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Securities
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IN THE MATTER OF ESW CAPITAL, LLC

-and-

IN THE MATTER OF OPTIVA INC.

**REASONS FOR DECISION
(Section 104 of the *Securities Act*, RSO 1990, c S.5)**

Hearing:	September 10 and 11, 2020	
Decision:	February 23, 2021	
Panel:	Timothy Moseley Wendy Berman Frances Kordyback	Vice-Chair and Chair of the Panel Vice-Chair Commissioner
Appearances:	Yvonne Chisholm Naizam Kanji Jason Koskela	For Staff of the Commission
	Steve Tenai Hansen Wong	For ESW Capital, LLC
	Robert Staley Nathan Shaheen Richard Swan Kristopher Hanc	For Optiva Inc.
	Andrew McCoomb Elana Friedman	For Maple Rock Capital Partners
	Paul Steep Graham Gow Anu Koshal	For EdgePoint Investment Group Inc.

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REASONS FOR DECISION

I. OVERVIEW

- [1] These reasons relate to an application for exemptive relief in connection with a contested proposed take-over bid by a control block shareholder. We dismissed the application.
- [2] On July 27, 2020, ESW Capital, LLC announced its intention to proceed with an all-cash offer to acquire any and all of the outstanding subordinate voting shares of Optiva Inc. (the **Voting Shares**) at a price of \$60 per share conditional upon, among other things, ESW successfully obtaining exemptive relief from the Commission, and certain other customary conditions (the **Proposed Offer**).
- [3] The Proposed Offer was made in the midst of an ongoing control battle related to competing strategic visions for Optiva among three control block shareholders: ESW, holding approximately 28% of the Voting Shares, Maple Rock Capital Partners, holding 22.4%, and EdgePoint Investment Group, holding 18.1%.
- [4] The Proposed Offer was subject to the mandatory minimum tender requirement in Ontario securities law which would require that at least 50% of the total outstanding Voting Shares not under the control of ESW be tendered before any take-up by ESW. The minimum tender requirement cannot be waived by ESW.
- [5] Neither Maple Rock nor EdgePoint supports the Proposed Offer. Each announced its intention not to tender to the bid. In such circumstances, the Proposed Offer cannot proceed unless ESW obtains exemptive relief to exclude Maple Rock's and EdgePoint's shareholdings from the minimum tender requirement.
- [6] On August 6, 2020, ESW applied for that exemptive relief (the **Requested Exemption**) under subsection 104(1) of the *Securities Act*¹ (the **Act**). At the suggestion of Staff of the Ontario Securities Commission, ESW did not commence a formal take-over bid pending the disposition of its application.
- [7] The minimum tender requirement is part of recent material amendments to the take-over bid regime designed to address the risks of coercion by facilitating collective shareholder decision-making. Any request for exemptive relief from the minimum tender requirement raises fundamental issues regarding the protection of shareholder choice and the integrity of the bid environment. Such a request must be considered in light of the recalibrated control dynamics among the bidder, the target and control block shareholders in the bid regime.
- [8] The main issue in this application is whether the Requested Exemption would be prejudicial to the public interest. Resolving this question requires an assessment of the circumstances of the proposed bid, the target, the bidder and the control block shareholders to determine whether excluding the control block shareholdings from the minimum tender requirement would be necessary to facilitate shareholder choice and to ensure a fair, open and even-handed bid environment.

¹ RSO 1990, c S.5

- [9] After hearing submissions from the parties on September 10 and 11, 2020, we reserved our decision. On September 14, we issued an order dismissing the application for reasons to follow. These are our reasons.
- [10] In summary, there were no exceptional circumstances or abusive or improper conduct that undermined minority shareholder choice to warrant intervention by the Commission. Predictability is an important aspect of take-over bid regulation and the Commission must be cautious in granting exemptive relief that alters the recently recalibrated bid regime.

II. BACKGROUND

A. Parties

- [11] Optiva provides customer support software solutions for telecommunications companies. Optiva is a reporting issuer in each of the provinces of Canada. Its Voting Shares are listed on the Toronto Stock Exchange.
- [12] ESW, a private company based in Texas, invests in software companies. ESW, together with its affiliates (collectively referred to below as **ESW**) owns or controls approximately 28% of the Voting Shares. It also owns or controls share purchase warrants (the **Warrants**), which if exercised would result in ESW owning, in aggregate, approximately 39% of the issued and outstanding Voting Shares. ESW also had ownership or control over 800,000 Series A preferred shares of Optiva (the **Preferred Shares**) from January 2017 until the redemption of the Preferred Shares by Optiva on July 20, 2020.
- [13] Maple Rock is an investment firm based in Toronto. It invests in companies on behalf of various discretionary accounts that it manages. Maple Rock controls approximately 22.4% of the Voting Shares. Maple Rock also holds approximately US\$22.8 million in secured debentures issued by Optiva in July 2020 (described and defined below).
- [14] EdgePoint is an investment management company based in Toronto. It provides discretionary portfolio management services to, and invests on behalf of, several mutual funds. EdgePoint controls approximately 18.1% of the Voting Shares. EdgePoint also holds approximately US\$55 million in secured debentures issued by Optiva.

B. Optiva shareholder and Optiva board control dynamics

- [15] Since 2018, Optiva has had three control block shareholders: ESW, Maple Rock and EdgePoint. By January 2020, they collectively controlled approximately 68.5% of the Voting Shares.
- [16] ESW initially invested in Optiva in 2016, acquiring an 11.5% shareholding. In September 2017, ESW increased its shareholding to approximately 28% through a rights offering at an acquisition cost of approximately US\$23 million.
- [17] ESW also provided equity financing of US\$83.2 million to Optiva through the acquisition of the Preferred Shares and the Warrants (the **Preferred Share Financing**), pursuant to the terms of a subscription agreement dated December 18, 2016 (the **Subscription Agreement**). The terms of the Preferred Shares, as contained in Optiva's articles of incorporation and the Subscription Agreement, included the right to elect a majority of the board of directors of Optiva for as long as the Preferred Shares are outstanding.

- [18] Following the Preferred Share Financing in 2016 and until the Preferred Shares were redeemed on July 20, 2020 (as described more fully below), ESW elected a majority of Optiva's directors, being four members (the **Preferred Directors**) of the seven-member board.
- [19] After the Preferred Share Financing, Maple Rock and EdgePoint began to acquire Voting Shares for the various discretionary accounts and/or funds they managed. By January 2020, they had acquired approximately 22.4% and 18.1% of the Voting Shares, respectively.
- [20] In October 2017, Robert Stabile was appointed to Optiva's board at the recommendation of Maple Rock. Stabile is currently the chair of Optiva's board and the chair of the Special Committee (described and defined below).
- [21] At the time of the Proposed Offer, Maple Rock and EdgePoint together controlled approximately 40.5% of the Voting Shares. ESW controlled approximately 28% of the Voting Shares.

