Ontario Securities Commission | Commission des valeurs mobilières de l'Ontario | 22nd Floor 20 Queen Street West Toronto ON M5H 3S8 | 22e étage 20, rue queen oust Toronto ON M5H 3S8

Citation: *Re Eco Oro Minerals Corp.*, 2017 ONSEC 23
Date: 2017-06-16

IN THE MATTER OF
ECO ORO MINERALS CORP.

- AND -

IN THE MATTER OF
A HEARING AND REVIEW OF A DECISION OF THE TORONTO STOCK EXCHANGE

REASONS FOR DECISION
(Sections 8(3), 21.7 and 127(1) of the *Securities Act*, RSO 1990, c S.5)

Hearing:	April 19, 20 and 21, 2017	
Decision:	June 16, 2017	
Panel:	D. Grant Vingoe	Chair of the Panel and Vice-Chair
	Monica Kowal	Vice-Chair
	Frances Kordyback	Commissioner
Appearances:	Markus Koehnen Melanie Harmer Paul Davis Allison Vale	For Courtenay Wolfe and Harrington Global Opportunities Fund Ltd., Applicants
	Linda Fuerst Orestes Pasparakis Dana Carson	For Eco Oro Minerals Corp., Respondent
	Linda Plumpton James Gotowiec	For the Toronto Stock Exchange
	Wendy Berman Lara Jackson John M. Picone	For Trexs Investments, LLC, Intervenor
	Teresa M. Tomchak	For Amber Capital LP and Paulson & Co. Inc., Intervenors
	Pamela Foy Alexandra Matushenko Naizam Kanji Jason Koskela Robert Galea Jordan Lavi	For Staff of the Commission

TABLE OF CONTENTS

I. OVERVIEW 1

II. MAIN ISSUES 2

III. BACKGROUND 3

A. Parties 3
1. Applicants 3
2. Respondent 3
3. The TSX 3
4. Intervenors 3
(a) Amber 4
(b) Paulson 4
(c) Trexs 4
B. Events Leading up to the Investment Agreement 5
C. The Investment Agreement 5
1. Tranche 1 5
2. Tranche 2 5
3. Other Terms of the Investment Agreement 6
D. Events after the Closing of Tranche 1 6
E. Events after the Closing of Tranche 2 7
F. The Proxy Contest 8
1. Applicants Requisition a Shareholder Meeting and Management Solicits Support Letters 8
2. Eco Oro's Partial Conversion of the Notes and Issuance of the New Shares 8
G. Events after the Issuance of the New Shares 9

IV. PRELIMINARY ISSUES 9

A. Applicants' Standing 9
B. Motions for Leave to Intervene 10
C. Confidentiality Order 10

V. ANALYSIS OF MAIN ISSUES 11

A. The Commission Should Consider the TSX Decision *De Novo* 11
1. Introduction 11
2. The TSX did not Consider the Proxy Contest 13
3. The TSX's Interpretation of "Materially Affect Control" 17
4. The TSX's Process 19
5. Conclusion 21
B. The Commission's *De Novo* Consideration of the TSX Decision 21
1. Introduction 21
2. Analysis 21
3. Conclusion 23
C. Terms and Conditions of the Commission's Decision 23
1. Introduction 23
2. Analysis 25

(a) Requirement of a Shareholder Vote to Approve or Reverse the Share Issuance....25
(b) Requirement that the Intervenors not Trade the New Shares Pending the Shareholder Vote....27
(c) Requirement that Eco Oro not Consider the New Shares Outstanding for Purposes of Voting Pending the Shareholder Vote....28
3. Conclusion....29
D. Jurisdiction to Render the Commission's Decision....29
1. Introduction....29
2. The Commission is not Restricted under Subsection 8(3) of the Act to What the TSX Can Decide....30
3. Principle of Statutory Interpretation: Implied Exclusion....31
4. Purposive Interpretation....35
5. The Doctrine of Jurisdiction by Necessary Implication....36
(a) Introduction....36
(b) The Law....36
(c) Application of the ATCO Factors....38
(d) Broadly versus Narrowly Drawn Powers....42
6. Conclusion....43
E. Alternative Grounds for Relief Sought Further to the Commission's Public Interest Jurisdiction under Section 127 of the Act....43
VI. CONCLUSION....43
SCHEDULE 'A'....45

REASONS FOR DECISION

I. OVERVIEW

[1] In April 2017, the Ontario Securities Commission heard an application for a hearing and review of a decision of the Toronto Stock Exchange (the **TSX**) pursuant to section 21.7 of the *Securities Act*, RSO 1990, c S.5 (the **Act**). The TSX's decision conditionally approved the issuance of common shares of Eco Oro Minerals Corp. (**Eco Oro**) to four recipients (each a **New Share Recipient**) shortly before an Eco Oro shareholders' meeting that was requisitioned by the Applicants, Harrington Global Opportunities Fund Ltd. (**Harrington**) and Courtenay Wolfe. In addition, the Applicants sought relief pursuant to the Commission's public interest jurisdiction under section 127 of the Act.

[2] In March 2017, the TSX conditionally approved the issuance of Eco Oro shares on a partial conversion of unsecured convertible notes equal to approximately 10% of the outstanding common shares, without requiring prior shareholder approval of the issuance (the **TSX Decision**). The TSX Decision approved the issuance of the shares (the **New Shares**) on an accelerated basis, enabling Eco Oro and the New Share Recipients to close the transaction without prior notice to the marketplace, including the Applicants.

