Holders in Special Transactions*, ASC Notice (20 July 2017), online: <http://www.albertasecurities.com/Regulatory%20Instruments/5362046-v1-MI_61-101_CSA_Notice.pdf>.
[158] *MI 61-101, supra* note 13 . See also subsection 3.6 above.
[159] *Proposed Amendments to Multilateral Instrument 62-104 Take-Over Bids and Issuer Bids, National Policy 62-203 Take-Over Bids and Issuer Bids, and National Instrument 62-103 Early Warning System and Related Take-Over Bid and Insider Reporting Issues*, OSC Request for Comments (2013) 36 OSCB 2675 (13 March 2013), online: <http://www.osc.gov.on.ca/documents/en/Securities-Category6/mi_20130313_62-104_take-over-bids.pdf>.

> "The objective of early warning disclosure is not only to predict possible take-over bids but also to anticipate proxy-related matters …[160]
>
> The purpose of early warning reporting is to compel the release of information with respect to changes in the ownership of, or control or direction over, a reporting issuer's voting or equity securities to allow the market to review and assess the potential market impact of the change. Investors must be given sufficient information to be able to effectively evaluate the impact. In our view, disclosure to investors of a change that may influence or affect control is essential for market transparency and investor confidence.
>
> Persons subject to the early warning requirements disclose the purpose of the change as part of their early warning news release and report. Concerns have been expressed about the adequacy of the disclosure included in the early warning reports filed in Canada, particularly with respect to disclosure about the purpose of the transaction.
>
> We have found that the disclosure is often inadequate and does not sufficiently inform investors. In our view, more detailed disclosure of, for example, the intentions of the person acquiring securities and the purpose of the acquisition would enhance the substance and quality of early warning reporting.
>
> … While persons subject to the early warning requirements are required to disclose the purpose of the acquisition as part of their early warning news release and report, we have found that this disclosure often consists of boilerplate language that provides little useful information for the market. … We believe that more detailed disclosure of the intentions of the person acquiring securities and the purpose of the acquisition is required for the market to properly evaluate the particulars of the acquisition."[161]

On February 25, 2016, the CSA announced the adoption of and published the amendments to NI 62-103,[162] which came into force on May 9, 2016 with additional amendments.[163] Such amendments to NI 62-103 included enhanced disclosure requirements with respect to the purpose and intention of an investor and any joint actors.[164] Prior to the amendments to NI 62-103, the early warning system required disclosure that described the purpose of the investor or its joint actors in effecting the transaction, including any future intention to acquire ownership of additional securities of the relevant reporting issuer. NI 62-103 now requires more exacting disclosure as to plans that relate to or would result in, among other things: the acquisition of additional securities of the reporting issuer; a corporate transaction, such as a merger; a change in the board of directors or management of the reporting issuer; a change in the reporting issuer's charter, bylaws or similar instruments that might impede the

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[160] *Ibid* at 2677.
[161] *Ibid* at 2678.
[162] *CSA Notice of Amendments to Early Warning System - Amendments to MI 62-104 Take-Over Bids and Issuer Bids, NI 62-103 Early Warning System and Related Take-Over Bid and Insider Reporting Issues*, OSC Notice (2016) 39 OSCB 1745 (25 February 2016), online: <http://www.osc.gov.on.ca/documents/en/Securities-Category6/csa_20160225_62-104_early-warning-system-take-over-bids.pdf>.
[163] *Amendments to National Instrument 62-103 The Early Warning System and Related Take-Over Bid and Insider Reporting Issues*, OSC Notice (2016) 39 OSCB 4284 (5 May 2016), online: <http://www.osc.gov.on.ca/documents/en/Securities-Category6/ni_20160505_62-103_early-warning-system-take-over-bids.pdf>.
[164] *Supra* note 162 ("joint actor" is defined in section 1.1 of NI 62-103 as a person "acting jointly or in concert" (as defined under applicable securities legislation) with another).

acquisition of control of the reporting issuer by any person or company; or a solicitation of proxies from security holders.[165]

3.11 Summary

The legislative history outlined above reflects a tension between the need to provide clarity and a belief that the phrase "acting jointly or in concert" is not capable of a definition that would easily apply in all circumstances. Over time, there was much back and forth between either deeming certain persons to be acting jointly or in concert, or presuming them to be acting jointly or in concert such that evidence could be provided by a respondent to rebut the presumption. The current state of securities legislation outlines two circumstances where persons will be deemed, with two other circumstances where persons will be presumed, to be acting jointly or in concert, while leaving it open to courts and securities regulators to further define the scope of the phrase. For the class of persons deemed, the focus of the first circumstance is on an agreement or understanding between the parties and the purchase of securities. The second circumstance is a blanket deeming provision for affiliates. For those persons that are presumed to be acting jointly or in concert, the focus of the first circumstance is an agreement or understanding between the parties and the exercise of voting rights. The second circumstance is a blanket presumption for associates.

With respect to the policy rationale for the phrase "acting jointly or in concert", it has been focused on covering persons who engage in a common investment or purchase program.

[165] *Ibid.*

4. JURISPRUDENCE

Over the years, a number of Canadian decisions have considered the concept of "acting jointly or in concert" and found a variety of factors to be significant in making such a finding. The following part of this paper provides an overview of the key decisions and our observations thereon.

4.1 Oakwest [166]

4.1.1 Summary

In *Oakwest*, the OSC considered take-over bids made by each of Oakwest Corporation Limited ("**Oakwest**") and Capricorn Capital Corporation ("**Capricorn**") for Russell Holdings Limited ("**Russell**"), whose major asset was approximately 33% of the common shares of Treats Inc. ("**Treats**"), a reporting issuer listed on the TSX.[167] The bids of Oakwest and Capricorn were each for a maximum of 50% of voting securities of Russell and, thus, indirectly for up to 16.5% of Treats.[168] Therefore, the objective of the bids was to acquire control over the shares of Treats.[169]

The OSC found that Oakwest and Capricorn had an understanding with respect to the bids, and thereby were acting jointly or in concert.[170] Accordingly, the bids constituted a take-over bid, as in aggregate the bids were for 33% of the voting securities of Treats, despite the offerors arguing that there were no agreements or understandings with respect to the voting of the shares following completion of the bids.[171] The OSC's conclusion was supported by a number of aspects of the bids, with perhaps the most significant being the inter-relationship of the conditions contained in each bid and the procedure for re-allocating the shares tendered to the bids.[172] A condition was contained in each bid, the effect of which was to ensure that following the completion of the bids, at least 50% of the shares of Russell would be held in aggregate by Oakwest and Capricorn.[173] Also, following the completion of the bids, shares were to be taken up and reallocated between the offerors, such that each would acquire up to 50% of the outstanding shares of Russell.[174]

4.1.2 Observations

The *Oakwest* decision was the OSC's first formal consideration of section 91 of the 1987 Act.[175] The 1987 Act had identified four factual circumstances where there was a rebuttal presumption that parties were acting jointly or in concert, which included where parties had reached an understanding to acquire or offer to acquire an issuer's securities.

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[166] *Re Oakwest Corp* (1988), 11 OSCB 744 [*Oakwest*].
[167] *Ibid.*
[168] *Ibid.* See also EA Turner, "The Cookie War – Take-over Bids for Russel Holdings/Treats" (paper delivered at *Dialogue with the OSC: Current Developments in Securities Regulation*, 22 April 1988), (Toronto: Insight, 1988) at 6 [*Turner*].
[169] *Ibid* at 4.
[170] *Ibid* at 8.
[171] *Ibid* at 7-8.
[172] *Ibid* at 7.
[173] *Ibid.*
[174] *Ibid.*
[175] *1987 Act, supra* note 93.

Though no reasons were given in the proceeding, the OSC Dialogue in 1988 regarding developments in securities regulation indicated the likely importance of the inter-relationships of each bid's conditions and the procedure for reallocating the shares tendered to the bid in coming to a finding of Oakwest and Capricorn acting jointly or in concert.[176] In these circumstances, it would have been difficult to rebut the presumption in the 1987 Act, as it would appear that, as structured by Oakwest and Capricorn, the transaction resulted in the two companies effectively engaging in a common investment or purchase program for the voting securities of Russell and, indirectly, of Treats.

4.2 Sirianni[177]

4.2.1 Summary

Sirianni arose due to a notice of hearing issued by the Superintendent of Brokers in October 1989, which alleged that Eugenio (Eugene) Sirianni and his brother, Francesco (Frank) Sirianni, engaged in certain improper conduct regarding their trading of the shares of Montreux Development Corp. ("**Montreux**") during the period between December 4, 1988 to January 27, 1989.[178]

In 1985, Eugene incorporated FSL Financial Strategy Ltd. ("**FSL**"), which purported to provide public relations services, act as a financier and find profitable business opportunities for publicly traded companies.[179] Eugene bought securities in the companies he advised, often taking a control position in them.[180] In 1987, Frank became Eugene's personal accountant and joined FSL as a director and its administrator.[181] In 1988, Frank set up two companies: I.C.L. Financial Communications Inc. and I.G.C. Interglobe Communications Ltd. (together, "**Interglobe**") to take over the public relations business of FSL.[182] Frank continued to be Eugene's personal accountant and a director and administrator of FSL.[183] FSL and Interglobe shared office space, expenses and employees.[184] Eugene introduced the companies he advised to Interglobe and he acted as a director on most of the boards of the companies that were clients of Interglobe.[185] Also, both Eugene and Frank dealt with the same banks.[186]

Montreux was a company that engaged in acquiring, exploring and developing resource properties.[187] Eugene advised the employees of Interglobe and FSL to purchase voting securities in Montreux's initial public offering.[188] Interglobe entered into an agreement with Montreux whereby it was to "develop, implement and maintain an ongoing Corporate Relations System with the general objective of expanding stockbroker awareness of the client's activities, and hence a commensurate interest in the Client's

[176] *Turner, supra* note 168 at 7.
[177] *Re Sirianni* (1991), 40 BCSCW Summ 7, 1991 CarswellBC 2653 [*Sirianni* cited to CarswellBC].
[178] *Ibid* at paras 1-2.
[179] *Ibid* at para 8.
[180] *Ibid.*
[181] *Ibid* at para 9.
[182] *Ibid* at para 10.
[183] *Ibid.*
[184] *Ibid.*
[185] *Ibid* at para 11.
[186] *Ibid* at para 12.
[187] *Ibid* at para 18.
[188] *Ibid* at para 15.

stock".[189] According to Eugene, there was "an understanding that he would help Montreux raise money for projects he introduced to Montreux and would be reimbursed for his costs incurred in doing so".[190]

Between December 4, 1988 to January 27, 1989, Eugene had trading authority over 32 brokerage accounts, while Frank had authority over 19 accounts.[191] There were 81,700 Montreux shares traded between the accounts during this period.[192] Furthermore, Eugene and Frank were both major shareholders of Montreux and, generally, traded large amounts of Montreux's shares during the same period.[193]

The British Columbia Securities Commission ("**BCSC**") found that Eugene and Frank were acting in concert in their trading of Montreux's shares during the relevant period.[194] In doing so, the BCSC considered the concept of "acting in concert" in the context of a control person, which is defined in the *Securities Act* (British Columbia) to include persons acting in concert by virtue of an agreement, arrangement, commitment or understanding, as well as in the context of a take-over bid or issuer bid, pursuant to section 78 of the *Securities Act* (British Columbia).[195] However, the BCSC noted that it was not limited by the words in the definition of control person or section 78 of the *Securities Act* (British Columbia) in making its finding against Eugene and Frank.[196]

The BCSC's finding was based on evidence that "… Eugene and Frank had a close working relationship with respect to Montreux and had, in general terms, a common purpose with respect to their involvement in Montreux".[197] The BCSC's determination was based on the following facts:[198]

- Frank remained Eugene's personal accountant and the administrator and a director of FSL following the establishment of Interglobe;
- the two men dealt with the same investors, brokers and issuers;
- they held shares in many of the same companies;
- Interglobe and FSL shared office space, employees and expenses;
- Frank and Eugene were involved with Montreux together. Eugene arranged financing and presented business opportunities to Montreux, while Frank, through Interglobe, provided investor relations services;
- they dealt with the same banks in relation to investments in Montreux, and they approached the same persons to induce them to buy shares in Montreux; and
- the purpose of their involvement was to make a profit from their shareholdings in Montreux.

[189] *Ibid* at para 16.
[190] *Ibid* at para 17.
[191] *Ibid* at para 39.
[192] *Ibid* at para 132.
[193] *Ibid* at para 130.
[194] *Ibid* at para 134.
[195] *Ibid* at paras 116-117.
[196] *Ibid* at paras 116-118.
[197] *Ibid* at para 120.
[198] *Ibid* at paras 121-124, 129.