C. Optiva control battle

- [22] ESW, Maple Rock and EdgePoint have been engaged in a public and often hostile battle regarding the strategic direction and governance of Optiva.
- [23] Beginning in the spring of 2019, Optiva began to accelerate its cloud-based business strategic plan. It discussed this plan and associated funding needs with the three control block shareholders. Optiva also discussed a proposal to divest an asset to ESW.
- [24] Maple Rock and EdgePoint (each of which held more than 10% of Optiva by this point) expressed concerns regarding certain strategic, governance and operational aspects of Optiva, including the proposed asset sale and funding proposal. Each also began to seek formal board representation rights through various proposals in 2019 and 2020.
- [25] Maple Rock and EdgePoint had direct discussions with each other regarding their concerns. In April 2019, they jointly submitted a debt financing proposal to Optiva to partially address its funding needs. Maple Rock also indicated to Optiva its willingness to provide debt or equity financing. EdgePoint made a separate equity financing proposal to Optiva of up to \$50 million.
- [26] Optiva did not proceed with the proposed asset sale to ESW, nor with the debt or equity financing proposals.
- [27] On January 20, 2020, Optiva publicly announced its plan to accelerate investment in cloud-based innovation initiatives and to raise up to US\$100 million to fund this plan.
- [28] Neither Maple Rock nor EdgePoint was supportive of Optiva's announced plans. The day after the announcement, EdgePoint expressed concerns in a letter to the Optiva Board regarding Optiva's governance, accelerated strategic plan and the quality and accuracy of the associated financial projections. The following day, Maple Rock expressed similar concerns in an open letter to Optiva's board.
- [29] On January 24, 2020, Maple Rock commenced a proxy contest. It sought to reconstitute Optiva's board by replacing two directors with its own nominees. It also sought to put forward an advisory resolution requesting that Optiva's board establish a special committee to explore strategic alternatives.

- [30] In response to Maple Rock's requisition, Optiva's board called an annual general and special shareholder meeting for May 12, 2020. The meeting was later postponed due to the COVID-19 pandemic. A shareholder meeting was ultimately held on August 18, 2020 (the **Shareholder Meeting**).
- [31] ESW responded to Maple Rock's statements and the proxy contest in an open letter. In that letter, ESW invited Maple Rock and EdgePoint to acquire ESW's control position for US\$200 million and indicated that otherwise, ESW supported Optiva's strategic plan.

D. Preferred share redemption and reconstituted Optiva board

- [32] From May 2020 to June 2020, Optiva, ESW, Maple Rock and EdgePoint engaged in discussions and negotiations for the purchase of the Preferred Shares by Maple Rock and/or EdgePoint or a consensual redemption by Optiva. Various proposals were exchanged and discussed but ultimately these negotiations were unsuccessful.
- [33] On June 26, 2020, and following the breakdown of the negotiations for the sale or consensual redemption of the Preferred Shares, ESW advised Optiva's board that the ongoing relationship was untenable. ESW also advised that, among other things, it would either reduce its involvement (including ceding board control and reducing its operational involvement) or it would acquire and run Optiva. ESW provided a preliminary non-binding indicative offer to acquire all of the Voting Shares for \$30 per share (the **Indicative Offer**).
- [34] Later that day, Optiva announced a US\$90 million debenture offering of 9.75% secured payment-in-kind toggle debentures due 2025 (the **Debentures**) backstopped by Maple Rock and EdgePoint. The proceeds of the debenture financing were to be used to fund the redemption of the Preferred Shares for US\$91.4 million.
- [35] The debenture financing was fully subscribed and together with the preferred share redemption closed on July 20, 2020. EdgePoint and Maple Rock acquired US\$55 million and US\$22,755,000 of the Debentures, respectively.
- [36] Concurrent with the debenture financing and the preferred share redemption, Optiva entered into agreements with EdgePoint and Maple Rock that provided certain board nomination rights. The agreements provided that each of Maple Rock and EdgePoint could nominate:
- a. two directors as long as it exercised control or direction over at least 12.5% of the Voting Shares;
 - b. one director if it owned at least 7.5% but less than 12.5% of the Voting Shares; and
 - c. no directors if it owned less than 7.5%.
- [37] At the Shareholder Meeting on August 18, 2020, eight directors were elected to Optiva's board, including two Maple Rock nominees and two EdgePoint nominees. The remaining four directors were mutually agreed among Maple Rock, EdgePoint and a committee of Optiva's independent directors. Maple Rock and EdgePoint had agreed with each other to vote in favour of all eight proposed nominees, and did so.

[38] ESW ceased to have any representation on Optiva's board following the Shareholder Meeting.

E. ESW challenges debenture financing and preferred share redemption

[39] On July 13, 2020, ESW commenced a court proceeding before the Ontario Superior Court of Justice (Commercial List), in which it sought various remedies, including an order setting aside the Debentures (the **Court Proceeding**). ESW challenged the debenture financing both in terms of the propriety of the corporate process and its compliance with the terms of Optiva's articles of incorporation and the Subscription Agreement. In particular, ESW alleged that the debenture financing offended the requirement in the articles of incorporation that any financing to fund the redemption of the Preferred Shares be on terms more favourable from a financial point of view to Optiva than the terms and conditions of the Preferred Shares.

[40] The Court Proceeding was scheduled to be heard in October 2020, after the hearing of this application. ESW advised us that it was not seeking any findings or relief from the Commission relating to the legal propriety of the debenture financing or the preferred share redemption and that these matters were before the court.

F. ESW's proposed offer to acquire Optiva

[41] On June 29, 2020, shortly following Optiva's announcement of the debenture financing and the preferred share redemption, ESW reiterated to Optiva's board its interest in acquiring Optiva. It advised of a revised price of \$60 per Voting Share (the **Preliminary Proposed Offer**).

[42] In response, Optiva's board established a special committee of independent directors (the **Special Committee**) with a mandate to review and consider the Preliminary Proposed Offer and alternatives to that offer and to oversee the preparation of a formal valuation of the offer. The Special Committee comprised two members: Stabile, who was first appointed to Optiva's board on Maple Rock's recommendation, and Andrew Day, a nominee of Maple Rock.

[43] The Special Committee engaged legal advisors and responded to ESW on July 4, 2020. It questioned whether ESW was acting in good faith. It requested additional information from ESW before proceeding with any further steps.