[3] The absence of a pause between the public announcement of the issuance of the New Shares and the closing deprived the Applicants of an opportunity to register their objections with the TSX and prevented the matter from being considered and potentially reviewed by the Commission prior to the closing of the transaction.

[4] The conversion was effected pursuant to an exclusive right of Eco Oro, and not the holders, to convert the notes. Since the issuance resulted from a partial conversion of the notes, no additional funds were obtained by Eco Oro and it was uncontested that none of the restrictions affecting Eco Oro in the notes were diminished in any way.

[5] The closing occurred a mere eight days prior to the record date for the Eco Oro shareholders' meeting requisitioned by the Applicants. Apart from the Executive Chairman of the Eco Oro Board, Anna Stylianides, the New Shares were only issued to three shareholders who, immediately prior to the issuance, were solicited by Eco Oro's management to execute support letters in favour of management's direction for Eco Oro. These three shareholders provided support letters.

[6] The TSX Decision approved the transaction and permitted an unannounced, accelerated closing without the TSX's prior awareness that: (i) a proxy contest was underway; (ii) a meeting requisitioned by dissident shareholders was imminent and the record date was only days away; and (iii) support letters were solicited by management and provided by the New Share Recipients other than Ms. Stylianides.

[7] The Applicants brought their application before the Commission for a hearing and review of the TSX Decision, or in the alternative, for the Commission to exercise its public interest jurisdiction in respect of the New Shares (the **Hearing and Review Application**). In particular, the Applicants sought an order setting aside the TSX Decision and directing that disinterested shareholder approval of the

issuance of the New Shares be required as soon as practicable and, if no such approval is obtained, that the Eco Oro Board and the New Share Recipients take all necessary steps to reverse the issuance of the New Shares.

[8] After hearing the Hearing and Review Application, including submissions by the Applicants, Eco Oro, the TSX, Staff of the Commission and three Eco Oro shareholders who received the New Shares and were granted leave to intervene in the Hearing and Review Application, the Commission issued an Order setting aside the TSX Decision on April 23, 2017 (the **Commission's Decision**), which is attached as Schedule A.

[9] The Commission's Decision also ordered Eco Oro to seek, at a meeting of shareholders, approval of the issuance of the New Shares to the New Share Recipients to the extent that Eco Oro and a New Share Recipient have not otherwise reversed the issuance of that recipient's New Shares. The shareholder approval required to be sought by Eco Oro was ordered to be calculated in accordance with the TSX Company Manual (the **Manual**) and the resolution was required to ask shareholders to either: (i) ratify the issuance of the New Shares; or (ii) instruct the Eco Oro Board to take all necessary steps to reverse the issuance of the New Shares. If the shareholders vote to instruct the Eco Oro Board to take all necessary steps to reverse the issuance of the New Shares, the Board was ordered to forthwith implement those instructions. Pursuant to the Commission's Decision, unless and until the shareholders of Eco Oro ratify the issuance of the New Shares, the New Shares are cease traded under subsection 127(1) of the Act, and Eco Oro and the Chair of any Eco Oro shareholder meeting shall not consider the New Shares to be issued and outstanding for the purposes of voting at the Annual General and Special Meeting of Shareholders scheduled for April 25, 2017, and any adjournment thereof, and at any other meeting of shareholders of Eco Oro.

[10] These are the reasons for the Commission's Decision.

II. MAIN ISSUES

[11] The first issue before this Panel is whether the TSX Decision should be considered *de novo*, substituting the Commission's own judgment for that of the TSX through a hearing and review. On this issue, we find that there are fundamental concerns with the TSX Decision and a hearing *de novo* is warranted.

[12] Upon deciding that the TSX Decision should be considered *de novo*, the Panel is required to undertake a full consideration of Eco Oro's application for approval of the issuance. This requires a fresh consideration as to whether the issuance of the New Shares materially affected control of Eco Oro, such that shareholder approval was required for purposes of sections 603 or 604(a)(i) of the Manual, as a precondition to the issuance of the New Shares. We find that the issuance materially affected control of Eco Oro and that a shareholder vote was required to determine whether the transaction was supported by Eco Oro's shareholders.

[13] In light of the accelerated closing of the issuance of the New Shares without shareholder approval, it falls to this Panel to fashion a decision within our jurisdiction that, while being appropriately limited in scope, gives effect to the requirement of a shareholder vote, despite the fact that the New Shares have already been issued. Doing so requires a discussion of public interest

considerations at issue in this case and an analysis of the Commission's jurisdiction to render the Commission's Decision.

[14] Finally, we must address the Applicants' alternative grounds for relief, that the Commission make an order under its public interest jurisdiction pursuant to section 127 of the Act.

III. BACKGROUND

A. Parties

1. Applicants

[15] The Applicants are Ms. Wolfe and Harrington. Ms. Wolfe is a resident of Ontario. She is a shareholder of Eco Oro and owns 1 million common shares, representing approximately 0.94% of the outstanding common shares of Eco Oro.[1] Ms. Wolfe first acquired shares in Eco Oro in the fall of 2016.

[16] Harrington is an investment manager with its head office in Bermuda. Harrington is a shareholder of Eco Oro and owns 9.76 million common shares, representing approximately 9.2% of the outstanding common shares of Eco Oro.[2] Like Ms. Wolfe, Harrington first acquired shares in Eco Oro in the fall of 2016.

