IN THE MATTER OF THE *SECURITIES ACT*
R.S.O. 1990, CHAPTER S.5, AS AMENDED

- AND -

IN THE MATTER OF
STERLING CENTRECORP INC.,
AND SCI ACQUISITION INC.

- AND -

IN THE MATTER OF
FIRST CAPITAL REALTY INC. AND GAZIT CANADA INC.

REASONS AND DECISION

Hearing:	May 17, 2007		
Panel:	Lawrence E. Ritchie	-	Vice-Chair (Chair of the Panel)
	Harold P. Hands	-	Commissioner
	Carol S. Perry	-	Commissioner
Counsel:	Kelley McKinnon Pamela Foy Naizam Kanji Erin O'Donovan	-	for Staff of the Ontario Securities Commission
	James C. Tory Crawford Smith Andrew Gray Patricia Koval	-	for First Capital Realty Inc. and Gazit Canada
	Eliot N. Kolers Marie Isabelle Palacios-Hardy Mihkel E. Voore	-	for SCI Acquisition Inc.
	S. Dale Denis Stephen N. Infuso Aaron Sonshine	-	for Sterling Centrecorp Inc.
	Robert L. Armstrong Alan B. Merskey	-	for the Special Committee of the Board of Directors of Sterling Centrecorp Inc.

TABLE OF CONTENTS

DECISION AND REASONS

I. OVERVIEW

A. Background to the Proceeding

[1] This is an application (the "Application") under sections 104 and 127 of the *Securities Act*, R.S.O. 1990, c. S.5, as amended (the "Act"). The applicants, First Capital Realty Inc. ("First Capital") and Gazit Canada Inc. ("Gazit"), (collectively, the "Applicants"), are common shareholders of Sterling Centrecorp Inc. ("Sterling") who oppose a going private transaction (the "Going Private Transaction") – initiated by a group of inside directors and officers of Sterling (the "Insiders"), through the acquisition vehicle, SCI Acquisition Inc. ("SCI Acquisition").

[2] The Insiders, collectively, own or control approximately 35.3% of Sterling's common shares. Through a series of support agreements (the "Support Agreement(s)"), the Going Private Transaction has support of the votes attaching to 14,764,964 Sterling securities – more than half of the securities not owned or controlled by the Insiders.

[3] Under Ontario law, the Going Private Transaction needs to be approved by two-thirds of Sterling security holders, as well as a "majority of the minority" (as discussed below). With the support of the Support Agreement counterparties (the "Supporting Shareholders"), Sterling and SCI Acquisition take the position that the Going Private Transaction achieves the requisite support within the scope of *OSC Rule 61-501 – Insider Bids, Issuer Bids, Business Combinations and Related Part Transactions* (2004), 27 O.S.C.B. 5975 ("Rule 61-501"). However, the Applicants challenge this result.

[4] First Capital and Gazit take the position that the Supporting Shareholders and the Insiders are "joint actors" within the meaning of Ontario securities law. As such, the votes attached to the shares of these "joint actors" should not be included in the calculation of the "majority of the minority".

[5] In their Application, First Capital and Gazit request that the Commission make an order under section 104 requiring Sterling to:

(1) comply with Rule 61-501 by excluding from the calculation of the majority of the minority securities of Sterling held by SCI Acquisition's joint actors; and

(2) make proper disclosure of the Support Agreements and SCI Acquisition's intentions with respect to any competing proposal.

(3) Further, it is submitted that the Support Agreements engage the Commission's public interest jurisdiction and warrant intervention in the Going Private Transaction, which should be cease traded until the requested section 104 order has been complied with.

[6] In the course of their submissions, the Applicants provided the Commission with a proposed draft order requesting the following relief:

(1) Sterling is directed to comply with Ontario Securities Law in respect of the Going Private Transaction; and

(2) The Going Private Transaction is cease traded until the Circular in respect of the Going Private Transaction is amended to disclose that Sterling will exclude from the calculation of the required majority of the minority approval the votes attached to the common shares and other securities that are subject of the Support Agreements.

B. The Parties

i) Sterling

[7] Sterling is incorporated pursuant to the provisions of the *Business Corporations Act* (Ontario), R.S.O. 1990, c. B.16, as amended ("OBCA"), and is a real estate investment and management services company specializing in the retail property sector, which is traded on the Toronto Stock Exchange ("TSX"). The company has offices in Toronto, Edmonton and Montreal, and its U.S. subsidiary ("Sterling USA, Inc.") has offices located in West Palm Beach, Charlotte, Dallas, San Antonio and Scottsdale. The co-Chief Executive Officers of Sterling are John W. S. Preston ("John Preston") and A. David Kosoy ("David Kosoy"). The President and Chief Operating Officer of Sterling is Robert S. Green ("Robert Green"). As at February 28, 2007, Sterling had 35,628,969 common shares issued and outstanding which were listed for trading on the TSX. Sterling has also issued options with an exercise price less than $1.26 per common share ("In-the-money Options") and restricted stock units ("RSUs"). At the close of business on March 30, 2007, there were 414,705 In-the-money Options, and 2,571,916 RSUs outstanding. The common shares, In-the-money Options and RSUs are collectively referred to as the "Securities".

ii) SCI Acquisition

[8] SCI Acquisition was incorporated in October 2006 as a vehicle for the contemplated Going Private Transaction. The officers and directors of SCI Acquisition are four directors and senior officers of Sterling or its subsidiaries: John Preston, Brian D. Kosoy ("Brian Kosoy") and Robert Green and Stephen Preston ("Stephen Preston"), a Vice-President of a Sterling subsidiary (collectively the "Acquisition Group").

[9] SCI Acquisition and its shareholders own or control 12,573,000 common shares of Sterling representing 35.3% of its outstanding common shares. As at February 28, 2007, John Preston, Stephen Preston, Robert Green and Brian Kosoy beneficially owned, directly or indirectly, or exercised control or direction over common shares as follows:

Name	Common Shares	Percentage of Outstanding Common Shares
John W.S. Preston	7,743,872	21.74%
Stephen Preston	950,000	2.67%
Robert S. Green	3,079,128	8.64%
Brian D. Kosoy	800,000	2.25%

iii) First Capital and Gazit

[10] First Capital is an Ontario corporation with its head office in Toronto. First Capital is a real estate company focused on the ownership, development and operation of supermarket anchored neighbourhood and community shopping centers located across Canada. First Capital is also a significant shareholder in the largest shopping centre real estate investment trust in the United States. First Capital is a publicly traded company whose shares are listed for trading on the TSX.

[11] First Capital's largest common shareholder is Gazit which owns a majority of the issued and outstanding common shares of First Capital. Gazit regularly invests in real estate development companies and, in addition to First Capital, owns shares in nearly a dozen other real estate companies across North America.

[12] First Capital and Gazit are both common shareholders of Sterling. As at the date of Sterling's Annual and Special Meeting on April 30, 2007, First Capital owned 1,690,200 common shares and Gazit owned 1,305,000 common shares, representing approximately 9% of the outstanding common shares.

C. The Application

[13] On March 26, 2007, First Capital and Gazit (through their counsel) wrote to Staff of the Ontario Securities Commission ("Staff") suggesting the parties to the Support Agreements should be regarded as "joint actors" within the meaning of Ontario securities laws, with the effect that the shares held by those parties should be excluded from the majority of the minority

approval required in connection with the Going Private Transaction under Rule 61-501. This correspondence continued between March 26, 2007 and April 25, 2007.

[14] On April 25, 2007, First Capital and Gazit filed an Application requesting that the Commission convene a hearing to consider matters in connection with the offer by SCI Acquisition to acquire all the outstanding common shares of Sterling by way of a plan of arrangement. On April 27, 2007, the Commission issued a Notice of Hearing under subsection 104(1) of the Act with respect to the Going Private Transaction and the Support Agreements.

[15] The evidence filed in the course of this Application includes:

(a) Six affidavits with exhibits;

(b) Five document requests by First Capital/Gazit;

(c) 1,100 pages of documents produced in response to such requests;

(d) Seven separate examinations or cross-examinations of witnesses;

(e) Three sets of answers to undertakings; and

(f) Nine volumes of evidence comprising 2,627 pages.

[16] Written submissions were received from First Capital and Gazit, SCI Acquisition, Sterling, the Special Committee of Sterling Centrecorp Inc., and Staff in advance of the hearing. On June 4, 2007, the Commission issued an Order with reasons to follow after the parties to the Application requested a decision from the Commission in advance of a court hearing scheduled for June 8, 2007. The Order, attached as Appendix A, provides that:

(1) Pursuant to subsections 104(1) and 127(1) of the Act, Sterling shall correct the record of the votes cast at the Meeting held on April 30, 2007 in respect of the Going Private Transaction, to exclude from the Rule 61-501 Calculation, the votes attached to all common shares and other securities of Sterling held by David Kosoy and First National Investments Inc.

(2) The Application is otherwise dismissed.

II. THE FACTS

A. Early Developments

[17] The current incarnation of Sterling was formed in March 2001 when Sterling Financial Corporation (formerly Samoth Capital Corporation) combined with the Centrecorp Group of Companies. David Kosoy and Brian Kosoy were major shareholders and senior management of Sterling Financial Corporation and John Preston and Robert Green were principals of

Centrecorp. David Kosoy and John Preston became the co-chairmen and co-CEOs of Sterling at that time.

[18] A memorandum of agreement (the "Memorandum of Agreement"), dated March 1, 2001, was entered into among the "Kosoy Group", the "Green Group" and the "Preston Group", each as defined in the Memorandum of Agreement, in order to ensure "the smooth joint management of Sterling by restricting acquisitions of Sterling shares by the parties to the Memorandum of Agreement and by providing for nominations by them of directors to the board of directors of Sterling." The parties to the Memorandum of Agreement collectively owned over 50% of the issued and outstanding Securities of Sterling. In addition to the four principals personally, the other parties to the agreement included RSG Corp. (a personal holding company of Robert Green), JMSC Holdings Inc. (a personal holding company of John Preston and his immediate family), First National Investments Inc. (a personal holding company of David Kosoy) and the Sterling Trust (a trust included in the "Kosoy Group" according to the document).

[19] Sterling's business model is focused on the leveraged acquisition and further development of shopping centres and commercial retail properties with the intention of generating capital gains upon asset disposition as opposed to focusing on generation of rental income.

[20] By late 2004, Sterling was enjoying some success in acquiring shopping centres in both Canada and the United States. In order to build on that potential, the principals agreed to extend the Memorandum of Agreement for an additional two years, to February 1, 2007. However, by the Fall of 2005, the market had started to change. The market capitalization rates and yield expectation for existing shopping centres were decreasing rapidly, resulting in a corresponding increase in the price of prospective shopping centre acquisitions. This made it extremely difficult for Sterling to grow its shopping centre portfolio through shopping centre acquisitions given its more expensive cost of capital compared to larger public real estate entities, pension funds, financial institutions and other competitors. It became increasingly apparent to management and the Board that the business of Sterling was not likely to be successful in the long term as constituted.

[21] In July 2005, a Special Committee was formed in response to a proposed offer for Sterling from RioCan Real Estate Investment Trust ("RioCan"). The Committee was in the process of engaging GMP Securities as its financial advisor when RioCan withdrew its offer. One of RioCan's reasons for withdrawing was the complexity of the ownership structures of Sterling's assets. The Board of Directors of Sterling began considering various options including a privatization of the company.

[22] In April 2006, SCI Acquisition, together with certain Insiders, and David Kosoy, advised the Board of Directors that they were considering a proposal to take Sterling private. At this stage, the Insiders constituted approximately 45% of the outstanding common shares.

[23] On May 9, 2006, the Board of Directors of Sterling established a special committee of independent directors (the "Special Committee"), comprised of Bernard Kraft (Chair), Peter Burnim and Stewart Robertson. The Special Committee retained outside counsel, Ogilvy

Renault LLP, and engaged GMP Securities L.P. ("GMP") as the independent financial advisor to prepare a formal valuation and fairness opinion in connection with that potential transaction.

[24] GMP prepared a valuation in accordance with Rule 61-501 and a fairness opinion which proposed a range of the fair market value of $1.15 to $1.27 per common share.

[25] The Special Committee met on December 8, 2006, with its legal and financial advisors to identify the remaining issues in connection with GMP's valuation. The Special Committee noted that, in discussing the Company's prospects, concern was expressed by the Board that Sterling was facing a substantial projected negative cash flow for 2007-2009 in the absence of asset sales, and that if the proposed transaction was not to proceed, alternatives may have to be explored, including a wind-up and liquidation. According to Sterling's Management Information Circular (the "Circular"), the Board was of the view that a wind-up and liquidation would negatively affect shareholder value compared to the Going Private Transaction.

B. The Support Agreements

[26] As stated above, at issue in this proceeding is the effect of the Support Agreements on the outcome of the shareholder vote.

i) Terms

[27] The Support Agreements all contain identical support provisions which provide as follows:

> **2.3** Acquiror [SCI Acquisition] further covenants, acknowledges and agrees that if the Going Private Transaction is terminated prior to the Expiration Date by the acceptance by the [Insiders], of a superior bid from a third party, then notwithstanding anything herein contained, Shareholder will be entitled, contemporaneously with the [Insiders] and at the same price per Share (and payment terms) as pertain to the [Insiders], to tender its Shares to such third party in acceptance of such superior bid. […]
>
> […]
>
> **3.1** Prior to the Expiration Date, at every meeting of the shareholders of the Corporation, however called, at which any of the following matters is considered or voted upon, and at every adjournment or postponement thereof. Shareholder shall, subject, however, to the provisions of Section 2.3, vote or cause the holder of record to vote all of the Shares:
>
> (a) in favour of approval and adoption of the Going Private Transaction and the transactions contemplated thereby;
>
> (b) against approval of any proposal made in opposition to or competition with consummation of the Going Private Transaction;

(c) against approval of any proposal from any party other than Acquiror;

(d) against any action or proposal that is intended to, or is reasonably likely to, result in the conditions of the Corporation's obligations under the Going Private Transaction not being fulfilled;

(e) against any action which would reasonably be expected to impede, interfere with, delay, postpone or materially adversely affect consummation of the transactions contemplated by the Going Private Transaction.

[…]

4.1 Shareholder hereby revokes any and all other proxies or powers of attorney in respect of all or any of the Shares and agrees that until the Expiration Date, Shareholder hereby irrevocably appoints Acquiror or any individual designated by Acquiror, and each of them, as Shareholder's agent, attorney-in-fact and proxy (with full power of substitution and re-substitution), for and in the name, place and stead of Shareholder, to vote (or cause to be voted) the Shares held of record by Shareholder or held of record by any other party on behalf of Shareholder, in the manner set forth in Section 3 at any meeting of the shareholders of the Corporation.

