ALBERTA SECURITIES COMMISSION

DECISION

Citation: Re DIRTT Environmental Solutions Ltd., 2023 ABASC 32 **Date: 20230317**

DIRTT Environmental Solutions Ltd.

Panel:	Tom Cotter Kari Horn
Representation:	Timothy Robson Tracy Clark Danielle Mayhew Tonya Fleming for Commission Staff
	C. Richard Jones, KC Adam Chisholm Paul Davis Sandra Zhao Alex Grigg for DIRTT Environmental Solutions Ltd.
	Mark Polley Jeffrey Haylock Ryan Lapensee Asli Eke for 22NW, LP; 22NW Fund, LP; 22NW Fund GP, LLC; 22NW GP, Inc.; Aron English; Ryan Broderick; and Cory Mitchell
	J. Kenneth McEwan, KC Emily Kirkpatrick Saheli Sodhi for 726 BC LLC; 726 BF LLC and Shaun Noll
Submissions Completed:	March 3, 2022
Date of Oral Decision:	March 4, 2022
Date of Written Reasons:	March 17, 2023

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I. INTRODUCTION

[1] DIRTT Environmental Solutions Ltd. (**DIRTT**) made an application dated January 20, 2022 (the **Application**) for various orders under ss. 179 and 198 of the *Securities Act* (Alberta) (the **Act**) relating to certain actions of:

- 22NW Fund, LP (the **22NW Fund**); 22NW, LP; 22NW Fund GP, LLC; and 22NW GP, Inc. (collectively, **22NW**);
- Aron English (**English**), founder, president or portfolio manager of the various 22NW entities;
- Ryan Broderick (**Broderick**) and Cory Mitchell (**Mitchell**), research analysts employed by the 22NW Fund;
- 726 BC LLC and 726 BF LLC (together, **726**); and
- Shaun Noll (**Noll**), Chief Investment Officer (**CIO**) and President of 726.

[2] We refer to 22NW, English, Broderick and Mitchell, collectively, as the **22NW Group**. We refer to 726 and Noll, collectively, as the **726 Group**. We refer to all of the entities and individuals in the 22NW Group and 726 Group, collectively, as the **Respondents**.

[3] We heard oral submissions on the Application on March 3, 2022, after receiving written submissions from counsel for each of DIRTT, the 22NW Group, the 726 Group, and staff (**Staff**) of the Alberta Securities Commission (the **ASC**). On March 4, 2022, we gave an oral ruling (the **Oral Ruling**) dismissing the Application, with written reasons to follow. These are those reasons. We expressed during the Oral Ruling – and repeat here – our dismay that DIRTT brought the Application, as it was ill-conceived and an imprudent use of DIRTT resources.

II. BACKGROUND

A. Parties

1. DIRTT

[4] DIRTT is an Alberta corporation in the business of commercial interiors and with headquarters in Calgary. Its shares (the **Shares**) are listed on the Toronto Stock Exchange and Nasdaq, Inc.

[5] DIRTT's chief executive officer (**CEO**) was Kevin O'Meara (**O'Meara**) until January 18, 2022, at which time he was replaced by interim CEO Todd Lillibridge (**Lillibridge**). Lillibridge was also the chair of DIRTT's board of directors (the **DIRTT Board**) at the time of the hearing and had been a member of the Nominating and Governance Committee of the DIRTT Board until January 18, 2022. During the relevant times, Kim MacEachern (**MacEachern**) was the Director of Investor Relations at DIRTT and Geoff Krause (**Krause**) was DIRTT's chief financial officer.

2. 22NW Group

[6] The 22NW Fund is an investment fund based in Seattle, Washington and started by English. The 22NW Fund initially invested in DIRTT by purchasing approximately 1% of the Shares on March 19, 2020. During the relevant times, English, Broderick, and Mitchell each owned some Shares personally. The parties were not always precise in distinguishing among the different entities comprising 22NW and the 22NW Group. In this decision, we use the term 22NW, 22NW Fund, or 22NW Group as most appropriate for the context.

3. 726 Group

[7] 726 is a private investment vehicle based in California. Noll became CIO of 726 in 2018. 726 initially invested in DIRTT by purchasing 60,000 Shares on August 17, 2018. Noll also owned some Shares personally.

B. Summary of DIRTT's Allegations and Relief Sought

[8] DIRTT made various allegations (the **Allegations**) that one or more of the Respondents:

- when acquiring Shares, failed to comply with the formal take-over bid requirements in National Instrument 62-104 *Take-Over Bids and Issuer Bids* (**NI 62-104**) (the **Take-Over Bid Allegation**);

- failed to comply with the insider reporting disclosure requirements in National Instrument 55-104 *Insider Reporting Requirements and Exemptions* (**NI 55-104**) (the **Insider Reporting Allegation**);

- when disposing of Shares, failed to comply with the prospectus requirements in Alberta securities laws or to rely on an exemption in National Instrument 45-102 *Resale of Securities* (**NI 45-102**) (the **Prospectus Allegation**);

- regarding certain holdings, acquisitions and dispositions of Shares, failed to comply with the early warning reporting (**EWR**) and alternative monthly reporting (**AMR**) requirements in NI 62-104 and National Instrument 62-103 *The Early Warning System and Related Take-Over Bid and Insider Reporting Issues* (**NI 62-103**), such as disclosing ownership of 10% or more of the Shares (the **Early Warning Allegations**); and

- when engaging in the impugned conduct, acted contrary to the public interest and in a clearly abusive manner.

[9] DIRTT sought the following orders against the Respondents under ss. 179 and 198 of the Act:

- an order under ss. 179(1)(c) and 179(1)(d) of the Act (the **Take-Over Bid Order**) to enforce compliance with the take-over bid provisions in the Act, to prevent the Respondents from obtaining an economic benefit from breaching the take-over bid provisions, and to restrain voting by the Respondents (collectively) to 19.9% of the issued and outstanding Shares;

- an order under s. 198(1)(b) (the **Cease-Trade Order**) to prevent the Respondents from trading in the Shares until they make public disclosure compliant with NI 62-103 and NI 62-104;

- an order under s. 198(1)(b.2) (the **Reprimand Order**) reprimanding the Respondents for their breaches of securities laws;

- an order under s. 198(1)(c) (the **Denial of Exemptions Order**) denying the Respondents exemptions in Alberta securities laws for two years;

- an order under s. 198(1)(e)(i) (the **D&O Prohibition Order**) prohibiting each of English, Noll, Broderick, and Mitchell from acting as a director or officer of an issuer for two years; and

- such further and other relief as the panel considered appropriate.

[10] We refer to the Cease-Trade Order, the Reprimand Order, the Denial of Exemptions Order and the D&O Prohibition Order, collectively, as the **Public Interest Orders**.

C. Evidence

[11] DIRTT tendered two affidavits:

- Lillibridge swore an affidavit on January 19, 2022. The transcript of the February 11, 2022 cross-examination of Lillibridge by counsel for each of the 22NW Group and the 726 Group was also in evidence. O'Meara (DIRTT's CEO during most of the relevant period) did not swear an affidavit.

- MacEachern swore an affidavit on January 20, 2022. The transcript of the February 14, 2022 cross-examination of MacEachern by counsel for each of the 22NW Group and the 726 Group was also in evidence.

[12] The 22NW Group tendered one affidavit, sworn by English on February 7, 2022. The transcript of the February 16, 2022 cross-examination of English by counsel for DIRTT was also in evidence.

[13] The 726 Group tendered one affidavit, sworn by Noll on February 8, 2022. The transcript of the February 15, 2022 cross-examination of Noll by counsel for DIRTT was also in evidence.

D. Events

1. August 2018 to March 2020

[14] As noted, 726 first bought Shares on August 18, 2018, then purchased more in early 2020. Noll stated that he reached out in February 2020 to many companies in which 726 held shares, offering those companies support and capital at the start of the COVID-19 pandemic (**COVID-19**).

[15] Noll sent a February 10, 2020 email to MacEachern identifying himself generally as a long-term investor and specifically as a "meaningful" shareholder in DIRTT. He asked to set up a meeting with O'Meara and others at DIRTT.

[16] Noll said that he and English were discussing COVID-19's financial effects and potential investments in March 2020, when Noll "suggested Mr. English consider investing in DIRTT, among other companies". Noll denied that he "introduced" DIRTT to English, saying that DIRTT was "a highly discussed stock in the public atmosphere of small-cap investors". English confirmed that Noll suggested English consider investing in DIRTT, and denied that Noll "recommended" such an investment. English also stated that he was familiar with DIRTT before Noll mentioned it. Noll and English both stated that they had known each other for several years, knew the other invested in small-cap or micro-cap companies, and talked somewhat regularly – English said "frequently" and Noll said there would be periods of time they did not talk, then other periods during which they would talk more frequently. (Although English used the term "micro-cap" and Noll used the term "small-cap", we understood them to be referring to the same concept.) Noll stated that he had known Mitchell for about two years and met him once (at the "Connext" event (**Connext**) discussed below) and had known Broderick about the same length of time but had never met him. Noll confirmed that 726 and 22NW would likely have had overlapping investments at times, in the sense of owning some shares in the same entities at the same time. He stated that "we have no business relationship of any kind and never have". He also clarified that he did not consider owning shares in the same publicly traded company at the same time to be "a co-investment".

[17] English sent a March 17, 2020 email to DIRTT's investor relations email address, identifying the 22NW Fund as a DIRTT shareholder and asking for a meeting. The 22NW Fund did not actually hold any Shares until March 19, 2020. English stated that he had made the decision to invest and thought the order had already been made at the time he sent the March 17 email.

[18] On March 25, 2020, Noll and Broderick were on the same conference call with MacEachern. English stated that he thought it would help 22NW to have Noll on that conference call because 726 was already a shareholder and, therefore, Noll likely "had a decent understanding of DIRTT's financial state at the time". Noll stated that he attended the conference call because he thought the 22NW Group was a good investor and a good partner to companies, and thought he might learn more about DIRTT during that call. English stated that Broderick offered DIRTT financing during that call and that 22NW offered financing to many companies in which it held securities because of the serious financial effects caused by COVID-19 to micro-cap companies.

2. April 2020 to January 2021

(a) 22NW Group's Acquisitions and Dispositions of Shares

[19] The 22NW Fund continued to increase its position in DIRTT. English deposed that the 22NW Group's due diligence continued throughout the period of its additional acquisitions.

[20] By the end of 2020, the 22NW Fund owned approximately 9.96% of the Shares. The 22NW Fund had purchased 101,500 Shares on December 31, 2020 (the **22NW December 2020 Purchase**). English deposed that this was to increase the 22NW Fund's position in DIRTT "and to close the year out as strongly as possible". He also stated that he was unaware at the time that this purchase meant the Shares held by a combination of the 22NW Fund and some of 22NW's

employees exceeded 10%. English deposed that he considered 22NW to be a passive investor and thus did not combine its ownership of Shares with that of its employees for filing purposes. The 22NW Fund sold those 101,500 Shares on January 4 to 6, 2021 (the **22NW January 2021 Sale**), with English stating that was to "rebalance" the 22NW Fund's portfolio and that such rebalancing is common in fund management.

[21] During cross-examination, English expanded on his rationale for the 22NW December 2020 Purchase and 22NW January 2021 Sale, explaining that "it's common to purchase stock on the last day of the year to support the stock price for a year-end portfolio performance mark, and that is not specific to DIRTT" and, as part of that, to sell the same shares in early January. English denied that he made the 22NW January 2021 Sale because he realized that the 22NW Fund plus 22NW's employees held over 10% of the Shares. He also confirmed that he was not aware of any filing by the 22NW Group disclosing a brief period of share ownership exceeding 10%.

[22] DIRTT alleged that the 22NW December 2020 Purchase and 22NW January 2021 Sale should have been disclosed through AMR filings. DIRTT also asserted that the 22NW January 2021 Sale should have been made using a prospectus or prospectus exemption.

(b) 726 Group's Acquisitions of Shares

[23] The 726 Group also continued to increase its position in DIRTT. Its holdings exceeded 6% of the Shares by August 2020. MacEachern deposed that, when told by Noll in an August 20, 2020 email that he would soon be making a filing for the 726 Group's 6% holding of Shares, she asked Noll to clarify whether 726 and 22NW filed separately. Noll confirmed by email that they filed separately and stated that he had "no professional connection to [22NW]".

[24] 726 purchased more Shares on November 27, 2020 (the **726 November 2020 Purchase**), at which time the 726 Group crossed the 10% early warning threshold. The 726 Group filed two disclosure forms with the United States' Securities and Exchange Commission (the **SEC**) on December 8, 2020 (Form 3 and Schedule 13G), both disclosing the 726 November 2020 Purchase. The 726 Group filed an AMR (Form 62-103F3) in Canada on January 8, 2021 (the **726 January 2021 AMR**), disclosing that it held, for investment purposes, approximately 12.23% of the Shares by the end of 2020. The 726 January 2021 AMR disclosed the acquisition date for crossing the 10% threshold as December 1, 2020, not November 27, 2020 as stated in the December 8, 2020 disclosure with the SEC.

[25] DIRTT alleged that the 726 January 2021 AMR should have been filed by December 10, 2020 and should have disclosed the purchase date for crossing the 10% ownership threshold as November 27, 2020, not December 1, 2020.

(c) January 2021 Financing

[26] On January 7, 2021, DIRTT announced a $35 million bought deal financing (the **January 2021 Financing**) with National Bank Financial Inc. (**National Bank**) of 6% convertible unsecured subordinated debentures. The proceeds were to "be used for capital expenditures, working capital, and general corporate purposes". The conversion ratio was approximately 215 Shares for each $1,000 in debenture principal, meaning a conversion premium of about 50% over the closing price of Shares that day. English deposed that 22NW was opposed to the January 2021 Financing

because 22NW had previously offered to provide DIRTT with non-dilutive financing, 22NW did not believe that DIRTT needed liquidity or to raise funds, and 22NW would have preferred a non-dilutive method of raising capital.

3. April to August 2021

[27] English stated that he was contacted in early April 2021 by two people from MAK Capital One LLC (**MAK**, the largest shareholder of DIRTT at that time), including Michael Kaufmann (**Kaufmann**, the principal of MAK). According to English, Kaufmann was concerned that O'Meara of DIRTT was overpaid, and English thought that Kaufmann might be planning a proxy fight to gain a seat on the DIRTT Board. English deposed that the 22NW Group did not share those concerns about O'Meara's compensation.

[28] Noll had a May 6, 2021 call with DIRTT following an annual general meeting (**AGM**). MacEachern's notes of that call referred to Noll's opinion of MAK. Noll stated during cross-examination that her notes mischaracterized his perspective. He clarified that he thought MAK had disrupted businesses in the past by removing CEOs, and he did not want that to happen with DIRTT. MacEachern deposed that, during a call with Mitchell and Broderick on the same day, they also raised concerns about MAK and said that the 22NW Group did not support a DIRTT Board seat for MAK. MacEachern said that the 726 Group and the 22NW Group both mentioning MAK, "suggest[ed] to us that 726 and 22NW had discussed the issue with each other independently". Contrary to that suggestion, MacEachern agreed during cross-examination that it was logical for English, Noll, and other shareholders to be thinking about MAK on the DIRTT Board at the time because there had just been an AGM.