2. Respondent

[17] The Respondent, Eco Oro, is a precious metals exploration and development company historically focused on the Angostura gold-silver deposit located in northeastern Colombia. Since 2016, Eco Oro's principal remaining asset is its pending international arbitration claim against Colombia (the **Arbitration**), which dispute arose over Colombian state measures that Eco Oro maintains has deprived it of Eco Oro's rights with regard to the Angostura gold-silver deposit and destroyed the value of its investments in the Colombian mining sector.

[18] Eco Oro is incorporated under the laws of British Columbia and is a reporting issuer in British Columbia, Ontario, Alberta and Nova Scotia. Eco Oro's shares are traded on the TSX.

3. The TSX

[19] The TSX is a stock exchange recognized by the Commission under section 21 of the Act.

[20] The TSX regulates certain conduct of listed issuers through its applicable by-laws, rules, regulations, policies, interpretations and practices.

4. Intervenors

[21] Three corporations were granted leave to intervene in the Hearing and Review Application: Amber Capital LP (**Amber**), Paulson & Co. Inc. (**Paulson**) and Trexs Investments, LLC (**Trexs**).

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[1] All share amounts and percentages are described based on the circumstances prevailing before the issuance of the New Shares, unless otherwise noted.

[2] Figures are as indicated in Harrington's Form 62-103F1 dated March 17, 2017.

(a) Amber

[22] Amber is an international investment fund manager that manages a group of funds, including Amber Global Opportunities Master Fund Ltd. and Amber Latin America LLC. Amber owns 20,348,508 common shares of Eco Oro, representing approximately 19.11% of its outstanding common shares. Amber previously had two representatives on the Eco Oro Board, but has not had any representation for over a year.

[23] Amber first acquired shares in Eco Oro in September 2009. In March 2011, Amber became an insider of Eco Oro, bringing its shareholdings to approximately 18% following a number of separate acquisitions.

[24] In 2015, Eco Oro approached Amber to seek funding for its ongoing operations. In order to help finance Eco Oro, Amber participated in two private placements, pursuant to which Amber received common shares of Eco Oro. As of the second private placement in August 2015, Amber had invested over US $50 million in Eco Oro and, at the time, owned approximately 25 million common shares, representing approximately 26.6% of Eco Oro's then-outstanding common shares.[3]

[25] In 2016, Eco Oro approached Amber seeking further funding for the Arbitration. Amber agreed to support Eco Oro in pursuing the Arbitration and entered into a subscription agreement in September 2016.

(b) Paulson

[26] Paulson is an investment management firm that manages investment funds and real estate private equity funds. Paulson is a shareholder of Eco Oro and owns 12,177,835 common shares, representing approximately 11.44% of Eco Oro's outstanding common shares. Paulson has never had representation on Eco Oro's Board.

[27] Paulson first acquired shares in Eco Oro in 2011, at which time it became an insider of Eco Oro, with an ownership interest of approximately 10.49%.

[28] In 2015, Eco Oro approached Paulson to seek funding for its ongoing operations. In order to help finance Eco Oro, Paulson participated in various private placements. As a result of such transactions, Paulson had invested approximately US $34 million in Eco Oro and, at the time, owned approximately 12 million common shares of Eco Oro, representing approximately 11.47% of Eco Oro's then-outstanding common shares.

[29] In 2016, Eco Oro approached Paulson seeking further funding for the Arbitration. Like Amber, Paulson agreed to support Eco Oro in pursuing the Arbitration and entered into a subscription agreement in September 2016.

(c) Trexs

[30] Trexs is a Delaware limited liability company managed by Tenor Capital Management Company LP and Tenor International and Commercial Arbitration Fund LP (together, **Tenor**). Tenor is an investment manager for funds that focus on investments in companies pursuing international treaty and commercial

[3] Amber's ownership percentage was reduced due to a divestiture of shares at some point prior to the execution of its subscription agreement with Eco Oro, discussed below.

arbitration claims. Trexs was incorporated for the purpose of making an investment in Eco Oro.

[31] Trexs owns 10,608,225 common shares of Eco Oro, representing approximately 9.96% of its outstanding common shares. David Kay, founder, partner and portfolio manager of Tenor, is currently a member of the Eco Oro Board.

[32] In April 2016, Eco Oro contacted Tenor to seek funding for the Arbitration. This was the first time that Tenor had any contact with Eco Oro. On July 21, 2016, Trexs entered into an investment agreement with Eco Oro for a US $14 million investment (the **Investment Agreement**).

B. Events Leading up to the Investment Agreement

[33] In May 2016, following several weeks of negotiations, Eco Oro and Tenor executed a non-binding term sheet that provided for a US $14 million investment by Tenor in exchange for common shares and a convertible note.

[34] During these negotiations, Eco Oro realized that further financing was required for the Arbitration in addition to Trexs's US $14 million investment. Tenor was unwilling to finalize its investment without assurances that Eco Oro would have sufficient funding to complete the Arbitration. As a result, Eco Oro approached some of its existing shareholders, including Amber and Paulson, to obtain additional investments. These shareholders agreed to an aggregate investment of approximately US $4 million.

C. The Investment Agreement

[35] The Investment Agreement entered into between Eco Oro and Trexs in July 2016 provided Eco Oro with an investment of US $14 million, to be used by Eco Oro to fund the Arbitration. In exchange for Trexs's investment, Eco Oro was to issue to Trexs common shares and an unsecured convertible note. The Investment Agreement contemplated that the investment be made in two tranches.