[…]

5.1 Prior to the Expiration Date, Shareholder shall not, without the prior written consent of the Acquiror:

(a) transfer, assign, sell or otherwise dispose of or grant a security interest in any of the Shares or any right or interest therein not enter into any agreement to do any of the foregoing ("Transfer"); or

(b) take any action that would make any representation or warranty of Shareholder contained herein untrue or incorrect or have the effect of preventing or disabling Shareholder from performing or interfering with Shareholder's ability to perform its obligations under this Agreement.

[28] The support provisions in the Support Agreements are described by Sterling in its Circular as follows:

> "Under the terms of the Support Agreements, the Public Securityholders who signed such agreements cannot withdraw their support for the Arrangement nor accept a bid from a third party unless the Purchaser and its shareholders elect to tender to such bid."

ii) The Purpose of the Support Agreements

[29] First Capital is a publicly traded company and Gazit owns a majority of its issued and outstanding common shares. Dori J. Segal is the president of both First Capital and Gazit. The Acquisition Group was aware that one or both of First Capital or Gazit (collectively, the "First Capital Group") were public shareholders of Sterling and that at the time the Acquisition Group announced its intentions, the First Capital Group owned about 2% to 3% of the outstanding common shares of the company.

[30] For over ten years, the First Capital Group, has had a history of litigation and threatened litigation with the members of Acquisition Group and with Sterling or its subsidiaries.

[31] According to the evidence of Robert Green, in light of the previous litigious experiences with the First Capital Group, and the knowledge that the First Capital Group were public shareholders of Sterling (owning or controlling about 2 to 3% of the outstanding common shares), the Acquisition Group was very concerned that the First Capital Group might attempt to interfere with the proposed Going Private Transaction once any such transaction was announced. In these circumstances, the Acquisition Group was not willing to proceed with any proposed transaction unless they could obtain support of holders of a sufficient number of Sterling's Securities in advance of announcing the proposed transaction to effectively ensure they could succeed in having the transaction approved.

[32] For this purpose, SCI Acquisition's counsel prepared the Support Agreement. The document was negotiated in January 2007 with counsel for David Kosoy and was also discussed with counsel for Peter Thomas, a significant shareholder of Sterling. The form of Support Agreement was finalized on or about January 26, 2007.

iii) David Kosoy Approaches Major Shareholders

[33] In November 2006, the Acquisition Group and David Kosoy decided that an approach should be made to one or two of the other large Sterling shareholders to ascertain their interest in supporting a Going Private Transaction. To that end, a meeting was arranged between Peter Thomas and David Kosoy in November 2006 at which Peter Thomas expressed a willingness, in principle, to support a transaction. Peter Thomas owns or controls 3,312,137 Securities of Sterling in his own name. In the course of his discussions with David Kosoy, Peter Thomas also indicated that he wanted $250,000 of the consideration paid to him as a non-refundable deposit in connection with signing the agreement to support the Going Private Transaction. Following consultation with legal counsel, David Kosoy subsequently advised Peter Thomas that a non-refundable deposit in respect of his Securities could not be paid and that he needed to be treated like all other shareholders. In a subsequent discussion between David Kosoy and Peter Thomas, David Kosoy advised that the price to be offered likely would be $1.26. According to the evidence before us, Peter Thomas and David Kosoy had no further discussions regarding his support of the Going Private Transaction.

[34] David Kosoy thereafter approached Peter Schlessinger of Apex Investment Fund Ltd. Mr. Schlesinger advised that he would be supportive of a transaction at a price of $1.26 per share. Apex Investment Fund Ltd. owns or controls 1,459,000 Securities of Sterling.

[35] After the price per share of $1.26 had been settled in principle with Peter Thomas and Peter Schlessinger, David Kosoy concluded that he did not wish to participate as a member of the Acquisition Group as he wanted to more actively pursue other interests. By January 11, 2007, as set out in the minutes of the Special Committee of that date, David Kosoy advised the Acquisition Group that he did not intend to increase his ownership interest in Sterling and that he wished instead to be a seller in the contemplated transaction.

iv) SCI Approaches Other Shareholders

[36] After David Kosoy and Peter Thomas both agreed to support the transaction and sign the form of Support Agreement required by SCI Acquisition, (on January 30, 2007 and February 2, 2007, respectively) the Acquisition Group began to seek the support of other shareholders to enter into the same form of Support Agreement. Brian Kosoy was the officer who had primary responsibility within SCI Acquisition for obtaining the level of support required. He undertook these efforts mostly during the first week of February 2007.

[37] By March 8, 2007, fifteen Supporting Shareholders, including David Kosoy, a company he controlled and Sterling Trust, a Trust that he had settled, executed Support Agreements. Brian Kosoy was the officer who signed each of the Support Agreements on behalf of SCI Acquisition. Each of the Support Agreements was signed by the supporting security holder on the date indicated on the face of the agreement except for the following: Peter Thomas (which was signed February 2, 2007); David Kosoy (which was signed January 30, 2007, but held in escrow by his counsel until February 8, 2007); and Sterling Trust (which was signed February 7, 2007, but held in escrow by counsel until February 8, 2007).

[38] In addition, five (5) of the Support Agreements were signed after February 8, 2007, the date the proposed transaction was publicly announced including those signed by the Erlbaum Family Limited Partnership and four employees of Sterling or its subsidiaries.

[39] The fifteen (15) Supporting Shareholders who signed the Support Agreements, the dates executed and the numbers of Securities committed under the Support Agreements are described below:

Support Agreements		
Shareholder	**Date Executed**	**Total Securities**
David Kosoy & First National Investments Inc.	January 30, 2007	3,841,820
The Sterling Trust	February 7, 2007	3,406,971
Peter Thomas	February 2, 2007	3,312,137

Apex Investment Fund Ltd.	January 31, 2007	1,459,000
Kimco Realty Corporation	February 7, 2007	720,500
Erlbaum Family Limited Partnership	February 28, 2007	597,100
Henry Bereznicki	February 5, 2007	570,900
Richard Levinsky	February 7, 2007	347,873
Gregory Moross	February 5, 2007	98,500
Marcus Bertagnolli	February 5, 2007	68,500
Chris Chamberlain	March 8, 2007	51,000
Thomas Hamilton	February 6, 2007	41,667
Vincent Costello	March 6, 2007	26,000
Craig Mueller	March 6, 2007	25,000
Russell Watson	March 1, 2007	25,000

C. The Going Private Transaction

[40] SCI Acquisition presented a term sheet dated January 9, 2007, to the Special Committee for its consideration regarding the proposed Going Private Transaction (the "Term Sheet"). The Special Committee reviewed the Term Sheet during a meeting held on January 11, 2007. The Term Sheet contemplated the Going Private Transaction involving Sterling and its shareholders to be effected through a plan of arrangement (the "Plan of Arrangement" or "Arrangement Agreement") under section 182 of the OBCA. The Term Sheet provided for:

(a) per share consideration of $1.26;

(b) the Support Agreements, to be executed by certain Shareholders (including David Kosoy and his affiliates); and

(c) a non-solicitation clause and a "fiduciary out" in the event of a superior proposal to be included in the Arrangement Agreement.

i) Business Combination is Acceptable to the Special Committee

[41] The Special Committee met on February 7, 2007, to consider the valuation prepared by GMP, and to consider whether to recommend to the Board that Sterling enter into a Plan of Arrangement in furtherance of the Going Private Transaction. The Special Committee concluded that the Going Private Transaction maximized shareholder value after taking into account the following factors:

(a) the failure of the original third party negotiations in 2005;

(b) the independent valuation of GMP performed in accordance with the requirements of Rule 61-501;

(c) the approach and subsequent retrenchment of two other potential third party bidders;

(d) the complex nature of the partnerships involved in Sterling's asset structure; and

(e) the possible requirement of expensive termination provisions in the event of third party bids.

[42] After reviewing the GMP valuation, the Special Committee resolved to recommend that the Board of Directors:

(a) approve the entering into by Sterling of the Arrangement Agreement to implement the Plan of Arrangement with SCI Acquisition;

(b) recommend that the Public Security holders (minority shareholders) of Sterling vote in favour of the Plan of Arrangement with SCI Acquisition.

[43] The Board of Directors of Sterling met on February 8, 2007, to consider the Special Committee's report. The members of the Board, other than John Preston, Robert Green and David Kosoy who did not vote, unanimously approved the terms of the Plan of Arrangement and unanimously recommended that the shareholders and other security holders vote in favour of the Arrangement Agreement at the annual and special meeting of shareholders. According to the evidence of Janet Hendry, Sterling's Corporate Secretary, the Board based its approval upon (a) the unanimous recommendation of the Special Committee, (b) the valuation, and (c) the fairness opinion.

ii) Sterling Issues Two Press Releases

[44] On February 8, 2007, Sterling issued a press release stating that it had entered into an agreement with SCI Acquisition to effect a Going Private Transaction whereby SCI Acquisition would acquire all of the outstanding common shares of Sterling not already owned or controlled by SCI Acquisition and its shareholders at a price of $1.26 per common share.

[45] The press release also stated that:

> [s]hareholders of Sterling holding an aggregate of 12,588,064 common shares have entered into support agreements with SCI Acquisition agreeing to vote their common shares in favour of the plan of arrangement. These common shares represent approximately 54.6% of the outstanding common shares other than those owned or controlled by SCI Acquisition and its shareholders.

[46] Additional shareholders entered into Support Agreements with SCI Acquisition following the February 8th press release. On March 30, 2007, Sterling mailed its Circular to its shareholders. The Circular discloses that Supporting Shareholders holding an aggregate of 14,765,964 of the votes attached to the outstanding common shares, In-the-money Options and RSUs have entered into the Support Agreements with SCI Acquisition agreeing to vote their Securities in favour of the Going Private Transaction. These votes are said to represent approximately 60.3% of the outstanding voting rights other than those controlled by SCI Acquisition and its shareholders.

[47] Sterling issued a second press release on February 23, 2007, to provide further details as to the terms of the Support Agreements signed in connection with the Going Private Transaction announced on February 8, 2007. In the press release, Sterling indicated as follows:

> The votes attaching to the shares and other securities owned by SCI Acquisition and its shareholders, together with those covered by these support agreements, are sufficient to approve the going private transaction. Further, under the terms of these support agreements, the Public Securityholders who signed such agreements cannot withdraw their support for the going private transaction nor accept a bid from a third party, unless SCI Acquisition and its shareholders elect to tender to such bid.

[48] On March 6, 2007, Sterling commenced an Application in the Ontario Superior Court of Justice with respect to the proposed Plan of Arrangement between Sterling and SCI Acquisition. The same day, the Honourable Madam Justice Lax issued an Order (the "Interim Order") permitting Sterling to call, hold and conduct an Annual and Special Meeting of Shareholders (the "Meeting") to, among other things, authorize, adopt and approve the Plan of Arrangement.

[49] A special meeting of shareholders of Sterling to consider the proposed transaction was announced on March 30, 2007, and was subsequently held on April 30, 2007 at the offices of Fogler, Rubinoff LLP.

D. First Capital Group's Opposition to the Going Private Transaction

[50] Commencing February 9, 2007, after the announcement of the Going Private Transaction, the First Capital Group started acquiring common shares of Sterling in the marketplace. From February 9 to April 30, 2007, the First Capital Group increased their holdings in Sterling by 1,910,200 common shares – nearly tripling their combined stake in the company – to approximately a 9% interest in Sterling, as at the hearing date.

[51] As stated in paragraph [13] above, on March 26, 2007, the First Capital Group (through their counsel) wrote to Staff asserting that the parties to the Support Agreements should be regarded as "joint actors" within the meaning of Ontario securities laws, with the effect that the shares held by those parties should be excluded from the majority of the minority approval required in connection with the Going Private Transaction under Rule 61-501.

[52] On April 24, 2007, six days prior to the scheduled meeting of shareholders, the First Capital Group filed notices of objection to the Plan of Arrangement (prior to the deadline for receipt being 10:00 a.m. (Toronto time) on April 26, 2007) pursuant to the rights of dissent granted to Shareholders under the terms of the Interim Order and the Arrangement Agreement (which adopted the procedure for the assertion of such rights provided under s. 185 of the OBCA).

i) The First Capital Group Makes Conditional Bid at the Eleventh Hour

[53] On April 25, 2007, five days before the scheduled meeting, the First Capital Group delivered a letter to the Special Committee. In that letter, the First Capital Group indicated that it was prepared to propose a take-over bid at a price of $1.62 per share, payable in cash or combination of cash and shares of the First Capital Group, subject to the completion of satisfactory due diligence and other customary conditions. Further, in that letter, the First Capital Group requested access to due diligence materials in order to complete its assessment of Sterling and to structure a definitive offer. As well, the First Capital Group delivered an additional letter to the Special Committee on April 29, 2007, to advise of its intention to make the offer and to "strongly reiterate" its request that Sterling postpone the Meeting. This request was based on the First Capital Group's anticipated offer, as well as the announcement by the Commission on April 27, 2007, that it had convened this Hearing after receiving an Application from the First Capital Group dated April 25, 2007.

[54] On April 27, 2007, the Special Committee advised the First Capital Group that it would not provide access to due diligence materials or otherwise participate in discussions with the First Capital Group, citing contractual restrictions between Sterling and SCI Acquisition. As well, the Special Committee advised that it was not prepared to recommend that the Meeting be adjourned or postponed.

[55] On April 29, 2007, the day before the Meeting, the First Capital Group announced that it intended to make an all-cash takeover bid to acquire all of the outstanding common shares of Sterling at a price of $1.62 per share. The First Capital Group indicated in its press release that the offer would be subject to customary conditions, except that it would not be subject to any minimum tender condition, and that it would be subject to the condition that the Plan of Arrangement proposed by Sterling and SCI Acquisition does not receive final approval.

[56] According to the written submissions of the Special Committee, First Capital Group's first proposed offer was viewed by the Special Committee as doomed to fail. It included a condition for two-thirds of the outstanding common shares of Sterling. By press release dated April 30, 2007, Sterling explained its decision to deny the First Capital Group's request (made a day earlier) to postpone the Meeting in the following terms:

> [First Capital Group] has also asked Sterling to postpone the meeting of shareholders called for April 30, 2007 to consider the Arrangement. Based on legal advice, the Sterling Board has determined that Sterling is obliged, under the terms of the Arrangement Agreement, to proceed with the meeting on that date.

E. Annual and Special Meeting of the Shareholders

[57] On April 30, 2007, Sterling held the Meeting and asked security holders to consider the Going Private Transaction. The Meeting was chaired by Jack Gilbert, the Secretary to the Board of Directors of Sterling. At the outset of the Meeting, the First Capital Group brought a motion to adjourn the Meeting to afford security holders more time in which to consider its offer. The motion was dismissed.

[58] Pursuant to the Arrangement Agreement, shareholders of Sterling are entitled to vote at the Meeting, in person or by proxy, as follows:

(a) each holder of common shares is entitled to one vote for each common share held; and

(b) each holder of an In-the-money Option and each holder of an RSU is entitled, in respect of the Arrangement Resolution, to one vote for each common share that such holder would have received on the valid exercise of such securities.