[29] In evidence was a March 26, 2021 email sent from MacEachern to an undisclosed list of recipients, apparently including Broderick. She invited the recipients to "a small in-person analyst/investor event in Rock Hill" on June 10, 2021 (the **Rock Hill Tour**), which would include a tour and lunch. Videos were also to be sent to those "of our analysts and investors" who would not be at the Rock Hill Tour in person. English and Mitchell received the official emailed invitation from MacEachern on April 19, 2021.

[30] English and Noll both attended the Rock Hill Tour. MacEachern referred to this in her affidavit by saying that "English and Noll jointly attended an investor tour . . . in Rock Hill". MacEachern acknowledged during cross-examination that eight to ten other investors – invited by her – attended the Rock Hill Tour. She stated that she "decided that [information about other investors attending] wasn't relevant for the purpose of this affidavit". She also stated during cross-examination that she did not think other shareholders needed to be mentioned because she was providing information specifically about the Respondents. MacEachern also acknowledged that she did not know whether English and Noll travelled to Rock Hill together, left together, or spoke while they were there, although she was aware that Noll and O'Meara had a business dinner without English. She agreed that all she could say was that she had "seen a record that they were both there" and that she had "no basis to say that they took any joint action including speaking, walking together, or anything while they were both there".

[31] English deposed that he attended the Rock Hill Tour, and that "Noll and eight to ten other shareholders or shareholder representatives also attended". English met O'Meara for the first time

at the Rock Hill Tour. English stated that O'Meara asked him during a private conversation if he would support DIRTT if it opposed MAK having a position on the DIRTT Board. According to English, he told O'Meara that the DIRTT Board should have shareholder representation, but that English would prefer that shareholder be him, not a MAK representative.

[32] Noll also discussed the Rock Hill Tour in his affidavit. He noted that several other DIRTT shareholders also attended, not only representatives from 22NW and 726. Noll and O'Meara had dinner after the Rock Hill Tour, with no other investors present.

[33] On June 17, 2021, English and Mitchell had a tour of DIRTT's design experience center in Dallas, Texas. O'Meara led the tour, with English and Mitchell the only investors present. English deposed that he took that opportunity to ask O'Meara questions and was generally impressed with the answers, including that O'Meara was no longer concerned about a possible take-over bid, was happy to have the 22NW Fund's support, and liked having "informed shareholders". English asked O'Meara if he was opposed to 22NW buying more Shares, and O'Meara said he supported that. English also asked if O'Meara knew of any large holders looking to sell a block of Shares, but O'Meara said he did not.

[34] The 22NW Fund purchased 180,000 Shares on June 18, 2021 (the **22NW June 2021 Purchase**), resulting in the 22NW Fund's holdings plus English's holdings crossing the 10% early warning threshold at that time. A July 16, 2021 Schedule 13G filed with the SEC disclosed that the 22NW Fund and English together held 12.14% of the Shares as at June 18, 2021. AMR disclosure of crossing the 10% threshold was not filed in Canada until August 10, 2021 (the **22NW August 2021 AMR**) – and that disclosure stated that the 22NW Fund alone crossed that threshold on July 14, 2021. Mitchell sent a July 16, 2021 email to O'Meara and Krause giving a courtesy notice of the 22NW Fund crossing the 10% threshold and having an approximately 11.9% holding at that time. O'Meara replied that DIRTT appreciated 22NW's support and its "thorough understanding of our company, the market and our strategy".

[35] DIRTT alleged that the 22NW Fund and English should have filed an AMR by July 12, 2021 relating to the 22NW June 2021 Purchase. We note that DIRTT referred to the end of June 2021 in making that allegation, not the June 18, 2021 purchase date. We used the correct date in our analysis.

[36] Lillibridge pointed to a July 6, 2021 email from Broderick to O'Meara, in which Broderick asked for a meeting with O'Meara "for a quick chat about the [DIRTT] Board" because the 22NW Group had some "thoughts and observations", but apparently no meeting occurred. Lillibridge confirmed during cross-examination that this was the first piece of paper of which he was aware showing English's interest in a seat on the DIRTT Board.

[37] Noll bought more Shares on July 14, 15, and 16, 2021. He deposed that he was contacted by a MAK representative in July 2021. Noll stated that he considered MAK "an effective and high-quality shareholder", even though they have different styles and philosophies of investing. Noll suspected that MAK wanted to discuss DIRTT's management and performance. According to Noll, the conversation covered MAK's concern about O'Meara as CEO and about O'Meara's compensation. Noll said that he told O'Meara about the conversation and Noll's consequent

concern that such issues be dealt with internally so as to avoid negative public effects on DIRTT. Noll stated that he did not contact the 22NW Group about that conversation with MAK.

[38] The 22NW Fund bought a block of 1.5 million Shares on August 5, 2021, increasing its ownership to 13.97%. English stated that, during an August 5, 2021 telephone call with O'Meara, he told O'Meara that he believed there should be a significant shareholder on the DIRTT Board, and that he was interested in being that person. O'Meara and English confirmed on August 10, 2021 a plan for O'Meara, Lillibridge and English to meet on September 10, 2021 to discuss this matter. On August 11, 2021, English sent his resume to O'Meara, at O'Meara's request.

[39] DIRTT asserted that English should have disclosed his August 5 or August 11, 2021 interest in affecting the composition of the DIRTT Board in the 22NW Group's September 2, 2021 AMR filing, or possibly should have disclosed the August 5, 2021 interest in an August 10, 2021 AMR filing. Both the August 10, 2021 and the September 2, 2021 AMR filings stated that the 22NW Group's intention to change the DIRTT Board was "not applicable". The 22NW Group did not file notice of an intention to affect the composition of the DIRTT Board until its October 8, 2021 AMR (the **22NW October 2021 AMR**).

[40] A significant DIRTT shareholder put approximately 5 million Shares (the **Jones Block**) up for sale on about August 12, 2021 through Jones Trading Institutional Services, LLC (**Jones**). After being contacted by Jones, the 22NW Fund purchased approximately 3.6 million Shares of the Jones Block on August 12, 2021, and English bought approximately 65,000 Shares personally. Mitchell sent an email that day to O'Meara, informing DIRTT of those purchases and stating that the 22NW Fund and English now owned 18.32% and 0.25%, respectively, of the Shares. O'Meara reiterated DIRTT's appreciation for the 22NW Group's support.

[41] Noll deposed that he was contacted by Jones on about August 12, 2021 regarding the Jones Block, and that the 726 Group bought 750,000 Shares on August 12, 2021 and 89,845 Shares on August 13, 2021. Noll stated that he purchased Shares from the Jones Block because he "wanted to increase 726's shareholdings and it was unusual to see such a large block" available. Noll confirmed that he told DIRTT management in an August 13, 2021 call that 726 had purchased those Shares. Noll also stated that he wanted to work with and support DIRTT and its management and thought that O'Meara, in particular, was doing a good job during a difficult time. During cross-examination, Noll denied talking to anyone at the 22NW Group about the Jones Block. Noll criticized MacEachern's and Lillibridge's admissions of inaccuracies in their respective affidavits and noted that MacEachern was not part of the August 13, 2021 call – he was, therefore, unsure how her notes of that call could be considered accurate.

[42] English deposed that he did not speak to Noll about the Jones Block at the time it was offered, nor did he recall speaking to Noll about the purchases since then. However, English stated that he learned on or about August 16 – from the 726 Group's Form 4 filed with the SEC – that the 726 Group had purchased almost 840,000 Shares on August 12 and 13, 2021. English confirmed on cross-examination that he did not discuss with Noll the 22NW Fund's August 12, 2021 large purchase, nor did Mitchell or Broderick, but that Noll would have seen the details when 22NW made its required filing. Noll stated that he learned from 22NW's August 12, 2021 filing that 22NW had bought a large number of Shares at the time.

[43] MacEachern agreed during cross-examination that "it would be likely that the broker [with a large block to sell] would start contacting other large shareholders", that it was "perfectly ordinary and reasonable that Jones would maybe start at the top with the biggest shareholder and let people know that this block was available", and that it was generally likely to have less of an effect on the market price of a stock if a purchase were made in a block.

[44] In evidence was an August 23, 2021 email sent by English to several 22NW employees, including Broderick and Mitchell. DIRTT pointed to that email as strong evidence that 22NW and 726 were joint actors working together. English stated that he was asking in that email for an analysis of short-selling interest in DIRTT at that point, and he was directing that the Jones Block of 5 million Shares be excluded from that analysis because the 22NW Group knew the identity of most of the purchasers (itself and the 726 Group), having learned from public disclosure the previous week that the 726 Group had purchased over 800,000 DIRTT Shares on August 12 and 13, 2021. We reproduce the body of that email verbatim:

> Can you guys please look into the short interest? The math of almost a 6m share change looks wrong to me - if we exclude the 5m share block in the volume stats over the time period (we bought most of that with Fortress) then it doesn't appear there is enough volume on the tape to account for the rest of the alleged short interest increase (6m shares - stock only traded 200k shares a day and not all of that is short). I'm on my phone on vacation so I might be wrong but I think the Bloomberg math is simply wrong. Thanks

[45] When asked during cross-examination if any of the people at 22NW receiving that email asked what English meant by buying the Shares "with Fortress", he said they did not ask and that they already knew from the 726 Group's filings "that Fortress had independently purchased [S]hares in the block" (English's reference to "Fortress" was a mistake, as he meant the 726 Group). English also stated that he did not recall if he had mentioned to his team that he had not discussed such trading with Noll: "There was no call with Mr. Noll, so there was nothing to discuss."

4. September to October 2021

[46] English deposed that he began to have substantive conversations with DIRTT Board members in September 2021 about becoming a director himself, even though discussions started with English's August 5, 2021 email to O'Meara (outlined above). English met with O'Meara and Lillibridge in Jackson Hole, Wyoming on September 10, 2021. English deposed that he was asked at that meeting which shareholders might support his DIRTT Board candidacy, and he replied that he believed other large shareholders would support having a major shareholder on the DIRTT Board. English denied telling O'Meara and Lillibridge "that 22NW and 726 could jointly block hostile activity" but did respond to a question about a shareholder rights plan "by saying that DIRTT's concentrated and sophisticated shareholder base would likely never vote to approve such a plan". English confirmed during cross-examination that he first mentioned a DIRTT Board seat in August 2021, despite having said to O'Meara at the time of the Rock Hill Tour (June 2021) that if the DIRTT Board were to have shareholder representation, English would prefer that director to be him. Noll stated during cross-examination that he did not know of English's meeting in Jackson Hole and did not tell anyone in the 22NW Group that 726 or Noll would support English's attempts to join the DIRTT Board.

[47] Regarding the meeting in Jackson Hole, Lillibridge confirmed during cross-examination that O'Meara drafted a follow-up memo and had Charles Kraus (**Charles Kraus**, DIRTT's general counsel) review it, even though Charles Kraus was not at the meeting. It appeared on the face of the document in evidence that edits, including substantive edits, had been made – Lillibridge said those were not made by him, and Charles Kraus seemed to be the only other person who could have made those edits. More edits were apparently to be made by another lawyer for DIRTT who had not been at the meeting. Lillibridge also suggested in an email some of his own points to add to that memo. Lillibridge stated that neither he nor O'Meara took notes during that meeting. Lillibridge also confirmed that memo was not delivered to the DIRTT Board, despite being addressed to it, and there was never a final version of the memo. During cross-examination, Lillibridge was asked if the detailed memo was drafted, reviewed and revised because of the idea that English might be an activist shareholder. Lillibridge replied that he could not speak to O'Meara's intent. Given the uncertainty surrounding the source of some of the information in this document, we were not able to rely on it as supporting DIRTT's allegations.

[48] English stated that because he was, by September 2021, having substantive conversations about a DIRTT Board position, the 22NW Group was no longer a passive investor. The 22NW Group filed a Schedule 13D with the SEC on October 7, 2021 and the 22NW October 2021 AMR on October 8, 2021. Those stated that English, Mitchell, Broderick, and two other 22NW employees were joint actors or members of a "group" with the 22NW Fund. They also stated that the 22NW Group may act to affect the composition of the DIRTT Board. That is the type of joint actor and board interest disclosure which DIRTT alleged should have been filed in January 2021 and August 2021, respectively. English also sent an October 6, 2021 email to O'Meara and Lillibridge, advising them of such filings. Noll stated that he became aware in October 2021 of the 22NW Group's joint actor disclosure.

[49] English deposed that Lillibridge said during an October 11, 2021 telephone call that the DIRTT Board would consider English's potential appointment at its November 3, 2021 meeting. Lillibridge's affidavit was consistent with that and referred to further discussions on the topic.

[50] Noll was also communicating with DIRTT during September and October 2021. In a September 16, 2021 email, Noll asked MacEachern about joining Connext, an event held by DIRTT, and having drinks or a meal there with O'Meara and Jennifer Warawa (**Warawa**), DIRTT's Chief Commercial Officer. Noll continued in his email: "I know they will be busy with the event so if [it] is more time efficient for them I am open to joining a meeting/meal with another investor as well if that helps." MacEachern replied with a date of October 5, 2021 for Noll and Mitchell to have a tour together and meet with O'Meara and Warawa. Noll stated that he attended the October 5, 2021 meeting and that Connext had hundreds of attendees; DIRTT's November 3, 2021 news release stated that over 1,000 people attended.

5. November 2021

[51] DIRTT released its third-quarter (**Q3**) 2021 financial results on November 3, 2021, which English characterized as "disastrous". English highlighted in his affidavit that DIRTT's revenue had declined 26% from the previous year's Q3, and DIRTT "had burned over 25% of its cash in a single quarter". Noll made similar statements.

[52] On November 4, 2021, English and DIRTT management had a telephone call after the public earnings call. English deposed that he expressed his frustration with DIRTT not disclosing details of its "sales pipeline". In English's opinion, that lack of disclosure and a large decrease in the price of the Shares, led him "to conclude that investors had likely lost complete confidence in [DIRTT's] pipeline and by extension the [DIRTT] Board as well". According to English, O'Meara said in a November 5, 2021 telephone call that 22NW was not the only shareholder frustrated about the lack of pipeline disclosure. English deposed that he said during that call that he wanted to see DIRTT Board members purchase more Shares.

[53] Noll had a separate call with some members of DIRTT management on November 4, 2021. According to Noll, he expressed his frustration with the disappointing Q3 results, the lack of pipeline transparency, and the lack of DIRTT Share ownership by DIRTT Board members. Noll said that Krause told him that DIRTT was exploring "capital options", which Noll was concerned meant raising capital.

[54] MacEachern deposed that English and Noll made some of the same points on their separate November 4 and 5, 2021 calls with DIRTT management, giving two examples: (1) lack of purchases of Shares by DIRTT Board members; and (2) DIRTT should disclose its future sales pipeline. MacEachern deposed that she "found the strong similarity in the views and concerns by 22NW and 726 notable".