[36] The TSX approved both **Tranche 1** and **Tranche 2** of the private placement, subject to shareholder approval for the issuance of common shares under Tranche 2, described in more detail below.

1. Tranche 1

[37] Under Tranche 1, Eco Oro was to issue 10,608,225 common shares to Trexs, representing just under 10% of Eco Oro's then-outstanding common shares, in exchange for a US $3 million investment. Tranche 1 closed concurrently with the execution of the Investment Agreement.

2. Tranche 2

[38] Under Tranche 2, in exchange for a US $11 million investment, Eco Oro was to issue to Trexs an unsecured convertible note in the principal amount of US $7 million (the **Trexs Note**) as well as either:

a. 84,590,427 common shares, representing 40% of Eco Oro's then-outstanding common shares; or

b. secured contingent value rights (**CVRs**), entitling Trexs to 51% of the gross proceeds of the Arbitration.

[39] The issuance of the common shares would be subject to shareholder approval. In the event that shareholder approval was not obtained for the share issuance, Tranche 2 would proceed with the alternative issuance of the CVRs.

3. Other Terms of the Investment Agreement

[40] The Investment Agreement provided for the right of existing Eco Oro shareholders to participate in Tranche 2 on a *pro rata* basis up to 49.9% of the total investment (the **Participation Right**), with this right available to certain shareholders at the sole discretion of the Eco Oro Board. The Participation Right was subsequently offered to five shareholders (the **Participating Shareholders**), whose identities were not publicly disclosed at the time of their selection but who include Amber, Paulson and Ms. Stylianides.

[41] The Investment Agreement required Eco Oro to cause to be appointed one nominee of Trexs to the Eco Oro Board. Mr. Kay was appointed to the Board as Trexs's nominee, effective in July 2016.

D. Events after the Closing of Tranche 1

[42] On July 22, 2016, Eco Oro issued a press release announcing the Investment Agreement. On August 2, 2016, a material change report reflecting this event was filed on the System for Electronic Document Analysis and Retrieval (**SEDAR**).

[43] On September 13, 2016, Eco Oro issued a management information circular in respect of a special shareholders' meeting for the purpose of obtaining disinterested shareholder approval for the issuance of common shares to Trexs and the Participating Shareholders pursuant to Tranche 2 (the **2016 Meeting**). The circular indicated that there were five Participating Shareholders, three of whom were insiders of Eco Oro and another two of whom were not identified. The 2016 Meeting was set to be held on October 13, 2016.

[44] Over the next two weeks, the Participating Shareholders entered into separate agreements with Eco Oro regarding their respective Tranche 2 investments.

[45] On September 28, 2016, Eco Oro sought TSX approval of the Tranche 2 investments. The revised terms of Tranche 2 were as follows:

a. with respect to Trexs, a US $11 million investment in the form of the Trexs Note and either:

   1. 139,410,688 common shares (subject to shareholder approval); or

   2. CVRs entitling Trexs to 51% of the gross proceeds of the Arbitration (failing shareholder approval);

b. with respect to the Participating Shareholders, an investment of approximately US $4.3 million in the form of unsecured convertible notes in the aggregate principal amount of approximately US $2.7 million (the **Participating Shareholder Notes**) and either:

   1. 54,496,905 common shares (subject to shareholder approval); or

   2. CVRs entitling the Participating Shareholders to an aggregate of 19.93% of the gross proceeds of the Arbitration (failing shareholder approval).

[46] On October 1, 2016, in response to the management circular, two shareholders of Eco Oro (the **Concerned Shareholders**), who are not the same as the Applicants, sent formal complaints to the British Columbia Securities Commission (the **BC Securities Commission**), this Commission and the TSX outlining their concerns regarding the Investment Agreement and disclosures. The shareholders requested that Eco Oro:

a. amend the circular to disclose the identities of the Participating Shareholders;

b. disclose the terms of the CVRs; and

c. delay the 2016 Meeting.

[47] On October 7, 2016, Eco Oro issued a responding press release. In accordance with the request of the Concerned Shareholders, Eco Oro provided additional information in respect of the 2016 Meeting and adjourned the 2016 Meeting to November 3, 2016, to give additional time to shareholders to consider the new information in the press release. In particular, the press release revealed the identities of three of the Participating Shareholders (Amber, Paulson and Ms. Stylianides) and announced the public filing of the form of the CVR certificate.

[48] The 2016 Meeting was ultimately held on November 3, 2016. Disinterested shareholders voted against the issuance of common shares under Tranche 2. Less than half of all common shares of Eco Oro were eligible to be voted as disinterested shareholders, and just over half of those eligible shares were voted.

[49] The day after the 2016 Meeting, the Concerned Shareholders issued a press release announcing that they requested that the BC Securities Commission exercise its public interest discretion to prevent the issuance of the CVRs, unless prior disinterested shareholder approval is obtained.

[50] On November 9, 2016, Eco Oro closed Tranche 2 by issuing the Trexs Note and the Participating Shareholder Notes (together, the **Notes**) and the CVRs to Trexs and the Participating Shareholders, in return for gross proceeds of approximately US $15 million. This Tranche 2 transaction proceeded without shareholder approval.

E. Events after the Closing of Tranche 2

[51] In December 2016, once Eco Oro had received the additional financing resulting from Tranche 2, it filed a Request for Arbitration against Colombia with the World Bank's International Centre for Settlement of Investment Disputes.

[52] A few weeks after the 2016 Meeting, the Concerned Shareholders filed an oppression claim in the Supreme Court of British Columbia seeking an order that the Investment Agreement and the issuance of the Notes and CVRs be cancelled. This claim remained outstanding as of the time of the Hearing and Review Application.