[59] The scrutineers of the Meeting reported that 165 shareholders holding 35,525,456 Securities were represented in person or by proxy, being 92.20 percent of the issued and outstanding Securities of Sterling.

[60] With respect of the vote on the Arrangement Agreement resolution (the "Arrangement Resolution"), the scrutineers prepared four separate Reports on Ballot according to which the final result of the vote was as follows:

(a) Security holders cast a total of 35,525,456 votes in respect of the Arrangement Resolution: 32,304,696 (90.93%) in favour, and 3,220,760 (9.07%) against.

(b) Security holders other than members of the Acquisition Group cast a total of 21,412,206 votes in respect of the Arrangement Resolution: 18,191,446 (84.96%) in favour, and 3,220,760 (15.04%) against.

(c) Common shareholders cast a total of 32,624,688 votes in respect of the Arrangement Resolution: 29,403,908 (90.13%) in favour, and 3,220,760 (9.87%) against.

(d) Common shareholders other than members of the Acquisition Group cast a total of 20,051,668 votes in respect of the Arrangement Resolution: 16,830,908 (83.94%) in favour, and 3,220,760 (16.06%) against.

[61] The Arrangement Resolution was therefore duly passed, without amendment, by Sterling's shareholders in accordance with the requirements of the Interim Order and the Arrangement Agreement.

III. ISSUES

[62] This Application raises the following issues:

1. Does the application of Rule 61-501 require the exclusion from the minority of any of the Supporting Shareholders as being "joint actors" with SCI Acquisition and the Insiders for purposes of the approval of the Arrangement Agreement?

2. What order, if any, should the Commission make in the event that it determines that any of the Supporting Shareholders ought to be excluded from the majority of the minority vote under Rule 61-501?

IV. SUMMARY OF CONCLUSION

[63] Having regard to the facts of this matter and the submissions of the parties we have concluded that David Kosoy (and therefore First National Investments Inc.) was and is deemed to remain, during the life of the Insider Bid, a "joint actor" with the Acquisition Group within the meaning of Rule 61-501.

[64] As set out in greater detail below, having found David Kosoy to be a joint actor, we find that his securities and the securities over which he had control and direction should be excluded from the determination of the "majority of minority" calculation required by Rule 61-501.

[65] For reasons also discussed below, on the evidence before us in this hearing, we do not find that David Kosoy (or by any other person who is a joint actor) exercised control or direction over the securities held by the Sterling Trust.

[66] As set out more fully below, on the evidence put before us, we are unable to conclude that any of the parties to the Support Agreements are "joint actors" within the meaning of Ontario securities laws, except for David Kosoy.

[67] We note that by excluding the votes of David Kosoy (and First National Investments Inc.) from the majority of minority calculation, the votes result as follows: Total of 17,570,386 votes in respect of the Arrangement Resolution, 14,349,686 (81.67%) in favour and 3,220,760 (18.33%) against. Given that, without David Kosoy's Securities, there is a 82% majority of the minority, and having concluded that David Kosoy was a "joint actor", but the other parties to the Support Agreements were not joint actors, and having regard to the cost and time involved in calling another meeting, the exceptionally high shareholder turnout at the Meeting, and the fact that the Supporting Shareholders are still required to vote in favour of the Going Private Transaction, we see no reason to require Sterling to call a further meeting.

[68] Accordingly, other than the Order, we find that it is not appropriate to grant the relief sought by the Applicants.

V. LAW AND ANALYSIS

A. Minority Approval for Business Combinations under Rule 61-501

[69] Rule 61-501 regulates transactions between, or involving, an issuer and its related party, such as a major shareholder, director or senior officer, who may have a significant conflict of interest or potentially be in a position to benefit from an informational advantage over other security holders of the issuer. These transactions include insider bids, business combinations and related party transactions. Rule 61-501 requires such transactions to have additional protections for security holders of the issuer such as valuation, enhanced disclosure, majority of the minority shareholder approval and special committee consideration to ensure fairness in the transactions to which it relates.

[70] The Commission has described the fairness principles underlying Rule 61-501, and the concerns surrounding the transactions Rule 61-501 regulates, in the introductory paragraphs of the Companion Policy to 61-501 (2004), 27 O.S.C.B. 5975 ("61-501CP"). That provision states as follows:

> 1.1 General - The Commission regards it as essential, in connection with the disclosure, valuation, review and approval processes followed for insider bids, issuer bids, business combinations and related party transactions, that all security holders be treated in a fair manner that is fair and that is perceived to be fair. In the view of the Commission, issuers and others who benefit from access to the capital markets assume an obligation to treat security holders fairly, and the fulfillment of this obligation is essential to the protection of the public interest in maintaining capital markets that operate efficiently, fairly and with integrity.
>
> The Commission does not consider that the types of transactions covered by Rule 61-501… are inherently unfair. The Commission recognizes, however, that these transactions are capable of being abusive or unfair [...]
>
> (61-501CP, *supra* at s. 1.1.)

[71] Part 8 of Rule 61-501 operates as a key procedural safeguard to protect the interests of minority shareholders. Among its other protective aspects, it provides for the determination of who can vote with the minority and reflects the guiding principle that, to the extent possible the minority voting on the merits of the business combination should exclude shareholders whose independence from the controlling shareholder has been or may be compromised.

[72] Pursuant to subsection 8.1(1) of Rule 61-501, a business combination can only be carried out if the issuer obtains minority approval from the holders of each class of the issuer's equity securities. As the Going Private Transaction is a business combination (which is not disputed), Sterling is required to obtain approval of a majority of its minority shareholders pursuant to Rule 61-501.

[73] Subsection 8.1(2) of Rule 61-501 provides as follows:

(2) Subject to section 8.2, in determining minority approval for a business combination or related party transaction, an issuer shall exclude the votes attached to affected securities that, to the knowledge of the issuer or any interested party or their respective directors or senior officers, after reasonable inquiry, are beneficially owned or over which control or direction is exercised by

(a) the issuer;

(b) an interested party;

(c) a related party of an interested party…; or

(d) a joint actor with a person or company referred to in paragraph (b) or (c) in respect of the transaction. [Emphasis added.]

[74] Pursuant to the Policy, for the transaction to be successful, a majority of this minority must vote in favour of the transaction. However, Sterling is required to exclude Sterling securities held or controlled by the Insiders, and persons acting as "joint actors" with them (as defined) in determining which votes are to be counted in the minority for the purposes of approving the Going Private Transaction.

[75] The policy and principles which underlie the "minority approval" requirement were emphasized by Staff in its response to comments received on the then proposed January 2004 amendments to Rule 61-501. Commission Staff stated as follows:

> […] In the case of a business combination, where a majority of security holders can force the minority to relinquish their securities against their will, it is important that this majority be comprised, to the extent possible, of security holders who are voting solely on the merits of the business combination. […]
>
> (*Notice of Proposed Amendments to Rule 61-501 – Insider Bids, Issuer Bids, Going Private Transactions and Related Party Transactions and Companion Policy 61-501 CP* (2004), 27 O.S.C.B. 550 at 566.)

[76] In its Notice of Amendments to Rule 61-501, while commenting on the nature of the minority approval requirement, the Commission expressed the expectation that those voting have interests which are aligned with those of the minority and as free from conflicts as possible:

> […] when a majority vote of security holders can force the minority to relinquish their securities against their will at a price they may regard as inadequate, it is reasonable to require that the security holders comprising the majority be as free from conflicts of interest as possible so that their interests are aligned with those of the minority.
>
> (*Notice of Amendments to Rule 61-501* (2004), 27 O.S.C.B. 4483 at 4486.)

[77] "Joint actors" is defined in Rule 61-501 as follows:

> "joint actors", when used to describe the relationship among two or more entities, means persons or companies "acting jointly or in concert" as defined in section 91 of the Act, with necessary modifications where the term is used in the context of a transaction that is not a take-over bid or issuer bid, *but a security holder is not considered to be a joint actor with an offeror making a formal bid, or with a person or company involved in a business combination or related party transaction, solely because there is an agreement, commitment or understanding that the security holder will tender to the bid or vote in favour of the transaction*; [Emphasis added.]
>
> (Rule 61-501, *supra* at s. 1.1.)

[78] As set out above, the definition of "joint actor" in Rule 61-501 incorporates the definition of "acting jointly or in concert" under section 91 of the Act and the Commission must therefore look to section 91 in assessing whether the Supporting Shareholders are joint actors under Rule 61-501.

[79] Subsection 91(1) provides that it is a question of fact whether a person or company is acting jointly or in concert with an offeror. However, the section creates some presumptions in certain circumstances, stating "without limiting the generality of the foregoing, the following shall be presumed to be acting jointly or in concert with an offeror:

> 1. Every person or company who, as a result of any agreement, commitment or understanding, whether formal or informal, with the offeror or with any other person or company acting jointly or in concert with the offeror, acquires or offers to acquire securities of the issuer of the same class as those subject to the offer to acquire.
>
> 2. Every person or company who, as a result of any agreement, commitment or understanding, whether formal or informal, with the offeror or with any other person or company acting jointly or in concert with the offeror, intends to exercise jointly or in concert with the offeror or with any other person or company acting jointly or in concert with the offeror any voting rights attaching to any securities of the offeree issuer.
>
> 3. Every associate or affiliate of the offeror.
>
> (*Securities Act*, *supra* at subsection 91(1).)

B. Interpretation of "Joint Actors" under Rule 61-501

i) Submissions from the First Capital Group

[80] The thrust of the position advanced by the First Capital Group is that all of the Supporting Shareholders should be excluded from the majority of the minority vote on the basis that they are all joint actors with SCI Acquisition.

[81] While the First Capital Group concedes that support agreements are not improper *per se*, they submit that the effect of the Support Agreements at issue precludes Sterling's shareholders from accepting an offer for their common shares for more than $1.26 during the term of the Support Agreements, (unless supported by the Insiders). Fundamentally, the First Capital Group argues that this creates a "joint actor" relationship because the Supporting Shareholders no longer have a choice and their interests, therefore, are completely aligned with those of SCI Acquisition.

[82] The First Capital Group submits that the Commission should give a broad, purposive interpretation to the term "joint actor", and apply it in a particular case. The Applicants urge us to find that an agreement between a security holder and an offeror, under which they agree to vote their common shares together, gives rise to a presumption that they are joint actors *unless* the agreement is *solely* an agreement by the shareholder to vote in favour of the transaction. The First Capital Group, therefore, sees in Rule 61-501, a very narrow exception to the presumption of being a "joint actor" within the meaning of section 91 of the Act. It emphasizes that the purpose of Rule 61-501 is the protection of minority shareholders through ensuring that voting in respect of a business combination is based on the merits of that proposal.

[83] Specifically, the First Capital Group relies on the second part of the "joint actor" definition set out in Rule 61-501, emphasizing the word "solely". It argues that the words "solely […] to vote in favour of the transaction" must be interpreted strictly because they are an exception to the general rule that parties agreeing to vote their common shares together are presumed to be acting jointly or in concert. It argues that if the agreement deals with matters beyond being "solely" an agreement to vote in favour of the transaction, it is outside of the scope of the exception of Rule 61-501.

[84] Referring to the Support Agreements in this matter, counsel points out that while the Support Agreements do include a provision that requires signatories to vote in favour of the Acquisition, its scope is broader. Counsel referred us to section 3.1(c) of the Support Agreements which provides, in part, that the Supporting Shareholders shall vote "against approval of any proposal from any party other than [SCI Acquisition]". Counsel for the First Capital Group submits that this provision is clearly outside the scope of Rule 61-501 because it does not reflect solely a commitment to vote in favour of the Going Private Transaction but, rather, a commitment to vote against any other proposal during the Going Private Transaction, whether or not SCI Acquisition's offer is still on the table.

[85] Counsel also points to other sections of the Support Agreements which go beyond the agreement exception they say is contained in the second part of the "joint actor" definition set out in Rule 61-501:

(a) the Supporting Shareholders are not entitled to accept a superior third-party offer unless the Insiders also agree to do so (s. 2.3);

(b) the Supporting Shareholders grant the Insiders an irrevocable proxy (s. 4.1); and

(c) the Supporting Shareholders are not able to sell or otherwise dispose of their Securities (s. 5.1).

[86] As such the Supporting Shareholders, according to the First Capital Group, are not "entitled" to the "exclusion" provided by Rule 61-501 and therefore are subject to the presumption provided in section 91 of the Act that they are joint actors with the Insiders. Counsel submits that the Supporting Shareholders have failed to rebut this presumption based on the evidence. Counsel also submits that the evidence taken as a whole with respect to the Acquisition Group, the Insiders and the Supporting Shareholders does not rebut, but neither strengthens, the presumption that they are acting jointly or in concert.

ii) Submissions of Staff

[87] Staff point out that an "ordinary" support agreement with identically treated shareholders should not in and of itself generally result in arm's length parties being found to be acting jointly or in concert with the offeror.

[88] However, Staff agree with the submissions of the First Capital Group and urges that the Commission take a very rigorous and narrow interpretation of the phrase "in favour of the transaction" in the "joint actor" definition set out in Rule 61-501. According to Staff, this interpretation follows the policy considerations underlying Rule 61-501, to ensure that the majority be comprised of shareholders who are voting solely on the merits of the transaction, to the extent possible.

[89] In summary, Staff submit that section 91 of the Act creates a presumption that a party to a support or lock-up agreement is a "joint actor" within the meaning of Rule 61-501.

[90] By virtue of Rule 61-501, however, there is no such presumption for a person who is a party to an agreement, commitment or understanding *solely* to tender to the bid or vote in favour of the transaction. However, if the agreement, commitment or understanding *includes* this element, but is broader in scope, the "exception" in Rule 61-501 should not apply. In this regard, Staff seem to agree with First Capital Group as to the interpretation and interaction of Rule 61-501 and section 91 of the Act.

[91] Staff suggest that the first question the Commission must ask itself is whether the Support Agreements fall within the exclusion in Rule 61-501 as they narrowly construe it; that is, are they simply agreements that the Supporting Shareholders will "vote in favour" of the Going

Private Transaction. If the Support Agreements are found merely to be agreements to vote in favour of the Going Private Transaction, the exclusion applies and the Supporting Shareholders would not be considered to be "joint actors" with SCI Acquisition and the Insiders merely because they entered into Support Agreements. If the Support Agreements do not fit within that exception, however, the parties would otherwise be caught by the presumption provided for by section 91 of the Act. However, Staff submit that a further analysis must be completed to determine whether there are facts in the surrounding circumstances which support the conclusion that the Supporting Shareholders were joint actors with SCI Acquisition and the Insiders.