[55] However, MacEachern acknowledged that she did not mention those similarities or any concern with those similarities in her contemporaneous notes. She also agreed that it was probably fair to say that all DIRTT shareholders were disappointed with the Q3 results. Further, MacEachern agreed that other investors had raised the topic of the sales pipeline before and after the Q3 results and acknowledged that a question was asked about the sales pipeline by another investor (that is, someone not from the 22NW Group or the 726 Group) during the November 4, 2021 public earnings call. She also agreed during cross-examination that it was not surprising for each of 22NW and 726 to discuss the pipeline concerns and the "cash burn" or "cash crunch" during their respective calls. MacEachern further acknowledged that Krause referred during the November 5, 2021 call with 22NW to being in a similar cash position in November 2021 as in December 2020 (soon before DIRTT entered into the January 2021 Financing).

[56] English deposed that he and his 22NW team discussed over the weekend (November 6 and 7, 2021) comments made by Krause on the November 4 and 5, 2021 calls with 22NW, concluding that DIRTT "appeared ready to raise additional equity through another dilutive offering" (as in the January 2021 Financing). Broderick sent a November 8, 2021 email to Krause (shown as 1:07 pm, which English said was after market close that day):

> It has come to our attention that Dirtt may be planning to raise capital more imminently than we assumed following our discussion last week. If the company plans to raise quickly **without a substantial, detailed discussion with its largest shareholder** and following an enormously disappointing quarterly report without providing tangible proof of how the pipeline is developing, then we will have a problem. To restate a point made on our call, most of the board of directors do not own a material amount of stock and they have not been inclined to buy in the open market to support the company since their appointments. The board are not as financially impacted by such a big decision, nor do most have the capital markets background necessary to make such a big decision on behalf of its shareholders **who are frustrated at the lack of actual shareholder representation**

> **in no uncertain terms**. We think this is a conflict of interest and as a 19% stakeholder with a D filed, we need to be included in discussions that could dilute or impair our large ownership stake. We should be made privy to these discussions so we can all help the company plot a plan forward while using the same basis of information as insiders. The company has a very concentrated ownership base and there are plenty of solutions to consider before bringing in third parties. [original emphasis]

[57] Noll stated that he asked Krause, on a November 8, 2021 call (in which nobody from the 22NW Group participated), if DIRTT was looking into options for its cash needs, and Krause replied that he was evaluating various options. Noll was concerned this meant DIRTT was contemplating a large financing akin to the January 2021 Financing. Noll thought that a new financing was unnecessary and would harm the 726 Group's investment. During cross-examination, Noll said that Krause made clear that DIRTT did not need the money but would raise it anyway, for comfort, and Noll thought that Krause actually said "like we did in January", which indicated to Noll that it would be the same structure with the same bank as for the January 2021 Financing. Noll deposed that he immediately contacted a representative at National Bank to say that the January 2021 Financing had been negative for DIRTT and its shareholders. According to Noll, the representative did not disclose any non-public information during that call, but emailed Noll later that day saying: "Have something urgent to discuss with you". Noll invited a telephone call, and the representative replied that he would call Noll "at market close". They did speak on the telephone that day. When asked during cross-examination if he knew 22NW was against that possible financing, Noll said he did not. However, the events of those few days led Noll to speculate "that a financing was probable", resulting in Noll again contacting Krause and expressing frustration about any unnecessary financing. Noll ended up signing a non-disclosure agreement with National Bank, referred to in hearing materials as going "over the wall" or being "wall-crossed". Noll deposed that he was told by National Bank that DIRTT shareholders were not positive about the proposed financing. He eventually decided that the 726 Group would not participate in what became the **November 2021 Financing**.

[58] English deposed that a National Bank representative asked him on November 9, 2021 if he wanted to cross the wall on a certain deal, which English deduced was for DIRTT. English also noted that the November 2021 Financing ended up undersubscribed, indicating that DIRTT shareholders were not in favour of that deal. During cross-examination, English clarified that he speculated on November 9 that the deal referred to by the National Bank representative was for DIRTT, and learned about it for certain when he saw the November 15, 2021 news release announcing the November 2021 Financing.

[59] In evidence was a November 8, 2021 memo from Krause to the DIRTT Board discussing the proposed November 2021 Financing. In it, Krause stated:

> . . . On November 4th, we held numerous meetings with shareholders, including our largest shareholders, indicating that, consistent with the liquidity and capital resources section of the 10Q, we would consider a financing if it [were] on economic terms and mentioned it in all of our meetings with shareholders. Our takeaways from the meetings were that liquidity was top of mind and that such a financing would be well received by the shareholders to alleviate that risk, given the results of [Q3].

[60] That November 8, 2021 memo also described that Noll and Krause had a follow-up telephone call at 9:00 am on November 8. After some discussions, Krause asked: "'if a similar deal were available, what would he [Noll] think?'" Krause then reported in that memo that Noll "said he would have to think about it, but if that were the case, he would want it smaller, but can't we just wait 5 weeks. We left the conversation at that."

[61] Also in evidence was a November 9, 2021 email from Krause to the DIRTT Board discussing the proposed November 2021 Financing. In it, Krause stated that he thought Noll concluded a financing was being discussed "based on Q3 results, our cash burn and messaging". That email also discussed making attempts to "wall cross" 22NW and 726 "to discuss the potential financing and deal structure". There was no indication in that email that DIRTT believed the 22NW Group and the 726 Group were working together or were otherwise sharing knowledge or information.

[62] Lillibridge confirmed during cross-examination that when he deposed that 22NW and 726 "somehow learned" about the proposed November 2021 Financing and "urgently" opposed it, he was just relying on what he heard from others. Lillibridge also acknowledged during cross-examination that although Noll and English both effectively said they did not support a capital raise, Noll made several other points which English did not. Lillibridge agreed that: (1) Noll stated that DIRTT had plenty of capital, a capital raise would be highly dilutive, and DIRTT should wait a few weeks; and (2) English stated that there was no discussion with DIRTT's largest shareholder, the Q3 results were very disappointing, there was lack of tangible proof about the pipeline, DIRTT Board members did not have Shares and lacked sufficient capital markets background to make this decision, and there were conflict of interest concerns.

[63] English deposed that Lillibridge and another DIRTT director told English on November 5, 2021 that he would not be appointed as a director. English stated that he told the DIRTT representatives on that call "that if the [DIRTT] Board did not reconsider, I intended to file a requisition for a shareholders meeting". During cross-examination, English agreed that Lillibridge mentioned on November 5 that English's candidacy may be considered in the future. A November 10, 2021 follow-up call was rescheduled to November 12, 2021. According to English, Lillibridge said the DIRTT Board would reconsider English as a director if he agreed to certain standstill conditions, but English never received a draft standstill agreement or a list of the types of condition the DIRTT Board intended. English stated that all this heightened his concern that the DIRTT Board's focus was its own entrenchment, and English "decided that 22NW would seek to improve [DIRTT] by replacing most of the current [DIRTT] Board". Although Lillibridge deposed in his affidavit that English stated during the November 5, 2021 call that he would file a requisition, Lillibridge stated during cross-examination that he did not remember that happening during that conversation, and DIRTT's December 10, 2021 news release said that a requisition (the **Requisition**) was made on November 17, 2021 "without prior notice". Lillibridge acknowledged that either his affidavit or the December 10, 2021 news release was wrong.

[64] English stated that he decided to bring a requisition following the November 12, 2021 conversation. Counsel for DIRTT noted that English's own consent to be nominated as a director of DIRTT was signed on November 11, 2011, the day before he made the decision about replacing some DIRTT directors, and another prospective director signed his consent on November 10.

English stated he was thinking about it before November 12, making the final decision only after his conversation with Lillibridge and another DIRTT director on that date.

[65] The 22NW Fund sent the Requisition to the DIRTT Board on November 16, 2021 for a special meeting of DIRTT shareholders to be held no later than January 21, 2022. The 22NW Fund wanted to remove six directors and replace them with six new directors, whose names and biographies were included with the Requisition. The 22NW Fund's news release announcing this was issued on November 17, 2021. The 22NW Fund filed an EWR on November 17, 2021 disclosing the Requisition.

[66] Noll stated that Krause had told him on November 15, 2021 about "rumblings" from an unidentified shareholder and that Noll could likely guess who it was. Noll deposed that he ended that call because he did not want to hear any non-public information, and stated during cross-examination that it was reasonable to infer that the unidentified shareholder was 22NW. Noll stated that the 726 Group filed a Schedule 13D on November 17, 2021 as a "prudent" step before having further discussions with DIRTT management. In a call on November 17, 2021 – this time with O'Meara and Krause – Noll said that he informed DIRTT that he did not think DIRTT management should allow any rumblings to cause public disruptions. Noll also deposed: "I communicated to management what I took them to already know: that I am not aligned with any other shareholders and that I make my own decisions about my investments." Lillibridge was not on the November 17, 2021 call with Noll, but had a memo of that date from Krause and O'Meara to the DIRTT Board setting out details of the call. That memo was consistent with the statements Noll made in his affidavit and during his cross-examination. Lillibridge deposed that he took from the memo that Noll believed boards are more successful when aligned with shareholders and that public distractions are negative, which Lillibridge understood "to be a thinly veiled reference to the Requisition, which was not yet public". However, Lillibridge acknowledged during cross-examination that he did nothing in response to what he characterized as a "thinly veiled threat", not even discussing it with O'Meara or Krause.

[67] Noll deposed that he was not a party to the Requisition, was not aware of it before it was announced on November 17, 2021, and thought replacing six directors was excessive. He stated during cross-examination that he did not call English to tell him that was excessive, nor did he talk with English or anyone at the 22NW Group after seeing the news release about the Requisition. Noll also stated that he later signed a proxy form supporting the slate of directors proposed by 22NW, but had no discussions with anyone at the 22NW Group before signing that proxy.

[68] On November 26, 2021, counsel for DIRTT sent separate letters to 22NW and Noll stating that the 22NW Fund and the 726 Group were being investigated by DIRTT as potentially acting jointly or in concert with each other or with others.

6. December 2021 to January 2022

[69] On December 7, 2021, DIRTT announced a shareholders' meeting for April 26, 2022 and that it had adopted a shareholder rights plan, which it said was "not . . . in response to any specific proposal to acquire control of [DIRTT]". DIRTT's announcement included its concern that certain shareholders were acting jointly or in concert with the 22NW Fund.

[70] On December 8, 2021, DIRTT (through counsel) complained in a letter to ASC Staff that it was investigating whether the 22NW Group and the 726 Group were secretly joint actors operating together. DIRTT issued a news release to that effect, and submitted a second complaint to Staff on December 31, 2021. The evidence was inconsistent as to whether the DIRTT Board or its special committee (composed entirely of directors whom the Requisition was seeking to replace) had finished its investigation by that time.

[71] On January 7, 2022, 22NW filed its definitive proxy statement, which allowed it to begin soliciting US DIRTT shareholders for the removal of DIRTT directors. According to English, the 22NW Fund received 50.4% proxy support and sent executed proxies to the DIRTT Board on January 14, 2022. English deposed that he had verbal commitments for 20% more support. Counsel for DIRTT criticized the proxies collected by 22NW on several grounds.

[72] DIRTT announced on January 18, 2022 that O'Meara had left DIRTT, being replaced by Lillibridge as interim CEO.

III. APPLICATION

A. Grounds for Application

[73] DIRTT sought orders under ss. 179 and 198 of the Act against the Respondents on the grounds:

> . . . that they have been acting jointly or in concert in a coordinated strategy to acquire [Shares], to influence or change decisions of the management and [DIRTT Board] and, ultimately, to gain control of [the DIRTT Board] in breach of Alberta securities laws and contrary to the public interest.

[74] DIRTT's application not only impugned the Requisition, but also contended that all aspects of the Respondents' investments in DIRTT were contrary to "Alberta securities laws, contrary to the public interest and clearly abusive of the public markets". The Take-Over Bid Allegation, the Insider Reporting Allegation and the Prospectus Allegation (together, the **Joint Actor Allegations**) were based on DIRTT's contention that all of the Respondents were acting jointly or in concert. The Early Warning Allegations were not linked to that alleged connection between the 22NW Group and the 726 Group. DIRTT's allegations of conduct which was contrary to the public interest or clearly abusive were part of DIRTT's four allegations that the Respondents contravened Alberta securities laws, rather than being separate grounds for which orders were sought.

B. Relief Sought

[75] As noted, DIRTT sought the Take-Over Bid Order and the Public Interest Orders.

IV. GENERAL PRINCIPLES

A. Onus and Burden of Proof

[76] It was not disputed that the onus of proving the Allegations on a balance of probabilities was on DIRTT. Most important, for the Joint Actor Allegations, DIRTT had the onus of demonstrating that the Respondents were acting jointly or in concert. Staff pointed to *Genesis Land Development Corp. v. Smoothwater Capital Corporation*, 2013 ABQB 509 at para. 24, which stated that such a relationship must be proved with evidence which is clear and cogent, and not ambiguous or speculative.

B. Credibility

[77] DIRTT's aspersions on English's and Noll's credibility were apparent throughout the materials, including the affidavits sworn by Lillibridge and MacEachern, and the questions asked of English and Noll during their respective cross-examinations. The basis of DIRTT's Joint Actor Allegations was that English and Noll were lying throughout their entire respective relationships with DIRTT. In addition, DIRTT specifically impugned English's credibility on the basis that English's initial email to MacEachern was a "lie" because 22NW was not a DIRTT shareholder until two days later. DIRTT also attacked Noll for reporting in a December 8, 2020 filing with the SEC that that the 726 Group's ownership of Shares exceeded 10% on November 27, 2020, although the 726 January 2021 AMR filing disclosed the date as December 1, 2020.

[78] Noll contended that Lillibridge and MacEachern had admitted to inaccuracies in their respective affidavits.

[79] We did not consider that English's credibility was tainted by referring to 22NW as a shareholder in an email to MacEachern two days before 22NW actually owned Shares – we accepted English's explanation that 22NW had already started the process to acquire those Shares. Similarly, we were not convinced that a difference of a few days in the 726 Group's report of crossing the 10% threshold of Share ownership was so significant as to impair Noll's credibility. This appeared to be a matter of carelessness, not untruthfulness.

[80] Overall, we had few concerns with the evidence from English and Noll, as their evidence generally aligned consistently with the documentary evidence. We were, however, unimpressed with the slant taken in the affidavits sworn by Lillibridge and MacEachern, referring to the Respondents as acting "jointly", attending meetings or events "together" or "jointly", and other such phrasing.

[81] For example, MacEachern deposed that English and Noll attended the Rock Hill Tour "jointly". However, she admitted during cross-examination that each had arranged his attendance separately with her, she did not know if they had travelled to and from Rock Hill together, others were also present at that event, and she did not know if or how English and Noll may have interacted with each other during the Rock Hill Tour. Further, Noll had dinner with O'Meara after the Rock Hill Tour (without English), which was not mentioned by MacEachern.

[82] As another example, MacEachern stated that she believed the Respondents were acting jointly or in concert because they were on multiple telephone calls together. Other evidence was convincing that the number of calls and meetings together was far outweighed by the number of calls and meetings in which each of them (or Mitchell or Broderick on English's behalf) was involved separately. The evidence showed that DIRTT representatives expressed appreciation for the efficiency of 22NW and 726 representatives being on the same calls.