[44] ESW responded to certain information requests. It declined to respond to others on the basis that such information was confidential and beyond what a bidder would typically disclose to a target.

[45] In particular, ESW confirmed that the offer price was in Canadian dollars and that the Preliminary Proposed Offer was an offer for all of the issued and outstanding Voting Shares. ESW declined to provide information related to, among other things, its discussions with any Optiva shareholder about the Preliminary Proposed Offer and the basis on which such offer could be completed if not supported by either Maple Rock or EdgePoint.

[46] As any bid by ESW would be an insider offer, a formal valuation was required in accordance with Multilateral Instrument 61-101 *Protection of Minority Security Holders in Special Transactions* (**MI 61-101**). The Special Committee and ESW engaged in a lengthy exchange of communications regarding the selection of a

valuator. That exchange included disputes regarding the timeline for the selection of the valuator, and the reasonable fee range, among others. Ultimately, the Special Committee selected a valuator on or about July 20, 2020, and ESW undertook to pay, and did deposit in trust, the valuator's fees.

- [47] Shortly after these dealings, ESW decided not to pursue a friendly bid. On July 27, 2020, ESW announced the Proposed Offer, being its intention to acquire any or all of the Voting Shares it did not already own, for \$60 per share in cash. The Proposed Offer was conditional upon ESW successfully obtaining exemptive relief from the minimum tender requirement, and contained certain other customary conditions.
- [48] The offer price of \$60 per Voting Share represented a 122% premium to the 20-day volume-weighted average price and a 92% premium to the 10-day closing high. Stabile, the chair of Optiva's board and of the Special Committee, acknowledged that the bid price represented an "extraordinary premium".

G. Events after the proposed offer

- [49] On July 27, 2020, the same day as the Proposed Offer, Optiva adopted a tactical shareholder rights plan with immediate effect (the **Shareholder Rights Plan**). Optiva also announced, among other things:
- a. the formation of the Special Committee;
 - b. the adoption of the Shareholder Rights Plan; and
 - c. its continuing concerns regarding ESW's intentions and conduct, including ESW's refusal to answer various enquiries about the Proposed Offer and certain other unspecified actions.
- [50] The Shareholder Rights Plan was ratified and approved by a majority of shareholders (51.87%) at the Shareholder Meeting. ESW voted against the Shareholder Rights Plan.
- [51] The Shareholder Rights Plan would prevent the Proposed Offer from proceeding even if an exemption from the minimum tender requirement were to be granted, absent a waiver by Optiva's board or a cease trade order by the Commission.
- [52] On the same day as the Proposed Offer, EdgePoint announced that it did not intend to tender its Voting Shares to the Proposed Offer and that it had no interest in pursuing discussions with ESW regarding any such possible transaction. Maple Rock made a similar announcement the following day.
- [53] On August 11, 2020, the Special Committee invited ESW to engage in discussions regarding a potential friendly bid at a "price to be mutually agreed between ESW and Optiva, subject to specified conditions". In response, ESW indicated its willingness to have discussions but advised that it had already made its highest and best offer.
- [54] There was no evidence before us of any other efforts by the Special Committee or Optiva relating to the Proposed Offer, including any other efforts to have discussions or negotiations with ESW, to explore strategic alternatives or to commence an auction process.

H. Order sought by ESW

- [55] ESW seeks the Requested Exemption, which as described above is an order granting relief from the minimum tender requirement, to permit it to take up the Voting Shares deposited under the Proposed Offer upon over 50% of the Voting Shares having been deposited and not withdrawn, excluding the Voting Shares beneficially owned, or over which control or direction is exercised, by Maple Rock or EdgePoint or by any person acting jointly or in concert with either of them.

III. PRELIMINARY ISSUE

A. Requests for intervenor status

- [56] Rule 21(4) of the *Ontario Securities Commission Rules of Procedure and Forms*² provides that, on motion, a panel may grant a person or company who is not a party to a proceeding intervenor status to participate in all or part of the proceeding on such terms as the panel considers appropriate.
- [57] Prior to the hearing of this application, each of Maple Rock and EdgePoint filed a motion seeking the right to participate fully in the proceeding, including the right to adduce evidence, to cross-examine and to make submissions.
- [58] ESW opposed Maple Rock's and EdgePoint's requests to participate fully. However, ESW did not oppose our granting them a limited right to adduce evidence and make submissions about the allegations concerning their conduct that were contained in the application, and about the impact on them of the relief sought.
- [59] Optiva and Staff supported Maple Rock's and EdgePoint's requests for the right to participate fully.
- [60] On August 21, 2020, we heard submissions regarding the requests for intervenor status. We decided to allow both Maple Rock and EdgePoint to participate fully in the hearing of ESW's application. The following are our reasons for that decision.
- [61] Requests by non-parties for rights of participation commonly arise in bid-related proceedings before the Commission. The parties and the Commission have often referred to "Torstar standing" or "modified Torstar standing" (as a consequence of the Commission's 1985 decision in *Re Torstar*³) to describe full participation rights and limited participation rights, respectively. As we indicated at the hearing of Maple Rock's and EdgePoint's motions, we prefer to speak explicitly about specific rights of participation rather than continue to use the "Torstar" label, which, in our view, obscures rather than clarifies the rights at issue.
- [62] The Commission has previously granted broad rights of participation in bid-related proceedings, given the nature of such proceedings. The Commission has granted full participation rights to shareholders where it determined that they had a direct financial or other substantial interest in the outcome of the application, and determined that they would make a useful or unique contribution without prejudicing the parties or impairing the efficiency of the proceedings.⁴

² (2019) 42 OSCB 9714

³ (1985) 8 OSCB 5067

⁴ *Eco Oro Minerals Corp (Re)*, 2017 ONSEC 23, (2017) 40 OSCB 5321; *Hollinger (Re)*, (2006) 29 OSCB 7071 at paras 44 – 45, citing *Albino (Re)*, (1991) 14 OSCB 365 at 425-426

- [63] Maple Rock and EdgePoint are significant shareholders and debtholders of Optiva. They have a direct and substantial interest in this application, because if we were to grant the requested relief, the shares they own or control would be excluded from the minimum tender requirement.
- [64] In addition, some of the evidence that ESW filed in support of its application relates to the alleged conduct and intentions of both Maple Rock and EdgePoint. Maple Rock and EdgePoint are uniquely positioned to provide evidence and to respond to those matters and thereby assist us in considering ESW's application.
- [65] Importantly, Maple Rock and EdgePoint undertook to: (i) coordinate with counsel for the parties to avoid duplication and ensure efficiency; and (ii) comply with any directions from the Commission regarding the conduct of this proceeding, including any timetable.
- [66] Finally, this application involves novel issues, as it is the first instance in which the Commission is being asked to provide relief from the minimum tender requirement under the bid regime.
- [67] We therefore decided that Maple Rock and EdgePoint would likely provide a useful contribution to our understanding of the issues in this application without impairing the efficiency of the proceedings or causing prejudice to the parties. Full rights of participation were appropriate.