[92] After reviewing the Support Agreements, Staff submit that certain terms, section 3.1(c) of the Support Agreements in particular, are unrelated and extend beyond provisions solely regarding voting in relation to the Going Private Transaction. They illustrate this by way of an example: even if the Going Private Transaction is abandoned and SCI Acquisition chooses not to terminate the Support Agreements, the Supporting Shareholders are still required under section 3.1(c) to vote their Sterling shares "against approval of any proposal from any party other than [SCI Acquisition]". This, in the view of Staff, demonstrates that the Support Agreements go beyond the scope of what was contemplated by Rule 61-501.

[93] As such, Staff submit that the Supporting Shareholders are to be presumed to be acting jointly or in concert with SCI Acquisition and the Insiders pursuant to paragraph 91(1)2 of the Act set out above. The onus is then on SCI Acquisition to rebut the presumption of a joint actor relationship between SCI Acquisition, the Insiders and the Supporting Shareholders.

iii) Submissions from SCI Acquisition

[94] SCI Acquisition submits that the narrow interpretation proposed by the First Capital Group and Staff is not supported by the published policy statements nor in the jurisprudence. SCI Acquisition submits that there is no suggestion in the development of the policy underlying Rule 61-501 that a narrow and rigorous interpretation should be applied. While SCI Acquisition accepts that this interpretation *could* be the correct policy for the Commission to pursue, it nevertheless submits that the development of this policy statement should not follow in the context of this Going Private Transaction. If this interpretation is to be given in this context, there should be commentary, requests for comment and feedback from market participants.

[95] Nonetheless, we did not understand Counsel for SCI Acquisition to have strongly taken issue with the general interpretation of the "joint actor" provisions given by Staff and the First Capital Group. Instead, Counsel emphasizes that under any interpretation of those provisions, the presumption does not apply in this case. The thrust of SCI Acquisition's position is that the operative provisions of the Support Agreements do not convert these agreements into something more than an agreement to vote in favour of the Going Private Transaction.

[96] SCI Acquisition submits that, as a policy matter, the Commission has considered and approved the concept of support agreements and lock-up agreements. It emphasized that there is nothing improper in a party who wishes to complete a transaction seeking to ensure in advance that its transaction will be successful. In addition, SCI Acquisition submits that whether a support agreement is "soft" or "hard" has no bearing on the interpretation of the definition of

joint actor (as explained below): if parties are to be held to be joint actors, SCI Acquisition submits that it must be for reasons other than the "hardness" of the Support Agreements. This approach has been endorsed by the Commission and lock-up shares should be counted with the minority, subject to the qualification that the locked-up shareholder:

(a) did not receive consideration per security that is not identical in amount and type to that paid to all other beneficial owners in Canada of affected securities of the same class;

(b) did not receive consideration of greater value than that paid to all other beneficial owners of affected securities of the same class; and

(c) upon completion of the transaction, did not beneficially own, or exercise control or direction over, participating securities of a class other than affected securities.

(*Notice of Proposed Changes to Proposed Rule 61-501 and Proposed Companion Policy 61-501CP Under the Securities Act Insider Bids, Issuer Bids, Going Private Transactions and Related Party Transactions* (1999), 22 O.S.C.B. 7835 at 7840 ("Request for Comments and Notice of Proposed Changes to Rule 61-501").)

[97] SCI Acquisition submits that a party cannot be a joint actor simply because that party signs a support agreement. Further, as stated, counsel for SCI Acquisition submits that the nature of a support agreement alone cannot make the parties to such an agreement "joint actors". There must be some other evidence to support such a finding. The issue of whether someone is a "joint actor" is fundamentally a question of fact and there must be evidence to support a finding that the parties are acting jointly or in concert. SCI Acquisition relies on the decision of *Drilcorp Ltd. v. Nova Bancorp Investments Ltd. et al.*, No. 0501-02360, March 24, 2005 (Unreported) (Alta. Q.B.) ("*Drilcorp*"), which defined acting jointly or in concert as parties acting together "to bring about a planned result" (*Drilcorp*, *supra* at p. 7). As discussed in more detail below, SCI Acquisition submits that the evidence falls short of establishing that any of the Supporting Shareholders acted with the Insiders to bring about the planned result.

iv) Submissions from Sterling

[98] Counsel for Sterling supports the submissions of SCI Acquisition. In particular, he submits that, with regard to the specific provisions of the Support Agreements, the words included in section 3.1(c) are merely "suspenders" – additional words to the agreement – which do not change the effect of the Support Agreements. This section says as follows:

> 3.1 Prior to the Expiration Date, at every meeting of the shareholders of [Sterling], however called, at which any of the following matters is considered or voted upon, and at every adjournment or postponement thereof. Shareholder shall, subject, however, to the provisions of Section 2.3, vote or cause the holder of record to vote all of the Shares:
>
> (a) in favour of approval and adoption of the Going Private Transaction and the transactions contemplated thereby;

(b) against approval of any proposal made in opposition to or competition with consummation of the Going Private Transaction;

(c) *against approval of any proposal from any party other than the Acquiror*;

(d) against any action or proposal that is intended to, or is reasonably likely to, result in the conditions of the Corporation's obligations under the Going Private Transaction not being fulfilled;

(e) against any action which would reasonably be expected to impede, interfere with, delay, postpone or materially adversely affect consummation of the transactions contemplated by the Going Private Transaction.

[Emphasis added.]

[99] It is those words in particular that Staff seem to rely upon to support its position that these agreements are more than ordinary support agreements. Sterling submits that the Support Agreements in this case are simply agreements of purchase and sale which include a voting provision providing that the Supporting Shareholders will vote in favour of the Going Private Transaction.

[100] Sterling submits that, in interpreting the Support Agreements, the Commission should consider the factual matrix in which the Support Agreements were drafted, including the commercial reasonableness of the agreements in order to ascertain what the parties truly intended. The Commission must also avoid adopting interpretation which goes against principles of business efficacy. Counsel for Sterling submits that it is inconceivable that the Supporting Shareholders would be precluded from voting on a bid after the Going Private Transaction was terminated. Such an interpretation would be commercially absurd.

[101] In any event, in the course of making submissions, counsel for SCI Acquisition undertook to this Panel that it would never seek to enforce any restrictions on the ability of shareholders to vote for another transaction if the Acquisition Group determined not to proceed with the Going Private Transaction. By doing so, counsel emphasizes that all of the terms of the Support Agreement are intended to only reflect a commitment to vote in favour of the Going Private Transaction.

v) Analysis

[102] The policy underlying the concept of identifying who is a "joint actor" was stated in *Re 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. (See *Re Sears* (2006), 22 B.L.R. (4th) 267 (Ont. Sec. Comm.) at paras. 149 and 153.) 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 a planned result". (See *Drilcorp*, *supra* at p. 7.)

[103] The Commission has recently stated in *Re Sears* that deposit agreements, support agreements, and lock-up agreements are all contemplated by the Act and Rule 61-501 and are not, in and of themselves, objectionable or illegal. (See *Re Sears*, *supra* at para. 250.)

[104] In fact, lock-up or support agreements are common arrangements used to ensure that holders of significant blocks of shares will vote their shares in support of a plan of arrangement (or tender them to a bid, as the case may be), thus helping to ensure the success of the transaction. This is not illegitimate or improper, but rather this is the result of a carefully formulated policy that has now been in practice for several years. The *Bingham* case addressed this issue as well, as follows:

> One would think that a shareholder who makes a lockup deal like that must be taken to have been acting jointly with the proponent. However, if you make that assumption and if as a consequence of it, takeover proponents are not allowed vote shares *[sic]* acquired through such agreements, then the assumption could stifle enthusiasm for takeover bids.
>
> And that might not be a good thing: lockup agreements serve a useful purpose -- they can give takeover proponents some certainty that the deals they propose have a chance of success. Absent the comfort and assurance provided by a lockup agreement, fewer takeover bids might be launched; and since takeover bids are not necessarily bad, that could inhibit the fostering of an efficient capital market.
>
> (*Bingham v. Ashton Mining of Canada Inc.*, [2007] B.C.J. 410 (B.C.S.C.) at paras. 51 and 52.)

[105] In order to provide some context to the Commission, Staff explained the distinction between lock-up agreements and support agreements. Support agreements capture agreements in respect of voting shares. Lock-up agreements, on the other hand, are by definition and by custom, agreements to tender shares into a bid. Staff took the position that the agreements at issue in this Application are support agreements because they relate only to voting.

[106] The First Capital Group also argues that in this case, the Support Agreements all contain identical "hard" provisions. In distinguishing whether agreements are "hard" or "soft", Staff referred us to a quote from an article in the McGill Law Journal by Christopher Nicholls, which provides a good description of what these terms mean:

> […] There are two basic modes of lock-up agreement: the "hard" lock-up and the "soft" lock-up. A hard lock-up agreement contains a commitment on the part of the target shareholder to tender his or her shares to the takeover bid that is to be launched by the bidder, provided that the bid price is no lower than the price specified in the lock-up agreement. A soft lock-up agreement would typically contain a conditional commitment by the shareholder to tender to the

> bid and a covenant not to actively solicit competing offers (i.e., not to "shop" the bid), but would nevertheless have an "out", allowing the shareholder to tender to a higher bid from a third party should one materialize."
>
> (Christopher C. Nicholls, "Lock-Ups, Squeeze-Outs, and Canadian Takeover Bid Law: A Curious Interplay of Public and Private Interests", (2006) 51 *McGill L.J.* 407 at 415.)

[107] Further, the definition of "joint actors" does not distinguish between "soft" and "hard" lock-up/support agreements. It simply excludes from the definition parties that have signed support agreements. The British Columbia Securities Commission explained the difference between what are colloquially termed "soft" and "hard" agreements as follows:

> […] In a soft lock-up agreement, the significant shareholder agrees to tender its share into the bid, but reserves the right to tender its shares into a higher-priced bid should one come along during the time the original bid is in play. In a hard lock-up agreement, the shareholder commits to tender its shares into the bid no matter what. […]
>
> (*Re Stornoway Diamond Corporation*, 2006 BCSECCOM 533 at para. 11; leave to appeal dismissed (2006), 21 B.L.R. (4th) 171 (B.C.C.A.).)

[108] We agree with counsel for SCI Acquisition that whether a support agreement is "soft" or "hard" has no bearing on the interpretation of the expressly carved-out definition of a joint actor. Again, this issue was clearly considered by the Commission in designing Rule 61-501. During the comment period, the Commission posed the following question on this very issue.

> Do you agree that a major shareholder that enters into a *hard and irrevocable lock-up agreement* to support a going private transaction but receives identical consideration to that received by other shareholders *should be entitled to vote its shares as part of the minority* in respect of the going private transaction in all cases? What about a soft lock up? [Emphasis added.]
>
> (Request for Comments and Notice of Proposed Changes to Rule 61-501, *supra* at 7840.)

[109] In its response to the six commentators who addressed this question, the Commission confirmed that its policy was that even shares subject to "hard" lock-up agreements should be counted as part of the minority vote. There should be no aspect of subjectively considering the "hardness" of the support agreement in question:

> *While the Commission recognizes that allowing locked-up shares to be counted may end or preclude an auction*, the Commission continues to believe that the approach taken in the January proposed Rule is the correct one and that locked-up shares should be counted, subject to the qualification that the locked-up shareholder (i) did not receive a consideration per security that is not identical in amount and type to that paid to all other beneficial owners in Canada of

> affected securities of the same class, (ii) did not receive consideration of greater value than that paid to all other beneficial owners of affected securities of the same class, and (iii) upon completion of the transaction, did not beneficially own, or exercise control or direction over, participating securities of a class other than affected securities. *The Commission does not propose to distinguish between hard and soft lock-up agreements*. […] [Emphasis added.]
>
> (Request for Comments and Notice of Proposed Changes to Rule 61-501, *supra* at 7840.)

[110] In order to understand the definition of "joint actors" in Rule 61-501, it is helpful to examine the Commission's historical treatment of lock-up agreements in the context of going private transactions. Under OSC Policy 9.1, the predecessor policy statement to Rule 61-501, the votes of the security holders who had entered into an agreement to support a going private transaction were excluded from the minority if such holder held sufficient securities to materially affect control of the issuer.

> (*OSC Policy Statement 9.1* (1992), 15 O.S.C.B. 2921 ("Policy 9.1") section 2.2.)

[111] In the process of reformulating Policy 9.1 as Rule 61-501, the Commission changed the treatment of shares subject to a lock-up agreement. The Commission explained this change in the context of a going private transaction as follows:

> The Commission is now of the view that shares should not be excluded from the minority for voting purposes, regardless of the level of share ownership of the shareholder or the circumstances in which the shares were tendered or are voted, so long as the shareholder does not (i) receive a consideration that is not available to other holders in Canada of affected securities of the same class, (ii) receive consideration of greater value than that paid to all other holders of affected securities of the same class, or (iii) upon completion of the transaction, beneficially own, or exercise control or direction over, participating securities of a class other than the class of securities subject to the going private transaction.
>
> […]
>
> (*Notice of Proposed Changes to Proposed Rule 61-501 and Proposed Companion Policy 61-501CP* (1999), 22 O.S.C.B. 493 (the "1999 Notice") at 494.)

[112] In its response to comments received during the reformulation process, the Commission acknowledged that including shares subject to a lock-up agreement as part of the minority may end or preclude an auction process. The Commission explained the balancing exercise which informed its policy decision as follows:

> Traditionally, the reason for excluding locked up shares has been that lock-up/support arrangements may effectively preclude or severely limit an auction process, thereby removing any practical alternatives from other shareholders.
>
> [A compromise proposal considered by the Commission in 1996] represented a more uniform and flexible approach than that currently in Policy 9.1, as it recognized that disenfranchisement represents a significant imposition on the rights of substantial shareholders whose actions may be of benefit to the minority. It recognized that support/lock-up arrangements generally serve to reduce risk to the offeror who might otherwise be reluctant to make an offer, thereby bringing offers to minority shareholders that might not otherwise appear. In addition, a substantial shareholder can bring to the negotiations a sophisticated and informed party with negotiating power, looking for the best price, whereas the minority have only the opportunity to withhold approval with no certainty of obtaining a better offer. […]
>
> […]
>
> […] In considering how shares held by controlling shareholders should be treated the Commission recognizes that to permit a controlling shareholder to enter into a lock-up/support arrangement without having the subject shares excluded from the minority vote could conceivably lead to situations where the lock-up/support arrangement severely limits or ends an auction process. […]
>
> (1999 Notice, *supra* at 502-503.)

[113] While Staff conclude that certain terms of the Support Agreements extend beyond provisions solely regarding voting in relation to the Going Private Transaction, we do not agree that this is determinative of the issue: the question before us is whether the parties to the Support Agreements are "joint actors" within the meaning of securities laws. Rule 61-501 states that the answer to the question is a question of fact, and not to be answered in the affirmative solely because of the existence of the Support Agreements. Nor do we find that the specific wording of the agreements in question resolves the matter without regard to other facts.