Additionally, the BCSC made note of the specific words used by Eugene and Frank in prior interviews. The BCSC noted that Eugene "did not distinguish between his involvement in Montreux and that of his brother and Interglobe".[199] Further, Frank referred to 60,000 shares in "my accounts"[200] at a particular brokerage – despite a spreadsheet that tracked both his and Eugene's holdings reflecting that, *collectively*, Eugene and Frank held 60,000 shares at that brokerage.[201] Lastly, the BCSC did not find Eugene's evidence regarding his reasons for his large volume of trading in Montreux credible, [202] and did not believe either Eugene's or Frank's claims that they conducted their trades without each other's knowledge.[203]

4.2.2 Observations

The *Sirianni* decision reaffirms that a determination of "acting jointly or in concert" is a finding of fact, and demonstrates the importance of the specific facts and circumstances of each case and the relationships between the parties in making such a finding. Despite their claims that they acted independently in respect of their trades of Montreux's shares, the words and conduct of Eugene and Frank proved otherwise and evidenced their joint purpose, which led the BCSC to its conclusion that they were acting in concert.

4.3 Seel[204]

4.3.1 Summary

This proceeding dealt with a take-over bid made by Dominion Trustco Capital Inc. ("**Dominion**") in February 1992 to purchase all the common shares of Seel Mortgage Investment Corporation ("**Seel**").[205] The decision focused on whether the bid was an "insider bid" under OSC Policy 9.1, thereby requiring a formal valuation of Seel and the securities of Dominion being offered under the bid.[206]

The OSC found that the offer was made by Dominion acting jointly or in concert with Lawrence Bloomberg ("**Bloomberg**") and Lloyd Fogler ("**Fogler**"), who were each insiders of Seel during the relevant times.[207] Therefore, the offer was an "insider bid", which was defined under securities laws as a take-over bid made by an insider of the offeree issuer, any associate or affiliate of the insider or of the offeree issuer, or an offeror acting jointly or in concert with any of the foregoing, excluding an issuer bid.[208] Additionally, although this was not decided in the OSC's interim decision, one of the panel members also concluded that First Marathon Inc. ("**First Marathon**") was acting jointly or in concert with Dominion.[209]

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[199] *Ibid* at para 126.
[200] *Ibid* at para 127.
[201] *Ibid* at para 128.
[202] *Ibid* at para 133.
[203] *Ibid* at para 134.
[204] *Seel Mortgage Investment Corp v Dominion Trustco Capital Inc* (1992), 15 OSCB 4287, 1992 CarswellOnt 4977 [*Seel* cited to CarswellBC].
[205] *Ibid* at para 1.
[206] *Ibid* at para 2.
[207] *Ibid* at para 48.
[208] *Ibid* at para 43.
[209] *Ibid* para 49.

First Marathon Securities Limited ("**Marathon Securities**") was engaged as a financial advisor to Dominion and its parent company, Dominion Trustco Corporation ("**Dominion Trustco**").[210] First Marathon, Marathon Securities' parent company, was a sub-advisor to Seel and held 4.28% of Seel's outstanding common shares.[211]

Bloomberg was the president and a director of Marathon Securities, as well as the president, CEO and a director of First Marathon.[212] He was also the beneficial owner of 26.4% of the voting securities of First Marathon.[213] Therefore, First Marathon was an associate of Bloomberg.[214] Bloomberg was also a director of Seel and a member of its Executive and Audit Committees until he resigned six days after the offer was made.[215] He had also been an advisor to Seel for a number of years.[216] Accordingly, Bloomberg was an insider of Seel at all relevant times.[217]

The law firm Fogler, Rubinoff LLP acted as general counsel to Seel for many years.[218] Fogler, a founding partner of the firm, was a director and a member of Seel's Audit Committee until he resigned after the offer was made.[219] Fogler was an insider of Seel and an associate of certain insiders of Dominion at all relevant times.[220]

In its interpretation of the definition of "insider bid" in OSC Policy 9.1[221] and section 91 of the 1987 Act, the OSC found that:

> "... acting in an advisory or administrative role alone for customary remuneration should not be construed as acting jointly or in concert. However, the provisions also indicate that relationships that go beyond an advisory or administrative role may, nonetheless, result in an adviser being construed to be acting jointly or in concert with its client".[222]

The actions of Bloomberg and Fogler were found to be "not confined to the customary functions of an investment dealer or legal adviser".[223] The offer had been conceived by Bloomberg and First Marathon, who sought out Dominion Trustco.[224] Further, the OSC noted that "Lawrence Bloomberg, First Marathon and Dominion Trustco structured the Offer and facilitated the making of the Offer through a wholly owned subsidiary of Dominion Trustco that was created for this purpose".[225]

The OSC also found that:

> "Bloomberg and Fogler each had an integral role in presenting the Dominion proposal to Seel management and to the Seel Board and in actively promoting the success of the Offer,

[210] *Ibid* at para 14.
[211] *Ibid* at para 10-11.
[212] *Ibid* at para 13.
[213] *Ibid.*
[214] *Ibid.*
[215] *Ibid.*
[216] *Ibid.*
[217] *Ibid.*
[218] *Ibid* at para 21.
[219] *Ibid* at para 22.
[220] *Ibid.*
[221] *OSC Policy 9.1 1992, supra* note 105 at 2930.
[222] *Seel, supra* note 204 at para 45.
[223] *Ibid* at para 52.
[224] *Ibid* at para 50.
[225] *Ibid.*

> with their activities in this respect exceeding the customary activities of an investment dealer or legal adviser".[226]

However, the OSC stressed that they were "in no way suggesting that those acting for customary remuneration in an advisory capacity alone are to be considered as acting jointly or in concert with an offeror in a take-over bid situation".[227]

First Marathon had a sub-advisory agreement with Seel (1985) Limited Enterprises ("**Seel 1985**"),[228] which was an advisor to Seel, where First Marathon presented and recommended suitable investments and investment programs consistent with investment policies, objectives and restrictions of Seel.[229] Under this agreement, First Marathon received one-third of the fees paid to Seel 1985 under Seel 1985's advisory agreement with Seel (the "**Advisory Agreement**").[230] This fee arrangement reflected that First Marathon had supplied one-third of the funds used to initially purchase the Advisory Agreement.[231]

In considering section 2.4 of OSC Policy 9.1,[232] the OSC noted that First Marathon was party to a lock-up agreement that allowed it to remove its shares from the offer on terms not available to all but two other shareholders.[233] Furthermore, First Marathon had an "ongoing indirect equity interest in the Offeror"[234] due to its contractual interest in the Advisory Agreement. The arrangements made by the parties in respect of that interest contemplated that the payments to First Marathon under the fee arrangement would continue following Dominion's acquisition of Seel, despite the fact that First Marathon would no longer be providing their advisory services.[235] Therefore, one of the panel members concluded that First Marathon was acting jointly or in concert with Dominion.[236]

4.3.2 Observations

While *Seel* confirms that merely acting in an advisory role is not in itself sufficient to substantiate a finding of "acting jointly or in concert", it indicates that exceeding what is customary for an advisor's activities may result in such a finding. In this case, the OSC found that the actions of Bloomberg and Fogler went above and beyond what is customary for an investment dealer or legal advisor, which resulted in them being held to be joint actors with Dominion with respect to the offer.

The factual findings regarding the customary role of legal and financial advisors does raise certain practical concerns, and may also be an inaccurate assessment of the roles that advisors are customarily expected to play in a particular climate. It is not unusual for a dealer or legal advisor to provide planning or structuring advice as part of their services in

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[226] *Ibid* at para 51.
[227] *Ibid* at para 52.
[228] *Ibid* at para 11.
[229] *Ibid* at para 7.
[230] *Ibid* at para 11.
[231] *Ibid* at para 12.
[232] *OSC Policy 9.1 1992*, *supra* note 105 at 2930 ("[t]he Commission is of the view that for an insider bid an offeror and an insider may be viewed as acting jointly or in concert where an agreement, commitment or understanding between an offeror and an insider provides that the insider shall not tender to the offer or provides the insider with an opportunity not offered to all security holders to maintain a direct or indirect equity interest in the offeror, the issuer or a material asset").
[233] *Seel*, *supra* note 204 at para 49.
[234] *Ibid*.
[235] *Ibid* at para 12.
[236] *Ibid* at para 49.

connection with a transaction, and there would be significant implications if that alone was sufficient for a finding of "acting jointly or in concert". We would note that the case has not been followed in any other decision with respect to the concept of "acting jointly or in concert". No doubt the fact that the advisors were also insiders of the target raised concerns that impacted the conclusions reached by the panel.

The findings regarding the advisors may also have been considered unnecessary in light of the role First Marathon played. First Marathon had an ongoing interest in that it would continue to receive fees from the target even after the acquisition was completed, notwithstanding that it would no longer be providing its services. It was also party to a lock-up agreement that allowed it to remove its shares from the offer on terms not available to all but two other shareholders. It is therefore surprising that only one panel member concluded that First Marathon was acting jointly or in concert with Dominion. A finding against First Marathon alone would have been sufficient to categorize Dominion's bid as an "insider bid".

4.4 Sepp's [237]

4.4.1 Summary

This case was an appeal of the decision of a Chambers judge approving an arrangement made under the *Company Act*.[238] The arrangement was sought by a group of shareholders (the "**Acquisition Group**") in an attempt to take Sepp's Gourmet Foods Ltd. ("**Sepp's**") private.[239] The members of the Acquisition Group together owned or controlled slightly over 50% of Sepp's outstanding shares[240] and signed lock-up agreements to vote their shares in favour of the arrangement.[241] The Acquisition Group also obtained confirmation from Mr. Rosenberg, a significant shareholder, of his support for the transaction subject to the price exceeding a specified amount, which it did.[242]

The Supreme Court of British Columbia had granted an interim order with respect to the arrangement (the "**Interim Order**"), and Sepp's held a meeting of shareholders to approve the arrangement.[243] The Interim Order required the approval of at least three-quarters of the votes cast by the Sepp's shareholders present in person or by proxy at the meeting, as well as approval of the "Special Minority".[244] According to the Interim Order, the following persons were to be excluded from the vote of the "Special Minority":

> "… any person or company who is, to the knowledge of Sepp's or any member of the Acquisition Group or any of their respective directors or senior officers, after reasonable inquiry: …
>
> > (g) a person or company acting jointly or in concert with any member of the Acquisition Group … in respect of the Arrangement; … [or]

[237] *Sepp's*, *supra* note 116.
[238] RSBC 1996, c 62.
[239] *Ibid* at para 4.
[240] *Ibid* at para 6.
[241] *Ibid.*
[242] *Ibid* at para 8.
[243] *Ibid* at para 12.
[244] *Ibid.*

> (i) a member who alone or in combination with others effectively controls Sepp's and who, prior to receiving the notice of the Meeting, entered into or has agreed to enter into an understanding to support the Arrangement;"[245]

The Court noted that paragraph 6(g) of the Interim Order was necessary to abide by[246] subsection 8.1(3)(d) of OSC Rule 61-501,[247] which prohibited, for the purposes of the minority vote, any person acting jointly or in concert with any insiders of Sepp's from voting their shares.[248]

Mr. Rosenberg was permitted to vote as part of the "Special Minority" and, as a result, the required "majority of the minority" shareholder approval was reached.[249] Sepp's then sought approval of the arrangement through a final court order, which was granted.[250]

One of the issues considered by the British Columbia Court of Appeal was whether the Chambers judge erred in ruling that Mr. Rosenberg was not precluded from voting as part of the "Special Minority" by paragraph 6(g) of the Interim Order.[251] The Court determined that Mr. Rosenberg was acting jointly or in concert with the Acquisition Group, and therefore the Chambers judge had erred.[252]

In coming to this decision, the Court agreed[253] with one of the appellants that the Chambers judge had erroneously relied on the companion policy to OSC Rule 61-501, which stipulated that signing an ordinary lock-up agreement should not by itself be sufficient to find a party to be acting jointly or in concert.[254] In agreeing with the appellant, the Court referenced a Request for Comment that accompanied the companion policy that gave a number of alternatives to dealing with the effects of lock-up agreements.[255] The Court determined that this showed that the companion policy was a discussion of policy, rather than interpretation, and that the OSC's view was not a firm one.[256]

Furthermore, the Court noted that British Columbia had not adopted the same wording in the *Company Act* and did not adopt a similar policy to the companion policy.[257] The Court also found that the Chambers judge was "obliged to consider, and to give primary importance to, the plain and ordinary meaning of the words before him".[258] Therefore, the Court determined that based on the plain and ordinary meaning of "jointly" and "concert", "a person who has entered into an agreement with a control group to support a proposed corporate action must be said to be acting jointly or in concert with that group" and that "there is not much more one can do than to enter into an agreement to

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[245] *Ibid* at para 16.
[246] *Ibid* at para 17.
[247] *OSC Rule 61-501 2000*, *supra* note 112 at 2719.
[248] *Sepp's*, *supra* note 116 at para 22.
[249] *Ibid* at para 22.
[250] *Ibid* at para 25.
[251] *Ibid* at para 28.
[252] *Ibid* at para 28.
[253] *Ibid* at paras 29-31.
[254] *OSC Rule 61-501 2000*, *supra* note 112 at 2.3(2).
[255] *Sepp's*, *supra* note 116 at para 29.
[256] *Ibid* at para 30.
[257] *Ibid.*
[258] *Ibid* at para 31.

achieve the desired objective, in order to be said to be acting jointly or in concert with its proponents".[259]

Finally, the Court found that the understanding between Mr. Rosenberg and the Acquisition Group was in effect a commitment to do something "in concert" – to support the arrangement.[260] According to the Court, the fact that Mr. Rosenberg would play no role in the transaction other than voting his shares and receiving cash was irrelevant to making a finding of "acting jointly or in concert".[261]

4.4.2 Observations

Sepp's is an unusual decision that appears to suggest that an ordinary lock-up agreement can in itself be sufficient evidence of parties acting jointly or in concert, and contradicts the Practitioners Report, the OSC's views and subsequent case law and securities regulatory decisions. In coming to its conclusion, the Court of Appeal took the literal meaning of "jointly" and "concert" and disregarded the context to which the concept is applied, as well as the objectives of a lock-up agreement. The decision caused the OSC to amend OSC Rule 61-501[262] to specifically provide that a shareholder is not considered to be a joint actor with an offeror solely because it has entered into a lock-up agreement or voting support agreement.