IV. ANALYSIS

A. Introduction

- [68] We turn now to our analysis of the principal question raised by ESW's application. Should ESW, in making the Proposed Offer, be permitted to exclude from the minimum tender requirement the Voting Shares beneficially owned, or over which control or direction is exercised by, Maple Rock and EdgePoint and any persons acting jointly or in concert with either of them?

B. Exemptive relief under the bid regime

- [69] The Commission may grant exemptive relief from the minimum tender requirement under s. 104(2)(c) of the Act if the Commission is satisfied that to do so would not be prejudicial to the public interest. ESW bears the onus of so satisfying the Commission.⁵
- [70] Applications in the context of take-over bids are most commonly made after a bid has been formally commenced. However, the Commission may grant exemptive relief prior to the launch of a formal take-over bid.⁶
- [71] In our view, a formal commencement of the Proposed Offer and delivery of a take-over bid circular to shareholders before the disposition of the application risked perpetuating market uncertainty about the viability of the bid and risked an associated prejudicial impact on the market price of Optiva's shares. We therefore determined that it was appropriate to consider ESW's application before a formal offer was made.

⁵ *Certain Directors, Officers and Insiders of Hollinger Inc et al*, 2005 ONSEC 4, (2005) 28 OSCB 3309 at para 42

⁶ *Macdonald Oil Exploration Ltd (Re)*, (1999) 22 OSCB 6452 at paras 50-53; *Canadian First Financial Group Inc (Re)*, (2002) 25 OSCB 3180

C. The law and policy governing the bid regime

- [72] The core purpose of take-over bid regulation is to protect the good faith interests of target shareholders by facilitating shareholder choice and ensuring fairness to shareholders. A secondary objective is to ensure that take-over bids proceed in an open and even-handed environment.⁷
- [73] In 2016, significant amendments to the bid regime were implemented across Canada. These amendments were designed to enhance the quality and integrity of the take-over bid environment and represented a material rebalancing of bid dynamics.⁸
- [74] All non-exempt bids are now subject to the minimum tender requirement and to a mandatory 10-day bid extension period following the satisfaction of the minimum tender requirement and the satisfaction or waiver of all other conditions. Before the amendments, any minimum tender condition was waivable by the bidder.
- [75] In particular, the minimum tender requirement under s. 2.29.1(c) of National Instrument 62-104 *Take-Over Bids and Issuer Bids* prohibits an offeror from taking up securities under a bid unless more than 50% of the outstanding securities of the class that is subject to the bid, excluding securities beneficially owned, or over which control or discretion is exercised, by the offeror or any person acting jointly or in concert with the offeror, have been deposited under the bid and not withdrawn.
- [76] The minimum tender requirement and the 10-day extension requirement were designed to address coercion concerns under the prior bid regime by facilitating the ability of shareholders to make voluntary, informed and co-ordinated tender decisions.
- [77] The Canadian Securities Administrators (the **CSA**) described the objective of these amendments as allowing for collective decision-making by security holders in a manner comparable to a shareholder vote on a bid. The CSA anticipated that the new bid regime might result in higher quality bids to win the support of the majority of independent security holders.⁹
- [78] The CSA recognized the potential for enhanced leverage for control block holders as a consequence of the minimum tender requirement and determined that this could be adequately addressed through exemptive relief. The CSA declined to provide guidance on the circumstances in which the CSA would be likely to grant exemptive relief, since all considerations of exemptive relief are based on unique fact circumstances.¹⁰

⁷ National Policy 62-202 *Take-Over Bids - Defensive Tactics*, s.1.1; *Hecla Mining Company (Re)*, 2016 ONSEC 31, (2016) 39 OSCB 8927 (***Hecla Mining Company***) at paras 74 -75

⁸ *Amendments to Take-Over Bid Regime*, (2016) 39 OSCB (Supp-1) (***Amendments to Take-Over Bid Regime***) at 2

⁹ *CSA Notice and Request for Comment – Proposed Amendments to Multilateral Instrument 62-104 Take-Over Bids and Issuer Bids; Proposed Changes to National Policy 62-203 Take-Over Bids and Issuer Bids; and Proposed Consequential Amendments*, OSC CSA Notice (31 March 2015), *Anticipated Impact of Proposed Bid Amendments*

¹⁰ *Amendments to Take-Over Bid Regime* at Annex B, Part 1, Item A1

D. Application of the law and policy

1. Introduction

- [79] This is the first matter in which a Canadian securities regulator has been asked to grant exemptive relief from the minimum tender requirement adopted as part of the amendments to the bid regime.
- [80] In 2018, the Commission considered the first application for exemptive relief from the mandatory minimum bid period adopted as part of the amendments to the bid regime. In its decision (*Aurora Cannabis Inc. (Re)*¹¹), the Commission emphasized the importance of predictability of take-over bid regulation, in order to ensure that investors and market participants know with reasonable certainty what rules govern the bid environment. We repeat and emphasize that objective in this context as well.
- [81] The minimum tender requirement is part of a material recalibration of bid dynamics designed to facilitate collective shareholder action. The Commission must be cautious in granting exemptive relief that alters these recalibrated control dynamics among the bidder, the target and control block holders. The Commission should not intervene absent exceptional circumstances or clear improper or abusive conduct by the target, bidder or control block holders that undermines minority shareholder choice.
- [82] Such caution promotes the integrity of the bid regime. It does so by ensuring a clear and predictable framework, while still allowing for intervention to address circumstances that unfairly deny shareholder choice and to deter the target and other stakeholders from engaging in abusive tactics.
- [83] The public interest discretion ensures the flexibility necessary to address any particular circumstances that offend the animating principles of the bid regime.
- [84] Consideration of the public interest in the context of an exemptive relief application requires that we carefully review the legal and factual considerations through the lens of the underlying objectives and principles of take-over bid regulation. Such assessment may include reference to the following factors, among others:
- a. the nature and circumstances of the bid;
 - b. the control dynamics of the target (both pre-existing control dynamics and any changes to the control dynamics);
 - c. the impact of a grant or denial of exemptive relief on shareholders;
 - d. the conduct of the control block holders and any special or differing interests or stake in the outcome of the bid;
 - e. the conduct of the target and its board;
 - f. the conduct of the bidder; and
 - g. any other information indicating the views of the target shareholders with respect to the bid.
- [85] We will address each of these in turn.