[114] The history of subsection 91(1) and Rule 61-501, in our view, suggests that the presumption in subsection 91(1) must be read in conjunction with the definition of "joint actors" in Rule 61-501. When we do so, we do not agree with Staff or counsel for the First Capital Group that Rule 61-501 creates an exemption, or "safe harbour" from the presumption of being a "joint actor" which only applies to an arrangement which is no more than an agreement, commitment or understanding that the security holder will tender to the bid or vote in favour of the transaction. Nor do we find that that provision does not permit us to consider any party to such an arrangement to be a joint actor. All the words of the section suggest is that "entering into a support agreement" should not be the sole or determining factor in the assessment.

[115] The assessment of whether a joint actor relationship has been established requires a factual analysis based on the plain and ordinary meaning of the words "acting jointly or in

concert", informed by the principles of the Act, the Rule and enunciated Commission policy. The facts regarding each Supporting Shareholder must be considered separately for there to be such a determination. (See *Re Sears*, *supra* at para. 79.)

[116] When determining the nature and scope of agreements and arrangements, the Commission should interpret the words used by the parties themselves by reference to the relevant documents, not by reference to evidence which counsel says was the subjective intention of one of the parties to the agreement. As Staff argue, Commission findings must be based on clear cogent evidence, not ambiguous or speculative evidence; however, reasonable inferences can always properly be drawn from evidence. (See *Investment Dealers Association of Canada v. Boulieris* (2004), 27 O.S.C.B. 1597 (Ont. Sec. Comm.) at paras. 33 and 34; aff'd [2005] O.J. No. 1984 (Div. Ct.).)

[117] Parties cannot be found to be "joint actors" simply because they are counterparties to voting support agreements. The Applicants must establish a joint actor relationship between SCI Acquisition and the Supporting Shareholders on other grounds. As the Commission has stated previously in *Re Sears*: "In the absence of the proverbial 'smoking gun', there must be evidence to support a finding that parties have acted jointly or in concert". (See *Re Sears*, *supra* at para. 79.)

[118] 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.

[119] We interpret the analysis of whether one is a "joint actor" in light of the interaction of subsection 91(1) and Rule 61-501, as follows:

(1) The language of subsection 91(1) that someone who is a party to *any* "agreement, commitment or understanding", whether formal or informal, *with the offeror* (or any party acting jointly or in concert with the offeror), and by virtue of that, forms the intention to exercise any voting rights attaching to securities of the offeror, gives rise to an evidentiary presumption that the party is a joint actor. The party challenging the vote must first prove that the intention to exercise the voting shares was formed "as a result of" the "agreement, commitment or understanding", to give rise to the presumption. This presumption can be rebutted by evidence;

(2) Rule 61-501 overrides the presumption of acting jointly or in concert with respect to voting arrangements: the fact and existence of "an agreement, commitment or understanding that the security holder will tender to the bid or vote in favour of the transaction" does not result in a finding that a party is a "joint actor", in the absence of other evidence;

(3) The question is one of fact, which will depend on all of the circumstances, not just the existence or the provisions of the agreement;

(4) The nature, scope and breadth of the relevant "agreement, commitment or understanding" (i.e., the obligations go beyond merely tending to the bid or voting in favour of the transaction), may be a relevant consideration to be considered and weighed in considering whether a party is a joint actor. However, notwithstanding the position advanced by counsel for Staff and the First Capital Group, we do not agree that the presence of other commitments or arrangements automatically denies the parties the protection of Rule 61-501 and restores the presumption that they are acting jointly or in concert as contained in subsection 91(1) of the Act.

[120] As the foregoing suggests, we do not accept the narrow interpretation of the word "solely" used in the definition of "joint actor" set out in Rule 61-501 proposed by the First Capital Group and Staff. In our view, their interpretation is not supported by any current published policy statements nor by the jurisprudence. While this novel interpretation *could* be endorsed by the Commission in the future, the development of such an interpretation would amount to a new or revised statement of policy. Although such a view may be sound, the suggested narrowing of this policy should, in our view, be pursued more transparently, through clearly articulated guidance, subject to comment and input of market participants.

[121] The Commission has stated that caution should be exercised where intervention in the public interest would amount to an amendment of existing policies:

> We would also adopt the statement in *Cablecasting* that this is an area in which we "must move with caution". In the great majority of cases, the use of the cease-trade power will be invoked where there is in fact a demonstrated breach of the Act, the regulations or a policy statement. If there is a situation which the Commission believes should be regulated, the appropriate way to proceed is to publish a policy statement in draft form for public comment. In that way, the concerns of the Commission are made known and the policy statement is subject to critique by interested parties. Where a final version is published, it should reflect the best thinking of all the participants in the capital markets, including the Commission.
>
> (*Re Canadian Tire Corp.* (1987), 10 O.S.C.B. 857 (Ont. Sec. Comm.) at 932 aff'd (1987), 59 O.R. (2d) 79 (Div. Ct.).)

As stated, this statement is apposite in the circumstances of this case.

C. Are the Supporting Shareholders or any of them Joint Actors under Rule 61-501?

[122] The First Capital Group takes the position that, as a result of the Support Agreements, the interests of the Support Agreement counterparties are unconditionally joined and aligned with the Insiders, and their interests diverge from those of the independent minority shareholders. As such, the First Capital Group takes the position that there is not one single supporting shareholder who is truly independent from the Insiders or Sterling.

[123] The First Capital Group submits that the effect of the Support Agreements is not merely a permissible hard lock-up, it is an "absolute lock-up" that guarantees for the Insiders the success of the Going Private Transaction irrespective of any superior offer. Furthermore, in the context of an offer by Insiders, who have statutory and fiduciary duties in their capacity as directors and officers of Sterling, the absolute lock-up not only leads to joint actor status for the Insiders and the Support Agreement counterparties, but it operates as a deal protection measure for conflicted Insiders, acting in their capacity as bidders, to protect their offer for Sterling, to discourage other offers from emerging, and to prevent a superior offer from succeeding. As a deal protection measure, the absolute lock-up is both preclusive and coercive.

[124] In contrast, SCI Acquisition and Sterling submit that there is no evidence that any of the Supporting Shareholders received a collateral benefit or preferential treatment in consideration for signing the Support Agreements which would call into question the integrity of their vote in respect of minority approval, or that any of the Supporting Shareholders is a joint actor with SCI Acquisition or any of the Insiders for the purposes of Rule 61-501.

[125] Sterling, in particular, submits that the sole purpose of the Support Agreements make the parties to the Going Private Transaction adverse in interest because SCI Acquisition and the Insiders want to complete their bid at the lowest price and the Supporting Shareholders want the highest possible price for their securities. As such, according to Sterling, the Supporting Shareholders are not acting jointly or in concert with the Insiders, if for no other reason than because their economic interest under the Going Private Transaction is different and the parties have no continuing relationship once the transaction concludes.

[126] Staff take the position that a distinction, in fact, may exist among David Kosoy, and the companies/entities he controls and directs on the one hand, and the other parties to the Support Agreements, on the other. Given the historical involvement of David Kosoy with Sterling and the Bid, we accept that this distinction provides a good framework in which to structure our analysis. However, the approach begs the question "which entities did David Kosoy control or direct at the time he entered into the Support Agreements, if any".

[127] We propose to divide our analysis of the joint actor issue into three different groups of Supporting Shareholders, namely:

(a) David Kosoy and First National Investments Inc. ("First National") (which is admitted to have been controlled by David Kosoy at the relevant time);

(b) the Sterling Trust (which David Kosoy settled); and

(c) the remaining thirteen Supporting Shareholders (the "Remaining Supporting Shareholders").

[128] The First Capital Group submits that, as a matter of fact, David Kosoy is a joint actor with the Acquisition Group. If this is the case, they submit that the votes attached to the Securities over which he has control or direction, should not be counted as part of the "majority of minority" determination. The First Capital Group says that this would include the Securities registered in the name of David Kosoy, First National and Sterling Trust. While there seems to be no dispute that David Kosoy controls the interests of First National, there is no such consensus that he controls or directs the interests of Sterling Trust.

D. Are David Kosoy & First National Investments Inc. Joint Actors under Rule 61-501?

i) Submissions from the First Capital Group

[129] David Kosoy owns or controls 3,841,820 Securities of Sterling making him, on his own, the second largest shareholder of Sterling. The First Capital Group points out that David Kosoy played an integral role in structuring, planning and promoting the Going Private Transaction. David Kosoy is the co-Chairman and co-Chief Executive Officer of Sterling. He is also a director of Sterling.

[130] The First Capital Group emphasizes that David Kosoy is a former member of the Acquisition Group, and only ceased to be a member after being the "point person" on behalf of SCI Acquisition successfully negotiating the price at which the Going Private Transaction would take place. He was also the individual who negotiated the terms of the Support Agreements as a seller. Those negotiations, through his counsel, were finalized when David Kosoy signed the Support Agreement on January 29, 2007. The Support Agreement signed by David Kosoy formed the template used for all the Support Agreements at issue in this Application.

ii) Submissions from Staff

[131] Staff submit that there is evidence on which the Commission could make a finding that David Kosoy has failed to rebut the presumption that he, and the company he controls, First National, are joint actors with the Insiders and SCI Acquisition. Staff make the following observations:

- As part of the Acquisition Group, David Kosoy was instrumental in making the strategic determination that the Going Private Transaction would need to be structured in a manner that made it immune to potential challenges by the First Capital Group. In his position, David Kosoy was privy to information that non-arm's length parties were not. Most specifically, the Acquisition Group's interests in thwarting any bid by the First Capital Group and their intention in this respect in drafting the form of the Support Agreement.
- As a seller, his counsel negotiated a template for the Support Agreements that reflected, in part, the concerns that motivated the Insiders when David Kosoy was part of the Acquisition Group. Unlike the situation in *Drilcorp* (discussed above), David Kosoy and the Insiders

intended to bring about a planned result – the thwarting of any proposal from the First Capital Group – and they succeeded in doing that by the terms of the Support Agreements.

[132] As such, Staff submit that circumstances such as these, at a minimum, call into question David Kosoy's independence given his relationship to SCI Acquisition and the Insiders and his interest in the Going Private Transaction.

iii) Submissions from SCI Acquisition

[133] SCI Acquisition submits that the fact that parties had acted jointly or in concert *at one time* in the past, does not mean they continue to do so at the relevant time. Thus, even if David Kosoy had been acting jointly or in concert with the Insiders while he was part of the Acquisition Group, there is no evidence to suggest he continued to so act, after the first week of January 2007 (when he advised them that he would no longer participate as one of the Acquisition Group).

[134] SCI Acquisition submits that while David Kosoy was engaged in discussions settling the purchase price with two large shareholders, Peter Thomas and Peter Schlessinger of Apex Investment Fund were represented by legal counsel, independent of David Kosoy and the Acquisition Group, throughout the negotiations of the Support Agreement and were acting at arm's length from SCI Acquisition. The consideration being paid in the proposed transaction is $1.26 per share and is at the high end of the independent valuation range of GMP. That consideration is being paid to all shareholders of Sterling.

[135] Other than negotiating the initial price with two other shareholders, SCI Acquisition submits that the evidence supports a finding that David Kosoy had no say or involvement in structuring or promoting the transaction: there is no evidence that he was financing the transaction or that he had any intention or motivation to thwart a bid from the First Capital Group. SCI Acquisition agrees that David Kosoy negotiated the document forming the template for the Support Agreements, but it says he did so in his capacity as the largest shareholder of the company and as a seller represented by legal counsel. Moreover, David Kosoy was never an officer or director of SCI Acquisition and he withdrew from the Acquisition Group during the first week of January 2007, prior to the delivery of the first Term Sheet in respect of the proposed transaction to Sterling's Special Committee. As such, SCI Acquisition submits that even if David Kosoy was acting jointly or in concert with the Acquisition Group, he ceased to do so by January such that he was not acting jointly or in concert at the time he negotiated or signed the Support Agreement.

[136] SCI Acquisition submits that David Kosoy swore an affidavit in the context of this proceeding and was cross-examined on its contents. It emphasizes that the First Capital Group never questioned David Kosoy whether he was acting jointly or in concert with SCI Acquisition or the Insiders.

iv) Submissions from Sterling

[137] Sterling submits that the fact that David Kosoy was originally part of the buying group before "switching sides" to become a seller is not a relevant consideration. It submits that there is no previous authority saying that some previous involvement in planning, promoting or

structuring an offer will lead to a joint actor status. Counsel for Sterling submits that the Commission must look at the conduct of David Kosoy as a whole. While the evidence suggests that David Kosoy and Peter Thomas discussed the price of $1.26 at an early stage, the negotiations between the two parties broke down and the agreement which was concluded with Peter Thomas several weeks later did not involve David Kosoy. The price of $1.26 was later settled through subsequent negotiations with the Insiders based on the conclusion of the GMP valuation. As such, the evidence shows that David Kosoy on his own did not deliver the votes necessary to ensure the success of the transaction.

[138] Counsel for Sterling points out that, at the time David Kosoy ceased his involvement with the Acquisition Group, he was not involved with the form of the Support Agreements other than as a shareholder who retained counsel to review and advise as to its terms. Sterling submits that negotiating a term of the support agreement does not automatically lead to finding that the parties were acting jointly or in concert.

[139] Sterling also submits that there is no evidence to support that David Kosoy was instrumental in making the strategic decision that the Going Private Transaction had to be structured in a manner that made it immune to potential challenges from the First Capital Group. Counsel for Sterling submits that the company followed all the protective measures set out in Rule 61-501 for the benefit of the shareholders. A Special Committee was formed and retained outside counsel. Sterling submits that the Special Committee fulfilled its fiduciary obligations and its business judgment, which included a finding that it was not likely that a third-party bidder could provide a competitive offer for the company (as reported in the minutes of the Special Committee of September 29, 2006). In addition, David Kosoy was never a director or officer of SCI Acquisition.

v) Analysis

[140] As set out in our discussion above with respect to the nature and implications of the Support Agreements, we are of the view that the fact that David Kosoy is a party to the Support Agreements is not determinative of the question: “was David Kosoy a joint actor within the meaning of Rule 61-501?” We are also unable to accept the proposition advanced by the First Capital Group that basically suggests that “once a joint actor, always a joint actor”. We agree with counsel for Sterling that, in the case before us, we must examine all of the facts, and the conduct of David Kosoy as a whole. When we asked Staff counsel, what direct evidence (other than the Support Agreement) is there to support a finding that David Kosoy continued to be a “joint actor”, counsel advised that there is no direct evidence – just an inference “from the facts”. In light of the seriousness of the result of such a finding, we are of the view that there needs to be more than a mere inference to base that conclusion; we are of the view that, by operation of subsection 91(1) as modified by Rule 61-501, there must be evidence beyond the existence of the Support Agreement, and such evidence must be sufficient, on a balance of probabilities to find that he is a joint actor. However, we do agree with Staff that at a minimum, David Kosoy’s circumstances call into question his independence from the Insiders, and this fact calls for a closer examination of his relationship to and role in the bid.