4.5 Drilcorp [263]

4.5.1 Summary

The applicants in this case sought an order to restrain a group of shareholders from voting their shares at a requisitioned meeting of shareholders of Drilcorp Energy Ltd. on the grounds that they were acting jointly or in concert with one another, and thus had breached the requirements of the *Securities Act* (Alberta) relating to early warning disclosure and take-over bids.[264] The respondents conceded that they were acting jointly or in concert as of December 14, 2004, the date that a reorganization agreement was reached.[265] The issue before the Court was whether the shareholder group was acting jointly or in concert at any point before that date.[266]

The Court focused its decision on the plain and ordinary meaning of the words "acting jointly or in concert", relying upon the *Dictionary of Canadian Law*, in its determination that the respondents were not joint actors before December 14, 2004.[267] This was based upon the Court's review of email and telephone communications between the parties, which it described as being "susceptible to a number of interpretations, from bare proposals or suggestions to a review of options for possible future courses of action".[268] The Court concluded that, prior to December 14, 2004, "no planned result had been

[259] *Ibid.*
[260] *Ibid* at para 34.
[261] *Ibid.*
[262] *OSC Rule 61-501 2004, supra* note 114.
[263] *Drilcorp Energy Ltd v Harry L Knutson et al* (24 March 2005), Calgary 0501-02360 (Alta QB) [*Drilcorp*].
[264] *Ibid* at 2.
[265] *Ibid* at 5.
[266] *Ibid.*
[267] *Ibid* at 7.
[268] *Ibid.*

agreed upon, committed to, or understood. Discussions were tentative and inconclusive. Ideas were raised and dropped".[269]

4.5.2 Observations

The Court in *Drilcorp* focused on the plain and ordinary meaning of the words "acting jointly or in concert" and found that the actions of the respondents did not fit within that meaning prior to the date of the reorganization agreement. *Drilcorp* suggests that where the communications and actions of the parties only amount to discussions of possibilities, rather than agreeing to, committing to or reaching an understanding with respect to a planned result, the parties cannot be said to be acting jointly or in concert.

4.6 Sears [270]

4.6.1 Summary

The *Sears* proceeding involved a going-private transaction in respect of Sears Canada Inc. ("**Sears Canada**"), initiated by Sears Holding Corporation ("**SH**"), which held 53.8% of the issued and outstanding common shares of Sears Canada. In connection with such transaction, approval of the "majority of the minority" of the company's shareholders was required, pursuant to OSC Rule 61-501. Two applications were filed in relation to the going private transaction alleging, among other things, that various parties were acting jointly or in concert.[271]

The first application was made by SH and its wholly owned subsidiary, SHLD Acquisition Corp. (collectively, "**Sears Holdings**"), alleging that Pershing Capital Management LP ("**Pershing**") was acting jointly or in concert with Vornado Realty Trust ("**Vornado**"),[272] and that a group of Sears Canada shareholders, which included Pershing (collectively, the "**Pershing Group**"), were acting jointly or in concert to thwart the going-private transaction.[273]

The second application was made by the Pershing Group and alleged that the Bank of Nova Scotia ("**BNS**") and its subsidiary, Scotia Capital Inc. ("**Scotia Capital**"), both of which were financial advisors to Sears Holdings, were joint actors with Sears Holdings.[274]

4.6.1.1 Sears Holdings' Allegation Against Pershing

Sears Holdings' allegation against Pershing was that it was a joint actor with Vornado, at least up until the time that Vornado entered into a deposit agreement with Sears Holdings on April 1, 2006 (the "**Vornado Agreement**").[275] Whether Pershing and Vornado were joint actors was relevant because Pershing would have contravened the early warning disclosure requirements if it were acting jointly or in concert. The Sears Canada shares acquired by Pershing from March 16 to 31, 2006, when aggregated with the 7.5 million

[269] *Ibid.*
[270] *Re Sears Canada Inc* (2006), 35 OSCB 878, 2006 CarswellOnt 6994 [*Sears* cited to CarswellOnt].
[271] *Ibid* at paras 1-2.
[272] *Ibid* at para 71.
[273] *Ibid* at para 4.
[274] *Ibid* at para 5.
[275] *Ibid* at para 71.

shares then held by Vornado, would have exceeded both the 10% and 5% thresholds for early warning reporting obligations generally and during the course of a take-over bid, respectively.

On or about February 15, 2005, Pershing entered into an arrangement with Vornado to split with Vornado its purchases of Sears Canada shares.[276] Between February and September 2005, Pershing sold to Vornado approximately 7.4 million Sears Canada shares pursuant to this arrangement, which was agreed to by the parties to save them from competing against one another in the marketplace.[277] Vornado also agreed to pay a "finder's fee" of $2.5 million to Pershing for bringing them the Sears Canada investment opportunity towards the end of February 2006.[278]

The OSC declined to find that Pershing and Vornado were acting jointly or in concert, relying upon evidence that indicated that (i) the joint purchasing arrangement was oral and entered into and terminated over the telephone, where termination occurred at the end of September 2005; (ii) the finder's fee was requested by Pershing in the fall of 2005 in connection with bringing the investment opportunity to Vornado; and (iii) the Vornado Agreement was negotiated and made without the knowledge of Pershing and had significant negative financial consequences for Pershing.[279] The OSC noted that while a formal agreement was not necessary in establishing joint actor status, in the absence of the "proverbial 'smoking gun'", there must be evidence to support a finding of "acting jointly or in concert".[280] The OSC accepted the "credible and plausible" alternative explanations provided by Pershing for its conduct and found that the evidence did not support Sears Holdings' assertion that Pershing and Vornado acted jointly or in concert.[281]

4.6.1.2 Sears Holdings' Allegation Against the Pershing Group

The fundamental allegation made by Sears Holdings against the Pershing Group was that they engaged in joint activity in a coordinated effort to thwart the going-private transaction. Sears Holdings alleged that the principals behind the Pershing Group purchased shares as a result of an agreement, commitment or understanding with each other, in order to "thwart the [going-private] Offer" and prevent Sears Holdings from securing the "majority of the minority" approval required for the transaction to proceed.[282] Sears Holdings argued that if the OSC were to determine that the Pershing Group acted jointly or in concert prior to April 6, 2006 – the date of the last purchase of Sears Canada shares by a member of the Pershing Group – the Pershing Group would have been in breach of obligations under the early warning regime as they would have held in the aggregate more than 5% of the outstanding Sears Canada shares.[283]

In arriving to its decision, the OSC noted that Ontario securities legislation defines "offeror's securities" to include securities "beneficially owned, or over which control or direction is exercised, on the date of an offer to acquire, by the offeror or any person

[276] *Ibid* at para 72.
[277] *Ibid.*
[278] *Ibid* at para 74.
[279] *Ibid* at paras 73-77.
[280] *Ibid* at para 79.
[281] *Ibid.*
[282] *Ibid* at para 81.
[283] *Ibid* at para 83.

acting jointly or in concert with the offeror".[284] The OSC stated that although the *Securities Act*[285] does not define "control or direction" over securities, the OSC has held that in order to exercise control or direction over shares of a company not owned by the offeror, the offeror must have the ability to exercise the attributes of ownership – being voting power and investment power, including the power to acquire or dispose of the shares.[286]

The OSC ruled that although a broker had telephone conversations with the Pershing Group's principals over the period of the offer by Sears Holdings (during which the principals attempted to make lists of shareholders that opposed the offer) and the Pershing Group met on April 6 and April 10, 2006, these facts alone were insufficient to support a finding of the Pershing Group acting jointly or in concert. The evidence showed that the Pershing Group decided to form a group to oppose the offer by Sears Holdings on April 14. This decision was announced promptly on April 17, the next business day.[287]

4.6.1.3 The Pershing Group's Allegation Against BNS and Scotia Capital

The Pershing Group alleged that BNS and Scotia Capital were joint actors with Sears Holdings on the basis that their services went beyond "customary dealer functions". The Pershing Group sought this finding so that the votes attached to shares held by BNS and Scotia Capital that were subject to lock-up agreements with Sears Holdings would be excluded from the "minority" in the required "majority of the minority" approval under OSC Rule 61-501. Specifically, the Pershing Group alleged that BNS and Scotia Capital planned, promoted and structured the offer to ensure its success beyond the customary roles of advisors.[288] In addressing this, the OSC focused on whether there was "an agreement, commitment or understanding by two or more parties with respect to a common acquisition or investment program or the exercise of voting rights".[289]

In November 2005, Sears Canada engaged Scotia Capital to arrange a $500 million credit facility.[290] Scotia Capital had a banking relationship with Sears Holdings and was the lead banker on the financing for Sears Canada.[291]

On January 6, 2006, Sears Holdings engaged Scotia Capital to advise it with respect to the going-private offer. The two parties signed an engagement letter, pursuant to which professionals from Scotia Capital's Investment Banking and Mergers and Acquisitions Groups ("**Scotia M&A**") were assigned.[292] Scotia M&A was entitled to a work fee of $50,000 per month and a success fee of $400,000 if the going-private offer was successful at or below a share price of $16.86.[293] If the share price was increased above $16.86, the payment of a success fee was within the sole discretion of Sears Holdings. If

[284] *Ibid* at para 88.
[285] RSO 1990, c S.5.
[286] *Sears*, *supra* note 270. See also *Re Robinson* (1996), 19 OSCB 2643 at 2675.
[287] *Ibid* at para 85.
[288] *Ibid* at para 153.
[289] *Ibid*.
[290] *Ibid* at para 143.
[291] *Ibid*.
[292] *Ibid* at para 144.
[293] *Ibid*.

Sears Holdings did not acquire a "majority of the minority" of the shares in Sears Canada, no success fee would be payable.[294] No success fee was ever paid to Scotia M&A, nor did it receive any other compensation above the monthly retainer.[295]

On February 8, 2006, Scotia M&A entered into a dealer-manager agreement with Sears Holdings, which provided Scotia M&A with a solicitation fee of $0.10 per share payable in respect of shares validly tendered to the going-private offer.[296] Scotia M&A was not entitled to any additional fees as a consequence of this agreement and a maximum fee payable was established.[297] The Pershing Group alleged that these agreements "linked" Scotia Capital and BNS to Sears Holding, and that the votes obtained through them should not be counted within the minority vote.[298]

On March 28, 2006, Sears Holdings entered into lock-up agreements as well as escrow agreements with each of BNS and Scotia Capital.[299] The escrow agreements provided that the lock-up agreements would be held in escrow until at least a majority of the Sears Canada shares held by minority shareholders was acquired by Sears Holdings pursuant to its insider bid, or had become subject to similar lock-up agreements.[300]

The OSC held that Scotia Capital's role was confined to that of customary advisory and administrative support, and in particular noted that neither Scotia Capital nor BNS acquired any shares of Sears Canada for their own accounts after Scotia Capital was engaged by Sears Holdings.[301] The OSC accepted the argument that it is a customary soliciting dealer function to identify the owners of shares of an offeree issuer and to ascertain their willingness to tender to the bid.[302] Further, the OSC accepted the arguments of Scotia Capital and BNS that, with respect to the lock-up agreements, neither of them had a "commonality of interest" with Sears Holdings and their interests were independent of Sears Holdings' interest to successfully complete the bid.[303] Accordingly, neither Scotia Capital nor BNS were acting jointly or in concert with Sears Holdings.