¹¹ *Aurora Cannabis Inc (Re)*, 2018 ONSEC 10, (2018) 41 OSCB 2325 at para 73

2. Nature and circumstances of the Proposed Offer

- [86] The Proposed Offer is an all-cash proposed bid for all Voting Shares at a premium to the prevailing market price. On its face, the Proposed Offer is not structurally coercive. We must therefore assess whether other circumstances create a risk of shareholder coercion.
- [87] Maple Rock and EdgePoint submit that the Proposed Offer was financially inadequate and opportunistic. Together with Optiva, they argue that the Proposed Offer was tactically motivated to enhance ESW's control over Optiva.
- [88] Whether a bid would be financially inadequate or opportunistic is a matter for Optiva's shareholders to decide, provided they receive adequate information. No issue was raised regarding the adequacy of information that would be available to Optiva shareholders. In that regard, we note that the Proposed Offer, as an insider bid, would entail enhanced financial value disclosure through the requirement of an independent formal valuation in accordance with MI 61-101.
- [89] Optiva submits that we should question ESW's intentions. Optiva says that ESW's conduct, including its failure to make a formal offer, its failure to move "with dispatch"¹² to facilitate an independent valuation, and its refusal to respond to certain queries of the Special Committee, showed ESW's lack of good faith.
- [90] We disagree with Optiva's submission that ESW did not proceed expeditiously. ESW refrained from making a formal bid because of Staff's concerns that doing so, and delivering a take-over bid circular to shareholders, prior to the grant of the required exemptive relief could perpetuate market uncertainty and have a prejudicial impact. In our view, ESW acted appropriately.
- [91] As for the retention of a valuator, there appears to be a genuine disagreement between Optiva and ESW regarding the steps taken and not taken. In any event, ESW provided an undertaking to pay the valuator's fees, and it paid these fees into trust. Accordingly, we do not find that the dealings between ESW and the Special Committee regarding the retention of a valuator cast doubt on ESW's good faith intentions related to its proposed bid.
- [92] Similarly, we do not find that ESW's refusal to respond to various queries provides a basis to challenge ESW's good faith. ESW did respond when asked whether the proposed bid was in US or Canadian dollars, and when asked whether the bid would indeed be a bid for all shares. We consider the remaining queries, and ESW's refusal to respond, to be inconsequential and a part of the tactical play common in hostile bids.
- [93] Optiva persisted in its submission that ESW's real intention was to make a partial bid to enhance its control over Optiva.
- [94] We do not accept this submission. The Proposed Offer was for all Voting Shares. ESW provided clear and unequivocal evidence to support its intention in this regard. There was no evidence to suggest that the Proposed Offer was, in effect, or otherwise intended to amount to, a partial bid.
- [95] ESW had a significant investment in Optiva and a clear interest in its financial growth and in the development of its business. ESW held differing views from those of the other controlling shareholders regarding Optiva's strategic direction,

¹² Written submissions of Optiva at para 146

operations and governance. ESW sought to overcome the control battle with Maple Rock and EdgePoint either by buying Optiva or by being bought out. ESW ultimately proposed a bid to acquire Optiva after negotiations for the purchase of its interest were unsuccessful.

- [96] We find that ESW's conduct was consistent with a genuine intention to proceed with a formal all-cash bid for all Voting Shares. The evidence fell short of demonstrating any bad faith or improper motivation on the part of ESW, such as an attempt to entrench its control over Optiva or an intention to make a partial bid.
- [97] The nature and circumstances of the Proposed Offer raised no shareholder protection concerns.

3. Control dynamics of Optiva

- [98] ESW, Maple Rock and EdgePoint have been engaged in a public and often hostile battle regarding the governance, operations and strategic direction of Optiva since at least January 2020. Maple Rock and EdgePoint have been vocal about their concerns regarding the governance, strategy and operations of Optiva since early 2019.
- [99] Against that background, we first review the shareholder control dynamics, and then review the Optiva board control dynamics. We conclude that those dynamics, on their own, do not warrant the grant of exemptive relief.

(a) Shareholder control

- [100] The current shareholder control dynamics at Optiva pre-date the Proposed Offer.
- [101] This matter does not involve a tactical share issuance or any accumulation, dilution or other alteration of shareholder control in anticipation of, or during, a bid and accordingly does not engage the abuse issues present in previous Canadian securities commission decisions such as *Hecla Mining Company* or *Red Eagle*.¹³
- [102] ESW, Maple Rock and EdgePoint, Optiva's three control block shareholders, all accumulated their positions in Optiva well before the Proposed Offer in July 2020 and even before the Indicative Offer in June 2020. Each control block shareholder held more than 10% of Optiva's shares for at least two years before the Proposed Offer. All became shareholders of Optiva after the amendments to the bid regime.
- [103] ESW has held approximately 28% of the Voting Shares since September 2017. Maple Rock has held more than 10% since June 2017, with total holdings of 22.4% since June 2019. EdgePoint has held more than 10% since May 2018, with total holdings of 18.1% since January 2020. Collectively, the three entities controlled approximately 68.5% of the Voting Shares.
- [104] These control dynamics were evident to the remaining minority shareholders when those shareholders acquired or held their positions. It would have been apparent that for any take-over bid to succeed, the bid would require acceptance by two or more of the control block shareholders. It would also have been apparent that such control dynamics created limited liquidity for their shares.

¹³ 2015 BCSECCOM 401

[105] These same control dynamics were evident to ESW when it provided the Indicative Offer, the Preliminary Proposed Offer and the Proposed Offer.

(b) Optiva board control

[106] Until July 2020, ESW elected the majority of the Optiva board. It thus exercised significant control and influence over Optiva.

[107] After the August 2020 Shareholder Meeting, Maple Rock and EdgePoint together had significant board representation, along with the associated control and influence over Optiva. In particular, Maple Rock and EdgePoint nominated two directors each, and agreed to vote for each other's nominees, with the remaining four nominees being mutually agreed among Maple Rock, EdgePoint and Optiva.

[108] ESW no longer had any Optiva board representation following the Shareholder Meeting.

[109] Investors with significant shareholdings often obtain board nomination or other governance rights that give those investors greater oversight over, control of and input into, corporate strategy and other matters. Where, as here, there is an ongoing dispute among controlling shareholders regarding the governance, operations and strategic direction of the company, efforts to obtain board representation often intensify and may culminate in more public efforts to obtain additional control and influence, such as a proxy contest.