[141] As set out above, David Kosoy is a director of Sterling and, along with Preston, is its co-Chairman and co-Chief Executive Officer; he is therefore an insider to Sterling. He also owns or controls 3,841,820 Securities of Sterling making him, on his own, the second largest shareholder of Sterling. Although David Kosoy has never been a director of SCI Acquisition, David Kosoy was part of the initial group of Insiders who approached Sterling in April 2006 regarding the Going Private Transaction.

[142] In November 2006, David Kosoy participated in the Acquisition Group's decision to approach one or some of Sterling's other large shareholders to ascertain their interest in supporting a Going Private Transaction by SCI Acquisition. Those discussions and negotiations were with Peter Thomas and with Peter Schlessinger of Apex Investment Fund Ltd., two significant shareholders of Sterling whose holdings were second only to David Kosoy's own holdings and those of Sterling Trust. *We agree that David Kosoy, therefore, played an integral role in structuring, planning and promoting the Going Private Transaction prior to his decision to become a seller and, therefore, a supporting shareholder under the Going Private Transaction.*

[143] After David Kosoy decided to leave the Acquisition Group, he had some discussions with the Insiders about his role, if any, with Sterling after the completing of the transaction. The discussions also included whether he would be terminated as an employee of Sterling and be paid the termination payment (approximately $2 million) outlined under his employment agreement with Sterling. The evidence on the issue indicates that no agreement was made regarding the payment of any termination amount. The possibility of a termination payment was also considered by the Special Committee and GMP in conjunction with the valuation of Sterling. The understanding of the Special Committee was that there was no agreement to make such a payment to David Kosoy. However, in discharging its obligations, the Special Committee asked GMP to consider the possibility of any such payment into its financial analysis. In the end, no aspect of the GMP valuation or fairness opinion is based on any payment being made.

[144] Counsel for SCI Acquisition spent a great amount of time in his submissions to emphasize that there is no evidence that David Kosoy's conduct was inappropriate, or abusive, and that there is no evidence that David Kosoy received any collateral benefit. We agree.

[145] We do not see any evidence in the record that David Kosoy acted improperly or that his decision to cease participation in the Acquisition Group was motivated by anything other than proper considerations.

[146] Nonetheless, we agree with the submissions of Staff, which were supported by the First Capital Group; in Staff's view, where a supporting shareholder: (i) who is an insider of the target company; (ii) was previously part of the Acquisition Group; (iii) was involved in the decision to obtain support from minority shareholders; (iv) who negotiated the price of the offer; and (v) who switched sides shortly after negotiating the terms of the offer, a serious question arises as to whether that shareholder can cease to be a "joint actor" in the context of the transaction once that shareholder has moved from the Acquisition Group to the selling group. As Staff say in their written submissions, "this is especially the case when the transaction involved is a transaction

that has been proposed by insiders and that would result in the expropriation of the shares held by minority shareholders."

[147] As a matter of policy, we are particularly sensitive to the concerns raised by the First Capital Group and Staff regarding an insider's ability to simply declare himself/herself "independent" of an insider group without regard to the history of his/her involvement and the circumstances. In the case before us, we note the short time that elapsed between David Kosoy's "declaration of independence", and the consideration of whether he is a "joint actor" for the purposes of the transaction. While we agree that the length of the time frame is not determinative of the issue, we do believe it to be a relevant consideration, particularly in this case.

[148] On the evidence, we find all of the facts enumerated above in paragraph 146 to apply in the circumstances of David Kosoy. In all of the circumstances, for the reasons set out above, we find that David Kosoy, and therefore First National which is admitted to be controlled by him, was and remains a "joint actor" with the Insiders in respect of the Going Private Transaction.

E. Is the Sterling Trust a Joint Actor under Rule 61-501?

[149] Having concluded that David Kosoy (and First National) are joint actors with SCI Acquisition and the Insiders, we must now determine whether the Sterling Trust is also a joint actor, the votes of which should be excluded from the minority.

[150] In our view, the issue comes down to the question of whether David Kosoy exercised direction and control over the Sterling Trust at the relevant time (being the entering into of the Support Agreement).

i) Submissions from the First Capital Group

[151] The First Capital Group submits that David Kosoy did in fact control the Sterling Trust. Their counsel points to at least four facts that reinforce the conclusion that David Kosoy and the Sterling Trust were acting together and ought to be treated by the Commission as acting jointly or in concert. First, the First Capital Group says that the Memorandum of Agreement entered into by the major shareholders who founded Sterling in March 2001 includes the Sterling Trust as a party under the definition of the "Kosoy Group".

[152] Second, the First Capital Group relies on David Kosoy's acknowledgement in the Sterling Management Information Circular dated April 24, 2006, that he considers himself to "act jointly and in concert with the Sterling Trust".

[153] Third, the First Capital Group points to the correspondence relating to Sterling Trust's execution of the Support Agreement. Counsel referred us to a series of emails amongst SCI Acquisition, Brian Kosoy, David Kosoy and Martin Middlestadt, David Kosoy's counsel, in which Brian Kosoy asks for David Kosoy's executed Support Agreement and, at the same time,

requests that David Kosoy forward a copy of the Support Agreement to the Sterling Trust for execution. This email correspondence continued between January 29th and February 6, 2007. Finally, on February 6th, David Kosoy wrote to Susan Fairhurst, Sterling Trust's trustee, asking her to sign the Support Agreement. Brian Kosoy was ultimately provided a copy of the Support Agreement executed by the Sterling Trust from David Kosoy's counsel on February 7th. All of the correspondence went on between David Kosoy and the Sterling Trust. The First Capital Group submits that this evidence leads to only one of two possible conclusions: either the Support Agreement was signed at David Kosoy's direction or, at a minimum, David Kosoy ensured that the document would be executed.

[154] Finally, the First Capital Group refers us to a document produced by SCI Acquisition which shows a list of shareholders who own or control more than 1,500 Securities of Sterling, and which shareholders entered into the Support Agreements with SCI Acquisition. The document shows the initials of David Kosoy beside Sterling Trust. The First Capital Group submits that this evidence suggests that SCI Acquisition regarded David Kosoy and the Sterling Trust as being aligned in interest.

ii) Submissions from Staff

[155] Staff submit that in circumstances where David Kosoy has taken the position in Sterling's publicly filed documents that he is acting jointly and in concert with the Sterling Trust, this position should be accepted for the purposes of the Going Private Transaction, regardless of the legal status of the trust, the identities of the trustee and protector, and who might have legal control or direction over the affairs of the trust. Staff submit that the Sterling Trust has failed to rebut the presumption that it is a joint actor with the Insiders and SCI Acquisition.

iii) Submissions from SCI Acquisition

[156] SCI Acquisition disputes the position put forward by the First Capital Group and Staff, and asserts that the Sterling Trust is a legitimate legal entity independent of David Kosoy. It points out that the Sterling Trust is a Cook Islands asset protection trust settled by David Kosoy on January 29, 1997, which owns 3,406,971 Sterling Securities. The beneficial owners of the Sterling Trust are the wife of David Kosoy, her son, and David Kosoy's two sons, but the beneficial interest is entirely discretionary in the hands of the protector and the trustee. The trustee is a professional trustee named Susan Fairhurst and the protector is Phillip Kosoy, David's brother. No distributions have ever been made from the trust.

[157] Contrary to the First Capital Group's suggestion, SCI Acquisition emphasizes that there is no evidence that David Kosoy exercises control or decision-making power in respect of the Sterling Trust. SCI Acquisition referred to the affidavit of Robert Green, where David Kosoy is described as having "no involvement in or control over the affairs of the trust pursuant to the requirements of such a trust, and exercises no control or decision-making power in respect of the trust's execution of a support agreement".

[158] While the Management Information Circular states that David Kosoy "acts jointly and in concert with the Sterling Trust", SCI Acquisition submits that the Circular does not say that he

considers himself to be a "joint actor". The takeover bid circular issued in the context of the Going Private Transaction does not contain the same disclosure statement made in the earlier document that David Kosoy considers himself a joint actor with the Sterling Trust, and the statement ought to be seen in the context in which it was made, according to these submissions.

[159] In addition, SCI Acquisition's counsel submits that the fact that the Sterling Trust is mentioned under the definition of the "Kosoy Group" in the Memorandum of Agreement that was entered into among the controlling shareholders of Sterling in 2001 is hardly determinative of the matter. Even if Sterling Trust was within the Kosoy Group for the purposes of that and any other circular, it does not mean that the Sterling Trust is a joint actor with David Kosoy for purposes of the Going Private Transaction. (SCI Acquisition also mentioned that the Memorandum of Agreement has since expired February 1, 2007, and is no longer in force.)

iv) Submissions of Sterling

[160] Sterling supports the submissions of SCI Acquisition and submits that David Kosoy, as settler of the Sterling Trust, has no involvement in or control over the affairs of the trust and exercised no decision-making power in respect of the trust's execution of the Support Agreement and that there is no evidence in this regard to the contrary. He emphasizes that the Sterling Trust is run by a professional trustee, Susan Fairhurst, who signed the Support Agreement.

[161] Counsel for Sterling referred to various provisions of the Deed of Settlement that demonstrate that the Sterling Trust was acting as an independent actor. In particular, clause 46 of the Deed of Settlement provides that the Sterling Trust is an irrevocable settlement. Clause 8(c) of the Deed of Settlement provides that the power to sell resides in the professional trustee Susan Fairhurst, not David Kosoy as beneficiary. The evidence with respect to David Kosoy's involvement in getting the Support Agreement signed does not amount to a finding that he was a joint actor, according to counsel for Sterling. Counsel for both Sterling and SCI Acquisition point out that the First Capital Group had the opportunity to cross-examine David Kosoy but did not ask any questions regarding his involvement with the Sterling Trust.

v) Analysis

[162] We are of the view that if the evidence supported a finding that David Kosoy had direction or control over the Sterling Trust, we would hold that the Securities of Sterling Trust should be excluded from the "majority of the minority" calculation given David Kosoy's characterization as a "joint actor". However, in this case, on the evidence before us, we are unable to make that finding. In approaching this question, we need to consider the trust documentation, as well as all evidence relating to the manner in which decisions of the Trust were made and the business of the Trust conducted. Like the very question of who or what are "joint actors", the question of whether David Kosoy controls or had direction over the affairs of Sterling Trust is a question of fact. (See *Re Rogers*, [1929] 1 D.L.R. 116 (Ont. C.A.)). Professor Waters has succinctly put the matter this way: "The test is really an objective one. Has the settler reserved such a degree a control over the trust property during his lifetime that the trustees are merely his agents?" (See Waters, Gillen and Smith, *Waters' Law of Trusts in Canada*, 3d ed.

(Toronto: Thomson Carswell, 2005) at p. 210). Based on the evidence in the record, we answer "no" to this question.

[163] The Deed of Settlement of the Sterling Trust provides that the power to sell shares resides in the professional trustee. The relevant provisions read as follows:

> Powers of Investment, Acquisition and Sale
>
> 8. (a) The Trustees, with the consent of the Protector, shall have power to invest the Trust Fund in the purchase of any investment including any shares, stocks, funds, securities, policies of insurance, bank accounts, time deposits, annuities, mutual funds, partnerships, reversionary or other interests, or property, movable or immovable, of whatsoever nature and wherever situated and whether or not productive of income and whether involving liability or not or upon such personal credit, with or without security, in all respects as the Trustees shall, in their discretion, think fit.
>
> 8. (b) The Trustees, with the consent of the Protector, shall be under no duty to diversify investments and shall have power to accept or acquire and to retain any assets subject to this Settlement, even though the assets may be producing no or insufficient income or may be of a wasting nature or may consist of shares, securities or interests in a single company or partnership.
>
> 8. (c) The Trustees, with the consent of the Protector, shall have power at any time to sell, concert, or call in any investments.
>
> 8. (d) The Trustees, with the consent of the Protector, shall have power to apply any money in making improvements to or otherwise developing or using any land or buildings or in erecting, enlarging, repairing, decorating, making alterations to or improvements in, or pulling down and rebuilding any buildings (but so that the Trustees shall be under no obligation to repair, decorate, improve, alter or rebuild any such buildings).
>
> 8. (e) The Trustees, with the consent of the Protector, shall have power to lease, let, license, mortgage or grant tenancies and to accept surrenders of leases, tenancies, and licenses, and to enter into and carry into effect any grants, agreements, or arrangements relating to and generally to manage and deal with any land or buildings.
>
> […]
>
> 31. (a) Subject to any express provision affecting the same, every discretion vested in the Trustees (except as requiring the consent of the Protector) shall be an absolute and uncontrolled discretion and the Trustees shall have an absolute and uncontrolled discretion in deciding whether or not to exercise any such power and no Trustee shall be under any duty to enquire as to the means or needs of any

> Discretionary Beneficiary, whether such Discretionary Beneficiary is a minor or a person under some disability or otherwise. In the event any Trustee shall have knowledge of such special circumstances, the Trustees shall not be under any duty to take this into account when exercising or not exercising any powers under this Settlement.
>
> (Deed of Irrevocable Settlement of the Sterling Trust dated January 29, 1997)

[164] As regards the execution of the Support Agreement by Sterling Trust, we see nothing particularly unusual in terms of how the matter was dealt with, and nothing inconsistent with a finding that the Sterling Trust and David Kosoy were not "joint actors". The evidence is clear that Brian Kosoy asks for David Kosoy's executed Support Agreement and, at the same time, requests that David Kosoy forward a copy of the Support Agreement to the Sterling Trust for execution. David Kosoy wrote an email on February 6th, 2007 to Susan Fairhurst, asking her to sign the Support Agreement. She signed the document the same day and provided an executed copy of the Support Agreement to David Kosoy's counsel the same day.

[165] We are advised that David Kosoy as settler, has no involvement in or control over the affairs of the trust pursuant to the requirements of such a trust, and exercised no control or decision-making power in respect of the trust's execution of a Support Agreement. There is no evidence to the contrary. In addition, Sterling Trust's Support Agreement was signed by Susan Fairhurst as trustee.

[166] On the evidence before us, David Kosoy appears to exercise no control or decision-making power in respect of the Sterling Trust. Counsel for the Applicants chose not to cross-examine David Kosoy on this issue. Further, on the evidence before us, there does not appear to have been any agreement or understanding between the Sterling Trust, the Insiders or SCI Acquisition in existence other than its Support Agreement. Nor did we find evidence of any such agreement or understanding between Sterling Trust and David Kosoy and/or First National.

[167] We have no reason, on the evidence before us, to consider that Sterling Trust was controlled by David Kosoy, and/or the Support Agreement was signed by the Trustee at the direction of David Kosoy. As stated above, we have concluded, on the evidence, that David Kosoy was, in fact, acting as a joint actor within the meaning of section 91 and Rule 61-501. As such we do not see it as unusual that he would be involved in facilitating the execution of the Support Agreements on behalf of the offeror. However, there is no evidence that his role was anything other than that and there is no evidence of impropriety with respect to the legal structure of the trust.