4.6.2 Observations

Sears suggests that in circumstances where there is no formal agreement, there needs to be other types of evidence to substantiate a finding of "acting jointly or in concert". Based on the evidence submitted, the OSC did not find sufficient support to determine that Pershing and Vornado were acting jointly or in concert at the relevant time. The basis of their earlier relationship to purchase shares together had been terminated more than two months before the bid was made by Sears Holdings.

Sears confirms that undertaking preliminary steps and discussions without a shared understanding or plan does not make the parties joint actors. Merely meeting and

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[294] *Ibid.*
[295] *Ibid.*
[296] *Ibid* at para 145.
[297] *Ibid.*
[298] *Ibid* at para 146.
[299] *Ibid* at para 39.
[300] *Ibid.*
[301] *Ibid* at para 155.
[302] *Ibid.*
[303] *Ibid* at paras 154 and 157.

discussing an offer, or making a list of shareholders who are potential friends and foes, does not necessarily mean parties are acting jointly or in concert.

Sears also confirms that a customary advisory or administrative support role does not lead to a finding of "acting jointly or in concert", and confirms that it is customary for a soliciting dealer to identify shareholders and ascertain their willingness to tender to a bid. Although the *Seel* decision was distinguished in *Sears*, the *Sears* decision may be read more broadly as a rebuke of the key conclusions reached in *Seel* in light of the manner in which it was distinguished.[304]

In *Sears*, counsel to BNS and Scotia Capital successfully argued that a finding of commonality of interest is needed for a finding of "acting jointly or in concert". We will suggest later in 5.1.6 below that this proposition is of particular importance.

4.7 Sterling [305]

4.7.1 Summary

Sterling involved the going-private transaction of Sterling Centrecorp Inc. ("**Sterling**") that was opposed by two of its shareholders, First Capital Realty Inc. ("**First Capital**") and Gazit Canada Inc. ("**Gazit**").[306] The going-private transaction was initiated by a group of insiders that collectively owned 35.3% of Sterling's outstanding common shares (the "**Sterling Insiders**") and had the support of more than half of the remaining shares through a series of support agreements (the "**Sterling Support Agreements**").[307] The Sterling Support Agreements were "hard" lock-up agreements[308] and required signatories thereto to: (i) vote in favour of the going-private transaction and against any competing transaction; (ii) grant an irrevocable proxy and a power of attorney; and (iii) not sell their shares.[309]

First Capital and Gazit argued that Sterling did not obtain the requisite "majority of the minority" shareholder approval for the transaction because the shareholders that were party to the Sterling Support Agreements were "joint actors" with the Sterling Insiders and, as such, their votes should be excluded from the "majority of the minority" approval.[310]

SCI Acquisition Inc. ("**SCI Acquisition**") was incorporated in October 2006 as a vehicle for the contemplated going-private transaction, and was led by a group of directors and senior officers of Sterling and its subsidiaries.[311] Beginning in November 2006, David Kosoy ("**Kosoy**"), a shareholder, director and officer of Sterling, began negotiating the Sterling Support Agreements with various shareholders of Sterling on behalf of SCI Acquisition.[312] On January 9, 2007, SCI Acquisition presented a term sheet to Sterling.[313]

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[304] *Ibid* at para 163 (the OSC simply held that in *Seel* the dealer's activities exceeded what is customary and this made the case distinguishable from *Sears*).
[305] *Re Sterling Centrecorp Inc* (2007), 30 OSCB 6683, 2007 CarswellOnt 4675 [*Sterling* cited to CarswellOnt].
[306] *Ibid* at para 1.
[307] *Ibid* at para 2.
[308] *Ibid* at para 106 (Relying on a decision of the BCSC, *Stornoway Diamond Corporation, Re*, 2006 BCSECCOM 533, the Court held that " in a soft lock-up agreement, the significant shareholder agrees to tender its share[s] into the bid, but reserves the right to tender its shares into a higher-priced bid should one come along during the time the original bid is in play. In a hard lock-up agreement, the shareholder commits to tender its shares into the bid no matter what").
[309] *Ibid* at para 27.
[310] *Ibid* at para 4.
[311] *Ibid* at para 8.
[312] *Ibid* at para 33.
[313] *Ibid* at para 40.

On February 8, 2007, Sterling issued a press release stating that it had entered into an agreement with SCI Acquisition to effect a going-private transaction.[314]

The going-private transaction was opposed by First Capital and Gazit, who first wrote to the OSC on March 26, 2007 suggesting that the parties to the Sterling Support Agreements should be regarded as "joint actors" within the meaning of Ontario securities laws.[315] Then, on April 25, 2007, five days before the scheduled shareholders' meeting, First Capital and Gazit delivered a letter to Sterling indicating that they were prepared to propose a take-over bid at a higher price than offered in the going-private transaction.[316]

However, according to the written submissions of Sterling, the offer presented by First Capital and Gazit was viewed by Sterling's board of directors as doomed to fail.[317] At the shareholders' meeting on April 30, 2007, First Capital and Gazit brought a motion to adjourn in order to afford security holders more time to consider their offer, but the motion was dismissed.[318]

First Capital and Gazit argued that a "joint actor" relationship existed on the basis that the Sterling Support Agreements precluded the shareholders from accepting another offer for their shares, which completely aligned the interests of those shareholders with SCI Acquisition, thus making them joint actors.[319]

In analyzing this argument, the OSC made a number of findings, citing *Sears* for the proposition that a joint actor relationship will be found where the parties played an integral role in planning, promoting and structuring the transaction to ensure its success beyond their customary role.[320] The OSC also cited *Drilcorp* for the proposition that discussions between persons does not make them joint actors unless the evidence establishes that the parties were acting together "to bring [about] a planned result".[321] The OSC also focused on the nature and scope of the agreements and arrangements, giving weight to the words used by the parties themselves in those relevant documents, rather than the subjective intentions of the parties.[322] The OSC confirmed that its findings must be based on clear, cogent evidence, not ambiguous or speculative evidence; however, reasonable inferences can be drawn from evidence.[323] The OSC further stated that the nature, scope and breadth of the applicable "agreement, commitment or understanding" could be a relevant consideration in determining whether parties are joint actors, but that the presence of other commitments or arrangements does not automatically restore a presumption of "acting jointly or in concert".[324]

The OSC noted that merely being a party to the Sterling Support Agreements does not make Kosoy a joint actor.[325] In fact, whether a voting support agreement is "hard" or "soft"

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[314] *Ibid* at para 44.
[315] *Ibid* at para 13.
[316] *Ibid* at para 53.
[317] *Ibid* at para 56.
[318] *Ibid* at para 57.
[319] *Ibid* at para 81.
[320] *Ibid* at para 102.
[321] *Ibid.*
[322] *Ibid* at para 116
[323] *Ibid.*
[324] *Ibid* at para 119.
[325] *Ibid* at para 140.

is not relevant to an assessment of whether parties are acting jointly or in concert. The OSC also rejected the proposition of "once a joint actor, always a joint actor" and noted that it must examine all the facts and Kosoy's conduct as a whole.[326] Ultimately, the OSC found Kosoy to be a joint actor with SCI Acquisition within the meaning of OSC Rule 61-501, on the basis that he "played an integral role in structuring, planning and promoting the Going-Private Transaction prior to his decision to become a seller and, therefore, a supporting shareholder under the Going-Private Transaction".[327] This determination was made based on the facts and Kosoy's actions.

In particular, the OSC noted that Kosoy was part of the initial group of Sterling Insiders that proposed the going-private transaction to Sterling. Kosoy also participated in the group's decision to approach Sterling's other large shareholders to ascertain their support and had discussions with two significant shareholders. Although Kosoy eventually left the acquisition group before becoming a seller, he did so after the terms of the offer were negotiated and after obtaining the support of one of the significant shareholders for the proposed transaction.[328]

The OSC agreed with OSC Staff that where a supporting shareholder: (i) is an insider of the target; (ii) was previously part of the acquisition group; (iii) was involved in the decision to obtain support from minority shareholders; (iv) negotiated the price of the offer; and (v) switched sides shortly after negotiating the terms of the offer, a serious question arises as to whether that shareholder can cease to be a "joint actor" in respect of the transaction once he has moved from the acquisition group to the selling group.[329] The OSC found that on the evidence, all these enumerated facts were applicable and Kosoy was and remained a "joint actor".[330]

No other parties were deemed to be acting jointly or in concert on the basis that they did not meet the threshold of being "intimately involved in structuring, planning and promoting" the going-private transaction; they did not have any interest in the outcome of the vote beyond their interest as shareholders and entering into the Sterling Support Agreement alone was insufficient to warrant joint actor status.[331] The OSC confirmed that the facts regarding each respondent had to be considered separately in order to make a finding of "acting jointly or in concert".[332]

4.7.2 Observations

While the facts of the case and the conduct of Kosoy led to a finding of him acting jointly or in concert with the acquisition group even after his transition from the acquisition group to the selling group, *Sterling* confirms that the mere entering into of a support agreement does not in itself make a shareholder a joint actor. Further, *Sterling* confirms that just because a party was a joint actor at one point does not mean that such party will remain a joint actor indefinitely. However, where a shareholder has been deeply involved

[326] *Ibid.*
[327] *Ibid* at para 142.
[328] *Ibid.*
[329] *Ibid* at para 146.
[330] *Ibid* at para 148.
[331] *Ibid* at paras 183-184.
[332] *Ibid* at para 115.

in the offer process and switches sides soon after negotiating an offer, the shareholder will not immediately cease to become a joint actor just because it has unilaterally declared that it is now a seller. There has to be sufficient objective evidence to substantiate that the relationship has terminated, which is particularly important where the shareholder is also an insider. There is also an important distinction between Kosoy, who helped to structure, plan and promote the transaction, and the other shareholders, whose interest in the transaction was confined to their interests as shareholders, and therefore lacked a commonality of interest with the acquisition group.

4.8 Bingham [333]

4.8.1 Summary

The petitioner was an individual shareholder ("**Bingham**") of Ashton Mining of Canada Inc. ("**Ashton**") who sought an order that would effectively cancel an amalgamation between Ashton and a wholly owned subsidiary of Stornoway Diamond Corporation ("**Stornoway**").[334]

Rio Tinto ("**Rio**") owned 52% of the shares of Ashton, which it agreed to sell to Stornoway, and the two parties entered into a "hard" lock-up agreement on July 21, 2006.[335] The lock-up agreement provided that Stornoway would initiate a bid to acquire Ashton shares for either $1.25 cash per Ashton share or one Stornoway share valued at $1.24 plus $0.01 cash.[336] Rio also agreed that, if required, it would vote its Ashton shares against any proposal from another interested party and that Rio would vote its shares in favour of the Stornoway transaction.[337]

The purpose of the bid was to acquire at least 90% of Ashton's outstanding shares so that Stornoway could squeeze out the remaining shareholders under a simple statutory process without the consent of the remaining shareholders (subject to a right of dissent about fair value, but which would not prevent the transfer of their shares).[338] The bid contained an alternative where, if Stornoway acquired less than 90% of the shares in its bid, it would propose a more complicated second-step squeeze-out amalgamation whereby Ashton would amalgamate with the Stornoway-controlled subsidiary.[339] If approved, the Stornoway-controlled entity would acquire all the Ashton shares on the same terms of the bid and Stornoway would effectively own Ashton outright after the subsidiary entity amalgamated with Ashton.[340]

Upon expiry of the bid, 68% of Ashton's shares had been tendered to Stornoway, including the 52% from Rio.[341] Therefore, Ashton called for a special meeting to consider Stornoway's proposal to amalgamate. The amalgamation, which the Court found to be a

[333] *Bingham v Ashton Mining of Canada Inc*, 2007 BCSC 281 [*Bingham*].
[334] *Ibid* at para 1.
[335] *Ibid* at paras 3-4, 7.
[336] *Ibid* at para 5.
[337] *Ibid* at para 7.
[338] *Ibid* at para 13.
[339] *Ibid* at para 14.
[340] *Ibid.*
[341] *Ibid* at para 15.

going-private transaction within the meaning of such term in the *Canada Business Corporations Act*, required "majority of the minority" approval in order to proceed.[342]

Bingham took the position that Stornoway should not be allowed to vote the shares that it had acquired from Rio in the "majority of the minority" vote on the basis that the two were joint actors as a result of the lock-up agreement.[343] The Court rejected this argument on the basis that the lock-up agreement was "precisely the type of agreement which the OSC has decreed in Rule 61-501 could not, in and of itself, lead to a finding that Stornoway and Rio were joint actors".[344] The Court likewise rejected Bingham's argument that a joint actor finding was required since the lock-up agreement required Rio to vote against competing transactions; in other words, to do more than simply support the transaction. The Court viewed such a provision as simply a corollary of voting for Stornoway's take-over bid.[345]

4.8.2 Observations

Bingham again reaffirmed the proposition that a lock-up agreement in itself, regardless of whether it is a "hard" or "soft" lock-up agreement, will not lead to a finding of "acting jointly or in concert". In fact, *Bingham* added that even if such an agreement included ancillary terms which supported the purpose of the agreement, such as an agreement to vote against a competing transaction, it would not be sufficient to make a joint actor finding.