(c) Conclusion regarding control dynamics

[110] These pre-existing control dynamics – that one or more shareholders held a potential blocking position and had certain board control and influence – are insufficient on their own to warrant our intervention even when coupled with the announced intention of two control block shareholders not to tender to the Proposed Offer.

[111] All shareholders, including significant or control block shareholders, are entitled to decide in their own interests whether and at what price they are willing to exit. Transparency of shareholder views of a bid, as happened here, may enhance informed shareholder choice and may contribute to improved overall bid quality.

[112] The amended bid regime materially altered the bid dynamics among the bidder, the target and control block holders. In implementing these amendments, Canadian securities regulators recognized that enhanced leverage for control block holders could result in bids not being made at all or shareholders being deprived of the ability to respond to a bid.

[113] The Optiva control dynamics, in light of this recalibration, do not on their own warrant our granting the Requested Exemption. The nature of the leverage held by Maple Rock and EdgePoint as a result of their shareholdings was explicitly contemplated as part of the amendments to the bid regime. Further, the involvement of significant shareholders in governance and strategic matters, including through board nomination rights, is not uncommon and may well facilitate enhanced shareholder value.

4. Impact of grant or denial of exemptive relief

[114] All parties argue that shareholder choice would be affected by the outcome of this application. Where the parties differ is whether granting exemptive relief

would positively or negatively affect shareholder choice. Our task is to weigh the risk that granting the requested exemptive relief would unfairly pressure Optiva shareholders to tender against the risk that denying the requested relief would unfairly limit shareholders' choice to tender.

- [115] ESW argues that the Proposed Offer allows the non-control block shareholders "to exit from being caught in the ongoing battle" at a premium.¹⁴ ESW submitted that exemptive relief would allow those shareholders to determine collectively the outcome of the bid, and that the risk of coercion is mitigated by the mandatory 10-day extension period following the satisfaction of conditions (which would include a minimum tender requirement modified by exemptive relief).
- [116] Optiva submits that if exemptive relief were to be granted, ESW could gain control without the uncoerced approval of a majority of shareholders, thereby effectively allowing ESW to make a partial bid. Optiva asserts that exemptive relief would be coercive to all shareholders, as it would force shareholders who did not support the Proposed Offer to either tender to the bid or risk being left holding even less liquid securities of an ESW-controlled Optiva.
- [117] Maple Rock and EdgePoint both submit that if the requested exemptive relief were granted, they would be forced to tender in order to avoid remaining in a company under greater ESW control. Both argue that the requested relief would unfairly deny their fundamental right to determine whether and at what price to exit.
- [118] ESW filed letters from four minority shareholders, collectively holding approximately 10%, who expressed support for the Proposed Offer and the exemptive relief. Three of these shareholders expressed concern about "being stuck in the middle" of the ongoing control battle among the three control block shareholders.
- [119] This evidence was of limited assistance given the pre-existing liquidity and control dynamics. In addition, the letters were unsworn statements, which are inherently less reliable than, for example, formal lock-up agreements or sworn statements.
- [120] Although the Proposed Offer is an all-cash bid for all Voting Shares at a premium to the prevailing market price, the Requested Exemption might create an environment in which ESW could obtain a blocking position of slightly less than 50%, assuming that a majority of the non-control block shareholdings are tendered and not withdrawn.
- [121] In these circumstances, Optiva minority shareholders - whether the minority of the non-control block shareholders or of all shareholders - may feel pressured to tender in order to avoid remaining in a company with such an enhanced control position and further reduced liquidity. The minimum tender requirement was implemented to address the potential for precisely that kind of coercion.
- [122] Further, and as outlined above, the non-control block minority shareholders acquired or held their positions with knowledge of the three control block shareholders, the associated limited Voting Share liquidity and the potential for control battles. Accordingly, the desire to exit the ongoing control battle is not, in

¹⁴ Written submissions of ESW at para 5

and of itself, a basis to grant the Requested Exemption and alter the recalibrated bid regime.

[123] In our view, the balance weighs in favour of denying the requested relief. The risk that a grant of exemptive relief would result in unfair pressure on the minority shareholders to tender for reasons unrelated to the quality of the bid outweighs any risk that a denial of exemptive relief would limit shareholders' choice to tender.

5. Improper or abusive conduct

(a) Introduction

[124] We turn now to consider whether there was improper or abusive conduct by any of the control block shareholders, the target, or the bidder, and if so, what impact that should have on the outcome of this application. We conclude that there was no conduct by any of the involved entities that would materially affect our decision.

(b) Conduct of control block shareholders and any differing interests in the outcome of the bid

[125] Improper conduct or abusive tactics by control block holders that undermines the bid process may warrant an exemption from the minimum tender requirement to ensure the fair treatment of shareholders and the integrity of the bid regime.

[126] For the reasons outlined below, the evidence fell short of demonstrating any abusive or improper conduct by Maple Rock or EdgePoint, or circumstances that could unfairly impede the bid.

[127] ESW asserts that various corporate developments resulted in two control block shareholders, Maple Rock and EdgePoint, having a different stake from other minority shareholders in the outcome of the Proposed Offer; namely, their control and influence over Optiva and their position as senior secured debtholders. ESW submits that Maple Rock and EdgePoint are motivated to block the Proposed Offer for reasons unrelated to the quality of the bid or their position as minority shareholders.

[128] In particular, ESW submits that Maple Rock and EdgePoint engaged in a course of conduct on a coordinated basis to:

- a. increase their control and influence over Optiva and to lessen and then eliminate ESW's control and influence;
- b. obtain status as significant senior secured lenders through the debenture financing, a special interest obtained without minority shareholder approval; and
- c. improperly use the minimum tender requirement as a "defensive tactic" to prevent the remaining minority shareholders from exercising their choice of whether to tender to the Proposed Offer.

[129] In response, Maple Rock and EdgePoint both state that they had no agreement, commitment or understanding with each other. They argue that they were not acting in concert, and that each of them sought and obtained greater influence over Optiva as a result of serious concerns regarding the strategy, governance and operations of Optiva. They note that they are fund managers with fiduciary

duties to the beneficial holders of the funds, and they submit that their separate refusals to accept the Proposed Offer reflect their legitimate views that the bid price is inadequate and that Optiva's future value would be enhanced without ESW's control.