F. The Proxy Contest

1. Applicants Requisition a Shareholder Meeting and Management Solicits Support Letters

[53] On February 10, 2017, the Applicants formally requisitioned the Eco Oro Board to call a shareholder meeting (the **Meeting**) for the purpose of reconstituting the Board by electing six new independent directors.

[54] On February 27, 2017, the Applicants issued a press release noting the "overwhelming support received to date for the reconstitution of the board of directors of the Company." On February 28, 2017, Eco Oro issued a press release announcing that it had filed a complaint with the BC Securities Commission regarding statements made by the Applicants and stating that "the Board believes that close to a majority of Eco Oro shareholders support the current Board and management team."

[55] On February 27 and 28, 2017, following the announcement of the Meeting requisition, Trexs, Amber and Paulson each signed a letter of support, indicating their support for the existing Eco Oro Board and its approach with respect to the Arbitration. In the letters, Trexs, Amber and Paulson all stated that their support was not a binding commitment with Eco Oro, as follows:

> This letter of support is not, and is not intended to be, construed as an agreement, commitment, arrangement or understanding between Eco Oro and [Trexs, Amber and Paulson] and, for greater certainty, [Trexs, Amber and Paulson] and Eco Oro are not acting jointly or in concert.

[56] One of the unidentified Participating Shareholders declined to sign a support letter, but nonetheless indicated an intention to vote in favour of the current Board.

[57] On March 2, 2017, Eco Oro issued another press release, announcing that it had set April 25, 2017 as the date of the Meeting, which would constitute its annual general meeting of shareholders and a special meeting, and set March 24, 2017 as the record date (the **Record Date**) for determining the shareholders entitled to vote at the Meeting.

2. Eco Oro's Partial Conversion of the Notes and Issuance of the New Shares

[58] In February 2017, Eco Oro approached Trexs regarding Eco Oro's plan to convert all or part of the Trexs Note. Trexs was initially opposed to the conversion but, after a number of discussions with Eco Oro, ultimately acquiesced to Eco Oro effecting a partial conversion. According to Eco Oro, Trexs indicated that it would prefer that the conversion occur prior to the Record Date.

[59] On February 27, 2017, Eco Oro sent a letter to the TSX requesting its expedited approval of the issuance of approximately 6 million common shares by way of partial conversion of the Trexs Note. Three days later, on March 2, 2017, the TSX conditionally approved the issuance of up to 6.5 million common shares to Trexs.

[60] On March 8, 2017, after Eco Oro advised Amber and Paulson that a portion of their Participating Shareholder Notes would be converted, Eco Oro submitted a

revised request to the TSX to approve an increase in the number of shares to be issued to a total of 10.6 million common shares, constituting the New Shares, to Trexs, Amber, Paulson and Ms. Stylianides (*i.e.*, the New Share Recipients).

[61] Two days later, on March 10, 2017, pursuant to the TSX Decision, the TSX conditionally approved the issuance of the New Shares without requiring a vote of Eco Oro shareholders. In its cover letter to Eco Oro's counsel, the TSX stated: "We confirm your advice that the transaction will not materially affect control of the Company." At the time of the conditional approval, the TSX was not aware of the fact that the Applicants had requisitioned the Meeting or of any of the related press releases. Eco Oro also did not issue a press release announcing the conditional approval and the pending transaction.

[62] On March 16, 2017, Eco Oro completed the partial conversion, which reduced its indebtedness under the Notes by approximately US $4.7 million through the issuance of the New Shares to the New Share Recipients. Following the partial conversion, as reflected in the TSX Memo to File regarding Eco Oro dated April 3, 2017 (the **TSX Memo**), the shareholdings of the New Share Recipients were as follows:

New Share Recipient	**New Shares Issued**	**Holdings**	
		Before New Shares	**After New Shares**
Trexs	7,747,508	9.96%	15.7%
Amber	1,655,150	19.11%	18.8%
Paulson	1,162,126	11.44%	11.4%
Ms. Stylianides	35,216	0.23%	0.3%

[63] On the same day, after the closing had occurred, Eco Oro issued a press release announcing these issuances and partial debt reduction.

G. Events after the Issuance of the New Shares

[64] On March 22, 2017, the Applicants filed a petition (the **Petition**) with the Supreme Court of British Columbia seeking an order that the issuance of the New Shares be set aside and cancelled or, in the alternative, that the New Shares not be voted at the Meeting.

[65] According to the Petition, the combined shareholdings of the Applicants, including a purchase of common shares of Eco Oro by Harrington earlier in the month, is 9.54%, after the issuance of the New Shares.

[66] On March 27, 2017, the Applicants brought the Hearing and Review Application before the Commission, seeking to set aside the TSX Decision.

IV. PRELIMINARY ISSUES

A. Applicants' Standing

[67] Subsection 21.7(1) of the Act permits a person or company directly affected by a decision of a recognized exchange to apply to the Commission for a hearing and review of the decision.

[68] The Applicants were conducting a proxy contest for control of Eco Oro's Board, with the Record Date for the Meeting falling within a few days of the issuance of the New Shares. The Applicants were clearly affected by the TSX Decision on the

basis that the conditional approval and accelerated closing could affect their ability to exercise their rights as shareholders to seek a change in the Eco Oro Board and thereby the corporate direction of Eco Oro. They meet the threshold for standing under section 21.7 of the Act.