[83] Based on all of the evidence before us, we concluded that the evidence tendered by DIRTT was unacceptably slanted in an attempt to convince us that DIRTT had met its evidentiary burden. The exaggerations and unwarranted characterizations in the affidavits sworn by Lillibridge and MacEachern negatively affected our view of the credibility of both Lillibridge and MacEachern.

[84] We note that this approach was continued in DIRTT's written submissions (and in DIRTT's complaint letters to the ASC), in which counsel for DIRTT defined and referred to the Respondents as the "Joint Actors". Whether the Respondents were acting jointly or in concert was the central issue in the Application. Advocating the desired finding in a defined term was inappropriate and singularly unpersuasive.

C. Hearsay, Circumstantial Evidence, and Adverse Inferences

1. Parties' Positions

(a) DIRTT

[85] DIRTT submitted that the panel may consider hearsay, with the appropriate weight depending on the circumstances. DIRTT also stated that evidence of parties acting jointly or in concert will often be circumstantial, and that inferences may be drawn from such circumstantial evidence. DIRTT further contended that the panel should draw an adverse inference because English and Noll did not attach certain documents to their respective affidavits – such as notes of telephone calls, texts, calendar appointments and telephone call logs – and Broderick and Mitchell did not file any evidence. As an alternative to adverse inferences, DIRTT stated that the panel could reach certain findings of fact based on a lack of corroboration.

(b) 22NW Group

[86] The 22NW Group did not dispute that the panel may rely on hearsay evidence, but argued that DIRTT "grossly overstated" the appropriate weight to be given to much of its hearsay evidence. The 22NW Group also argued that there has to be some rigour applied when considering circumstantial evidence and the inferences which can be drawn from it.

(c) 726 Group

[87] The 726 Group emphasized that MacEachern and Lillibridge, through whom DIRTT tendered its evidence, were not best suited to provide evidence, as they did not have the direct knowledge that O'Meara or Krause had. The 726 Group also contended that DIRTT attempted to rely on various pieces of uncorroborated hearsay evidence or opinions presented as facts, none of which met the required standard of clear, convincing, and cogent evidence. The 726 Group further noted that any inferences must be reasonable and be supported by evidence rather than speculation, and argued that the evidence from DIRTT did not meet that threshold. The 726 Group submitted that DIRTT was wrong in attempting to equate drawing an adverse inference when a party fails to call a certain witness with drawing an adverse inference when a party fails to produce certain documents. Further, the 726 Group argued that no adverse inference could be drawn in the present circumstances because, in its view, DIRTT did not adduce credible and reliable evidence to which a respondent would have had to provide contrary evidence.

(d) Staff

[88] Staff did not address these topics in their submissions.

2. Hearsay

[89] Relevant hearsay evidence is admissible in ASC proceedings, although that is subject to the rules of natural justice and procedural fairness and to our discretion – see ss. 29(e) and (f) of the Act and *Re Aitkens*, 2018 ABASC 27 at para. 50 (citing other decisions, including *Re Arbour*

Energy Inc., 2012 ABASC 131 at para. 45; and *Lavallee v. Alberta (Securities Commission)*, 2010 ABCA 48 at paras. 14-18).

[90] As also stated in *Aitkens* (at para. 51), we must determine what weight to give the evidence, including hearsay evidence, admitted during a hearing: "In doing so, we consider indicators of its reliability, such as corroboration by other evidence (*Arbour* at paras. 46 and 53)."

[91] We assessed all of the evidence before us on that basis.

3. Circumstantial Evidence

[92] DIRTT acknowledged that it was relying heavily on circumstantial evidence. It also asserted that circumstantial evidence is different from "no evidence", and that the 22NW Group, in particular, claimed there was "no evidence" against the Respondents.

[93] We did not take the 22NW Group's submissions as claiming that circumstantial evidence was somehow not real evidence – we were satisfied that the 22NW Group was arguing that there was insufficient evidence of any nature on which the panel could find that the Respondents were acting jointly or in concert.

[94] In considering the circumstantial evidence before us, we remained mindful of the dangers of inappropriately relying on circumstantial evidence, including the following points made by the Alberta Court of Appeal in *Walton v. Alberta (Securities Commission)*, 2014 ABCA 273 (at paras. 26, 27, and 28):

- while "inferences could be drawn from circumstantial evidence", "speculation and conjecture [are] not the equivalent of proper inferences";
- "'speculation' can therefore be described as the drawing of an inference in the absence of any evidence to support that inference, or in situations where there is no 'air of reality' to the inference" (quoting *Alberta Union of Provincial Employees v. Alberta*, 2010 ABCA 216 at para. 38);
- "'when drawing an inference from circumstantial evidence, we must ensure that the inference is grounded on proved, not hypothetical or assumed, facts and is a reasonable one – one drawn using common sense, human experience and logic having considered the totality of the evidence and any competing inferences'" (quoting the decision appealed from, *Re Holtby*, 2013 ABASC 45 at para. 463); and
- "'there comes a time when the underlying facts may be so remote that there are just too many steps or leaps in the chain of reasoning to say that a particular inference can be reasonably drawn'" (quoting *R. v. Cavanagh*, 2013 ONSC 5757 at para. 74).

4. Adverse Inferences

[95] DIRTT relied on *Re Bluforest Inc.*, 2020 ABASC 138 at para. 76, *Stikeman Elliott LLP v. 2083878 Alberta Ltd.*, 2019 ABCA 274 (at paras. 87-88 of the dissenting decision), and *Arbour* (presumably at para. 73) for its proposition that the panel should draw an adverse inference from

English's and Noll's non-production of documents to support statements in their respective affidavits, such as call logs which would show that the two had not spoken at certain times and Noll's notes from telephone calls. The 726 Group argued that those cases did not support DIRTT's position.

[96] The panel in *Arbour* stated (at para. 73):

> We are entitled to draw an adverse inference against a party [two of the respondents] when, in the absence of an explanation, that party fails to call a witness who would have knowledge of the facts and presumably would be willing to assist that party. However, given our findings below that all extant allegations against [those two respondents] have been proved to the requisite evidentiary standard based on sufficiently clear, convincing and cogent evidence, we need not address this point.

[97] The panel in *Bluforest* addressed Staff's argument that it could draw an adverse inference against a respondent who failed "to call a witness who would have knowledge of the facts and presumably could be willing to assist" (at para. 75). The panel (at para. 76) cited the dissenting opinion in *Stikeman* at paras. 87-88, which referred to Wigmore's leading statement (Wigmore, *Evidence in Trials at Common Law*, 1979), in stating that:

- When a party or opponent states that certain documents or witnesses would elucidate the facts and the party fails to bring such documents or witnesses before a tribunal, the most natural inference is that the facts elucidated through those documents or witnesses would be unfavourable to the party.

- Such inferences may only be drawn in certain circumstances and are open to explanations which would lead to a different inference.

[98] The panel in *Bluforest* (at para. 77) also cited *Re Hutchinson* (2019), 42 O.S.C.B. 8843 at para. 76: an adverse inference would be appropriate "where the evidence established a *'prima facie* case regarding a particular factual conclusion', stating that 'Staff must first adduce evidence that appears to be credible and reliable and that is sufficiently strong for the respondent to be called on to answer it . . .'".

[99] As discussed below, we were satisfied that DIRTT did not establish through credible and reliable evidence that the Respondents were acting jointly or in concert. Accordingly, there was no case "sufficiently strong for the [Respondents] to be called on to answer". In these circumstances, it would be inappropriate to draw an adverse inference. This reasoning also explains our rejection of DIRTT's alternative contention that there was a lack of corroboration for the Respondents' positions.

[100] Although we also drew no adverse inferences against DIRTT, we noted that DIRTT did not tender evidence from O'Meara or Krause, who would have had more relevant knowledge of many of the events at issue than did Lillibridge.

V. RELIEF SOUGHT

A. The Law: Relief Sought

1. Section 179 of the Act

[101] Section 179 of the Act provides:

> (1) On application by an interested person, if the Commission considers that a person has not complied or is not complying with this Part or the regulations, the Commission may make an order
>
> (a) restraining the distribution of any document, record or materials used or issued in connection with a take-over bid or issuer bid,
>
> (b) requiring an amendment to or variation of any document, record or materials used or issued in connection with a take-over bid or issuer bid and requiring the distribution of amended, varied or corrected information,
>
> (c) directing any person or company to comply with this Part or the regulations,
>
> (d) restraining any person or company from contravening this Part or the regulations, or
>
> (e) directing the directors and officers of any person or company to cause the person or company to comply with or to cease contravening this Part or the regulations.
>
> (2) On application by an interested person, the Commission may order that a person or company is exempt from any requirement under this Part or the regulations if the Commission considers it would not be prejudicial to the public interest to do so.

2. Section 198 of the Act

(a) Legislation

[102] The portions of s. 198(1) of the Act relevant to the Application provide:

> (1) Where the Commission considers that it is in the public interest to do so, the Commission may order one or more of the following:
>
> . . .
>
> (b) that a person or company cease trading in or purchasing securities, derivatives, specified securities or a class of securities or derivatives as specified in the order;
>
> . . .
>
> (b.2) that a person or company be reprimanded;
>
> (c) that any or all of the exemptions contained in Alberta securities laws do not apply to the person or company named in the order;
>
> . . .
>
> (e) that a person is prohibited from becoming or acting as a director or officer or as both a director and an officer

> (i) of any issuer or other person or company that is authorized to issue securities, . . .

(b) Exercise of Public Interest Jurisdiction

[103] In *Re Bison Acquisition Corp.*, 2021 ABASC 188, an ASC panel discussed the ASC's public interest jurisdiction (at paras. 71-86). We adopt that discussion, setting out here only some of the most important points:

- The Supreme Court of Canada in *Committee for the Equal Treatment of Asbestos Minority Shareholders v. Ontario (Securities Commission)*, 2001 SCC 37 stated that the Ontario Securities Commission (the **OSC**) – by extension, also the ASC – has broad discretion, but "not unlimited" public interest powers (at paras. 39, 41-42, and 49 of *Asbestos*; quoted in para. 73 of *Bison*).

- Before making a public interest order, a panel should consider both "the fair treatment of investors" and "[t]he effect of an intervention in the public interest on capital market efficiencies and public confidence in the capital markets" (at para. 41 of *Asbestos*; quoted in para. 73 of *Bison*).

- The transactions at issue should be "clearly abusive" of investors and capital market integrity before a public interest order is appropriate (at para. 52 of *Asbestos* and para. 73 of *Bison*). An older decision of an OSC panel (*Re Canadian Tire Corp.* (1987), 10 O.S.C.B. 857 (at paras. 124 and 130)) used similar language, stating that "a flagrant abuse" or "clearly abusive" conduct was required, regardless of whether there was a breach of securities laws (quoted in para. 74 of *Bison*). The impugned "conduct or transaction must clearly be demonstrated to be abusive of shareholders in particular, and of the capital markets in general" (at para. 155 of *Canadian Tire*; quoted in para. 77 of *Bison*).

B. Parties' Positions: Relief Sought

1. DIRTT

(a) Take-Over Bid Order

[104] As mentioned, DIRTT sought the Take-Over Bid Order under s. 179 of the Act to address the alleged contraventions by the Respondents of take-over bid requirements.

[105] DIRTT contended such relief was appropriate because of the Respondents "acting jointly or in concert, not just with respect to specific transactions and goals pertaining to [DIRTT], but in connection with all aspects of their investment in [DIRTT], culminating in seeking to reconstitute the [DIRTT Board]. This conduct also stems from breaches of disclosure obligations under the AMR regime regardless of whether a finding of acting jointly or in concert is made."

[106] DIRTT's proposed Take-Over Bid Order sought an order under ss. 179(1)(c) and (d) of the Act "that the Respondents not vote their improperly obtained [Shares] above the 19.99% threshold". DIRTT argued that the panel had the authority to make that order because it would be enforcing compliance with and restraining contravention of the take-over bid provisions of the Act (also referring to *Cybersurf Corp. v. Mercury Partners & Company*, 2003 ABQB 954 at para. 45).

DIRTT contrasted that to an order denying a vote at a shareholders' meeting, which DIRTT agreed was beyond the panel's jurisdiction (citing *Bison* at para. 473).

(b) Public Interest Orders

[107] DIRTT urged us to exercise our public interest jurisdiction to make orders under s. 198 of the Act against the Respondents. DIRTT contended that the Respondents' actions, as described by DIRTT in the Joint Actor Allegations and the Early Warning Allegations, were contrary to Alberta securities laws and clearly abusive of investors and the Alberta capital market. For example, DIRTT asserted that director-and-officer bans were appropriate for the individual Respondents because of their alleged "abdication of responsibility for public disclosure after bringing a vindictive Requisition". DIRTT also argued that disclosure alone could not remedy the alleged misconduct.

2. 22NW Group

(a) Take-Over Bid Order

[108] The 22NW Group argued that there was no misconduct to remedy. Specifically regarding the Take-Over Bid Order, the 22NW Group contended that an ASC panel does not have the jurisdiction to prevent a shareholder from voting shares, as such power is not in s. 179 of the Act but is given to the court by s. 180 (as stated in *Bison* at para. 771). To support its contention that DIRTT's interpretation of s. 179 should fail, the 22NW Group also relied on the fact that s. 179 does not refer to voting percentages. In the 22NW Group's submission, DIRTT's motivation was to restrict the Respondents' voting power so the DIRTT Board would have an advantage in the proxy contest.

(b) Public Interest Orders

[109] As noted, the 22NW Group submitted that there was no misconduct to remedy.

[110] The 22NW Group called the proposed D&O Prohibition Order "another clear attempt to interfere with the impending proxy contest". It also argued that a director and officer ban is appropriate when misconduct was committed in a person's capacity as a director or officer (citing *Re Podorieszach*, 2004 ABASC 567 at para. 50). Because English's actions (if found to be misconduct) were taken as a shareholder, not as a director or officer, the 22NW Group submitted that the D&O Prohibition Order against English would be inappropriate. Further, it argued that the rationale for the D&O Prohibition Order against Broderick and Mitchell was even weaker, as they were employees of 22NW.

[111] In the event that the panel were to uphold any of the Allegations, the 22NW Group asserted that the other Public Interest Orders would be too sweeping and intrusive in the circumstances. If any disclosure breaches were found and DIRTT shareholders still lacked knowledge of what should have been disclosed, the 22NW Group suggested that delaying the meeting would be the appropriate order.

3. 726 Group

(a) Take-Over Bid Order

[112] The 726 Group submitted that, because there was no take-over bid, DIRTT had no standing to seek the Take-Over Bid Order. The 726 Group echoed the 22NW Group's contention that the

panel has no jurisdiction to grant such an order, even had there been a take-over bid. The 726 Group pointed to *Bison* and a plain reading of s. 179 of the Act in arguing that the legislature gave authority to the Alberta Court of Queen's Bench (now Court of King's Bench) to restrain the exercise of voting rights, and gave no such authority to the ASC.