- [130] The efforts of Maple Rock and EdgePoint to obtain representation on Optiva's board were initiated well before the Proposed Offer. Maple Rock sought increased representation and influence over Optiva initially in 2017, then again in 2019 (when its recommended nominee, Stabile, was appointed to Optiva's board) and in February 2020, when it commenced a proxy contest. EdgePoint also sought Optiva board representation in 2019 and 2020.
- [131] Negotiations regarding the debenture financing, preferred share redemption and associated nomination rights agreements began in early June 2020, before the Proposed Offer and the Indicative Offer. These agreements were concluded before the Proposed Offer.
- [132] Maple Rock and EdgePoint were aligned in their shared objective to change board control and to influence Optiva's governance, operations and strategic direction. That alignment is apparent from:
- a. EdgePoint's support of the proxy contest by Maple Rock in February 2020 to reconstitute Optiva's board by replacing two directors with nominees proposed by Maple Rock;
 - b. the regular communications between Maple Rock and EdgePoint, as acknowledged in EdgePoint's disclosures related to the proxy contest initiated by Maple Rock, that it was in "regular communication with Maple Rock and is supportive of better corporate governance";
 - c. Maple Rock and EdgePoint both ceasing to use the alternative monthly reporting system¹⁵ for their shareholdings in Optiva shortly following the initiation of the proxy contest, which reporting regime was available only to the extent they were not soliciting proxies relating to Optiva board elections or certain other transactions and/or they had no current intention of acquiring control of Optiva;
 - d. Maple Rock and EdgePoint's joint financing proposals to Optiva, and joint proposal and negotiation of the debenture financing, preferred share redemption and nomination rights agreements with Optiva; and
 - e. Maple Rock and EdgePoint's agreement to vote for each other's board nominees at the Shareholder Meeting.
- [133] Maple Rock and EdgePoint ultimately obtained significant board control and influence following the Shareholder Meeting. We accept that they may well be motivated to retain such control, given their shared view of the need for strategic, governance and operational changes.
- [134] Shareholders, including control block holders, may engage in coordinated efforts to effect a change of board control, including through voting agreements, in order to pursue their own financial interests as investors.

¹⁵ As contemplated in Part 4 of National Instrument 62-103 *The Early Warning System and Related Take-over Bid and Insider Reporting Issues*

- [135] There was no evidence to suggest that any of the coordinated efforts by these two control block shareholders related in any way to a shared objective or concerted effort to impede the Proposed Offer. Instead, the evidence demonstrates that these control block shareholders undertook the various transactions, obtained the governance rights and secured lender status, and engaged in the other conduct, all as part of the ongoing control battle and difference of views regarding the governance and strategic direction of Optiva.
- [136] The evidence also fell short of establishing any agreement, understanding or arrangement related to tendering or not tendering to the Proposed Offer. To be clear, commitments to tender or not to tender are not inherently objectionable. They are an established practice that can enhance the bid process.
- [137] Maple Rock and EdgePoint both provided evidence of their separate views regarding the inadequate bid price and their determinations to reject the Proposed Offer as fund managers with duties to the beneficial fundholders.
- [138] In our view, there is no basis to infer that either Maple Rock or EdgePoint engaged in any conduct to misuse its control block position to unfairly impede the Proposed Offer or that it otherwise controlled or influenced, or attempted to control or influence, Optiva's board or the Special Committee in respect of Optiva's response to the Proposed Offer.
- [139] As regards Maple Rock's and EdgePoint's status as senior secured lenders, there is no evidence to suggest that the Debenture terms created any unique or special rights for them beyond reasonable commercial terms typically contained in such debentures.
- [140] Had the Proposed Offer succeeded, neither Maple Rock nor EdgePoint would have suffered any detrimental financial outcome as secured lenders. The Debentures' change of control terms provided that Maple Rock and EdgePoint would remain debenture holders unless:
- a. they chose to accept a change of control offer from Optiva at 101% of the principal amount of the Debentures, plus accrued and unpaid interest; or
 - b. Optiva proceeded with a unilateral redemption with a make-whole payment.
- [141] In summary, the evidence falls short of demonstrating any conflicting or special interest or abusive or improper tactics by Maple Rock or EdgePoint to impede the Proposed Offer.

(c) Conduct of Optiva and its board

i. Introduction

- [142] Ensuring confidence in the integrity of the bid regime often requires the Commission to consider the conduct of boards of directors and special committees. This is so, despite the overlap with issues of corporate law that are scrutinized by Canadian courts.
- [143] We therefore turn now to consider the conduct of Optiva, its board and the Special Committee in relation to the Proposed Offer. We review each entity's

conduct separately, as well as together with that of Maple Rock and EdgePoint, as part of the overall circumstances.

[144] ESW submits that we ought to be concerned about that conduct in two respects.

[145] First, ESW challenges the composition and conduct of the Special Committee in responding to the Indicative Offer and the Proposed Offer and argues that this is part of the overall circumstances demonstrating unfair interference with the Proposed Offer. In particular, ESW questions:

- a. the independence of the Special Committee, as both its members are nominees of Maple Rock; and
- b. the Special Committee's adoption of the Shareholder Rights Plan, its failure to ensure timely selection of a valuator at a reasonable fee, and its failure to enter into any meaningful discussions with ESW.

[146] Secondly, ESW challenges the steps taken by Optiva to reduce or eliminate ESW's control and influence, including in coordination with Maple Rock and EdgePoint. ESW argues that such conduct unfairly impeded the Proposed Offer.

[147] We address each of these two concerns in turn.

ii. Composition and conduct of the Special Committee

[148] Although both members of the Special Committee were nominees of Maple Rock, there is no basis to conclude that they did not act in accordance with their duties, that they were motivated to impede the Proposed Offer, or that they were improperly influenced or directed by Maple Rock, EdgePoint or any other stakeholder in the performance of their duties.

[149] The Special Committee followed an independent process related to its consideration of the Proposed Offer, which included a robust mandate, the engagement of independent legal and financial advisors and the holding of separate meetings.

[150] ESW submits that the Shareholders Rights Plan should be considered as part of the course of conduct by Optiva to impede the Proposed Offer. ESW argues that the Shareholders Rights Plan was tactical and clearly designed to prevent only ESW from accumulating additional Voting Shares while allowing Maple Rock and EdgePoint to do so.

[151] The Shareholder Rights Plan applies to any bid that involves an accumulation of more than 30%, on an aggregate basis, of the outstanding Voting Shares through purchases exempt from applicable take-over bid rules. All parties acknowledged that the 30% trigger differed from the more common 20% trigger.

[152] However, the trigger may apply to all three control block holders depending on the circumstances. Given their respective shareholdings, the Shareholder Rights Plan would be triggered by acquisitions by ESW at or above 2%, by Maple Rock at or above 7.6% and by EdgePoint at or above 11.9%.