4.9 Genesis [346]

4.9.1 Summary

Genesis Land Development Corp. ("**Genesis**") applied for an order disentitling Smoothwater Capital Corp. ("**Smoothwater**"), Liberty Street Capital Corp. ("**Liberty**"), Garfield Mitchell and Mark Mitchell from voting their shares at Genesis' annual general meeting on the basis that they were acting jointly and in concert and failed to disclose their common intention to elect their own members to the Genesis board, as required under the early warning regime.[347]

Garfield Mitchell, the owner and controller of Smoothwater, was a shareholder of Genesis who increased his personal holdings from 10.02% to 16.5% in 2012, making him Genesis' largest shareholder.[348] Garfield Mitchell filed early warning reports – albeit late – regarding this increase in holdings, but did not disclose any joint actors.[349]

From March to May 2013, Garfield Mitchell and his brother, Mark Mitchell, purchased large blocks of Genesis shares through a broker they both used.[350] Mark Mitchell was a

[342] *Ibid* at paras 31, 37.
[343] *Ibid* at para 50.
[344] *Ibid* at para 56.
[345] *Ibid* at para 55.
[346] *Genesis Land Development Corp v Smoothwater Capital Corp*, 2013 ABQB 509 [*Genesis*].
[347] *Ibid* at 1.
[348] *Ibid* at para 27.
[349] *Ibid* at para 28.
[350] *Ibid* at para 32.

director of Genesis and the Chair of its Governance Committee, and was responsible for making recommendations for director nominees.[351] Following the purchases, Mark Mitchell held 9.27% of the outstanding Genesis shares.[352]

In June 2013, Garfield Mitchell transferred nearly all of his Genesis shares to Smoothwater, which now held 22.06% of the outstanding Genesis shares.[353] Combined with some additional shares he still held personally, Garfield Mitchell beneficially owned 22.09% of the outstanding Genesis shares.[354]

On July 4, 2013, Mark Mitchell scheduled a meeting of Genesis' Governance Committee to propose a new slate of directors.[355] One of the directors of Genesis stated that while discussing his proposed nominees to the Governance Committee, Mark Mitchell said that was what "we" wanted, without specifying whom he meant as "we", that there were shareholders who were aligned and had the votes to get their way and that "we" had decided who ought to be on the board.[356] The Governance Committee rejected the proposed slate and resolved to recommend that the incumbent board members remain in place.[357]

Within two business days of this meeting, on July 8, 2013, Mark Mitchell, Garfield Mitchell and others, as well as representatives of a proxy solicitation firm, participated in a telephone conference call.[358] During the call, Mark Mitchell informed the group that the Governance Committee had resolved to recommend that the incumbent board be re-nominated.[359] The participants testified that they were looking at options that ought to be taken regarding the Genesis board.[360] It is unclear whether all of the participants knew that the proxy solicitation firm was also on the call, though both Mark Mitchell and Garfield Mitchell confirmed their knowledge.[361]

Genesis argued that Smoothwater, Liberty, Garfield Mitchell and Mark Mitchell were acting jointly or in concert with one another and they had a plan to replace the then-current board of Genesis with their own nominees they had failed to disclose. The Court agreed and found the respondents to have been acting jointly or in concert beginning with the July 8, 2013 conference call, stating that.[362]

> "it is clear, however, that these Respondents were joint actors from July 8 forward from their participation in the conference call of that date and other calls, from Liberty providing a draft of the dissident proxy circular to Smoothwater, and, ultimately, from their participation in the formal voting support agreement of July 26".

Additionally, the Court noted that "[c]ircumstantial evidence, such as family relationships, communication between the parties and attendance at meetings together, can be taken

[351] *Ibid* at para 32.
[352] *Ibid* at para 33.
[353] *Ibid* at para 37.
[354] *Ibid.*
[355] *Ibid* at para 39.
[356] *Ibid* at para 40.
[357] *Ibid* at para 41.
[358] *Ibid* at para 43.
[359] *Ibid.*
[360] *Ibid* at para 44.
[361] *Ibid* at paras 43-44.
[362] *Ibid* at para 52.

into account in determining whether the parties were making a concerted effort to bring about a specified objective".[363]

The Court also separately analyzed the joint actor status of Mark Mitchell, who was held to be a joint actor on the basis of participating in and disclosing confidential committee proceedings during the July 8, 2013 conference call in the presence of the proxy solicitation firm, which the Court said "are not neutral acts".[364] The Court further stated that Mark Mitchell was a joint actor beginning with the July 8, 2013 conference call because "there was an understanding from that point on that he would support their proposed new slate of directors by exercising his votes in their favour".[365]

4.9.2 Observations

Although there are no clear guiding legal principles regarding whether a person is acting jointly or in concert in *Genesis*, certain key facts led the Court to the conclusion that the parties were acting jointly or in concert. These facts include the meetings and calls that were held, the information provided by an insider to the group, the familial relationship between the Mitchell brothers, the involvement of a proxy solicitation firm and the use of the same counsel by certain of the parties. Although the voting support agreement was another consideration that tilted the Court in making its finding, it was only one of a variety of factors considered. Further, the Court found that the disclosure of confidential information was not a "neutral act". We have not found another decision that relied on this or a similar factor in determining that persons are acting jointly or in concert.

4.10 Kingsway [366]

4.10.1 Summary

Kobex Capital Corp. ("**Kobex**") was a British Columbia-based company in which Kingsway Financial Services Corp. ("**Kingsway**") was a shareholder.[367] During an acrimonious proxy fight, Kingsway failed to convince shareholders of Kobex to appoint its proposed slate of directors, with the Kobex board adopting a shareholder rights plan commonly known as a "poison pill" to prevent Kingsway from acquiring more than 15% of Kobex's shares.[368]

Sprott Inc. is an Ontario company that, through its subsidiary, Sprott US Holdings Inc. ("**Sprott US**"), was a significant shareholder of Kobex.[369] The president of Sprott US and the person responsible for its interest in Kobex was Mr. Rule who, one month after commencement of the proxy contest,[370] purchased 1,092,500 shares of Kobex (representing 2.4% of the then-issued and outstanding Kobex shares) for his personal account.[371]

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[363] *Ibid* at para 25.
[364] *Ibid* at para 53.
[365] *Ibid.*
[366] *Kingsway Financial Services Inc v Kobex Capital Corp*, 2016 BCSC 460 [*Kingsway*].
[367] *Ibid* at paras 1-2.
[368] *Ibid* at para 9.
[369] *Ibid* at paras 4, 7.
[370] *Ibid* at para 8.
[371] *Ibid* at para 10.

As established in his affidavit, the purchase came about through an unsolicited email from a broker acting for an unidentified vendor and Mr. Rule did not intend to acquire control of Kobex through this transaction.[372] However, the 2.4% of Kobex shares in Mr. Rule's personal account, combined with Sprott US's holdings of 18.5%, took their combined holdings over the 20% threshold for a take-over bid. Three days after the transaction and upon realizing that the purchase could constitute a take-over bid, Mr. Rule cancelled the purchase of shares.[373]

Kingsway brought an application that Sprott US and Mr. Rule were acting jointly or in concert within the meaning of the *Securities Act* (British Columbia) and MI 62-104, and that, as a result, obligations under the take-over bid regime had not been complied with. Kingsway argued that the phrase "acting jointly or in concert with one or more persons" does not require that the "acting" be for a specific purpose – it is sufficient if there is a common alignment of general interests.[374] Kingsway further argued that it is impossible to imagine how Mr. Rule in his personal capacity and in his capacity as the chief executive officer of Sprott US could be anything other than commonly aligned.[375]

The Court disagreed, stating that section 98 of the *Securities Act* (British Columbia) clearly requires that "acting jointly or in concert" be for the specific purpose of a take-over bid.[376] The Court took the evidence surrounding Mr. Rule's personal purchase of Kobex shares – including his affidavit surrounding the events of the purchase – to find that Sprott US and Mr. Rule were in fact not acting jointly or in concert.[377] The Court stated that Mr. Rule had two hats and he was only wearing one of them when he entered into the personal transaction.[378]

4.10.2 Observations

Kingsway is an example of why the intent of the parties may be important in making a determination of "acting jointly or in concert". The decision also confirms that a finding of joint actor status must be in respect of a specific transaction or purpose that is the subject of the regulatory provisions in question. Here, the conduct of Mr. Rule, including the fact that he cancelled the share purchase within a short timeframe, supported his claim that his intention was never to act with Sprott US to acquire control of Kobex.

4.11 Aurora[379]

4.11.1 Summary

This decision, rendered by both the OSC and the Financial and Consumer Affairs Authority of Saskatchewan ("**FCAAS**") following a simultaneous hearing, arose out of the contested take-over of CanniMed Therapeutics Inc. ("**CanniMed**") by Aurora Cannabis Inc. ("**Aurora**"), both of whom were competitors in Canada's cannabis industry.

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[372] *Ibid* at para 18.
[373] *Ibid.*
[374] *Ibid* at para 34.
[375] *Ibid.*
[376] *Ibid* at para 35.
[377] *Ibid* at paras 35-37.
[378] *Ibid* at para 38-39.
[379] *Re Aurora Cannabis* (2018), 41 OSCB 2325, 2018 CarswellOnt 4282 [*Aurora* cited to CarswellOnt].

Aurora's take-over bid came about as a result of dissatisfaction among CanniMed shareholders regarding CanniMed's strategy for entering the recreational cannabis industry, which involved a proposed merger with Newstrike Resources Ltd. ("**Newstrike**").[380] Negotiations for this merger occurred from July to September of 2017; however, beginning in late September, certain board members and large shareholders of CanniMed began to express concerns. These shareholders included SaskWorks Venture Fund Inc. ("**SaskWorks**"), which held 8% of the outstanding shares of CanniMed; Apex Investment Limited Partnership ("**Apex**"), which held 3%; Golden Opportunities Fund Inc. ("**Golden Opportunities**"), which held 17%; and Vantage Asset Management ("**Vantage**"), which held 9% (together, the "**Locked-up CanniMed Shareholders**").[381]

On November 6, 2017, Vantage contacted Aurora about a potential business combination with CanniMed, which was followed by a call on November 8, 2017, among Aurora, Vantage and the portfolio manager of both Apex and SaskWorks. During this call, Aurora learned that CanniMed would soon be acquiring an unnamed business in the cannabis market and that it needed to proceed quickly if it wished to make a bid for CanniMed.[382] Aurora decided to pursue a take-over of CanniMed the following day.[383]

On November 12, 2017, Aurora entered into separate "hard" lock-up agreements with Golden Opportunities, Vantage, SaskWorks and Apex, who agreed to tender their shares of CanniMed to any take-over bid by Aurora that met certain price criteria.[384] The next day, and only an hour before the CanniMed board was scheduled to vote on the acquisition of Newstrike, Aurora submitted a proposal to purchase all of CanniMed's issued and outstanding shares.[385]

On November 24, 2017, Aurora formally launched its offer and issued a press release outlining the terms of the offer.[386]

In its application to the OSC and FCAAS, CanniMed sought an order that Aurora and the Locked-up CanniMed Shareholders were "joint actors" under section 1.1 of MI 61-101 and were acting jointly or in concert under NI 62-104.[387] Such a finding would be important because: (i) the shares of the Locked-up CanniMed Shareholders would be excluded in determining if Aurora satisfied the statutory minimum tender condition under NI 62-104;[388] (ii) Aurora's offer would be considered an "insider bid" under MI 61-101, requiring additional disclosure in its take-over circular; (iii) Aurora may have to restart its offer with new time periods; and (iv) Aurora would have to issue new press releases and file early warning reports.[389]

Because a determination of "joint actor" or "acting jointly or in concert" is a question of fact as it related to the bidder, the relationships between all of the parties were examined

[380] *Ibid* at para 15.
[381] *Ibid* at paras 20, 22.
[382] *Ibid* at para 33.
[383] *Ibid* at para 34.
[384] *Ibid* at para 36.
[385] *Ibid* at para 37.
[386] *Ibid* at para 47.
[387] *Ibid* at para 89.
[388] *NI 62-104*, *supra* note 9.
[389] *Aurora*, *supra* note 379 at para 90.

separately to determine whether the parties were acting together "to bring about a planned result" as established in *Sterling*.[390]

CanniMed argued that Aurora was acting jointly or in concert with the Locked-up CanniMed Shareholders because Vantage and the other Locked-up CanniMed Shareholders shopped CanniMed to Aurora and shared non-public information with Aurora, and by doing so were active participants in assisting Aurora in planning its bid, including the timing and tactical considerations arising from the Newstrike proposal.[391] CanniMed further argued that the terms and conditions of the lock-up agreements supported the conclusion that Aurora was acting jointly or in concert with the Locked-up CanniMed Shareholders.[392]