[69] Section 127 of the Act does not permit an affected party such as the Applicants to pursue relief as of right. Standing to make such an application is reserved to Staff. The Applicants in this proceeding are seeking relief under sections 21.7 and 127 of the Act concurrently in connection with important matters involving shareholder democracy inherently affecting the public interest by which they are materially affected. They are granted standing pursuant to section 127.

B. Motions for Leave to Intervene

[70] On April 3, 2017, Trexs, Amber and Paulson filed written submissions for respective motions for leave to intervene in the Hearing and Review Application with full standing, including the right to adduce evidence and make submissions. These motions were heard by means of a written hearing pursuant to Rule 11.4 of the Commission's *Rules of Procedure* (2014), 37 OSCB 4168 (the **Commission's Rules**) and subsection 5.1(1) of the *Statutory Powers Procedure Act*, RSO 1990, c S.22 (the **SPPA**). Eco Oro consented to the granting of these motions and Staff and the TSX took no position on these motions.

[71] On April 7, 2017, we granted these motions on the basis that these shareholders have a substantial interest in the outcome of the Hearing and Review Application since the relief sought could affect their ownership interests in the New Shares and their respective right to vote the New Shares at the Meeting. In these respects, their interests are of comparable significance to those of Eco Oro and the Applicants.

C. Confidentiality Order

[72] At the outset of the hearing, Eco Oro filed a letter requesting redactions to a portion of the materials filed. The Panel requested that written submissions be made on the issue within a week of the conclusion of the hearing. Accordingly, Eco Oro filed written motion materials to have certain information asserted to be confidential redacted from the materials filed in connection with the Hearing and Review Application pursuant to subsection 9(1)(b) of the SPPA and Rule 5.2 of the Commission's Rules.

[73] The redactions sought fell into two categories. The first were names of individuals where issues of personal security, and therefore of privacy, were raised. The second related to the identity of certain persons on an exhibit entitled "List of Key Parties" for purposes of certain of the operative documents governing the relationships between the New Share Recipients and Eco Oro, which Eco Oro has not publicly disclosed and which is considered by Eco Oro to constitute sensitive commercial information. Staff and the TSX took no position on the requested redactions. The Applicants objected to the redaction of the List of Key Parties, asserting that this is material information that has been utilized for certain purposes in the ongoing proxy contest and thus redactions are not in the public interest.

[74] On May 9, 2017, we granted Eco Oro's motion in full, declaring such information to be confidential, and ordered the requested redactions without prejudice and

without limitation to the obligations of the parties to comply with any disclosure obligations pursuant to Ontario securities law.

[75] In addition to our determination that confidentiality is warranted on the grounds specified above, we also concluded that this information is not material to the issues under consideration in this proceeding and can be redacted without affecting the public's ability to understand the issues addressed in these Reasons.

V. ANALYSIS OF MAIN ISSUES

A. The Commission Should Consider the TSX Decision *De Novo*

1. Introduction

[76] Subsection 21.7(2) of the Act provides that a hearing and review of the decision of a recognized exchange follows the same procedure as a hearing and review of a Director's decision under subsection 8(3) of the Act.

[77] In other words, this is the same procedure that is available at the instance of an affected person or company, whereby the Commission can review the administrative actions of its senior staff: the Executive Director, Commission Directors (typically in charge of Commission branches) and deputy directors and other senior staff acting pursuant to delegated authority from the Commission.

[78] Using a similar structure of oversight for decisions of recognized exchanges reflects the fact that the Commission relies on exchanges to perform regulatory functions in a manner that is consistent with the mandate of the Commission. This mandate requires the Commission to:

a. provide protection to investors from unfair, improper or fraudulent practices; and

b. foster fair and efficient capital markets and confidence in capital markets.

[79] The Commission's reasons in *Re Canada Malting Co.* (1986), 9 OSCB 3566 (***Canada Malting***) and in cases that have followed have narrowed the basis on which the Commission will substitute its own judgment for that of the TSX through a hearing and review. This reluctance to substitute a different judgment is based on the expertise of the exchange in considering such applications and "the care with which the TS[X]'s filing committee approaches its responsibilities" (*Canada Malting* at 3589).

[80] The Panel in *Canada Malting* identified five possible grounds on which the Commission might interfere with a decision of the TSX:

a. the TSX proceeded on some incorrect principles;

b. the TSX erred in law;

c. the TSX overlooked material evidence;

d. new and compelling evidence was presented to the Commission that was not presented to the TSX; and

e. the TSX's perception of the public interest conflicts with that of the Commission.

(*Canada Malting* at 3587)

[81] The primary issue, both at the core of the Hearing and Review Application and that the TSX Decision had to address, is whether the issuance of the New Shares materially affected control of Eco Oro, such that the TSX should have required security holder approval for purposes of sections 603 or 604(a)(i) of the Manual as a precondition to the issuance of the New Shares.

[82] The TSX's consideration of other provisions of the Manual and their application to the transaction are not at issue here. In particular, the TSX considered subsection 604(a)(ii), which applies to transactions that provide consideration to insiders of 10% or greater of the market capitalization of the listed issuer during any six-month period and that were not negotiated at arm's length. The TSX also considered the application of section 607 relating to private placements and the shareholder approval required under that section for transactions where certain dilution and pricing thresholds are triggered.