[153] We note that the Shareholders Rights Plan was approved by a majority of Optiva shareholders after the Proposed Offer. We also note that adoption of a tactical shareholders rights plan is an established practice that often provides protection to minority shareholders.

- [154] We were not asked on this application to provide any relief or make any findings regarding whether the Shareholder Rights Plan amounted to an improper defensive tactic and we have not done so. ESW advised that it would consider whether to commence proceedings to challenge the Shareholder Rights Plan following the determination of this application. Accordingly, we have considered the circumstances of the adoption of the Shareholder Rights Plan as part of the overall factual matrix only.
- [155] Optiva's and the Special Committee's initial efforts may have been focused more on questioning the good faith of the Proposed Offer rather than on taking meaningful steps to open negotiations with ESW or to commence an auction. That approach could fairly be described as being tactical, instead of being designed to ensure an open and fair bid process that maximizes shareholder value. However, there was no conduct, whether viewed separately or as a course of conduct, that rises to the level of abuse or impropriety in relation to a bid necessary to warrant intervention by the Commission.
- [156] Although other cases may involve a record where the course of conduct demonstrates mixed motivations that include an improper defensive purpose, the evidence in this matter falls short of establishing any abusive or improper conduct by Optiva, its board or the Special Committee, that undermined shareholder choice in respect of the Proposed Offer.

iii. Steps taken by Optiva with respect to ESW's control and influence

- [157] We accept ESW's submission that Optiva, separately or in coordination with Maple Rock and EdgePoint, took steps that reduced ESW's control and influence. We reject the submission, however, that in doing so, Optiva unfairly or improperly impeded the Proposed Offer or that such conduct created exceptional circumstances warranting intervention to facilitate shareholder choice.
- [158] The relevant steps include the following:
- a. Optiva negotiated the debenture financing and preferred share redemption with Maple Rock and EdgePoint, unbeknownst to ESW, while at the same time Optiva was engaged in negotiations for the consensual redemption of the Preferred Shares;
 - b. Optiva did not give certain ESW-appointed directors access to information about the debenture financing, asserting that the directors were not entitled to that information;
 - c. Optiva structured the debenture financing so that it would be exempt from the requirement for shareholder approval and a formal valuation;
 - d. Optiva successfully rebuffed ESW's efforts to replace two of the Preferred Directors, on the basis that ESW had become, or had recently been discovered to be, a competitor (a position disputed by ESW); and
 - e. the debenture financing and the nomination rights agreements were concluded without shareholder approval, which contrasted with the shareholder approval obtained for the Preferred Share Financing and the associated right of ESW to elect a majority of Optiva's board.

- [159] The debenture financing, Preferred Share Financing and Nomination Agreements were negotiated, considered and approved by a committee of three independent directors (the **Independent Committee**), following a process that included the engagement of independent legal and financial advisors and the holding of separate meetings. In addition, two members of the Independent Committee were nominees selected by ESW.
- [160] The Independent Committee relied on a fairness opinion from an independent financial advisor that the debenture financing and preferred share redemption were fair, from a financial point of view, to Optiva shareholders other than ESW, EdgePoint and Maple Rock.
- [161] We note that the issues regarding the legal propriety of the debenture financing and preferred share redemption, including whether Optiva's conduct in implementing these transactions violates corporate law principles, Optiva's articles of incorporation or any contractual entitlements, are the subject of the Court Proceedings initiated by ESW. ESW confirmed to us that it was not seeking any findings or relief from the Commission in this application regarding the legal propriety of these transactions.
- [162] Accordingly, we make no determination regarding the propriety, from a corporate law or contractual perspective, of any failure to inform or involve ESW, the Preferred Directors or the full Optiva board in the process leading to the preferred share redemption and the debenture financing.
- [163] As for the structure of the debenture financing, the financing was a related party transaction within the meaning of MI 61-101 and was structured to come within certain exemptions from the requirements for minority shareholder approval and a formal valuation.
- [164] Absent some abuse, there is nothing inherently improper about Optiva structuring the debenture financing to ensure the availability of an exemption from minority shareholder approval and a formal valuation. In our view, Optiva undertook the financing for the legitimate purpose of redeeming the Preferred Shares, given the ongoing control battle.
- [165] The conduct described above may have effectively prevented ESW from exercising influence over these transactions, whether through its board representation entitlements or through voting as a significant shareholder. However, there is no indication that the debenture financing, nomination rights agreements and preferred share redemption were negotiated or implemented by Optiva in anticipation of a bid or as part of any strategy to impede the Proposed Offer or otherwise had the effect of unfairly doing so.

(d) Conduct of bidder: Has ESW engaged in abusive or improper conduct, and, if so, should such conduct disentitle ESW from seeking the requested exemptive relief?

- [166] Optiva argues that the Commission should refuse to exercise its discretion to grant the Requested Exemption on the basis that ESW engaged in conduct that was fundamentally inconsistent with the standards of honesty and business conduct expected of market participants.
- [167] In particular, Optiva alleges that ESW engaged in conduct designed to enrich its control over Optiva and interfere with Optiva's operations and corporate transactions. Among other things, Optiva alleges that ESW attempted to improperly renegotiate or disrupt ongoing operational, financial and technical support services provided by ESW to Optiva under various services agreements, improperly acquire an asset of Optiva, improperly influence current executive management and improperly attempt to interfere with the debenture financing and preferred share redemption, including by attempting to replace the Preferred Directors and external legal counsel who were facilitating these transactions.
- [168] In our view, any such conduct of ESW, which included conduct and transactions prior to the Proposed Offer, is not relevant to the application and does not disentitle ESW from seeking the Requested Exemption. None of the alleged conduct raises any concerns regarding the integrity or fairness of the bid process.

6. Public interest considerations

- [169] The new bid regime makes it possible for control block holders to have greater leverage and to misuse that leverage. In all bid-related applications, the Commission must examine closely the entire factual matrix in order to determine whether actions by control block shareholders undermine the integrity of the bid regime, including the primary objective of protecting shareholder choice, and to determine whether remedies including exemptive relief are in the public interest.
- [170] In the circumstances of this application, preserving the minimum tender requirement holds open the possibility of superior offers and protects against the potential for coercion of the minority shareholders.
- [171] We found no reason to grant the exemptive relief from the minimum tender requirement in the circumstances of this matter in the public interest.

V. CONCLUSION

[172] For the above reasons, we issued our order on September 14, 2020, dismissing ESW's application.

Dated at Toronto this 23rd day of February, 2021.

"Timothy Moseley"

Timothy Moseley

"Wendy Berman"

Wendy Berman

"Frances Kordyback"

Frances Kordyback