Subsection 1.9(1) of NI 62-104 provides that it is a question of fact as to whether a person is acting jointly or in concert with an offeror or an acquiror, but includes a deeming provision for any persons who, as a result of any agreement, commitment or understanding with the offeror, acquires or offers to acquire securities of the same class as those subject to the offer.[393]

However, as provided in subsection 1.9(3) of NI 62-104, an agreement or understanding to tender securities to a bid does not, in and of itself, lead to a determination of "acting jointly or in concert".[394] Following *Sterling*, the OSC concluded that this section covers both "soft" and "hard" lock-up agreements and that it does not allow for a determination that the shareholders are acting jointly or in concert solely on the basis of strong commitments to tender set out in lock-up agreements.[395]

The Locked-up CanniMed Shareholders committed to vote against the Newstrike acquisition and vote for the Aurora transaction.[396] The OSC and FCAAS concluded that the voting provisions in the lock-up agreements did not result in the Locked-up CanniMed Shareholders acting jointly or in concert with Aurora.[397] The presumption that an agreement to exercise voting rights leads to joint actor status can be rebutted where, as in this case, the voting rights are tailored to be consistent with and to support otherwise permissible commitments to tender securities to a bid.[398] However, it is important to note that the OSC and FCAAS observed that the lock-up agreements did not contain certain provisions:

> "Subject to these restrictions, the Locked-up Shareholders did not agree to vote in accordance with Aurora's instructions, and they did not agree to give Aurora their proxies to vote their securities. Aurora did not take steps to transfer voting rights or entitlements to Aurora generally or in respect of all significant matters requiring a vote of shareholders in a manner similar to what would prevail if the shares had already been transferred to Aurora or the Aurora Offer had been successful and the shares taken up by Aurora".[399]

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[390] *Ibid* at para 96
[391] *Ibid* at para 98.
[392] *Ibid* at para 99.
[393] *NI 62-104*, *supra* note 9.
[394] *Aurora*, *supra* note 379 at para 100.
[395] *Ibid* at para 102.
[396] *Ibid* at para 105.
[397] *Ibid* at para 108.
[398] *Ibid*.
[399] *Ibid* at para 106.

It is therefore not clear that the OSC and FCAAS would have reached the same conclusion if one or more of these provisions were included in the lock-up agreements.

The OSC and FCAAS also considered the circumstances leading to the Aurora offer in order to make its joint actor determination, looking in particular at the transfer of material non-public information to Aurora from the Locked-up CanniMed Shareholders, namely Vantage. The OSC found that while the transfer of such information impelled Aurora to pursue the bid on an accelerated basis, it did not rise to the level that Aurora could be said to have become a joint actor with the Locked-up CanniMed Shareholders as a result.[400] A key aspect of the OSC's decision was that throughout the transaction, Vantage and the other Locked-up CanniMed Shareholders were all sellers acting in their own financial interests, while Aurora remained the only buyer in this transaction, meaning that at all times they were "fundamentally on different sides of the transaction".[401]

4.11.2 Observations

Aurora confirms that in order to make a finding of "acting jointly or in concert", there needs to be a commonality of interest between the parties. Notwithstanding the fact that Vantage played a role in planning the transaction, it was at all times, as was the case with each of the other Locked-up CanniMed Shareholders, a seller acting in its own financial interest with Aurora on the buyer side. The decision also confirms that the sharing of material undisclosed information does not necessarily mean, in itself, that parties are acting together.

Aurora followed earlier decisions[402] in confirming that the existence of additional terms in lock-up agreements that support the key purpose of such agreements will not lead to a finding of "acting jointly or in concert". However, the decision raises certain questions as to whether a finding of "acting jointly or in concert" would be made if a lock-up agreement included provisions that provide for the transfer to a bidder of (i) voting rights or (ii) entitlements that would prevail if the shares had already been transferred to the bidder or a take-over bid had been successful and the shares taken up by the bidder. We discuss this matter further in 5.1.4 below.

[400] *Ibid* at paras 123-126.
[401] *Ibid* at para 128.
[402] *Sterling*, *supra* note 305 at para 186.

5. GUIDING PRINCIPLES AND KEY FACTUAL CIRCUMSTANCES

Based on the legislative history and jurisprudence summarized above, we have distilled key guiding principles applicable to a finding of "acting jointly or in concert" or being a "joint actor" in 5.1 below. In 5.2 below, we examine the key factual circumstances that have been considered relevant historically as to whether two or more persons have been acting jointly or in concert or are joint actors.

5.1 Guiding Principles

5.1.1 The Onus Falls on Person(s) Alleging Concerted Actions

In assessing whether someone is acting jointly or in concert, or is a joint actor, with another person, there needs to be a factual analysis. The onus is on the party making the allegation to demonstrate, using clear and cogent evidence that is neither ambiguous nor speculative, that such a relationship exists based on a balance of probabilities.[403]

This onus does not shift in regard to an allegation that "acting jointly or in concert" has been deemed to occur or presumed to occur under subsections 1.9(1)(a) and 1.9(1)(b) of NI 62-104, respectively.[404] The party making the allegation must still prove the underlying facts in order for a finding of "acting jointly or in concert" under those provisions. Where facts have been alleged that prove the underlying agreement, commitment or understanding (and the intention or obligation to vote as a result thereof),[405] or an associate relationship, under subsection 1.9(1)(b) of NI 62-104,[406] this presumption can be rebutted by evidence adduced by the respondent. Furthermore, although the carve-out to the rebuttable presumption under subsection 1.9(1)(b),[407] set forth in subsection 1.9(3) of NI 62-104[408] and the definition of "joint actor" in MI 61-101,[409] provides that a person is not acting jointly or in concert solely because there is an agreement, commitment or understanding that the person will tender securities under a take-over bid or vote in favour of a transaction, the presence of other commitments or arrangements between the parties does not automatically deny them the protection of such carve-out, and thereby does not restore the presumption that such persons are acting jointly or in concert.[410]

5.1.2 Factual Assessment/Nature of Proof

The assessment of whether a joint actor relationship has been established requires a factual analysis based on the plain and ordinary meaning of the words "acting jointly or in concert", informed by the principles of securities legislation, regulations and enunciated securities regulatory policy.[411]

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[403] *Ibid* at paras 116, 140.
[404] *NI 62-104*, *supra* note 9.
[405] *Sterling*, *supra* note 305 at para 119.
[406] *NI 62-104*, *supra* note 9.
[407] *Ibid.*
[408] *Ibid.*
[409] *MI 61-101*, *supra* note 13.
[410] *Sterling*, *supra* note 305 at para 119.
[411] *Ibid* at para 115.

The facts regarding each alleged joint actor must be considered on their own for there to be such a determination.[412] Accordingly, the analysis must occur on an individual basis, establishing "acting jointly or in concert" or a "joint actor" relationship for each person separately.

Clear and cogent evidence that is neither ambiguous nor speculative is required. However, findings can be taken from reasonable inferences drawn from the evidence.[413] As a result, circumstantial evidence, such as familial or close relationships, communications and attendance at meetings, can be considered in determining whether parties are acting jointly or in concert.[414] Nevertheless, there must be evidence to support a finding of "acting jointly or in concert" absent the proverbial "smoking gun".[415]

When determining the nature and scope of agreements and arrangements under subsection 1.9(1) of NI 62-104,[416] securities regulators should interpret the words of the parties themselves by reference to the relevant documents, not by reference to evidence that counsel argues was the subjective intention of one of the parties to the agreement.[417]

5.1.3 Specific to a Transaction

A finding of "acting jointly or in concert" requires that the "acting" be for a specific purpose related to the regulations that are being considered, whether a take-over bid or otherwise.[418] For example, if persons (joint actors) are held to be acting jointly or in concert for purposes of a proxy contest, and one of such joint actors purchases shares – or if the designation of joint actor status constitutes a change in material fact in the most recent early warning report filed by such joint actor – such joint actor would have to comply with any applicable disclosure and moratorium obligations under the early warning regime. However, if one of the other joint actors decides to proceed with a contemporaneous take-over bid without the knowledge of the other joint actors, the other joint actors should not be considered to be acting jointly or in concert in respect of the take-over bid.

5.1.4 Lock-Up Agreements

Section 1.9(3) of NI 62-104 and the definition of "joint actor" in MI 61-101 negate any finding of "acting jointly or in concert" under subsection 1.9(1) of NI 62-104 by solely referencing agreements, commitments or understandings that a person will tender securities under a take-over bid or vote in favour of a transaction.[419] Also, it is irrelevant whether a lock-up agreement or voting support agreement is "hard" or "soft" when conducting an analysis of whether persons are acting jointly or in concert.[420]

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[412] *Ibid.* See also *Aurora*, *supra* note 379 at para 96.
[413] *Sterling*, *supra* note 305 at para 116.
[414] *Genesis*, *supra* note 346 at paras 52-54.
[415] *Sears*, *supra* note 270 at para 79.
[416] *NI 62-104*, *supra* note 9.
[417] *Sterling*, *supra* note 305 at para 116.
[418] *Kingsway*, *supra* note 366 at para 34.
[419] *NI 62-104*, *supra* note 9; *MI 61-101*, *supra* note 13.
[420] *Bingham*, *supra* note 332 at para 53; *Sterling*, *supra* note 304 at para 108; *Aurora*, *supra* note 379 at 102.

In fact, notwithstanding that subsection 1.9(3) of NI 62-104 provides that a finding of "acting jointly or in concert" does not arise solely because of lock-up agreements,[421] it has been held that additional terms that give effect to the substance of lock-up agreements or voting support agreements, or are "consistent with the permissible objectives" of such agreements, do not give rise to a finding of "acting jointly or in concert".[422] Nevertheless, there does remain some confusion as to whether the granting of certain specific rights under a lock-up agreement that more resemble ownership rights (such as a proxy) could undermine the benefits of the carve-out in subsection 1.9(3) of NI 62-104.[423] *Aurora* and *Sterling* appear to be somewhat in conflict on this question – at least as it relates to the appointment of a proxy.[424] While we do agree that the granting of rights under a lock-up agreement that in effect appear to transfer ownership rights raise significant concerns as to whether the carve-out in subsection 1.9(3) of NI 62-104 should be applicable, it is not clear how the granting of a proxy (even an irrevocable proxy as in *Sterling*) is inconsistent with the permissible objectives of a lock-up agreement, provided that the lock-up agreement (including the proxy right granted thereunder) terminates if the transaction fails.[425] The granting of a proxy may simply serve to ensure that the locked-up, or supporting, shareholder complies with its covenants to support the transaction in question or to defeat competing transactions.[426]

5.1.5 Once a Joint Actor, Not Always a Joint Actor

The fact that parties had been joint actors in the past will not be sufficient to establish that they are currently joint actors.[427] However, it would likely be important to give evidence of the termination of that relationship to avoid a finding of "acting jointly or in concert".[428] In the event there has been a short time period between the termination of the relationship and key events relevant to the analysis of whether persons are acting jointly or in concert, an adjudicator is likely to treat with suspicion any termination resulting merely from the self-declared actions of a respondent, particularly where the respondent is an insider.[429]

5.1.6 Commonality of (Commercial or Financial) Interest; Planning, Promoting and Structuring

5.1.6.1 Commonality of (Commercial or Financial) Interest

Numerous cases have confirmed that the policy behind identifying who is a joint actor is to ensure that all persons or companies that are effectively engaged in a common investment or purchase program are required to abide by the requirements of applicable securities laws,[430] including those rules that govern securities transactions prior to, during and subsequent to a bid.[431] The genesis of this can be found in the Practitioners Report,

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[421] *NI 62-104*, *supra* note 9.
[422] *Aurora*, *supra* note 379 at para 108.
[423] *NI 62-104*, *supra* note 9; *Aurora*, *supra* note 379 at para 106.
[424] *Aurora*, *supra* note 379; *Sterling*, *supra* note 305.
[425] *NI 62-104*, *supra* note 9; *Sterling*, *supra* note 305.
[426] *Code*, *supra* note 43 (we acknowledge that the Code is consistent with the inference in *Aurora* in noting that irrevocable commitments may be considered to be indicia of "acting in concert" where the terms "give the offeror … either the right (whether conditional or absolute) to exercise or direct the exercise of the voting rights attaching to the shares or general control of them").
[427] *Sterling*, *supra* note 305 at para 140.
[428] *Sears*, *supra* note 270 at para 73.
[429] *Sterling*, *supra* note 305 at para 147.
[430] *Ibid* at para 102; *Sears*, *supra* note 270 at para 70.
[431] *Practitioners Report*, *supra* note 37 at s 3.27.