(b) Public Interest Orders

[113] The 726 Group again argued that DIRTT had no standing to seek the Public Interest Orders, and submitted that none of those orders would be warranted here in any event. Further, the 726 Group noted that any such orders are to be proportional, preventive and prospective, not punitive or remedial. Here, according to the 726 Group, the one instance of long-corrected late disclosure was not material, so no relief was warranted. The 726 Group stated: "The fact that these grossly disproportionate remedies have been claimed at all is telling as to the audience and ulterior purpose of this application."

4. Staff

(a) Take-Over Bid Order

[114] Staff noted that the wording of s. 179 of the Act deliberately limits the powers an ASC panel may exercise (assuming a take-over bid occurred) – in contrast to s. 180 which gives the court virtually unlimited jurisdiction. Therefore, Staff stated that this panel does not have the authority to make the Take-Over Bid Order by prohibiting the Respondents from exercising voting rights. Staff further submitted that, if the panel were to find the take-over provisions had been contravened, it could make other orders falling within the s. 179 categories, such as an order that the Respondents comply with the take-over bid requirements in Alberta securities laws.

(b) Public Interest Orders

[115] Staff agreed that the panel has the power to grant the Public Interest Orders for the late filing of certain documents, if such orders would be in the public interest and would be preventive and prospective, not punitive or remedial. Staff pointed out that the late filings were made and the relevant information was known to the market before the hearing began. Given those circumstances, Staff submitted that the Cease-Trade Order would be warranted only if the panel were to find other undisclosed information. Staff argued that the other Public Interest Orders sought by DIRTT would serve to punish the Respondents and provide the "[DIRTT Board] and management with a significant tactical advantage in the ongoing proxy contest" – in other words, such order would serve private interests, not the public interest. Specifically regarding the proposed Reprimand Order, Staff submitted that reprimands ordered in other cases cited by DIRTT were all given in circumstances with more complex and egregious misconduct than a mere late filing of required documents.

C. Conclusion: Relief Sought

[116] As discussed below, we determined that there was no take-over bid here. Accordingly, we had no jurisdiction to make any orders under s. 179 of the Act. Even had there been a take-over bid, the voting restriction sought by DIRTT (the Take-Over Bid Order) is not within the scope of our jurisdiction under s. 179 – that section does not give ASC panels jurisdiction to disenfranchise shareholders. In this, we relied on the reasoning in *Bison* (at para. 473), in which the panel held that it had no jurisdiction to make an order regarding voting at shareholder meetings. In contrast, in the event of contraventions of take-over bid requirements, s. 180(1)(d) gives the court

jurisdiction to make orders "prohibiting any person or company from exercising any or all of the voting rights attached to any securities". We did not find the general statements in *Cybersurf* to be helpful here.

[117] Also as discussed below, we concluded that the 22NW Group and the 726 Group each filed some disclosure later than the required deadlines. The appropriateness of issuing any of the Public Interest Orders for those late filings is addressed in that analysis.

VI. REGULATORY REQUIREMENTS: THE LAW

A. Relevance

[118] DIRTT alleged that the Respondents engaged in various contraventions of Alberta securities laws. We set out here the provisions allegedly contravened.

B. Take-Over Bid Provisions

[119] Part 14 of the Act and NI 62-104 set out the regulatory scheme in Alberta for take-over bids. A take-over bid by a person or company "whether alone or acting jointly or in concert with one or more persons" must be made in accordance with the regulations (s. 159 of the Act). A take-over bid is defined in s. 158(c) as "a direct or indirect offer to acquire a security that is (i) made directly or indirectly by a person or company other than the issuer of the security". A take-over bid is defined in s. 1.1 of NI 62-104 as an offer to acquire outstanding voting or equity securities if the securities subject to the offer plus the offeror's own securities would be 20% or more of those outstanding securities. For the relevant part of the take-over bid provisions, an offeror is defined to include a person making a take-over bid and "a person acting jointly or in concert with a person" making a take-over bid (ss. 2.1(a) and (b) of NI 62-104).

[120] If a take-over bid is being made, specific requirements must be followed, including restrictions on acquisitions or sales, preparation and delivery of an offeror's circular, and adherence to bid mechanics (e.g., a minimum deposit period and take-up requirements).

[121] There could only be a take-over bid here if the Respondents were acting jointly or in concert, so that their collective ownership of Shares was 20% or more of the total Shares outstanding. The Respondents denied that they acted jointly or in concert.

[122] As concluded below, DIRTT did not prove that the Respondents acted jointly or in concert. Therefore, there was no take-over bid. Without a take-over bid, we had no reason (and no jurisdiction) to consider the remedies sought by DIRTT under s. 179 of the Act. Accordingly, we need not set out extensive details of the take-over bid regulatory requirements and potential remedies.

C. Insider Reporting Provisions

[123] Under s. 9.1 of NI 62-103, eligible institutional investors (as defined in s. 1.1(1) of NI 62-103, and including 22NW and 726) meeting EWR or AMR requirements are exempt from insider reporting requirements (see NI 55-104) in specified circumstances. One of those circumstances is that such eligible institutional investors, alone or with joint actors, not have effective control of the reporting issuer (s. 9.1(f) of NI 62-103). "[E]ffective control" is defined to be "control in fact" of the issuer (s. 1.1(1) of NI 62-103). As concluded below, we found that the

Respondents did not have control of DIRTT. Therefore, we need not set out further insider trading disclosure details here.

D. Prospectus Provisions

[124] DIRTT alleged that sales of Shares by 22NW between January 4 and 6, 2021 were "distributions" by a "control person", thus required to be sold through a prospectus or under a prospectus exemption, as set out in s. 2.8 of NI 45-102. A "control person" is defined in s. 1(l) of the Act to mean:

> (i) a person or company who holds a sufficient number of the voting rights attached to all outstanding voting securities of an issuer to affect materially the control of the issuer, and if a person or company holds more than 20% of the voting rights attached to all outstanding voting securities of an issuer, the person or company is deemed, in the absence of evidence to the contrary, to hold a sufficient number of the voting rights to affect materially the control of the issuer, or
>
> (ii) each person or company in a combination of persons or companies acting in concert by virtue of an agreement, arrangement, commitment or understanding, who holds in total a sufficient number of the voting rights attached to all outstanding voting securities of an issuer to affect materially the control of the issuer, and if a combination of persons or companies holds more than 20% of the voting rights attached to all outstanding voting securities of an issuer, the combination of persons or companies is deemed, in the absence of evidence to the contrary, to hold a sufficient number of the voting rights to affect materially the control of the issuer[.]

[125] As we found (discussed below) that the 22NW Fund was not a "control person" – on its own or with any other Respondents – we need not set out here further specifics of the distribution requirements and the control person exemption.

E. Early Warning Provisions

1. General

[126] Various "early warning" provisions are prescribed in NI 62-103 and NI 62-104. These aim to provide the market with timely notice of information about an issuer's securities, such as significant acquisitions and dispositions by those with a specified level of ownership of that issuer. In simplified terms, an EWR filing is required for an entity which (alone or acting jointly or in concert with another) reaches 10% or more ownership of an issuer's securities. There are additional reporting requirements after that threshold has been crossed. An eligible institutional investor may make an AMR filing in lieu of certain EWR filings.

[127] Section 5.1(1) of NI 62-104 defines an "acquiror" to mean a person acquiring a security, other than through a take-over bid and defines an "acquiror's securities" to be those "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". These terms have the same meaning in NI 62-103 (by virtue of s. 1.1(1) of NI 62-103).

[128] Section 1.1(1) of NI 62-103 defines "acting jointly or in concert" to have "the meaning ascribed to that phrase in securities legislation, and, when used in connection with an entity, has the meaning ascribed in securities legislation as if the term 'entity' replaced the term 'person or company' or similar term".

2. EWR

[129] The EWR requirements relevant here are:

- when an acquiror reaches 10% or more beneficial ownership of a class of an issuer's voting or equity securities, the acquiror must disclose certain information promptly in a news release and must file a certain report no later than two business days after the acquisition (s. 5.2(1) of NI 62-104);

- after making such disclosure, an acquiror acquiring or disposing of 2% or more of the subject securities or dropping below 10% beneficial ownership must make further disclosure in a news release and a required report (ss. 5.2(2) and (3) of NI 62-104); and

- "any plans or future intentions which the acquiror and any joint actors may have which relate to or would result in . . . a change in the board of directors or management of the reporting issuer" must be disclosed (Item 5(d) of the EWR filing form (Form 62-103F1 *Required Disclosure under the Early Warning Requirements*)).

3. AMR

[130] In some circumstances, eligible institutional investors may satisfy EWR filing obligations by meeting AMR filing requirements (see Part 4 of NI 62-103).

[131] The AMR requirements relevant here are:

- when the eligible institutional investor's beneficial ownership reaches 10% or more of a class of an issuer's voting or equity securities, the eligible institutional investor must file a report within 10 days of the end of the month in which that threshold was reached or crossed (s. 4.5(b) of NI 62-103);

- after making such disclosure, an eligible institutional investor acquiring or disposing of a certain percentage of the subject securities or dropping below 10% beneficial ownership must file a report within 10 days of the end of the month in which that occurred (ss. 4.5(c) and (d) of NI 62-103); and

- "any plans or future intentions which the eligible institutional investor and any joint actors may have which relate to or would result in . . . a change in the board of directors or management of the reporting issuer" must be disclosed (Item 5(d) of Form 62-103F2 *Required Disclosure by an Eligible Institutional Investor under Section 4.3* and Item 4(c) of Form 62-103F3 *Required Disclosure by an Eligible Institutional Investor under Part 4*).

VII. ANALYSIS

A. Jointly or In Concert Allegations

1. Allegations and Brief Conclusion

[132] DIRTT's Joint Actor Allegations and proposed related orders were based on its contention that the Respondents were acting jointly or in concert for some or all of the period from March 2020 to the date of the Requisition and beyond.

[133] DIRTT also contended that, if Mitchell or Broderick (or both) was acting jointly or in concert with the rest of the 22NW Group from December 31, 2020 to January 4, 2021, then the 22NW Group breached additional EWR or AMR reporting requirements for trades which occurred during that period. We address that below with the other Early Warning Allegations.

[134] As discussed below, we concluded that the Respondents were not acting jointly or in concert. Therefore, all of the Joint Actor Allegations failed – there was no take-over bid, the 726 Group did not have insider reporting obligations, and no prospectus (or exemption) was required.

2. The Law: Jointly or In Concert

(a) Regulatory Provisions

[135] Section 1.9(1) of NI 62-104 sets out deeming and presumptive provisions for determining if one is acting jointly or in concert with another:

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

[136] There was no allegation or evidence that the 22NW Group and 726 Group were affiliates or associates of each other. Therefore, the relevant parts of s. 1.9(1) of NI 62-104 were ss. 1.9(1)(a)(i) and 1.9(1)(b)(i).

(b) Case Law

(i) General

[137] The parties cited various cases for our consideration. We reviewed those and the parties' associated submissions, but discuss only a few of the cases here.

(ii) *Sears*

[138] An OSC panel in *Re Sears Canada Inc.* (2006), 35 O.S.C.B. 8781 (aff'd *sub nom. Sears Holdings Corp. v. Ontario (Securities Commission)* (2006), 84 O.R. (3d) 61 (Ont. S.C.J.)) discussed the concept of joint actors. There, Sears Holdings Corporation and a subsidiary (together, **Sears Holdings**) made an offer for all outstanding shares of Sears Canada Inc. (**Sears Canada**). As Sears Holdings planned to take Sears Canada private following a successful offer, majority of the minority approval would be required. We discuss only the aspects relevant to the present case.

[139] Sears Holdings claimed that Pershing Square Capital Management L.P. (**Pershing**) and two other entities (collectively, the **Pershing Group**) were acting jointly in various ways but did not disclose their joint relationship soon enough. Sears Holdings also alleged that Pershing and Vornado Realty L.P. (**Vornado**) were acting jointly before April 2006, which would have meant that Pershing and Vornado failed to disclose their aggregate ownership of Sears Canada shares under the early warning threshold requirement.

[140] Regarding the allegations against the Pershing Group, the OSC panel found that they were not acting jointly until April 14, so that their April 17 disclosure was made in a timely manner (at para. 86).

[141] In concluding that Pershing and Vornado were not acting jointly, the OSC panel agreed that a formal agreement was not required to find that parties were joint actors, but held that, without "the proverbial 'smoking gun', there must be evidence to support a finding that parties have acted jointly or in concert" (at para. 79). There, Pershing provided alternative explanations which were credible and plausible in response to evidence provided by Sears Holdings.

[142] On the other side of the events at issue, the Pershing Group alleged that the Bank of Nova Scotia (**BNS**) and Scotia Capital Inc. (**Scotia Capital**) acted jointly or in concert with Sears Holdings and, therefore, should be excluded from those allowed to vote to reach the majority of the minority threshold for the going-private transaction to proceed. That allegation was dismissed. The panel held that Scotia Capital did not go beyond the customary role of providing advice and administrative support to Sears Holdings (at para. 155). The panel also concluded that BNS and Scotia Capital were acting in the best interests of themselves and their shareholders, and did not share a commonality of interest with Sears Holdings (at paras. 157 and 158). The panel further stated that BNS's and Scotia Capital's agreements to vote their shares in favour of the going-private transaction did not mean that they were all joint actors (at para. 162).

(iii) *Sterling*

[143] In *Re Sterling Centrecorp Inc.*, (2007) 30 O.S.C.B. 6683, an OSC panel needed to determine if certain shareholders of Sterling Centrecorp Inc. (**Sterling**) were acting jointly or in concert with a group proposing to take Sterling private. If so, their votes would not be included in

calculating the majority of the minority approval required for a going-private transaction. Some of the alleged joint actors had signed a support agreement in which they agreed, among other things, to vote in favour of the going-private transaction. The applicable law was the former s. 91 of the *Securities Act* (Ontario), which was largely comparable to s. 1.9(1) of NI 62-104 before us.

[144] The OSC panel held (at paras. 63-68) that some, but not all, of those shareholders were joint actors. The transaction proceeded because the joint actors' votes were an insufficient percentage to derail the transaction.

[145] The OSC panel summarized in *Sterling* the policy underlying a joint actor determination (at para. 102, citing *Sears* at paras. 149 and 153 and *Drilcorp Energy Ltd. v. Knutson* (March 24, 2005) Calgary 0501-02360 (Alta. Q.B.) (unreported) (at p. 7)):

> The policy underlying the concept of identifying who is a "joint actor" was stated in [*Sears*] as being "to ensure that all persons or companies who are effectively engaged in a common investment or purchase program [...] are required to abide by the requirements of Ontario securities laws […]" A determination of a joint actor relationship can be made if the facts establish that the parties in question played an integral role in planning, promoting and structuring the transaction to ensure its success beyond their customary role. . . . In *Drilcorp*, the Alberta Court of Queen's Bench held that discussions between and among parties did not make them joint actors unless the evidence established that the parties were acting together "to bring [about] a planned result". [citations omitted]

[146] In *Sterling* (at para. 103), the OSC panel cited *Sears* (at para. 250) for the point that agreements solely for the purpose of voting – such as the support agreements in *Sterling* – were not objectionable in themselves. The OSC panel also stated that such agreements are common, help ensure a transaction's success, and are neither illegitimate nor improper (at para. 104). There was no such agreement among the Respondents in the present case, but had we found one existed, it would not have been determinative, and we still would have had to examine all of the relevant facts in determining if the Respondents were acting jointly or in concert.