[168] Accordingly, having found the Sterling Trust is *not* subject to the control and direction of David Kosoy, the question of whether Sterling Trust is a "joint actor" must be determined on other factors, and we consider those factors, as they relate to the other Supporting Shareholders below.

F. Are the Remaining Supporting Shareholders Joint Actors under Rule 61-501?

i) Submissions from the First Capital Group

[169] The First Capital Group submits that the Support Agreements are being improperly used as deal protection measures by the Insiders: by gaining absolute control over the Securities of the Supporting Shareholders, the Insiders intended to inhibit an auction and guarantee that a superior proposal could not succeed without their consent. Counsel relies on the affidavit of Robert Green, in which, he deposes that the Acquisition Group was very concerned that the First Capital Group might attempt to interfere with the proposed Going Private Transaction and upset the transaction by attempting to acquire common shares of Sterling not owned by the Insiders once any such transaction was announced. Counsel for the First Capital Group requests that we consider the Support Agreements within that context.

[170] As described above, nine of the Remaining Supporting Shareholders are employees or former employees of Sterling, and eight of the current Remaining Supporting Shareholders hold senior management positions with Sterling and report to certain of the Insiders. The First Capital Group submits that these employees did not negotiate the price offered for their Securities, nor did they negotiate any of the other terms of the Support Agreements.

[171] Counsel referred us to the cross-examination of Marcus Bertagnolli, Sterling's Vice-President Real Estate Finance. According to that evidence, the first time Marcus Bertagnolli was provided with a copy of the Support Agreement was as an attachment to a one-line e-mail from John Preston, his superior, directing him to sign the Support Agreement and forward it to Brian Kosoy. Counsel submits that the evidence produced by Sterling and SCI Acquisition is consistent with Marcus Bertagnolli's evidence – the employees were approached and signed their respective Support Agreements in similar circumstances to the one-line directive received by Marcus Bertagnolli.

[172] The First Capital Group further submits that the timing of the Support Agreements, in a number of cases, reinforce the argument that the agreements were not negotiated fully on the merits of the Going Private Transaction. On February 8, 2007, Sterling issued a press release stating that it had entered into an agreement with SCI Acquisition to effect a business combination. Sterling issued a second press release on February 23, 2007, to indicate that it had achieved a sufficient number of votes through the Support Agreements to approve the Going Private Transaction. However, three employees, Vincent Costello, Russell Watson and Chris Chamberlain signed their Support Agreements after the February 23rd press release. Counsel submits the these employees failed to receive consideration in circumstances where the approval of the Going Private Transaction was a foregone conclusion. These facts, according to counsel, strengthen the presumption that the employees are acting jointly or in concert with SCI Acquisition and the Insiders.

[173] The First Capital Group also refers to a second group of Supporting Shareholders who are not Sterling employees, but have business connections with either Sterling or the Insiders or both:

- Kimco Realty Corporation is an ongoing business partner with Sterling, including in one of Sterling's most valuable real estate assets (the Mall of the Americas).

- Peter Thomas was the founder of Sterling's predecessor, Samoth Capital Corporation.

- Apex is owned or controlled by Peter Schlessinger, long time friend and business partner of David Kosoy. Schlessinger is also a limited partner with Sterling or its subsidiaries in a number of business ventures.

- Erlbaum Family Limited Partnership is owned or controlled by Gary Erlbaum, another long time friend and business partner of David Kosoy. Like Apex, Gary Erlbaum or the Erlbaum Family Limited Partnership have been investors with Sterling or its subsidiaries in various business ventures.

ii) Submissions from Staff

[174] Staff submit that the Remaining Supporting Shareholders are *presumed* to be joint actors by reason of the Support Agreements (because the Support Agreements go beyond being "solely" an agreement in respect of voting, and therefore not within the "exception" of Rule 61-501, as discussed above). Staff submit, however, that the record did not disclose overwhelming evidence which would suggest that there were overt acts for anything that would suggest that the Remaining Supporting Shareholders were acting jointly or in concert with SCI Acquisition.

[175] Although the evidence suggests that Peter Thomas and Peter Schlessinger of Apex both negotiated the price at which the Sterling Securities would be acquired, Staff submit there is no evidence that the Remaining Supporting Shareholders would not have been satisfied with an "ordinary" support agreement that did not have the effect and purpose that the terms of the Support Agreements do in this case. These shareholders accepted the agreements as they were given to them.

[176] According to Staff, the allegations advanced by the First Capital Group that some Supporting Shareholders had business relationships and friendships with the Insiders are not enough to establish that the Remaining Supporting Shareholders were acting jointly or in concert. Staff indicated that they merely signed the Support Agreements and that there is no other evidence which would suggest that the Remaining Supporting Shareholders were acting jointly or in concert with SCI Acquisition and the Insiders.

iii) Submissions from SCI Acquisition

[177] In response to the allegations of the First Capital Group, SCI Acquisition submits the following:

- Kimco Realty Corporation ("Kimco") has certain business ventures with Sterling but has none with the Insiders or with SCI Acquisition. Kimco has an agreement with SCI Acquisition which relates to the early redemption of the Sterling convertible debentures held by Kimco. The early redemption of the debentures is a necessary condition of completing

the Going Private Transaction, and was agreed to by two other convertible debenture holders who own an aggregate of 60% of the debentures and who did not sign Support Agreements. Kimco had independent legal representation throughout.

- Apex Investment Fund Ltd. is not currently a partner or investor with Sterling. It is solely a shareholder of Sterling. There is no agreement or understanding between Apex, the Insiders or SCI Acquisition in existence other than its Support Agreement.

- Peter Thomas was represented by legal counsel throughout the negotiations of the Support Agreement with SCI Acquisition and was clearly acting at arm's length from SCI Acquisition. The fact that he was a founder of a predecessor company of Sterling does not put him in any position of conflict. There is no agreement or understanding between Peter Thomas and either the Insiders or SCI Acquisition in existence other than his Support Agreement.

- Erlbaum Family Limited Partnership is owned and controlled by Gary Erlbaum, a long time friend and business partner of David Kosoy. Like Apex, Gary Erlbaum of the Erlbaum Family Limited Partnership have been investors with Sterling or its subsidiaries in various business ventures but has no ongoing interests with Sterling other than as shareholder. There is no agreement or understanding between Erlbaum Family Limited Partnership and either the Insiders or SCI Acquisition other than the Support Agreement.

- Henry Bereznicki is a co-owner with Messrs. Preston and Green of a small strip mall in Edmonton. It is currently under firm contract for sale to a third party. There is no agreement or understanding between Henry Bereznicki and either the Insiders of SCI Acquisition in existence other than this and his Support Agreement.

[178] According to SCI Acquisition's submissions, there is no basis on which to find that Peter Thomas decided to support the proposed transaction in exchange for anything other than the opportunity to receive the same consideration being paid to all shareholders. Peter Thomas was represented by legal counsel throughout the negotiations of the Support Agreement with SCI Acquisition. The fact that he was a founder of a predecessor company of Sterling does not put him in any position of conflict, *per se*, in our view.

[179] With respect to the Remaining Supporting Shareholders who are employees of Sterling or one of its subsidiaries, SCI Acquisition submits that the mere fact that such employees may continue to be employed after the Going Private Transaction is insufficient to establish that they are acting jointly or in concert with SCI Acquisition or the Insiders. There is no suggestion that any employees of Sterling received collateral benefits and there is no agreement with respect to the continued employment of any of these individuals.

iv) Submissions from Sterling

[180] Sterling submits that Peter Thomas is a sophisticated investor who bargained hard for the price he was trying to obtain for his Securities. Counsel for Sterling indicates that Peter Thomas

was successful in negotiating a higher purchase price and he requested to review the GMP valuation report in order to be satisfied that the bid price was within the valuation range. Peter Thomas also tried unsuccessfully to obtain a $250,000 break fee from SCI Acquisition if the Going Private Transaction was not concluded. There is therefore no evidence that Peter Thomas was given or is entitled to receive preferential treatment in order to obtain his support for the Going Private Transaction.

[181] Relying on the affidavit of Robert Green, Sterling submits that "none of the [Supporting Shareholders] have been promised or received any side agreements, understandings or benefits in consideration for entering into the [Support Agreements]".

[182] Finally, Sterling submits that the First Capital Group has offered nothing other than speculation and innuendo in support of their assertion that the Supporting Shareholders are joint actors with SCI Acquisition. Counsel for Sterling referred us to the following passage in *Re Kosomoto*, a decision of the Alberta Securities Commission:

> … we consider the comment of Nordheimer, J. in *R. v. Rankin*, [2006] O.J. No. 4579 (at para. 58) to be apt notwithstanding the considerably higher standard of proof applicable to that proceeding: "Suspicion is simply speculation by another name. It can never be elevated to the very high standard of proof beyond a reasonable doubt". *Neither mere plausibility nor suspicion satisfies even the lower balance of probabilities standard applicable to the present proceeding.* [Emphasis added.]
>
> (*Re Kusumoto*, 2007, ABASC 40 (Alta. Sec. Comm.) at para. 91.)

v) Analysis

[183] We have previously concluded that joint actors are intimately involved in structuring, planning and promoting the Going Private Transaction and not solely signatories to a support agreement. We agree with the submissions of SCI Acquisition, that the First Capital Group has filed no evidence, and has not otherwise provided any cogent basis for us to find that any of the Remaining Supporting Shareholders are found acting jointly or in concert with the Insiders at the relevant time. The mere fact that parties had personal or business relationships in the past does not render them joint actors within the meaning of Rule 61-501.

[184] We do not agree with Staff that the Supporting Shareholders are presumed to be joint actors by reason of the Support Agreements, as we have discussed above. As stated, Rule 61-501 requires that there be more evidence than merely the existence of the Support Agreements to ground a finding that parties to them are acting "jointly and in concert" as joint actors. Here, unlike with David Kosoy, there is no evidence that the Remaining Supporting Shareholders had any specific interest in allowing the Insiders and SCI Acquisition to thwart a First Capital Group proposal. Although the evidence suggests that Peter Thomas and Schlessinger/Apex both negotiated a price at which the Sterling Securities would be acquired, there is no evidence that the Remaining Supporting Shareholders would not have been satisfied with an "ordinary" support agreement that did not have the effect and purpose that the terms of the Support

Agreements do in this case. These shareholders accepted the agreements as they were given to them.

[185] As well, we find no evidence of the existence of "any agreement, commitment or understanding, whether formal or informal" between David Kosoy or First National, on the one hand, and any of the other Supporting Shareholders (including Sterling Trust).

[186] We agree with Staff's submission (and that of the other responding parties) that there is no cogent evidence to support a finding that any of the Remaining Supporting Shareholders intended the Support Agreements to be "auction inhibiting", generally, and specifically as it relates to the First Capital Group. But, as counsel for the First Capital Group properly points out, we must carefully review the evidence of the circumstances and events surrounding the entering into of the Support Agreements, as well as the terms themselves. As pointed out by First Capital's counsel, beyond voting in favour of the Going Private Transaction (and against any other transaction in opposition to the Going Private Transaction), there are voting provisions in the Support Agreements which survive the termination of the Going Private Transaction. However, we find insufficient evidence on which to base any finding that the Remaining Supporting Shareholders had any interest in the outcome of the vote independent of their role as shareholders, nor any evidence that, in fact, they were working jointly and in concert with the Insiders to effect their desired outcome.

G. What is the Appropriate Remedy?

i) Submissions from the First Capital Group

[187] The First Capital Group has brought this Application on the basis that the Circular provided to shareholders before the Meeting did not disclose adequate information about the Support Agreements in connection with the Going Private Transaction: the identities and interests of the Supporting Shareholders; the terms of the Support Agreements; or the intentions of the Insiders with respect to accepting an alternative offer for Sterling. In response, they ask the Commission to exercise their jurisdiction under sections 104 and 127 of the Act.

[188] First Capital requests a broad remedy to redress what it says is an unjustified restriction into the auction process. Counsel for SCI Acquisition correctly observes that the effect of the order sought is to require Sterling to call and hold a new special meeting, which would follow a revised disclosure. First Capital states that a remedy which merely excludes the impugned votes would be insufficient. First Capital says as follows:

(a) "First, it disregards or minimizes the effect the respondents' disclosure may have had on the result of the vote. Since at least February 23, 2007, Sterling has stated publicly: (1) that the votes of the Support Agreement counterparties would be counted as part of the minority for purposes of majority of the minority approval and (2) that the result of the vote was a foregone conclusion. In the fact of these statements, it is simply not possible to take any comfort in the voting. Nor, is it an answer to point to the dissent rights available to minority shareholders. There is a significant economic cost to exercising these

rights; a cost which is not justifiable for parties holding relatively few Securities. In this respect, the Applicants are in a materially different position.

[…]

(b) Further, the argument overstates the fact that the Arrangement Resolution was passed by the thinnest of margins. In the case of the vote of all Securityholders, excluding the votes of the Support Agreement counterparties, the result was only 53% in favour of the Going Private Transaction. In the case of the vote of the common shareholders, the result was even closer (50.1% vs. 49.9%).

(c) Finally, it ignores the timing of the Meeting relative to the announcement by First Capital of its takeover bid and attempts to adjourn the Meeting in order to afford shareholders more time in which to consider that bid.

[…]

(d) The First Capital Group therefore submits that the Commission should make an order under section 104 requiring Sterling to: (1) comply with Rule 61-501 by excluding from the calculation of the majority of the minority securities of Sterling held by SCI Acquisition's joint actors; and (2) make proper disclosure of the Support Agreements and SCI Acquisition's intentions with respect to any competing proposal. Further, it is submitted that the Support Agreements engage the Commission's public interest jurisdiction and warrant intervention in the Going Private Transaction, which should be cease traded until the requested section 104 order has been complied with."

[189] Relying on *Re Sears*, the First Capital Group submits that in order to give effect to the purposes of Rule 61-501, the appropriate remedy should include amending the takeover bid circular and/or the management information proxy circular to expressly state which securities would be excluded from the minority for the purposes of meeting the majority of the minority requirement. The First Capital Group submits that appropriate disclosure is essential in the case in order to not undermine the purpose of compliance with Rule 61-501. As such, the First Capital Group requests that a new circular be distributed to Sterling's shareholders in order for the true minority of Sterling to evaluate the merits of the Going Private Transaction.