which discussed this goal in the context of a take-over bid. It noted that the specific enumeration of parties who are subject to the rules will make the rules more certain and "should tend to reduce abuses which could result from take-over bids which might be made through undisclosed joint actions or from unannounced joint actions which may accompany public take-over bids."[432] It is therefore not surprising that the existence of a common investment or purchase program is a key factor in the context of a take-over bid. This is reflected in the deeming provisions in subsection 1.9(1)(a) of NI 62-104.[433] A common investment and purchase program is clearly evidenced by an agreement, commitment or understanding to acquire securities of the same class as those subject to a bid, and would usually be evidenced by the acquisition of shares undertaken by a company controlled by a bidder. As noted in the Request for Comment for Proposed NI 62-104, the relationships in subsection 1.9(1)(a) of NI 62-104 were "of such significance that any *purchases* made by persons in these circumstances should"[434] [emphasis added] be deemed to be covered by the definition of "acting jointly or in concert".[435]

We would suggest that another way of addressing this underlying policy rationale is to consider the "commonality of interests" among the parties in connection with a transaction, as was articulated in *Sears*.[436] In fact, we would suggest that it is best to understand this concept by focusing on the "interest" being considered, and that such interest would be commercial or financial. For example, in *Aurora*, the alleged joint actors had a commonality of interest with respect to the completion of the sale/acquisition of CanniMed, but their commercial interests were not aligned.[437] In that case, the OSC and the FCAAS focused on the fact that Vantage and the other Locked-up CanniMed Shareholders were each sellers acting in their own financial interests, while Aurora was the only buyer in the transaction. As the OSC and FCAAS stated:

> "These are not circumstances in which their share positions should be aggregated since Aurora and these shareholders are fundamentally on different sides of the transaction".[438]

The need for commonality of financial or commercial interests in establishing a joint actor relationship does explain why – until judicial intervention in *Sepp's* created uncertainty – it was considered unnecessary to provide for an exemption for lock-up agreements from the definition of "acting jointly or in concert".[439]

It is clear that a finding of "acting jointly or in concert" requires that the conduct be for a specific purpose, yet without a requirement for a commonality of financial or commercial interest, the ambit of the phrase "acting jointly or in concert" would be difficult to define.

5.1.6.2 Planning, Promoting and Structuring

[432] *Ibid* at s 2.06.
[433] *NI 62-104*, *supra* note 9.
[434] *Proposed NI 62-104*, *supra* note 130 at 3535.
[435] *Ibid.*
[436] *Sears*, *supra* note 270 at paras 154, 157.
[437] *Aurora*, *supra* note 379 at para 128.
[438] *Ibid.*
[439] *Practitioners Report*, *supra* note 37.

Other cases have held that a determination of a joint actor relationship will be made if the facts establish that the parties in question played an integral or intimate role in planning, promoting and structuring the transaction to ensure its success beyond their customary roles.[440]

With respect to the addition of the words "beyond their customary roles", we would suggest that these words were added to this test to ensure that persons acting solely in an agency capacity, and undertaking customary functions for that role, were not found to be joint actors.

The planning, promoting and structuring test is not identical to the commonality of interest test, and it is not clear that a finding in this regard will alone, in all circumstances, be sufficient for a finding that parties are acting jointly or in concert. In examining this point, it may be helpful to consider the planning, promoting and structuring test in the context of unique facts. For example, would a controlling shareholder that owns 52% of the common shares of a reporting issuer be acting jointly or in concert with a bidder if it sets the cash price at which it will tender, outlines the timing of the transaction and prepares the take-over bid circular, and the bidder accepts all such terms and uses the draft take-over bid circular in connection with a take-over bid? In these circumstances, the controlling shareholder is clearly planning, promoting and structuring the transaction to ensure its success; however, there is no commonality of commercial or financial interests in connection with the transaction. We believe that a finding of "acting jointly or in concert" would be unlikely in such circumstances.

The jurisprudence certainly shows that a finding of both commonality of commercial or financial interest, and planning, promoting and structuring a transaction to ensure success beyond one's customary role, will result in persons acting jointly or in concert.[441] However, the question remains as to whether a finding of "acting jointly or in concert" requires that both the commonality of commercial or financial interest test and the planning, promoting and structuring test be satisfied. We would suggest that the answer to this question is no and that both are not required. The deeming provisions under subsection 1.9(1)(a) of NI 62-104 do not evidence a need for both tests to be met – just the commonality of commercial or financial interest test.[442] In examining this point, it may also be helpful to once again consider unique facts. If an activist, which holds 5% of the outstanding shares of a reporting issuer, approaches a shareholder, which holds 10% of the outstanding shares of such issuer, with the proposition that the larger shareholder fund all or two-thirds of the cost of a proxy contest but plays no other role whatsoever in the proxy contest, can the 10% shareholder be said to not be a joint actor with the activist? We would suggest the answer is no. Any contrary answer would defeat the underlying policy rationale of the early warning regime.

Accordingly, we would suggest that the planning, promoting and structuring test should not be a standalone or necessary test in making a finding of "acting jointly or in concert". Nevertheless, we believe a finding of "acting jointly or in concert" does require conduct

[440] *Sears*, *supra* note 270 at paras 149, 153.
[441] *Seel*, *supra* note 204 at paras 50-52; *Sterling*, *supra* note 305 (Kosoy satisfied both tests).
[442] *NI 62-104*, *supra* note 9.

that is active and integral or significant to the transaction or planned outcome – see 5.2.3 below – but the conduct need not rise to the level of planning, promoting and structuring.

5.1.6.3 Take-Over Bids; Proxy Contests; Majority of Minority Vote

As noted earlier, a finding of "acting jointly or in concert" is particularly important in the accumulation of shares under the take-over bid regime, in the accumulation of shares or votes in a proxy contest under the early warning regime, and in determining who can approve certain conflicted transactions under MI 61-101.[443] In each of such circumstances, the consequences of a finding of "acting jointly or in concert" will have different results, some far more onerous than others. Yet, no cases have sought to make any distinctions between the interpretation of "acting jointly or in concert" in such disparate circumstances.

The majority of the decisions regarding "acting jointly or in concert" pertain to whether certain persons should constitute part of the "minority" for voting purposes. In considering each of such cases where a finding of "acting jointly or in concert" was made (other than *Sepp's,* which is an outlier) – namely, *Oakwest*, *Seel* and *Sterling* – the joint actors have a clear commonality of commercial or financial interests and were acting together "to bring about a planned result".[444] As noted earlier, the commonality of commercial or financial interest test is more aligned with purchases (and accordingly take-over bids and business combinations), and therefore this result is not surprising. It may therefore be argued that since the commonality of commercial or financial interest test is more aligned with take-over bid transactions or business combinations, merely acting together "to bring about a planned result"[445] where there is a commonality of commercial or financial interest will be sufficient for a finding of "acting jointly or in concert" in the context of such transactions.

In considering other circumstances – including proxy contests, for example – it would appear that the commonality of commercial or financial interest test receives less weight to a finding of "acting jointly or in concert", while the planning, promoting and structuring test is critical. We would suggest that this may well be the case because, outside of a plan to acquire shares, the planning, promoting and structuring of a transaction to ensure its success is very strong evidence of parties working in concert. However, a full consideration of the planning, promoting and structuring of a transaction test in the context of a proxy contest, as set out in the second example in 5.1.6.2 above, demonstrates the test's limitations.

The fact is that in proxy contests all shareholders who wish to change incumbent directors may be said to have a commonality of commercial or financial interests; however, there must exist an agreement or understanding to actively work together to bring about that desired result for a finding of joint actor to be made. The planning, promoting and structuring of a proxy fight is certainly strong evidence of an agreement or understanding to actively work together to bring about that desired result and that is why such test may serve as a standalone test in proxy contests for a finding of "acting jointly or in concert" –

[443] *MI 61-101*, *supra* note 13.
[444] *Sterling,* *supra* note 305 at para 97. See also *Drilcorp*, *supra* note 263 at 7; *Aurora*, *supra* note 379 at para 96.
[445] *Ibid.*

because it proves that two or more persons have a commonality of commercial or financial interest and are working together to bring about a planned result. However, we would suggest that the commonality of commercial or financial interest test remains the key test. In this regard, it is interesting to review *Genesis*, which is the only decision where a finding of "acting jointly or in concert" has been made in the context of a proxy contest.[446] In that case, there was no clear evidence that the respondents were all involved in the planning, promoting and structuring of the proxy contest; what was clear is that they were actively working together in a coordinated fashion under a clear understanding to bring about a planned result.[447]

Consider, for example, activity undertaken by a group of hedge funds that tacitly reach an understanding that one of the funds will publicly lead a proxy fight, and the others will purchase shares and support the actions of the publicly declared dissident without publicly declaring same.[448] In these circumstances, it may not be possible to show that the planning, promoting and structuring of a transaction test has been met. However, from a policy perspective, disclosure under the early warning regime should certainly be triggered if collectively the funds acquire 10% or more of the outstanding voting securities of the reporting issuer. In considering the commonality of commercial or financial interest test, a different result is reached, as the funds would certainly have a common commercial or financial interest. The remaining question would be whether there is a clear understanding between the parties to bring about a specific result – in this example, it is to change the board with nominees proposed by the publicly declared dissident. If that understanding can be proven, then a finding of "acting jointly or in concert" should follow. It may also be argued that the deeming provision of subsection 1.9(1)(a)(i) of NI 62-104[449] is also applicable if it can be proved that there is an understanding to acquire or offer to acquire securities among the hedge funds.

5.2 Surrounding Facts and Circumstances

Whether a party is "acting jointly or in concert" is a question of fact.[450] Nevertheless, certain key factors have arisen throughout the jurisprudence that help point to a finding of "acting jointly or in concert." These key fact scenarios are discussed below.

5.2.1 An Agreement Towards a Common Goal

Parties will not be found to be "acting jointly or in concert" where no planned result was agreed upon, committed to or understood by the parties, and discussions between the parties were tentative and inconclusive.[451] However, the parties need not reach a formal agreement in order to be found as joint actors. An informal agreement, commitment or understanding is sufficient, especially where the parties have come together to discuss "next steps" they wish to take with regard to a shared goal.[452]

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[446] *Genesis*, *supra* note 346.
[447] *Ibid* at para 52.
[448] This activity is commonly referred to as the formation of a "wolf pack".
[449] *NI 62-104*, *supra* note 9.
[450] *Ibid* at s 1.9(1).
[451] *Drilcorp*, *supra* note 263 at 7.
[452] *Genesis*, *supra* note 346 at paras 24, 44.

The common goal between the parties does not need to be highly specific or remain in the exact same form through the relevant time period. Where the specific individuals who would make up a planned new board of directors varied from time to time, the common goal of replacing the board was specific enough to warrant a finding of "acting jointly or in concert".[453]

5.2.2 The Words Used by the Parties Themselves

An important factor in determining whether the parties have "an agreement, commitment or understanding" is the belief of the parties regarding their relationship with one another, as established by oral statements or written materials that are the subject of documentary evidence.[454] However, the testimony of the individuals may play a key role where the evidence is susceptible to a number of interpretations.[455]

Parties are also more likely to be found to be "acting jointly or in concert" where they do not distinguish between each other's involvement in a given issuer,[456] or they each refer to their collective shareholdings in an issuer as their own.[457]

5.2.3 The Conduct and Actions of the Parties

The actions taken by a party, such as structuring and negotiating the transaction and soliciting support from key shareholders as part of the buyer group, may lead to a finding of "joint actor status", even if the party switches from the buying to selling side after taking such actions.[458] While participating in meetings or conference calls alone does not necessarily mean parties are acting jointly or in concert, the nature of the discussions and the involvement of paid advisors may be indicators that a joint actor relationship exists.[459]

What is also clear is that the conduct in question must be active and also integral or significant with respect to the transaction or planned outcome for a joint actor finding to be made.[460]

5.2.4 Personal or Familial Relationships

The Court has also considered the role of personal or familial relationships that exist between parties in determining whether those parties are acting jointly or in concert, focusing particularly upon whether the two parties have a close working relationship and share a common purpose.[461]

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[453] *Ibid* at para 54.
[454] *Ibid* at para 40; *Sterling, supra* note 305 at para 116.
[455] *Sears, supra* note 270 at paras 74-78.
[456] *Sirianni, supra* note 177 at para 126.
[457] *Ibid* at paras 127-128.
[458] *Sterling, supra* note 305 at para 146.
[459] *Genesis, supra* note 346 at para 52.
[460] *Seel, supra* note 204 at para 51 (the conduct was "integral"); *Sterling, supra* note 294 at paras 146, 183 (Kosoy negotiated the price for the transaction while those found not to be joint actors were not "intimately involved" in the transaction); *Genesis, supra* note 346 (the joint actors attended planning meetings and worked actively together through meetings and discussions to seek to bring about the desired result in a "concerted effort").
[461] *Sirianni, supra* note 177 at para 120.