[147] As stated in *Sterling* (at paras. 118 and 183):

> In determining who is or is not a "joint actor", the Commission must look at all of the facts, not only that there is a support agreement, but their terms, any other terms accompanying them, the circumstances surrounding its making, the relationship generally between the party to the bid and the party alleged to be a "joint actor", the conduct of the parties, and any other relevant facts.
>
> . . .
>
> . . . The mere fact that parties had personal or business relationships in the past does not render them joint actors . . . .

(iv) *Genesis*

[148] In *Genesis*, Romaine J. held that certain parties were acting jointly or in concert, so that proper disclosure was required before the annual general meeting of Genesis Land Development Corp. (**Genesis**) could be held (at paras. 2, 54, and 70-72). The court referred to *Sterling* and *Re Kusumoto*, 2007 ABASC 40 in stating that evidence such as "family relationships, communication between the parties and attendance at meetings together" can be considered in

determining if the alleged joint actors "were making a concerted effort to bring about a specified objective" (at paras. 24-25).

[149] The facts in *Genesis* were complex, but the important factors on which the court relied in finding the respondents were joint actors included:

- In 2012, Liberty Street Capital Corp. (**Liberty**, a corporate respondent) failed in an attempt to have two of its principals (Edwin Nordholm (**Nordholm**, an individual respondent) and Louden Owen (**Owen**)) elected to the Genesis board.

- Garfield Mitchell, an individual respondent, was the largest shareholder of Genesis and continued to increase his holdings through 2012 and 2013. Garfield Mitchell also owned all the shares of and controlled Smoothwater Capital Corporation (**Smoothwater**, a corporate respondent). By June 2013, Garfield Mitchell and Smoothwater together held approximately 22% of the Genesis shares.

- In early 2013, Garfield Mitchell and Stephen Griggs (**Griggs**) succeeded in having Owen appointed to the Genesis board, but Griggs himself did not get appointed to the board. Griggs became the CEO of Smoothwater in May 2013.

- Mark Mitchell, Garfield Mitchell's brother and an individual respondent, was a director of Genesis and the chair of its governance committee. The brothers purchased large blocks of Genesis shares in the first half of 2013. They said they were purchasing independently and for investment purposes.

- On July 3, 2013, Mark Mitchell proposed to the Genesis CEO that Nordholm be nominated for the Genesis board. The next day, Mark Mitchell proposed to the Genesis governance committee a slate of directors, including himself, Nordholm, Owen, and Griggs.

- The Genesis governance committee decided at a July 6, 2013 meeting to reject Mark Mitchell's proposed slate in favour of nominating the current board members. Another board member stated that Mark Mitchell advised the governance committee that a proxy battle would follow and that the major shareholders would not support the governance committee's proposed slate of nominees. Mark Mitchell denied that, saying that he said there "could" be a challenge to that slate.

- Within the next two days, Mark Mitchell, Garfield Mitchell, Griggs, Owen, and Nordholm had a conference call with a proxy solicitation firm. During that call, Mark Mitchell told the others that the Genesis governance committee had decided to re-nominate the incumbent board members.

- Over the next three weeks, Liberty and Smoothwater worked together on proxy solicitation matters, and all of the respondents except Mark Mitchell executed a voting agreement. None of the proxy materials or other materials filed by any of the respondents disclosed that any parties were acting jointly or in concert.

[150] The court held that all of the respondents, including Mark Mitchell, were joint actors as of July 8, 2013 (the date of the call with the proxy solicitation firm). The court also stated that some of the parties may have been joint actors perhaps as early as February 2013, but that the evidence did not establish that on a balance of probabilities (at paras. 52-54). The court, referring to *Drilcorp*, stated (at para. 52) that "communications during this period [between February 2013 and July 8, 2013] were susceptible of a number of interpretations and it is only speculative that an agreement or understanding to achieve a planned result had been reached during this earlier period". The court further stated that the common plan to replace the Genesis board had not changed, even though there were some changes in the respondents' proposed slate of nominees.

(v) *Drilcorp*

[151] In *Drilcorp*, the "new regime" faction of directors wanted to prevent the "old guard" faction and its supporters from voting at a meeting, including to elect directors. As in the present case, the issue was whether some or all of the old guard and its supporters were acting jointly or in concert and thus breaching early warning and take-over bid requirements. The court assessed the evidence of communications among the respondents starting on September 9, 2004, and (at p. 7) Hart J. determined there was no joint actor relationship until December 14, 2004 because the evidence relating to the period before that date "[fell] short of establishing acting together to bring about a planned result". The court stated that the respondents' communications before December 14, 2004 (at p. 7):

> . . . were susceptible of a number of interpretations, from bare proposals or suggestions to a review of options for possible future courses of action. No planned result had been agreed upon, committed to, or understood. Discussions were tentative and inconclusive. Ideas were raised and dropped.
>
> In short, I find the evidence upon which the applicants rely to show joint or concerted actions by the respondents prior to December 14, 2004, to be vague, fragmented, and inconclusive, and wholly unable to support the inferences which the applicants must rely upon to demonstrate this conduct. . . .

(c) Academic Commentary

[152] DIRTT submitted as one of its authorities a paper co-authored by two of its counsel appearing at the hearing: Paul Davis, Leila Rafi, and Sandra Zhao, "'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" (September 25, 2018) (the **Davis Paper**).

[153] We were not persuaded by the 726 Group's apparent suggestion that DIRTT relied on the Davis Paper rather than on case law. Although the Davis Paper did propose a different framework for the assessment of acting jointly or in concert, DIRTT's reliance on the Davis Paper was largely on its summary of the interpretation of the issue in various cases.

[154] That said, however, we found the Davis Paper to be of limited use, preferring our own analysis of the law.

3. Parties' Positions: Jointly or In Concert

(a) DIRTT

[155] DIRTT argued that the Respondents acted jointly or in concert so that their DIRTT shareholdings should be considered in the aggregate, thus putting them over the threshold for making a take-over bid, filing certain insider reports, and requiring a prospectus or exemptions when selling Shares.

[156] DIRTT cited the provisions in NI 62-104 and also referred to the Davis Paper which, in part, advocated for a new approach to determining when parties are acting jointly or in concert. DIRTT noted that acting jointly or concert is a question of fact in the circumstances.

[157] Citing the Davis Paper (at p. 56), DIRTT also stated that a finding parties were acting jointly or in concert is likely to depend "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".

[158] In support of its position that the Respondents were acting jointly or in concert, DIRTT further contended that "the progression of the [Respondents'] common goals is now obvious":

> (a) The [Respondents] made investments in [DIRTT] at about the same time in early 2020;
>
> (b) They conducted their due diligence together, including holding joint meetings with [DIRTT];
>
> (c) They built up their shareholdings until they reached and passed reporting thresholds;
>
> (d) They consulted with each other and approached [DIRTT] with the same strategies, recommendations and concerns;
>
> (e) They sought to exercise control over [DIRTT] Board positions, shareholder rights plans and funding;
>
> (f) They obtained, and expressly indicated to [DIRTT,] that they had the ability to act together to exercise negative control;
>
> (g) They purchased together, on at least one occasion, a block of shares from another shareholder; and
>
> (h) They coordinated or collaborated to make the Requisition and, more generally, in Mr. English's efforts to be appointed to the [DIRTT] Board.

[159] Throughout its arguments, DIRTT stated that it was seeking remedies to protect DIRTT shareholders and the capital market in general.

(b) 22NW Group

[160] The 22NW Group submitted that the Respondents did not act jointly or in concert and, therefore, that DIRTT did not prove any of the Joint Actor Allegations. The 22NW Group also referred to NI 62-104 and the case law (particularly *Drilcorp*), stating that DIRTT's reliance on the Davis Paper was improper.

[161] The 22NW Group focused on: the lack of an agreement, commitment or understanding among the Respondents; the need for a "planned result" (citing *Drilcorp* at p. 7); the fact that more is needed than two shareholders purchasing alongside one another; and the lack of entanglement among the Respondents at the level required to ground a finding that they were acting jointly or in concert because there was no common purpose, no shared resources, no advance knowledge by one group of the other's planned purchases, no long-standing business or personal relationships, and there were other explanations for trading activity.

[162] The 22NW Group summarized DIRTT's assertions as "nothing more than cynically piling up circumstances in which 22NW and 726 participated in the same meetings or took similar views on particular issues".

(c) 726 Group

[163] The 726 Group raised the issue of DIRTT's standing to make the Application because standing under s. 179 of the Act is engaged only for an "interested person" during the course of a take-over bid. The 726 Group asserted that there was no take-over bid here and, therefore, no standing. We did not address the question of standing because the Application proceeded and was dismissed on other grounds. In any event, the 726 Group's argument begged the question by effectively restating the conclusion as a basis for the conclusion.

[164] Regarding the substance of the allegation that the Respondents were acting jointly or in concert, the 726 Group contended that DIRTT chose to rely on statements made in the Davis Paper, not directly on the case law. The 726 Group therefore summarized DIRTT's position as claiming there was an agreement between alleged joint actors to bring about a common goal or planned result "in the abstract", rather than an agreement "directed towards the intention to acquire shares or exercise voting rights" (emphasis by the 726 Group). The 726 Group argued that the evidence fell "manifestly short" of proving DIRTT's allegations on this point. The 726 Group relied largely on *Genesis* and *Sterling*.

[165] The 726 Group set out the following principles from case law (emphasis by the 726 Group):

a. the objective meaning of the words used by the parties *themselves* in relevant documents, not merely "evidence which counsel says was the subjective intention of one of the parties to the agreement"; [*Sterling* at para. 116]

b. the existence of a voting support agreement (which is by itself insufficient) and its terms, any accompanying terms, and the circumstances surrounding its formation; [*Sterling* at paras. 117-118]

c. the relationship generally between the alleged joint actors; [*Sterling* at para. 118]

d the conduct of the parties; [*Sterling* at para. 118]

e. the intention to exercise voting rights must be caused by the agreement, commitment, or understanding; [*Sterling* at para. 119]

f. whether the parties who were once joint actors are still joint actors; [*Sterling* at para. 140]

g. the alleged joint actors must be "acting" for a specific purpose or to bring about a planned result, such as a take-over bid or the replacement of a board of directors; [*Kingsway Financial Services Inc. v. Kobex Capital Corp*., 2016 BCSC 460 at para. 34; *Genesis* at para. 25; and *Re Aurora Cannabis Inc*. (2018), 41 O.S.C.B. 2325 at para. 96]

h. uncontradicted, credible, and plausible explanations for the alleged joint conduct, which preclude a finding of a joint relationship; [*Karnalyte Resources Inc. v. Phinney*, 2020 ABQB 119 at para. 117; and *Sears* at para. 79]

i. family relationships between the parties and attendance at meetings together may be considered in assessing whether the parties were "making a concerted effort to bring about a specified objective". Of course, the nature of the discussions at meetings and the involvement of other attendees is relevant to the inferences to be drawn (if any); [*Genesis* at paras. 25 and 52] and

j. communications between the parties that are inconclusive and susceptible to multiple interpretations, which are merely speculative and cannot support a finding of a joint relationship. [*Genesis* at para. 52; and *Sterling* at para. 97]

(d) Staff

[166] Staff did not think that DIRTT met its onus of proving the Joint Actor Allegations with evidence that is clear and cogent, not ambiguous or speculative.

[167] Staff, referring to *Sears* (at paras. 157, 154, 149, and 153), summarized a joint actor relationship as one in which:

(a) there is a commonality of financial or commercial interest between two or more parties,

(b) the parties have entered into an agreement or understanding to actively work together to bring about a particular outcome, and

(c) each of the parties has gone above and beyond its customary role and played an integral or intimate role in planning, promoting and structuring the transaction or obtaining that outcome. [footnotes omitted]

[168] Staff considered the evidence here to be ambiguous and speculative and, therefore, insufficient. Staff emphasized that "an active and coordinated effort by both parties to achieve [an] objective" was required, not merely an alignment of interests and a willingness by the 726 Group to support the 22NW Group's slate of nominees.

4. Discussion: Jointly or In Concert

(a) Impugned Relationship

[169] The relationship relevant to the Joint Actor Allegations was that between the 22NW Group and the 726 Group and whether they were acting jointly or in concert. If they were so acting, then they would together have reached the 20% threshold to trigger: the take-over bid requirements (the Take-Over Bid Allegation); insider reporting obligations through having effective control of DIRTT (the Insider Reporting Allegation); and prospectus obligations for sales of Shares from a control block (the Prospectus Allegation).

[170] As stated in s. 1.9(1) of NI 62-104, determination of whether parties are acting jointly or in concert is a question of fact. Sections 1.9(1)(a)(i) and 1.9(1)(b)(i) set out circumstances in which

parties are deemed or presumed (respectively) to be acting jointly or in concert. In either case, there must be an "agreement, commitment or understanding with" another party. The status of acting jointly or in concert is deemed if those with such an arrangement acquire or offer to acquire securities of the same class, and is presumed if those with such an arrangement intend to exercise jointly any voting rights attached to such securities. However, those provisions do not limit our assessment of the matter – it is still a question of fact in all of the circumstances, as evident in the various cases cited by the parties.

(b) 22NW Group and 726 Group – Joint Actors Discussion

[171] We were not persuaded by DIRTT's evidence, arguments or assertions that the 22NW Group and the 726 Group were acting jointly or in concert. We now turn to each of DIRTT's points.

- DIRTT claimed that the alleged joint activities began when the 22NW Group first bought Shares in March 2020. DIRTT characterized Noll as introducing or recommending DIRTT to the 22NW Group as an investment.

    - The evidence did not support that. Both Noll and English gave credible evidence that Noll made no such introduction or recommendation, merely suggesting English consider investing in DIRTT, a company with which English was already familiar.

    - Supporting our conclusion that English made his own decision about buying Shares was a memo from O'Meara regarding the September 10, 2021 meeting with English. In that memo, O'Meara said that 22NW "conducted over 30 expert calls and spent in excess of 500 hours analyzing the company prior to making the investment".

- DIRTT impugned the fact that the 22NW Group and the 726 Group held some of the same securities – including DIRTT Shares – at the same time.

    - The fact that two entities own some of the same securities at the same time does not make them joint actors. There would have to be something more, such as an agreement between the two entities to purchase and hold the same securities for a particular purpose. There was no such agreement here, as discussed below. To the extent DIRTT may have been relying solely on the fact of Share ownership at the same time, we reject that as nonsensical.

- DIRTT asserted that the 22NW Group and the 726 Group bought some Shares at the same times and bought some from the Jones Block "together". The evidence showed two short time periods during which both the 22NW Group and the 726 Group bought Shares: July 14 to 16, 2021 and August 12 to 13, 2021. Other than that, their purchases of Shares did not overlap.

