Alert

February 7, 2024

COZEN O'CONNOR

BCSC Guidance on Joint Actors in Proxy Contests and Early Warning Disclosure Requirements

On December 22, 2023, the British Columbia Securities Commission (the BCSC) rendered a decision in *NorthWest Copper Corp. (Re)* clarifying when parties are considered to be "acting jointly or in concert" and the appropriate remedies for failing to meet the early warning requirements in the context of a proxy contest.

The decision involved a dispute between NorthWest Copper Corp. (NWST) and three of its shareholders, Grant Sawiak, Anthony Ianno, and John Kimmel (collectively, the Respondents), regarding whether the Respondents were acting "jointly or in concert" and failed to publicly disclose the same when they proposed a dissident slate of board members for election at NWST's annual general meeting of shareholders (the AGM). The BCSC ultimately found that no joint actor relationship existed and that the early warning disclosure requirements under National Instrument 62-103 *The Early Warning System and Related Take-Over Bid and Insider Reporting Issues* (NI 62-103) did not apply.

In rendering its decision, the BCSC found that the bar for a finding that parties are acting jointly or in concert is appropriately set relatively high, and although disclosure of shareholder blocks is important, so is the free flow of information and opinion among shareholders of a public company. The BCSC therefore concluded that it is better to insist on sufficiently clear, convincing, and cogent evidence that parties are acting jointly or in concert and take the risk that, by doing so, some groups will fly under the radar, than to allow reliance on speculation to create a climate that stifles discussion among shareholders.

The BCSC further ruled that in circumstances where shareholders do breach the early warning regime by failing to disclose that they are acting jointly and in concert, the appropriate remedy will likely be an order of disclosure, rather than disenfranchising the applicable shareholders.

Background

NWST is a Vancouver-based mineral exploration company with shares listed on the TSX Venture Exchange. Three of its shareholders, Sawiak, Ianno, and Kimmel, owned 0.4%, 3.9% and 8.2% of NWST's total outstanding common shares, respectively. If taken together, the Respondents collectively owned and controlled over 10% of NWST's total outstanding common shares.

The key facts in the BCSC's analysis included the following:

- In late October 2022, Ianno discussed his concerns over the short selling of NWST's shares and the distraction of certain directors by their other business activities with David Moore (Moore). Moore was not a director or officer of NWST at such time, but was acting as NWST's Interim President And Chief Executive Officer when NWST made its application to the BCSC.
- In early April 2023, Ianno spoke with Sawiak about his concerns with NWST's management and direction. Before and after his conversation with Sawiak, Ianno had been engaged in discussions with NWST's management about changes to its board of directors (the Board).
- In late April 2023, Ianno raised the possibility to Kimmel about replacing one or two of NWST's directors. Kimmel was also dissatisfied with NWST's management, and once he became aware of the potential dissident slate, Kimmel proposed his personal lawyer as a nominee for the Board. Kimmel was not otherwise involved in the solicitation of directors, although he also agreed (through his personal lawyer) to contribute funds to Sawiak's proxy solicitation.

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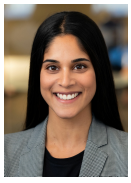

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- In mid to late May 2023, Sawiak provided notice to NWST of his intention to nominate a competing slate of directors for election at the AGM. Sawiak also issued a press release announcing his alternate slate of directors. Neither the notice nor the news release made any reference to Kimmel or Ianno, and the notice specifically stated that "the nominating shareholder is not acting jointly or in concert with any other person or company in connection with the foregoing."
- In July 2023, NWST's management and Kimmel substantially negotiated a deal whereby Kimmel's nominee would be part of the management's Board nominees in exchange for Kimmel's support and financing of NWST. These negotiations were abruptly terminated by NWST when its management learned that Kimmel had contributed to the cost of Sawiak's solicitation for the dissident slate.
- In mid-August 2023, Sawiak directly contacted Kimmel for the first time and solicited his support for the election of the dissident slate at the AGM.

The Dispute

In August 2023, NWST made an application to the BCSC alleging that the Respondents were acting jointly or in concert to replace NWST's Board at the AGM and that they had failed to comply with the early warning disclosure requirements under National Instrument 62-104 *Take-Over Bids and Issuer Bids* (NI 62-104) and NI 62-103.

Section 5.2 of NI 62-104 provides that "an acquiror who acquires beneficial ownership of, or control or direction over, voting or equity securities of any class of a reporting issuer… that, together with the acquiror's securities of that class, constitute 10% or more of the outstanding securities of that class" must issue and file a news release and file an early warning report. For the purposes of the early warning regime, an acquiror's securities also includes securities owned by any person acting jointly or in concert with an acquiror.

NWST claimed that Sawiak was acting jointly or in concert with Kimmel and Ianno, and because the Respondents held more than 10% of the outstanding shares of NWST, they were required to file early warning disclosure of their joint action, which they had failed to do. NWST sought orders from the BCSC:

- prohibiting the Respondents from exercising voting rights with respect to the election of directors at the AGM;
- requiring that the Respondents cease trading in NWST's shares for six months; and
- directing Sawiak to comply with the early warning rules.

In response, the Respondents claimed that they were not joint actors and were therefore not required to comply with the early warning rules.

The BCSC's Analysis

The BSCS dismissed NWST's application and outlined the following considerations in finding that the Respondents were not acting jointly or in concert.

Acquisition required to trigger early warning requirements

The BCSC first clarified that an *acquisition* is required to trigger the early warning requirements. Consequently, the formation of a joint-actor group will not, in itself, require the filing of an early warning press release and report under NI 62-104.