[83] Subsection 604(a)(i) of the Manual provides that the TSX generally requires shareholder approval of a share issuance if the transaction "materially affects control of the listed issuer." In addition to specific requirements in the Manual for shareholder approval of share issuances, section 603 of the Manual provides that the TSX has the discretion to impose conditions on transactions, such as a condition that shareholder approval be received prior to closing a share issuance. In exercising its discretion, the TSX is required under section 603 to consider the effect of the transaction on the quality of the TSX marketplace based on a number of factors, including the material effect on control of the listed issuer. The application of both of these provisions therefore turns on the interpretation of "materially affect control."

[84] "Materially affect control" is defined in Part I of the Manual as:

> [T]he ability of any security holder or combination of security holders acting together to influence the outcome of a vote of security holders, including the ability to block significant transactions. Such an ability will be affected by the circumstances of a particular case, including the presence or absence of other large security holdings, the pattern of voting behaviour by other holders at previous security holder meetings and the distribution of the voting securities. A transaction that results, or could result, in a new holding of more than 20% of the voting securities by one security holder or combination of security holders acting together will be considered to materially affect control, unless the circumstances indicate otherwise. Transactions resulting in a new holding of less than 20% of the voting securities may also materially affect control, depending on the circumstances outlined above.

[85] Each of the grounds identified in *Canada Malting* supports our intervention in this matter and our consideration of the evidence in its entirety without deference to the TSX Decision. The grounds for intervention arise from two fundamental concerns with the TSX Decision. The first is the absence of consideration by the TSX of the relevant circumstances (*i.e.*, the proxy contest, the requisitioned shareholder Meeting, the impending Record Date and the support letters solicited by Eco Oro and obtained from each of the New Share Recipients, other than the member of executive management, immediately prior to the share issuance).

This engages the third and fourth *Canada Malting* grounds for intervention in that, in part, the TSX overlooked material evidence and, in part, new and compelling evidence was presented to the Commission that was not presented to the TSX.

[86] The second fundamental concern relates to the TSX's interpretation of "materially affect control" so as to prevent consideration of the effect of the share issuance on a specific pending shareholder vote. This engages the first, second and fifth *Canada Malting* grounds for intervention in that the TSX proceeded on an incorrect principle, erred in law and perceived the public interest in a manner that conflicts with the Commission's view of the public interest.

2. The TSX did not Consider the Proxy Contest

[87] We turn first to the absence of consideration by the TSX of the proxy contest, the impending Record Date and shareholder Meeting requisitioned by the Applicants and the presentation to the Commission of new and compelling evidence that was not presented to the TSX.

[88] The TSX Memo from the manager responsible for the TSX Decision (the **Manager**), dated April 3, 2017, included in the TSX's Record, is replete with references to the TSX's awareness of the pending requisitioned Meeting and ongoing proxy contest. The TSX Memo states that it reflects the reasons for the TSX Decision. On the first day of the hearing, this understanding of the TSX Memo was contradicted by an affidavit sworn by the Manager that same day and in submissions of the TSX to the effect that the Manager was unaware of these circumstances at the time of the TSX Decision.

[89] This contextual information clearly goes to the potential exercise of discretion by the TSX, regardless of the outcome of the resulting analysis. These were undoubtedly circumstances that needed to be considered but that did not factor into the TSX Decision and that, for the Manager, provided new and potentially compelling evidence put to us at the hearing. The Manager admitted that he was either unaware of the information about the requisitioned Meeting or he failed to absorb it.

[90] The Manager's affidavit does not indicate how this new information would have affected the TSX's analysis and decision in that regard. The TSX's counsel's submission that the decision would have been the same lacks an evidentiary basis and was no more than a stated conclusion after the issue had been joined by the TSX's defense of its decision. The TSX's position, as expressed by its counsel, that the TSX Decision would have been the same had the circumstances of the proxy contest been considered is therefore not a decision of the TSX before this Panel for review and cannot attract deference of the Commission.

[91] In this regard, it is perhaps not surprising that the Manager did not receive or alternatively absorb this information since none of these facts were disclosed in writing to the TSX pursuant to the application for approval in Eco Oro's Form 11 – Notice of Private Placement (**Form 11**). In fact, conclusory statements were made by Eco Oro's counsel and relied upon by the Manager that the transaction would not materially affect control and that there were no other relevant circumstances to be considered.

[92] Eco Oro's revised Form 11, dated March 8, 2017, states, in response to Question 11: "Could the placement potentially result in a material affect [*sic*] in control?", "No." Question 12 calls for: "Any significant information regarding the proposed private placement not disclosed above." Eco Oro's response only notes that the placement involved a partial conversion of convertible notes and that a replacement note would be issued.

[93] At the end of the Form 11, Eco Oro's Chief Executive Officer certifies the following:

> The undersigned, a director or senior officer of the issuer duly authorized by the issuer's board of directors, certifies that this notice is complete and accurate. This notice contains no untrue statement of a material fact and does not omit to state a material fact that is required to be stated or that is necessary to make a statement not misleading in the light of the circumstances in which it is made.

[94] By correspondence from the Manager to Eco Oro's counsel, dated March 2, 2017, the Manager stated: "We confirm your advice that the transaction will not materially affect control of the Company." Eco Oro's counsel did not dispute this conclusion nor did they provide any further explanation or commentary that would expand upon or modify this assertion. They did not disclose the material circumstances noted above in Eco Oro's Form 11 or in other written correspondence. If this information was disclosed orally, the Manager tells us that he did not absorb it. The written record before the TSX was not amended to include this material information.