    - There was little evidence about the July 2021 purchases, other than a July 16, 2021 email from Mitchell to O'Meara stating that the 22NW Group "decided to take advantage of a block [of Shares]" that was for sale. It was

reasonable to infer that the 726 Group was also taking advantage of a block of Shares for sale at that time; there was nothing suspicious about that.

- The August 2021 purchases by the 22NW Group and the 726 Group from the Jones Block were also consistent with each separately deciding to purchase Shares which came on the market in a large block. Each of English and Noll was contacted separately by Jones, who asked if each was interested in purchasing from the Jones Block. Contrary to DIRTT's submission, this did not amount to purchasing Shares "together". As we found for many other of DIRTT's assertions and arguments, doing something separately at the same time is not equivalent to doing something together. DIRTT tendered no evidence that there was an agreement, understanding, or arrangement between the 22NW Group and the 726 Group regarding the purchase of Shares from the Jones Block. We accept the evidence of English and Noll that there was no such agreement, understanding, or arrangement between the two groups.

- DIRTT relied on the words "with Fortress" (a misnomer for 726, Noll, or the 726 Group) in an August 23, 2021 email sent by English to several 22NW employees, referring to the Jones Block of Shares and stating as a parenthetical descriptor: "we bought most of that with Fortress". We accepted English's explanation that this meant he was aware from 726's filings that 726 had also purchased some of the Shares from the Jones Block, and did not mean that 726 was working together with 22NW in making such purchases. Had there been any convincing evidence for DIRTT's contention that the 22NW Group and the 726 Group were acting jointly or in concert, this email could possibly have been tendered as one more supporting piece. However, it would be wholly improper to use the preposition "with" in an email focused on a different topic as the linchpin for an inference that two entities were collaborating in the contravention of Alberta securities laws. The fact that English inaccurately used "Fortress" instead of "726" or "Noll" is another indication that it would be wrong to rely too much on one word in an email.

- The evidence showed that Mitchell notified O'Meara in an August 12, 2021 email of the 22NW Group's Jones Block purchases, and that Noll told DIRTT management in an August 13, 2021 telephone call about the 726 Group's Jones Block purchases. MacEachern acknowledged during cross-examination that it would have been reasonable for Jones to contact the two large DIRTT shareholders when the Jones Block became available. All of this indicated to us that there was nothing unusual about these purchases, none of the Respondents were hiding the purchases, and nobody at DIRTT seemed concerned at the time.

- MacEachern also acknowledged during cross-examination that she tracked the shareholdings separately for each of the 22NW Group and 726 Group, indicating she did not have contemporaneous concerns.

- DIRTT argued that the Respondents "conducted their due diligence together, including holding joint meetings with [DIRTT]", and that this relationship was apparent to DIRTT (for example, to MacEachern) "[s]ince very early in their involvement with [DIRTT]".

  - The evidence showed that the Respondents participated in some of the same telephone conferences with DIRTT, and also showed that there were many instances in which they had separate communications with DIRTT. Noll and English both asserted that the majority of their respective communications with DIRTT were done separately, not together. Consistent with that, MacEachern admitted that she had no reason to disagree that the vast majority of Noll's communications with DIRTT were without any other DIRTT shareholders present.

  - We did not consider damning the three emails sent from Mitchell to various recipients from DIRTT and apparently copied to Noll (and others). MacEachern highlighted these in her affidavit. Presumably, DIRTT would have pointed to other such correspondence being copied among the Respondents, had that existed. Three emails over the course of many months convinced us only of the paucity of DIRTT's evidence for its allegations.

  - The list of "jointly attended" calls and meetings provided by MacEachern contained only 10 instances over a period of approximately 18 months. She acknowledged that she was aware of many other calls which each of the 22NW Group and the 726 Group had separately with DIRTT management. As an example of the slanted presentation of DIRTT's evidence, MacEachern characterized the first call in which English and Noll both participated as a joint call, even though she stated that she had no reason at the time to think there was a connection between the two.

  - MacEachern mentioned in her affidavit a February 17, 2021 email she sent to Mitchell and Broderick regarding a date for a demonstration by DIRTT, apparently of a software tool. She asked in that email if 22NW wanted Noll included in the invitation. The evidence did not contain an explanation from her as to why she would have made such an offer when she purported to have had concerns going back several months that the Respondents were acting together in what she implied was a nefarious way. This was another example of DIRTT making after-the-fact insinuations which were not supported by the evidence or common sense.

  - As noted in the context of purchasing Shares, doing something at the same time is not the same as doing something jointly or together. DIRTT

personnel were obviously aware that the Respondents sometimes participated in the same meetings, but no concerns were raised at the time of those meetings. MacEachern even sometimes arranged for the Respondents to participate in the same meetings.

- Even had the Respondents been involved in more interactions with DIRTT at the same time, that would not have been indicative or determinative of any inappropriate behaviour. MacEachern agreed that collaborative shareholder engagement could have advantages over single shareholder engagement.

- In one email (February 2021), MacEachern mentioned to Noll that she noticed the Respondents sometimes participated in the same meetings. Noll replied that was only for the convenience of DIRTT. That contemporaneous email was more convincing and more telling than the after-the-fact and exaggerated interpretations claimed by DIRTT. We also accepted Noll's evidence during cross-examination that MacEachern "encouraged us to join meetings together to be efficient with her time. And [O'Meara and Krause] did as well. And it was broadly understood that it was efficient for them, and it was appreciated and expressed appreciation many times."

- In argument (and affidavits), DIRTT characterized such participation by the Respondents as "joint", in an apparent effort to colour the evidence on the most important factual issue before the panel. We simply cannot accept assertions such as the Respondents "jointly" attended the Rock Hill Tour or Connext. Individuals from the 22NW Group and the 726 Group were present at the same two events, but that was arranged by MacEachern, there was no evidence that they travelled to or from the events together or engaged with each other while attending the events, there was evidence that Noll had a meeting alone with O'Meara at the time of the Rock Hill Tour, and there was evidence that many others attended those events as well. MacEachern herself arranged for Noll and Mitchell to attend a meeting at Connext with O'Meara and Warawa, and agreed that she (MacEachern) had no concern at that time with Noll and Mitchell being in the same meeting. We were not impressed with DIRTT's implication that the Respondents' participation in those events was "joint" or "together". It was not.

- MacEachern acknowledged that Noll would have communicated most frequently with O'Meara and Krause, with MacEachern not always involved in those communications. As mentioned, we drew no adverse inference from the fact that DIRTT did not tender affidavit evidence from O'Meara or Krause. However, this left a large gap in their contention that the Respondents were conducting due diligence together.

- DIRTT contended that the Respondents "consulted with each other and approached [DIRTT] with the same strategies, recommendations and concerns". The matters

cited by DIRTT in this regard included: offering financing to DIRTT; expressing concerns about MAK; being concerned about DIRTT's lack of pipeline disclosure; being dissatisfied with the 2021 Q3 results; and telling DIRTT they opposed the November 2021 Financing.

- The 22NW Group and the 726 Group each offered some financing to DIRTT, specifically at the start of the COVID-19 pandemic. DIRTT did not prove that there was anything unusual about those offers, particularly given DIRTT's circumstances then.

- MacEachern deposed: "It appeared to me on the [March 25, 2020] call that 22NW and Noll had discussed the matter [of providing debt or equity funding during COVID-19] with one another in advance of the call". However, her contemporaneous notes said nothing of the kind – they stated that Noll reiterated an earlier offer of funding and Broderick said that the 22NW Group "could also step in". We were confident that she would have recorded in her notes if she had indeed concluded on that first call that the Respondents were all working together. This was another example of DIRTT's insinuations created after-the-fact. We accepted the Respondents' evidence that the funding offers were normal course offers by each, separately, not the result of an agreement or collusion. The fact that each group made a separate offer is more consistent with them operating separately, in contrast, for example, to only one group making an offer of financing but both groups providing the money.

- DIRTT noted that the Respondents expressed concerns about MAK on May 6, 2021. MacEachern deposed that "suggest[ed] to us that 726 and 22NW had discussed the issue with each other independently". The evidence did not show any recorded concerns by DIRTT at that time. More significant, DIRTT's separate telephone conversations with the 22NW Group and the 726 Group on May 6 were post-earnings calls. English stated that the topic of a DIRTT Board seat for MAK had been discussed during the earnings call, so it was not notable that both groups would discuss the issue that day. Their concerns were also different – as recorded in MacEachern's notes, the 22NW Group was concerned with MAK potentially getting a DIRTT Board seat, and the 726 Group was concerned with MAK possibly being disruptive.

- The evidence was clear that others were concerned with DIRTT's lack of pipeline disclosure and were dissatisfied with the 2021 Q3 results. Nothing in that indicated that the Respondents were acting jointly or in concert.

- DIRTT contended that both groups "somehow" knew about the November 2021 Financing before it happened, leading DIRTT to conclude that the Respondents were acting jointly or in concert at that time. Lillibridge deposed that Noll made "a thinly veiled reference to the Requisition, which

was not yet public", although, according to Noll, it was Krause who had told Noll two days earlier about "rumblings". Noll's explanation was supported by a November 17, 2021 memo from Krause and O'Meara to the DIRTT Board. Noll also deposed that Krause told him during a November 8, 2021 call that DIRTT was evaluating financing options. Noll recalled that Krause mentioned financing "like we did in January", which Noll interpreted as the same type of financing with the same bank (National Bank). Noll did not contact DIRTT again until after speaking to a National Bank representative who responded with an email mentioning "something urgent to discuss". English deposed that comments by Krause during calls on November 4 and 5, 2021 led English to believe that DIRTT was considering another offering. A November 8, 2021 memo from Krause to the DIRTT Board also stated that DIRTT "mentioned . . . in all of our meetings" with shareholders on November 4, 2021 that it was considering a financing.

- Therefore, the evidence was more consistent with DIRTT having given sufficient information for the Respondents to discern, independently, that a new financing was likely being considered. English and Noll are experienced market participants, well-versed in reaching conclusions by piecing together bits of information. We also note that the 22NW Group and the 726 Group took different approaches when asked if they wanted to "cross the wall" to learn information about the November 2021 Financing, again indicating that they were not taking identical approaches to DIRTT matters.

- DIRTT asserted that the Respondents "coordinated or collaborated to make the Requisition" and in other efforts by English to be appointed to the DIRTT Board.

  - There was no evidence that the 726 Group was working with English in his "other efforts" to get on the DIRTT Board. We did not find any indications of this, and DIRTT did not expand on that point.

  - We were satisfied that Noll's position throughout the events at issue was generally, despite some frustrations, to support O'Meara, DIRTT management, and the composition of the DIRTT Board. There was no indication that Noll knew of the September 10, 2021 meeting which English had with O'Meara and Lillibridge, although there was evidence that Noll was resistant to initiatives which would cause disruption to DIRTT's management and operations. DIRTT pointed to Noll seeming to have some knowledge of the Requisition before it was announced. However, Noll's explanation that he deduced that from a comment Krause made was supported by other evidence, including Noll immediately making a filing so that he could properly discuss board composition issues with DIRTT.

  - The fact that the 726 Group appeared to support the Requisition after it was issued was irrelevant to the 726 Group's knowledge of or participation in –

or, as we found was the case, its lack of knowledge of or participation in – the Requisition before it was announced.

5. Conclusion: Jointly or In Concert

[172] We concluded that the Respondents did not act jointly or in concert with a view to attaining an agreed-upon objective. There was no evidence that they had any agreement, commitment, or understanding regarding the acquisition of Shares or the voting of Shares. The 726 Group was not involved in planning or preparing the Requisition. The fact that the interests of the 22NW Group and the 726 Group aligned in some areas – such as their disapproval of the November 2021 Financing and their attendance at the Rock Hill Tour and Connext – did not mean that they were acting jointly or in concert. Nor did the 726 Group's intention to support the Requisition after it was announced show that the 726 Group had coordinated the Requisition with the 22NW Group.

[173] DIRTT had the onus to prove that the Respondents were acting jointly or in concert. The evidence fell far short of such proof; it was ambiguous and speculative, and it did not support the inferences argued for by DIRTT. In fact, the evidence was far more consistent with the 22NW Group and the 726 Group acting independently in their own interests.

[174] We had no hesitation in dismissing the Joint Actor Allegations. Without a finding that the Respondents were acting jointly or in concert, there was no take-over bid and no basis for upholding the Take-Over Bid Allegation. The Insider Reporting Allegation depended on a finding that the Respondents had effective control of DIRTT at certain times and, therefore, did not qualify for the insider reporting exemption in s. 9.1 of NI 62-103. We concluded that the Respondents were not acting jointly or in concert, and thus did not have control of DIRTT. The Prospectus Allegation was that the 22NW January 2021 Sale was a distribution by a control person, thus needing a prospectus or prospectus exemption. We found that the Respondents were not acting jointly or in concert, so that 22NW was not a control person and no prospectus or exemption was required.

B. Early Warning Allegations

1. Parties' Positions: Early Warning

(a) DIRTT

[175] DIRTT's Early Warning Allegations were independent of its allegations that the 22NW Group and the 726 Group acted jointly or in concert. Specifically, DIRTT alleged that:

- 726 and Noll together passed the 10% threshold as at the end of November 2020 when making the 726 November 2020 Purchase, but the 726 January 2021 AMR was filed on January 8, 2021 instead of December 10, 2020;

- some or all of 22NW, English, Mitchell, and Broderick were acting jointly or in concert for the 22NW December 2020 Purchase and the 22NW January 2021 Sale, but made no disclosure of crossing the 10% threshold for those transactions;

- 22NW and English together passed the 10% threshold in June 2021 when making the 22NW June 2021 Purchase, but the 22NW August 2021 AMR was filed on August 10, 2021 instead of July 12, 2021; and

- the 22NW October 2021 AMR disclosing that English was interested in a seat on the DIRTT Board should have been filed earlier than October 8, 2021.

[176] DIRTT argued that the conclusion for two of its allegations was clear: that the 726 January 2021 AMR was late, as was the 22NW August 2021 AMR.

[177] DIRTT acknowledged that the lack of an AMR for the 22NW December 2020 Purchase and the 22NW January 2021 Sale was only a contravention if Broderick or Mitchell (or both) had been acting jointly or in concert with 22NW and English at that time. DIRTT claimed that employees with "a key role in the advancement of the investor's goals" must be considered to be acting jointly or in concert, with their holdings thus aggregated with those of their employer – not so aggregating would be "preposterous", "damaging to the capital markets of Alberta and contrary to the public interest, as well as common sense", and "simply not supported by the animating principles" of Alberta securities laws.

[178] Regarding English's filing of his interest in a DIRTT Board position, DIRTT claimed that the 22NW October 2021 AMR was late because English's intention existed on August 5, 2021 (the date of communications between English and O'Meara) or August 11, 2021 at the latest (the date English sent his resume to O'Meara).

(b) 22NW Group

[179] The 22NW Group did not extensively address DIRTT's allegations that disclosure was late for the 22NW December 2020 Purchase, the 22NW January 2021 Sale and the 22NW June 2021 Purchase. The 22NW Group did submit that the relevant Respondents did not act jointly or in concert as contended by DIRTT.