A close working relationship may arise when the parties have a familial relationship[462] and share work expenses, premises and clients.[463] Whether parties have a familial relationship can also be taken into consideration when determining "whether the parties were making a concerted effort to bring about a specified objective".[464] This is consistent with the fact that there is a rebuttable presumption under subsection 1.9(1)(b)(ii) of NI 62-104 for associates, which includes relatives that live in the same home.[465] While a presumption may not exist for other relatives, it is a factor to consider in assessing whether a joint actor relationship exists.

5.2.5 Going Beyond Customary Functions

An important aspect of the "acting jointly or in concert" concept is the role played by advisors, dealers and others, and a consideration of the circumstances in which they have "gone beyond the customary functions" of their role.[466] Going beyond customary functions may be evidence of a joint actor relationship; in other words, not acting as an agent but as a principal. In considering this issue, courts will look at normal industry practices,[467] as well as the nature of the interest held by the advisor or dealer, including whether the dealer or advisor acquired shares in the issuer for its own account,[468] or if it acquired an indirect equity interest as a result of a contractual interest that will continue following a transaction.[469]

5.2.6 Going Beyond Lock-Up Agreements and Voting Support Agreements

Subsection 1.9(3) of NI 62-104 and the definition of "joint actor" under MI 61-101 make it clear that persons will not be found to be "acting jointly or in concert" solely because they have signed a lock-up agreement or a voting support agreement.[470] When examining lock-up agreements or voting support agreements to determine if the parties are joint actors, the Courts and securities regulatory authorities will look at the terms of the lock-up agreement itself in making such a determination, including looking at each agreement separately.[471] What is clear is that the terms must be extraordinary in going beyond the purpose of the agreement to be relevant to a finding of joint actor.

5.2.7 Insiders

In addition, Courts and securities regulatory authorities appear to be more likely to consider an insider's role more negatively in making a joint actor determination. As a

[462] *Ibid* at para 121.
[463] *Ibid* at paras 121-123.
[464] *Genesis, supra* note 346 at para 25. See also *Kusumoto, Re*, 2007 ABASC 40 at para 67.
[465] *NI 62-104, supra* note 9.
[466] *Ibid* at s 1.9(2); *Seel*, *supra* note 204 at paras 45, 52.
[467] *Sears, supra* note 270 at para 155.
[468] *Ibid.*
[469] *Seel*, *supra* note 204 at paras 12, 49 (this determination was made by one of the members of the panel, after the interim order had been made and interprets OSC Policy 9.1 1992, *supra* note 105 at ss 2.2(6) and 2.4).
[470] *NI 62-104, supra* note 9; *MI 61-101, supra* note 13.
[471] *Aurora, supra* note 379 at para 102.

result, on similar facts, an insider is more likely to be held to be a joint actor when it cooperates or works with an offeror or activist.[472]

[472] *Seel*, *supra* note 204 at para 50.

6. CONCLUSION – A NEW PATH FORWARD

The lack of clarity surrounding the phrase "acting jointly or in concert" has caused unnecessary litigation and encouraged the perpetual threat of litigation in contested transactions. We believe that, with over 50 years of history dealing with this concept, meaningful guidance can be provided regarding the scope of such phrase which will likely lead to less "legal wrangling".[473]

The following guidelines can be gleaned from the legislative history and prior jurisprudence:

1. The analysis regarding whether someone is a joint actor must occur on an individual basis, establishing "acting jointly or in concert" or "joint actor" relationship for each person separately.
2. The key factor as it relates to purchasing shares is whether the parties have a common investment or purchase program.
3. A finding of "acting jointly or in concert" requires that the "acting" be for a specific purpose or transaction, and the joint actor must have played an active and significant role.
4. Parties will not be found to be "acting jointly or in concert" where no planned result was agreed upon, committed to or understood by the parties.
5. For a joint actor relationship to be established, it is critical that the joint actors have a commonality of commercial or financial interest.
6. The fact that parties had been joint actors in the past will not be sufficient to establish that they are currently joint actors.
7. A finding of "acting jointly or in concert" is more likely where there exists a close working or familial relationship between the parties.
8. Courts and securities regulatory authorities appear to be more likely to consider an insider's role with a propensity towards making a joint actor determination.
9. Persons acting solely in an agency capacity are unlikely to be found to be "acting jointly or in concert", unless their conduct goes beyond the customary functions of their role.

Based on the foregoing guiding principles, it would appear to us that a finding of "acting jointly or in concert" or "joint actors" is likely based on whether two or more persons reach an agreement or understanding as a result of which they actively seek to implement a specific transaction or to bring about a planned outcome, and such persons have a commonality of commercial or financial interest in respect of that specific transaction or planned outcome.

[473] *FMC LLP Comment Letter, supra* note 144.

In order to apply our conclusion, we have put forward a draft legislative definition that would replace section 1.9 of NI 62-104.[474] The draft provisions are set out below with explanations given for each subsection. Attached as Schedule "A" is a document showing blacklined changes to section 1.9 of NI 62-104.[475]

1.9(1) In this Instrument, a person is acting jointly or in concert with an offeror or an acquiror in respect of a transaction or planned outcome, if the person, as a result of any agreement, commitment or understanding with the offeror or the acquiror, actively assists or works together with the offeror or acquiror in order to give effect to the transaction or to cause the planned outcome and, in either circumstance, has a commercial or financial interest in the sought result that is aligned with the commercial or financial interest to be received or obtained by the offeror or acquiror.

> [*We have removed the concept of "it is a question of fact". We have sought to provide for a comprehensive definition that we believe is consistent with judicial authority.*]

For greater certainty, the following persons shall be deemed to be acting jointly or in concert with an offeror or acquiror:

> a) a person that, as a result of any agreement, commitment or understanding with the offeror or the acquiror, acquires or offers to acquire securities of the same class as those subject to the acquisition or offer to acquire made by the offeror or the acquiror; and
>
> [*We have maintained the deeming provision from subsection 1.9(1)(a)(i) and clarified the language. In addition, we have deleted the words "or with any other person acting jointly or in concert with the offeror or the acquiror" because we believe its inclusion results in the possibility of an offeror or acquiror being deemed to be a joint actor of a third party that, unknown to it, is a joint actor of one of its joint actors. It is our belief that the CSA could not have intended this result, which appears to be inconsistent with the policy rationale of the regulation.*]
>
> b) an affiliate of the offeror or the acquiror.
>
> [*We acknowledge that there may be circumstances where an affiliate need not necessarily be acting jointly or in concert with its controlling shareholder – for example, and as noted in previous comment letters,[476] where (i) the affiliate is a separate public company or (ii) ethical walls have been put in place for various reasons, including regulatory reasons. Nevertheless, we believe the circumstances should be so rare, and the ability to rebut a presumption so difficult, that the onus*

[474] *NI 62-104, supra* note 9.
[475] *Ibid.*
[476] *Comment Letters for Proposed National Instrument 62-104, July 2006, supra* note 143.

should be on the controlling shareholder to ensure that steps are taken to not have this deeming provision raise problems for it. As a result, we have maintained the deeming provision from subsection 1.9(1)(a)(ii).]

(2) Without prejudice to the general application of subsection (1), the following persons will be presumed to be acting jointly or in concert with an offeror or an acquiror unless the contrary is established:

a) any partner of the offeror or acquiror;

b) any trust or estate in which the offeror or acquiror has a substantial beneficial interest or as to which such offeror or acquiror serves as trustee or in a similar capacity;

c) any relative of the offeror or acquiror who resides in the same home;

d) any person who resides in the same home as the offeror or acquiror and to whom the offeror or acquiror is married or with whom the offeror or acquiror is living in a conjugal relationship outside marriage;

e) any relative of a person mentioned in clause (d) who has the same home as the offeror or acquiror; and

f) a director of the offeror or acquiror.

[*We have deleted the presumptions under subsection 1.9(1)(b). In fact, a finding of "acting jointly or in concert" has never been made under subsection 1.9(1)(b)(i), and has been made only under subsection 1.91(1)(b)(ii) as it relates to associates who are such because of close familial relationships. As a result, we have used the relevant language from the definition of "associate" in section 1.1 of the Securities Act (Ontario), other than inclusion of a shareholder that owns 10% or more of the outstanding voting securities of a company. We have also included directors of an offeror or acquiror, which we have adopted from the Code.]*

(3) Subsections (1) and (2) do not apply to a person acting solely in an agency capacity for or on behalf of the offeror or the acquiror, provided that that the services it is performing are not beyond customary services in the circumstances.

[*We believe that subsection 1.9(2) is too limiting in its language and that all persons acting solely in an agency capacity should not be considered to be acting jointly or in concert, unless their conduct goes beyond the customary functions of their role*.]

(4) For the purposes of this section, a person is not acting jointly or in concert with an:

a) offeror solely because there is an agreement, commitment or understanding that the person will tender securities under a take-over bid or an issuer bid, made by the offeror, that is not exempt from Part 2; and

b) offeror or an acquiror solely because there is an agreement, commitment or understanding that the person will vote in favour of a transaction proposed or initiated by the offeror or acquiror.

[*We have expanded subsection 1.9(3) to include voting support agreements*.]

The most significant change we have proposed in our legislative definition is to provide for a comprehensive definition, and thereby reject the view that because the determination of whether someone is "acting jointly or in concert" is fact-specific, it would be imprudent to provide for a concise definition. In fact, securities regulators have stated that even providing guidance would be inappropriate. We believe that even if that statement was true years ago, in light of the significant jurisprudence we now have in this area, there is no excuse to not providing greater clarity and guidance to market participants. In this regard, we note that the Code provides a definition for "acting in concert" together with guidance. In addition, definitions are provided in securities laws for other matters where determinations are fact-specific without the concerns expressed by regulators regarding the phrase "acting jointly or in concert" – for example, definitions are provided for "control person"[477] and "material change".[478]

Nevertheless, we do acknowledge that as the Canadian capital markets evolve, our proposed definition could face challenges. However, in those circumstances, guidance could be given through policy statements or Staff Notices, or further amendments of NI 62-104 could be made if warranted. We would suggest that it is in the public interest to provide clarity rather than focus on regulatory flexibility, and therefore, it is time to find a new path forward with respect to the meaning of the phrase "acting jointly or in concert".

In conclusion and as noted above, our hope is that this paper and, particularly, the proposed draft statutory language, will ignite a healthy debate that will eventually lead to a modification of the current legislative provision dealing with "acting jointly or in concert" (and joint actors), thereby lessening the legal uncertainty and unnecessary litigation, as well as the perpetual threat of litigation, often present in contested transactions.

[477] *Securities Act*, RSO 1990, c S.5 s 1(1).
[478] *Ibid.*

Schedule "A"

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,~~ in respect of a transaction or planned outcome, if the person, as a result of any agreement, commitment or understanding with the offeror or the acquiror, actively assists or works together with the offeror or acquiror in order to give effect to the transaction or to cause the planned outcome and, in either circumstance, has a commercial or financial interest in the sought result that is aligned with the commercial or financial interest to be received or obtained by the offeror or acquiror.

~~(a)~~For greater certainty, the following ~~are~~persons shall be deemed to be acting jointly or in concert with an offeror or ~~an~~ acquiror:

> ~~(i~~a) 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 acquisition or offer to acquire~~;~~ made by the offeror or the acquiror; and
>
> ~~(ii~~b) an affiliate of the offeror or the acquiror~~;~~.

(~~b~~)2) Without prejudice to the general application of subsection (1), the following ~~are~~persons will be presumed to be acting jointly or in concert with an offeror or an acquiror~~:~~ unless the contrary is established:

> ~~(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;~~
>
> a) any partner of the offeror or acquiror;
>
> b) any trust or estate in which the offeror or acquiror has a substantial beneficial interest or as to which such offeror or acquiror serves as trustee or in a similar capacity;
>
> c) any relative of the offeror or acquiror who resides in the same home;
>
> d) any person who resides in the same home as the offeror or acquiror and to whom the offeror or acquiror is married or with whom the offeror or acquiror is living in a conjugal relationship outside marriage;
>
> e) any relative of a person mentioned in clause (d) who has the same home as the offeror or acquiror; and

~~(ii) an associate~~f) a director of the offeror or ~~the~~ acquiror.

(~~2) Subsection~~3) Subsections (1) ~~does~~and (2) do not apply to a ~~registered dealer~~person acting solely in an agency capacity for or on behalf of the offeror ~~in connection with a bid and not executing principal transactions in the class of securities subject to the offer to acquire or performing services~~or the acquiror, provided that that the services it is performing are not beyond ~~the~~ customary ~~functions of a registered dealer~~services in the circumstances.

(~~3~~4) For the purposes of this section, a person is not acting jointly or in concert with an:

a) offeror solely because there is an agreement, commitment or understanding that the person will tender securities under a take-over bid or an issuer bid, made by the offeror, that is not exempt from Part ~~2.~~2; and

b) offeror or an acquiror solely because there is an agreement, commitment or understanding that the person will vote in favour of a transaction proposed or initiated by the offeror or acquiror.

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