[190] The First Capital Group submits that the remedies requested are suitable and appropriate in light of the circumstances surrounding SCI Acquisition's proposed Going Private Transaction. The remedies sought are not punitive but are intended to ensure the protection of all minority shareholders of Sterling and the preservation of public confidence in Ontario's capital markets.

ii) Submissions from Staff

[191] Staff submit that the Commission must be mindful that any remedy it orders must be connected to and proportionate to the alleged wrong. Staff submit that proper disclosure is particularly important when it comes to the integrity of a vote in a majority of a minority context. In the context of this Application, Staff express concerns about the lack of disclosure and the

impact it may have had during the majority of the minority vote to approve the Going Private Transaction, if it is found that the votes of all, or certain of the Supporting Shareholders ought to have been excluded from the "minority of the majority" calculation.

[192] In the event that the Commission determines that a sufficient number of Sterling Securities held by the Supporting Shareholders have to be excluded so that the Insiders and SCI Acquisition no longer have a majority of minority support guaranteed under the Support Agreements, Staff submit that it would open to the Commission to cease trade the Going Private Transaction so that the "true" minority shareholders would have proper disclosure of the new circumstances and an ability to make a voting decision based on those facts. However, the predominant responsibility of the Commission is to determine what is the appropriate remedy in the circumstances.

iii) Submissions from SCI Acquisition

[193] SCI Acquisition highlighted for the Commission that 92.2 percent of the issued and outstanding Securities of Sterling were represented in person or by proxy at the Meeting held on April 30th. With respect to section 104 of the Act, SCI Acquisition submits that issuing a revised circular and holding a new vote is unnecessary. If the Commission finds that Supporting Shareholders should be removed from the minority, SCI Acquisition submits, in the circumstances where the vote has already been held, that it is entirely appropriate for the Commission to accept the results of the vote that has already occurred and remove the conflicted votes from the minority.

[194] With respect to section 127 of the Act, SCI Acquisition submits that unlike the Commission's findings in *Re Sears*, there is no allegation of abusive or reprehensible conduct on the part of SCI Acquisition or any of the Insiders. Although the Commission's public interest jurisdiction under section 127 of the Act is very broad, SCI Acquisition submits that this jurisdiction is meant to rectify clear breaches of the Act, regulations or policy statements, abusive conduct and other inappropriate behaviour. A showing of abuse is something different from, and goes beyond, a complaint of unfairness. SCI Acquisition submits that an order in this Application such as the one issued in *Re Sears* would offend the principles of proportionality.

[195] SCI Acquisition also submits that the Commission should consider the First Capital Group's motivation as a bidder, given its antagonistic relationship with Sterling. They were both shareholders of Sterling, owning approximately 3 percent of the company as at February 8, 2007, and they acquired almost 2 million common shares of Sterling since the Going Private Transaction was announced. The First Capital Group has tripled their holdings of Sterling since the Going Private Transaction was announced and they account for nearly 80 percent of the trading since February 8th. By bringing this Application, SCI Acquisition submits that the First Capital Group attempted to squeeze the size of the minority into a very small number of shareholders that they would dominate, putting them in a position to defeat the Going Private Transaction. As such, they do no represent the true minority shareholders.

[196] SCI Acquisition finally submits that the First Capital Group has a statutory right of dissent provided under s. 185 of the OBCA under the terms of the interim order and the

Arrangement Agreement. Any arguments relating to the Going Private Transaction and any breach of fiduciary duties by the Insiders can be advanced at the fairness hearing which was scheduled for June 8, 2007, later rescheduled for June 15, 2007. The First Capital Group has filed Notices of Appearance in that proceeding and have indicated that they intend to oppose the approval of the Plan of Arrangement on the basis that it is unfair.

iv) Submissions from Sterling

[197] Sterling supports the submissions and position of SCI Acquisition Group. Sterling, among other things, submits that adequate disclosure of the Support Agreements was made in the Circular and much of the information at issue in this Application was in fact contained in the Circular. With regard to the balance of the information (in particular the future intentions of the Insiders with respect to accepting an alternative offer for Sterling), Sterling submits that this information lacks materiality in the sense that a reasonable shareholder would not consider it important in deciding how to vote.

[198] Sterling emphasizes that the Commission's "public interest jurisdiction" ought to be exercised cautiously and in appropriate circumstances. In this case, it asserts that there is no "unfairness" here, no evidence of joint actorship, collateral benefits, differential or preferential treatment or any breach of law. There is nothing "coercive" or "abusive" to engage section 127.

v) Analysis

[199] Pursuant to subsection 104(1), the Commission may make an order directing any person or company to comply with a requirement under Part XX of the Act, if the Commission considers that a person or company has not complied with, or is not complying with, a requirement under Part XX or the regulations related to this part.

[200] The Commission may make an order under subsection 127(1) of the Act that trading in any securities by or of a person or company cease permanently or for such period as may be specified (the cease trade order) where, in its opinion, it is in the public interest to do so.

[201] Paragraph 2 of the draft order proposed by the First Capital Group requires that the Going Private Transaction be cease traded until the circular is amended to disclose that there will be compliance with Rule 61-501, that is, that the votes attached to shares held by joint actors will be excluded from the minority.

[202] In its Notice of Amendments to Rule 61-501, in commenting on the nature of the minority approval requirement, the Commission expressed the expectation that those voting be as free from conflicts as possible:

> […] when a majority vote of security holders can force the minority to relinquish their securities against their will at a price they may regard as inadequate, *it is reasonable to require that the security holders comprising the majority be as free from conflicts as possible so that their interests are aligned with those of the minority.* […] [Emphasis added.]

(*Notice of Amendments to Rule 61-501* (2004), 27 O.S.C.B. 4483 at 4486.)

[203] The Commission's public interest jurisdiction is derived from the broad mandate conferred upon it under the Act to provide protection to investors from unfair, improper, or fraudulent practices and to foster fair and efficient capital market and confidence in their integrity (section 1.1 of the Act).

[204] The Commission recently commented upon its public interest jurisdiction in *Re Sears*, citing the *Cablecasting Ltd.* case:

> In *Re Cablecasting Ltd.*, [1978] O.S.C.B. 37, the Commission applied its public interest jurisdiction to a "going private transaction" effected in compliance with the requirements of the Ontario *Business Corporations Act*, R.S.O. 1990, c. B.16 but not in compliance with the disclosure requirements applicable to issuer bids under the predecessor policy to Rule 61-501. In its decision, the Commission balanced the need for intervention where a transaction was inconsistent with the best interests of investors against a preference for a policy oriented solution but, ultimately, did not have to issue a cease trade order because the respondent undertook to obtain minority approval. The Commission, however, provided guidance on when it was more likely to intervene under the rubric of its public interest jurisdiction despite the absence of any breach of Ontario securities law:
>
> > "If the transaction under attack was of an entirely novel nature, Commission action might seem more appropriate. Another relevant consideration in assessing whether to act against a particular transaction is whether the principle of the new policy ruling that would be required to deal with the transaction is foreshadowed by principles already enunciated in the Act, the regulations or prior policy statements. Where this is the case the Commission will be less reluctant to exercise its discretionary authority than it will be in cases that involve an entirely new principle." (*Re Cablecasting*, *supra* at 43).
>
> The frequently cited *Canadian Tire* decision established that the Commission can and will intervene on public interest grounds even if there is no breach of the Act, the regulations or Commission policies. In such circumstances, the Commission's public interest jurisdiction will be invoked where necessary to prevent an otherwise abusive transaction from occurring. Accordingly, the standard for intervention in such circumstances is more than a complaint of unfairness and will generally involve some showing of a broader impact on the operation of the capital markets (*Re Canadian Tire Corp.* (1987), 10 O.S.C.B. 858 at 948, affirmed (1987) 37 D.L.R (4th) 94 (Div. Ct)).
>
> (*Re Sears*, *supra* at paras. 303-304.)

[205] The Commission also considered this aspect of its public interest jurisdiction in *H.E.R.O. Industries Ltd*. In that case, the Commission noted that the "animating principles" of the Act, and the takeover bid provisions in particular, should compel it to intervene to protect the public interest against transactions that are abusive of both investors and the capital markets. The Commission held that "in determining whether or not to so intervene, the Commission must have regard to whether its intervention will enhance the pursuit of the policy objectives it has identified." (See *H.E.R.O. Industries Ltd.* (1990), 13 O.S.C.B. 3775 (Ont. Sec. Comm.) at p. 7(QL).)

[206] The parameters of the Commission's jurisdiction to impose terms and conditions under a section 127 order was addressed by both the Ontario Court of Appeal and the Supreme Court of Canada in the *Asbestos* decision. The Supreme Court there stated as follows:

> The breadth of the OSC's discretion to act in the public interest is also evident in the range and potential seriousness of the sanctions it can impose under s. 127(1). Furthermore, pursuant to s. 127(2), the OSC has an unrestricted discretion to attach terms and conditions to any order made under s. 127(1).
>
> (*Committee for the Equal Treatment of Asbestos Minority Shareholders v. Ontario (Securities Commission),* [2001] 2 S.C.R. 132 (S.C.C.) at 149.)

[207] The Court went on to say that the nature of any section 127 order and the terms and conditions that may attach to it must be consistent with the Commission's overall mandate under the Act.

[208] We agree with the Respondents' counsel that this case is markedly different than the facts found in the *Re Sears* case: here, we make no finding of abusive conduct and find that there is no evidence to support such a finding. As counsel for Staff observes, "it is important to recognize that the factual context within which the joint actor relationship arose was very different than the facts in the present case". However, we certainly agree with counsel for the First Capital Group that the Commission has the jurisdiction to make the requested order if deemed to be in the public interest, if such abuse were found, or in the absence of a finding of abuse, if a breach of securities law were found.

[209] In this case, we have found that David Kosoy, and the company he controls, First National, were joint actors within the meaning of Rule 61-501 and section 91 of the Act. As such, they ought to be excluded from the calculation of the "minority of the majority" calculation. If this is the case, the following result would ensue:

> (a) **Security holders** other than members of the Acquisition Group cast a total of 21,412,206 votes in respect of the Arrangement Resolution 18,191,446 (84.96%) in favour, and 3,220760 (15.04%) against. David Kosoy & First National Investments Inc. own 3,841,820 Securities. As such, security holders other than members of the Acquisition Group, and David Kosoy & First National Investments Inc., cast a total of 17,570,386 votes in respect of the Arrangement Resolution: 14,349,626 (81.67%) in favour, and 3,220,760 (18.33%) against.

(b) **Common shareholders** other than members of the Acquisition Group cast a total of 20,051,668 votes in respect of the Arrangement Resolution: 16,830,908 (83.94%) in favour, and 3,220,760 (16.06%) against. David Kosoy & First National Investments Inc. own 3,451,320 common shares. As such, common shareholders other than members of the Acquisition Group, and David Kosoy & First National Investments Inc., cast a total of 16,600,348 votes in respect of the Arrangement Resolution: 13,379,588 (80.60%) in favour, and 3,220,760 (19.40%) against.

[210] In these circumstances, we are satisfied that there is very little chance that the outcome of the vote would be materially different than it was on April 30th. That being the case, we are not able to conclude that the original press release and disclosure which trumpeted that, "the votes attaching to the shares owned or controlled by SCI Acquisition, the Insiders and the support agreement counterparties are sufficient to approve the Arrangement Resolution", was materially misleading in its statement about the effect of the Support Agreements.

[211] Counsel for SCI Acquisition correctly points out that "the requirement of full disclosure does not mean that every instance of non-disclosure will constitute a breach of disclosure obligations". It is *material* information that must be disclosed and materiality is to be determined when there is a substantial likelihood that a reasonable shareholder would consider the information to be important when deciding whether to accept or reject the bid or plan. (See *Re MacDonald Oil Exploration Ltd.* (1999), 22 O.S.C.B. 6452 (Ont. Sec. Comm.) at 6455, *Re Sears*, *supra* at 310, and *Re Standard Broadcasting Corporation Limited and Starlight Broadcasting Inc. and Sulkirk Communications Limited* (1985), 8 O.S.C.B. 3672 (Ont. Sec. Comm.) at 3676).

[212] The Commission's "public interest" jurisdiction is broad and powerful, and must be exercised with caution, as recognized in the *Re Canadian Tire* decision. When considering the exercise of this jurisdiction, the Commission needs to have regard to all of the facts, all of the policy consideration at play, all of the underlying circumstances of the case, and all of the interests affected by the matter and the remedy sought. As described above, section 91 of the Act and Rule 61-501, fundamentally, must be interpreted to ensure protection of the minority. At the same time, we recognize the Commission's broad mandate as articulated in the *Re British Columbia Forest Products* case:

> However, the Commission's responsibility and duty is not only to the minority security holders but to the capital markets as a whole and to all participants therein whether majority or minority security holders. Accordingly, just as the Commission must be vigilant to protect minority security holders so too it must be vigilant not to abuse the rights of majority security holders […]
>
> […] There must be confidence in the marketplace for holders of large blocks of securities as well as for holders of small blocks of securities.
>
> (*Re British Columbia Forest Products Ltd.* (1981), 1 O.S.C.B. 116 (Ont. Sec. Comm.) at 120C.)

[213] We feel that in this case, it is useful to emphasize this latter point. In coming to our conclusion that it is not necessary for us to require a further meeting and vote, we took into account the exceptionally high voting turnout of Sterling shareholders at the Meeting, as well as the additional costs and time associated in calling another meeting. We also take notice that First Capital's bid was made quite late in the process, and is conditional. In addition, we note that although the bid launched by the First Capital Group on May 15, 2007 included a condition that there be no material adverse change in the company after April 24, 2007, a notice of a material change report was received by the company on May 10, 2007, and was disclosed on May 11, 2007.

[214] We also take notice of the fact that a Special Committee was highly engaged in this process, that it engaged experienced independent counsel and an independent valuator. As counsel for the Special Committee observed in its written submissions, "the fairness of the Special Committee process and the GMP valuation have not been directly challenged nor should they be". The Special Committee concluded that the Insider Bid "maximized shareholder value, in all of the circumstances".

[215] We see no reason to question the Special Committee's efforts, judgment or conclusions.

[216] As well, we read the Act as a whole. By doing so, we recognize other statutory remedies are available to dissenting shareholders, or those who disagree with our conclusion that the impugned materials were not materially misleading with respect to the Support Agreements. We are of the view that availability of alternative remedies is a relevant consideration in exercising the Commission's public interest jurisdiction.

[217] In light of the foregoing, we do not find that it is in the public interest, in this case, to grant the relief sought by the Applicants, except to exclude the votes of David Kosoy and First National, in the manner set out below.

VI. CONCLUSION

[218] For these Reasons, we conclude that Sterling shall correct the record of the votes cast at the Meeting held on April 30, 2007 in respect of the Going Private Transaction, to exclude from the Rule 61-501 calculation, the votes attached to all common shares and other securities of Sterling held by David Kosoy and First National Investments Inc. A copy of our Order, issued on June 4, 2007, is attached as Schedule A.

Dated at Toronto, this 16th day of July, 2007.

"Lawrence E. Ritchie" "Harold P. Hands"

Lawrence E. Ritchie Harold P. Hands

"Carol S. Perry"

Carol S. Perry