The BCSC concluded that the plain meaning of the words within section 5.2 of NI 62-104 meant that where parties are acting jointly or in concert and the joint actors collectively hold 10% or more of the outstanding securities of the class, the early warning requirements will not be triggered until subsequent acquisition of securities of that class by a member of the joint actor group. As such, where a joint actor relationship is found, it must first be determined when such relationship came into being, and then whether there was a subsequent acquisition by one of the joint actors while the group's holdings were over the 10% threshold or that took the group's holdings over such threshold.

High bar for a "acting jointly or in concert" finding

The bar for finding that parties are acting jointly or in concert is appropriately set relatively high, and it is a question of fact as to whether a person is acting jointly or in concert with an acquiror.

NI 62-104 does not define "acting jointly or in concert;" however, certain deeming provisions and presumptions under NI 62-104 help guide this analysis. For example, section 1.9(1)(b)(i) of NI 62-104 states that "persons that, as a result of any agreement, commitment or understanding between them…intend to exercise jointly or in concert voting rights attached to securities of an issuer" are presumed to be acting jointly or in concert. Where the circumstances do not fall within the presumptions set out in section 1.9 of NI 62-104, it is a question of fact whether the applicable parties are acting jointly or in concert.

In the present case, the BCSC found that there was no formal agreement or commitment among the Respondents to exercise their voting rights to install Sawiak's dissident slate, and so the presumption in section 1.9(1)(b)(i) did not apply. The onus was on NWST to provide "sufficiently clear, convincing and cogent evidence" that the parties were acting jointly or in concert, and the BCSC found that NWST could not demonstrate on the balance of probabilities that the Respondents intended to act jointly or in concert to replace the Board with the dissident slate. Although this evidentiary burden may risk the possibility that some shareholder groups will "fly under the radar," the BCSC found that this result was preferable to allowing reliance on speculation which could create an environment that stifles discussion among shareholders.

In finding that NWST had not satisfied its onus to prove that Kimmel was acting jointly or in concert with Ianno and Sawiak, the BCSC made the following observations:

- Ianno had no authority to speak for Kimmel, and Kimmel was not aware nor privy to any conversations between Ianno and NWST's management.
- There was insufficient evidence to demonstrate a "close personal relationship" between Kimmel and Ianno that would suggest joint action. Kimmel's conversations with Ianno were limited to their investment portfolios.
- Although Kimmel and Ianno discussed their concerns about the Board and NWST's management, this was not enough to demonstrate a plan of action or commitment to pursue it.
- Kimmel was not involved in the selection of any of the proposed directors on the dissident slate and never met any of them, apart from the one nominee director that he proposed.
- When Kimmel was involved in negotiations with NWST, he told NSWT that he was not part of any group and was simply protecting his own interests.
- Kimmel was prepared to support management's Board slate and provide financing to NWST until it terminated their negotiations. Objectively, Kimmel was negotiating with NSWT for a totally different result than the Respondents, which demonstrated that he was not engaged in a common enterprise.
- Despite almost reaching an agreement with NWST where Kimmel would vote in favour of the management nominees, Kimmel did not inform the other Respondents about his negotiations with NWST.
- Kimmel contributed to the financing of the proxy solicitation simply to keep his options open. This was not evidence that he was involved in the planning or preparation of the solicitation.
- Kimmel did not hold himself out as if he were a member of a group pursuing a common goal. His conduct was consistent with an investor "keeping his powder dry" in the context of a proxy contest and identifying opportunities to advance his own interests.
- The Respondents appeared to have different goals in mind. Kimmel did not seem to have a "common specific purpose" with the other Respondents to demonstrate a mutual understanding as to how each Respondent would vote. Irrespective of what Ianno and Sawiak may have thought, at no time was Kimmel a party to a mutual understanding that he would vote with the Ianno and Sawiak to install the dissident slate. Kimmel was solely motivated to place his own representative on the Board by one means or another.

Based on the foregoing, the BCSC found that, on a balance of probabilities, NWST had not demonstrated that the Respondents worked together to achieve a joint specific purpose. It did not matter what the other Respondents thought about their relationship with Kimmel. If Kimmel did not act in an active and coordinated effort to install the dissident slate, he was not acting jointly or in

concert with the Respondents. Kimmel was a sophisticated investor who acted independently and in his own interests, without regard for the interests of others. As a result, the 10% shareholding threshold under section 5.2 of NI 62-104 was not satisfied and the early warning disclosure requirement were not triggered.

Remedies

Despite finding that the Respondents were not acting jointly or in concert, which made it unnecessary to decide on applicable remedies, the BCSC noted that if they had arrived to the opposite finding, they would not have imposed the "draconian measures" of prohibiting the Respondents from exercising voting rights at the AGM and requiring that the Respondents cease trading in NWST's shares for six months, as proposed by NWST. The BCSC stated that the rights of shareholders to elect directors is of critical importance, and where better disclosure would solve the problem, then disclosure should be the remedy instead of disenfranchisement. If the Respondents were acting jointly or in concert, any potential harm to investors resulting from non-disclosure could be addressed with a disclosure order.

Conclusion

The decision in *NorthWest Copper Corp. (Re*) illustrates that securities regulators aim to balance disclosure requirements of joint actors with facilitating discussion among shareholders. Although disclosure of shareholder blocks is important, so is the free flow of information and opinions of shareholders. This decision suggests that securities regulators will seek to apply remedies that are proportionate to the potential harm relating to non-disclosure where shareholders in similar situations breach the early warning requirements under Canadian securities laws.