[180] English stated in his affidavit and during his cross-examination that he and 22NW were passive investors at the time of the 22NW June 2021 Purchase (because he was not yet attempting to obtain a position on the DIRTT Board), so it was not necessary to file disclosure for crossing the 10% threshold as a result of the 22NW June 2021 Purchase.

[181] The 22NW Group submitted that expressing an interest in August 2021 in a potential DIRTT Board seat and arranging a meeting did not fall within the requirement that "plans or future intentions" for changing the DIRTT Board be disclosed. That argument seemed to imply that English's interest at that time was not sufficiently crystallized into a plan which would need to be disclosed.

(c) 726 Group

[182] The 726 Group conceded that the 726 January 2021 AMR was late disclosure of the 726 November 2020 Purchase – describing it as "a publicly disclosed, long-corrected, and otherwise inconsequential late disclosure of the acquisition of [Shares]". The 726 Group also noted that the comparable disclosure with the SEC was on time. The 726 Group further stated that it did not acquire any more Shares between the disclosure to the SEC and the filing of the 726 January 2021 AMR, and that the delay did not affect the market, investors, or the price of Shares. The 726 Group therefore argued that the late disclosure was not material.

(d) Staff

[183] Staff asserted that 726 should have filed the 726 January 2021 AMR by December 10, 2020. Staff also stated that the 22NW August 2021 AMR was late because it should have been filed in July 2021 due to the 22NW Fund and English together crossing the 10% threshold at the time of the 22NW June 2021 Purchase. Finally, Staff stated that the 22NW October 2021 AMR disclosing English's interest in a DIRTT Board seat would have been about two months late, if "the mere expression of an interest in a potential board seat, and arranging a meeting to discuss the possibility" is sufficient to trigger the disclosure obligation.

2. Discussion: Early Warning

(a) 726 Group – 726 November 2020 Purchase

[184] The 726 Group acknowledged that the 726 January 2021 AMR was filed late. It should have been filed by December 10, 2020 for the 726 November 2020 Purchase. That AMR also incorrectly identified the triggering date as December 1, 2020 instead of November 27, 2020 (had the December 1, 2020 date been correct, the 726 January 2021 AMR would not have been late).

[185] We concluded that disclosure for the 726 November 2020 Purchase was late and inaccurate, and the 726 Group thus did not comply with s. 4.5(b) of NI 62-103.

(b) 22NW Group – 22NW December 2020 Purchase and 22NW January 2021 Sale

(i) Timing of Joint Actor Disclosure

[186] The 22NW Group disclosed in the 22NW October 2021 AMR and the 22NW November 2021 EMR that 22NW, English, Mitchell and Broderick were acting jointly, and that they collectively held 10% or more of the Shares. However, DIRTT argued that most or all of the members of the 22NW Group should have been reported as joint actors as far back as December 31, 2020, at the time of the 22NW December 2020 Purchase and subsequent 22NW January 2021 Sale.

(ii) Mitchell's and Broderick's Status

[187] DIRTT conceded that the 22NW Group would have needed to make an AMR filing for the 22NW December 2020 Purchase and 22NW January 2021 Sale only if Broderick or Mitchell (or both) were considered at those times to have been acting jointly or in concert with 22NW and English. In arguing that position, DIRTT effectively claimed that the two employees were acting outside of any customary role as employees. DIRTT pointed to:

- Mitchell's and Broderick's participation in 22NW's DIRTT investment, "including by arranging and attending calls and meetings, and corresponding, with management of DIRTT, sometimes without the knowledge or direction of Mr. English";

- from March 25, 2020 to November 12, 2021, Mitchell participated in at least 18 calls or meetings with DIRTT, and Broderick participated in at least 15 – Mitchell and Broderick participated in at least 13 of these together, with English not present for at least eight;

- Mitchell was a named nominee in the Requisition; and

- "Broderick played a key role in assisting Mr. English in selecting the other director nominees as early as mid-October 2021".

[188] Generally, employees' securities holdings would not need to be aggregated with those of their employer, as the employees' interests as shareholders would be separate from their duties as employees. There is, of course, a point after which employees may be considered to be acting jointly or in concert with their employer, depending on the circumstances. As stated in the analysis above regarding acting jointly or in concert, there would need to be a commonality of interest, an agreement or understanding designed to lead to a particular outcome, and actions beyond a party's customary role.

[189] Here, the 22NW Group identified that point as September 2021 by filing the 22NW October 2021 AMR. At that time English was actively pursuing a seat on the DIRTT Board. Later in October, Broderick was assisting English in identifying other potential candidates to be proposed as DIRTT Board members. The onus was on DIRTT to tender evidence and identify concerns at the time of the alleged non-filing following the 22NW December 2020 Purchase and the 22NW January 2021 Sale.

[190] DIRTT's evidence was that Mitchell and Broderick participated in approximately 20 meetings over a period of almost 20 months (some of those after December 2020). We do not consider an average of a meeting per month to be significant involvement which would change the nature of their relationship with their employer. Nor was it significant that they both participated in some of those meetings or that English did not participate in every one of those meetings. Moreover, DIRTT tendered no evidence that Mitchell and Broderick, during those meetings, were acting outside of their regular and customary roles as employees and research analysts for 22NW by December 2020 and January 2021. DIRTT also offered no evidence that Mitchell and Broderick had an agreement or understanding at that time with 22NW or English (or both) regarding a particular planned outcome involving all of their shareholdings in DIRTT.

[191] DIRTT argued that Broderick had "a key role" in selecting other candidates for the DIRTT Board. English stated that Broderick started in mid-October 2021 to help identify candidates for the DIRTT Board – though English did not say that Broderick was "key" in this or that he was involved in actually "selecting" candidates. More significant, however, was that those activities of Broderick were in October 2021, almost a year after the alleged non-filings based on the 22NW December 2020 Purchase and the 22NW January 2021 Sale. By mid-October 2021, the 22NW Group had, in fact, already filed the 22NW October 2021 AMR. DIRTT's other point was Mitchell's nomination in the Requisition – again, however, that was irrelevant to his status at the time of the 22NW December 2020 Purchase and the 22NW January 2021 Sale.

[192] None of DIRTT's arguments were persuasive, individually or collectively. Employees must be able to fulfil their duties as employees – such as meeting and communicating with employees or management of other companies – without being considered to be acting jointly or in concert

with their employer. That is not, in DIRTT's words, "preposterous". Nor is it "damaging" to the Alberta capital market, or contrary to the public interest.

(iii) Conclusion – 22NW December 2020 Purchase and 22NW January 2021 Sale

[193] We found that the 22NW Group (and each of its members) did not contravene filing requirements by failing to file early warning disclosure relating to the 22NW December 2020 Purchase and 22NW January 2021 Sale. There was no evidence that Mitchell or Broderick (or both) acted outside of his customary role or acted pursuant to an agreement with 22NW and English regarding a planned outcome.

(c) 22NW Fund and English – 22NW June 2021 Purchase

[194] The combined Share ownership of the 22NW Fund and English exceeded 10% as at June 18, 2021 (although DIRTT incorrectly alleged that the relevant date was June 30, 2021).

[195] No AMR was filed for the 22NW June 2021 Purchase. The 22NW August 2021 AMR filed on August 10, 2021 incorrectly identified July 14, 2021 as the triggering date for the early warning disclosure.

[196] We concluded that AMR disclosure relating to the 22NW Fund and English together crossing the 10% threshold was late and inaccurate, and the 22NW Fund and English thus did not comply with s. 4.5(b) of NI 62-103.

(d) 22NW and English – Interest in DIRTT Board

(i) Context

[197] The 22NW Group first disclosed English's interest in changing the composition of the DIRTT Board in the 22NW October 2021 AMR. DIRTT argued that disclosure should have been made earlier, based on DIRTT's contention that English intended to pursue a DIRTT Board position on August 5, 2021 or at least by August 11, 2021.

(ii) Discussion: DIRTT Board Composition Disclosure

[198] As noted by Staff, it would be reasonable to uphold DIRTT's contention on this point only if English's interest in a DIRTT Board position had progressed far enough by early August 2021. Staff questioned whether an expression of interest and the arranging of a meeting would be sufficient to crystallize that intention.

(iii) Conclusion: DIRTT Board Composition Disclosure

[199] We did not need to determine the exact date at which English had a sufficient interest in pursuing a DIRTT Board seat such that it changed from an interest to a plan or intention. Even had we found that 22NW should have made such disclosure earlier than October 8, 2021, we would have found that the 22NW October 2021 AMR, along with the information provided to the capital market through the course of the Requisition, was sufficient to cure any information gap that might have existed before October 8, 2021. In other words, had we sustained that allegation, we would not have ordered a remedy for it.

3. Conclusion: Early Warning

[200] We found that the 726 January 2021 AMR was filed approximately one month late, and incorrectly identified the 726 Group's triggering purchase date as December 1, 2020 instead of November 27, 2020.

[201] We found that the 22NW August 2021 AMR was filed approximately one month late, and incorrectly identified the 22NW Group's triggering purchase date as July 14, 2021 instead of June 18, 2021.

[202] We dismissed the other Early Warning Allegations. We found no disclosure contraventions by any member of the 22NW Group in connection with the 22NW December 2020 Purchase and 22NW January 2021 Sale. We concluded that we did not need to decide whether the 22NW Group filed late disclosure relating to English's intention to change the composition of the DIRTT Board.

C. Alleged Clearly Abusive Conduct

1. Parties' Positions: Alleged Clearly Abusive Conduct

(a) DIRTT

[203] DIRTT asserted that the Respondents' conduct in failing to disclose promptly or properly their alleged status as joint actors and their alleged take-over bid was clearly abusive of DIRTT investors or the capital market in general. Therefore, DIRTT sought public interest orders under s. 198 of the Act in addition to any orders we might make for breaches of Alberta securities laws (and, presumably, as an alternative in the event that we did not consider ourselves to have jurisdiction to make the orders DIRTT sought under s. 179).

(b) 22NW Group

[204] The 22NW Group stated during oral submissions that DIRTT was the one engaging in abusive conduct. However, no formal allegations were made or remedies sought.

(c) 726 Group

[205] The 726 Group did not separately address any contention that its behaviour was clearly abusive of the market and investors. We are confident that the 726 Group did not consider its acknowledgement of a single late filing could be considered clearly abusive. The 726 Group did assert that DIRTT itself ought to be rebuked for its conduct in breaching s. 221.1 of the Act by putting information before the ASC which was "materially misleading, untrue, or omit[ted] facts necessary to make the statement not misleading".

(d) Staff

[206] Staff submitted that, although the panel had the jurisdiction to grant orders if it were to find clearly abusive conduct by the Respondents, this would not be appropriate in the present case if we were to find instances only of late disclosure. Such late filings would typically be treated by Staff as compliance matters, not through enforcement proceedings. Staff noted that DIRTT was the party which appeared to be taking advantage of Staff's investigative process and appeared to be trying to use the ASC's process as part of DIRTT's defensive tactics in the context of a private dispute with its largest shareholders.

2. Discussion: Alleged Clearly Abusive Conduct

[207] The Respondents did not engage in any clearly abusive conduct.

[208] DIRTT's Joint Actor Allegations failed because the Respondents were not acting jointly or in concert. They did not hide any agreement, understanding, or commonality of interest because no such relationship existed between them. The 22NW Group and the 726 Group were independent of each other during the course of their DIRTT investments at issue.

[209] We also reject any contention DIRTT may have been making that the Early Warning Allegations alone would warrant a finding that the Respondents were acting in a clearly abusive manner – had the Early Warning Allegations all been upheld, we would still not have found such contraventions to be clearly abusive behaviour by the Respondents.

3. Conclusion: Alleged Clearly Abusive Conduct

[210] We concluded that the Respondents' conduct was not clearly abusive of DIRTT investors or the capital market in general. Making orders against the Respondents on that basis would be unfair to the Respondents, unfair to DIRTT investors and the Alberta capital market, and an inappropriate exercise of our public interest jurisdiction. Such orders could also lead to a chilling effect on investors – they may become reluctant to invest in a company or criticize its management for fear of being attacked for abusive conduct merely because another investor's approach had similar timing or raised similar concerns.

[211] Here, only DIRTT's conduct raised public interest concerns. It was evident that as soon as the Requisition was made, the DIRTT Board took steps to thwart the Requisition and to tar those involved with both the 22NW Group and the 726 Group. Even in the complaint letters to the ASC, DIRTT referred to those two as "the Joint Actors", and DIRTT continued using that nomenclature before this panel.

D. Remedies

1. Remedies Sought

[212] DIRTT sought the Take-Over Bid Order and the Public Interest Orders.

2. Joint Actor Allegations and Remedies

[213] We found that the Respondents did not act jointly or in concert, which disposed of the Joint Actor Allegations and all orders sought in connection with those.

3. Early Warning Allegations and Remedies

(a) Early Warning Contraventions Found

[214] The 22NW August 2021 AMR and the 726 January 2021 AMR were each approximately one month late and each referred to an incorrect date.

[215] We did not reach a conclusion on DIRTT's allegation that the 22NW October 2021 AMR was late regarding English's intention to change the DIRTT Board. Our rationale was that a remedy would not have been appropriate, even had we upheld that allegation. It would have been inappropriate for the same reason set out below relating to the two early warning contraventions we did find.

(b) Remedies for Early Warning Contraventions Found

[216] The two filings for which we made findings were late and erroneously stated the respective purchase date of Shares.

[217] Although disclosure is a cornerstone principle of our securities regulatory system, the context and materiality of that disclosure – and failures to make such disclosure in accordance with regulatory deadlines – are important. Here, each disclosure filing was made approximately one month late, in January 2021 (by the 726 Group) and in August 2021 (by the 22NW Group).

[218] We agreed with Staff that late disclosure in those circumstances would typically be a matter for compliance communications between ASC corporate finance staff and the filer. These types of disclosure errors would not generally be addressed in an enforcement context. Further, the scheduled DIRTT shareholders' meeting was April 26, 2022. All DIRTT shareholders (and the public) had access to full disclosure of 22NW's, English's, 726's, and Noll's ownership of DIRTT Shares – as well as English's intention to change the composition of the DIRTT Board – for many months before that meeting.

[219] Therefore, we also agreed with Staff that the appropriate treatment for the two contraventions here is similar to what occurred in *Re Osum Oil Sands Corp.*, 2021 ABASC 81. There, the panel held that certain information could not have been disclosed because it was unavailable. The panel also concluded that, if that information had been available, the failure to disclose it at a certain time would not have attracted a remedial order because there was no harm to the shareholders – all of the information was later disclosed in a bid circular, which gave those shareholders sufficient time to assess the information before making their decisions regarding the bid.

[220] We concluded here that the inaccurate and late 726 January 2021 AMR and 22NW August 2021 AMR filings were not properly the subject of orders under s. 198 of the Act.

VIII. CONCLUSION

[221] DIRTT did not establish any grounds for us to issue the Take-Over Bid Order or Public Interest Orders, and we therefore dismissed the Application.

March 17, 2023

For the Commission:

"original signed by"
Tom Cotter

"original signed by"
Kari Horn