[95] One of the conditions to the approval in the TSX's Decision required confirmation that there was "no voting trust or similar agreement" affecting the manner in which Trexs would vote its shares. Eco Oro's counsel provided this narrow confirmation.

[96] It is imperative for the fair and efficient functioning of capital markets and public confidence in those markets that regulators and self-regulatory organizations (**SROs**) exercising regulatory responsibilities are provided with complete information relevant to the matters at issue by market participants and their counsel. Since these matters may subsequently be reviewed by the Commission, it is also important that these material facts, and how they are assessed, be included in the written materials exchanged between the TSX and the listed company seeking approval. Material facts should not be left as unverifiable discussions, as this poses an increased risk of information being overlooked or not absorbed by the decision maker.

[97] The TSX did not consider the context of the surrounding proxy contest because Eco Oro did not inform the TSX as such in its Form 11. Since we were informed at the hearing that the Manager was unaware of the proxy contest at the time of the TSX Decision, it follows that the TSX did not consult the public filings involving Eco Oro on its SEDAR profile prior to the TSX Decision, despite those public filings being later referenced in the TSX Memo.

[98] Eco Oro's application was treated as routine because the TSX was unaware of the far-from-routine circumstances.

[99] In addition, we were provided with evidence regarding support letters solicited by Eco Oro and executed by the three Intervenors (Trexs, Amber and Paulson). Although not binding voting commitments on their face, the effect and timing of those letters, which were unknown to the Manager and which, in the context of the other evidence that the TSX failed to consider, provide material evidence and, to the Manager, new and potentially compelling evidence that needed to be considered at the time of the TSX Decision.

[100] Information regarding these support letters should have been disclosed to the TSX in response to Questions 11 and/or 12 in Eco Oro's Form 11 or, if not in these responses, as a more complete written response in Eco Oro's counsel's confirmation that there was no voting trust or agreement in place affecting the shares to be issued to Trexs, in order to make such confirmation complete in what should be a candid application process with the TSX.

[101] All of this new evidence is also highly relevant to the TSX's decision about whether to require, as a condition of its approval of the share issuance without a shareholder vote, a public announcement and delay in the closing for a limited period of time. This was so much as admitted in an e-mail sent by the Manager's supervisor in light of the Applicants' complaints to the TSX.

[102] Specifically, after the TSX conditionally approved the transaction and received a complaint from the Applicants, the Manager inquired of his supervisor whether he should ask Eco Oro to comment on the complaint. His supervisor commented on the conditional approval as follows:

> [I]f we are in a position to conditionally approve, we should make the company press release when the[y] get [conditional approval] and then wait at least five business days to close and indicate the closing date.

[103] The Manager responded by stating:

> Already conditionally approved, and already closed – they only press released on closing.

[104] Counsel for the TSX at the hearing agreed that this aspect of the TSX Decision should have been handled differently. In response to a question from the Panel about whether it would have been preferable to have a delay before closing, the TSX's counsel responded by stating:

> In an ideal world there would have been. And I think we see from [the Manager's Supervisor's] e-mail that knowing the facts, that's the manner in which they would have proceeded.

[105] This is a significant concession by the TSX that, in circumstances such as these, the TSX should have exercised its discretion to allow a pause to permit objections to be raised and to be potentially addressed by the Commission so as to help ensure that the status quo is maintained until the processes permitting objections to be considered can unfold.

[106] The circumstances surrounding this share issuance (namely the proxy contest, the requisitioned shareholder Meeting, the impending Record Date and the solicitation by Eco Oro of support from Amber, Paulson and Trexs in advance of the share issuance), were, in part, overlooked by the TSX and, in part, presented to this Panel as new evidence that we find compelling *in toto*.

[107] The standard for "new and compelling" evidence applied by this Commission in *Re Northern Securities Inc.* (2013), 37 OSCB 161 at para 28 is stated as follows:

> The Commission has taken a restrained approach in exercising its discretion to allow new and compelling evidence to be tendered. … Further, the Commission addressed [in *Re Hahn Investment Stewards & Co* (2009), 32 OSCB 8683 at paras 197–98] what is meant by "new and compelling evidence":
>
> > Absent, compelling evidence to the contrary, we are of the view that in the circumstances of this case, *"new" means information that was not known to the party purporting to introduce it as new at the time of the SRO's decision.* …
> >
> > In our view, that information would be considered *"compelling" if it would have changed the SRO's decision, had it been known at the time of the decision*.
>
> [emphasis in original]

[108] The first part of this formulation, "new" evidence, is certainly established in this case since the Manager either did not know the information or did not absorb it. The second part of the test, "compelling" evidence, is more difficult to determine if it is considered to relate to the particular decision maker at the TSX, namely, the Manager.

[109] Applying the standard for "new and compelling" evidence in this case requires us to consider what a reasonable decision maker would have determined following an appropriate process. This consideration demonstrates the interrelationship of the *Canada Malting* factors and highlights the overlap between consideration of these factors, on the one hand, and the analysis inherent in a *de novo* review of the TSX Decision, on the other. Our consideration of the new evidence leads us to the conclusion that such evidence is sufficiently compelling in totality such that the TSX should have reached different conclusions on Eco Oro's application. In other words, this evidence would have changed the TSX's Decision had the TSX acted reasonably in accordance with its rules.

[110] Our reasons for reaching this conclusion are coextensive with our analysis of the other *Canada Malting* factors and the analysis resulting from our *de novo* review of the TSX Decision.

[111] We note that counsel for the TSX asserted at the hearing that the TSX Decision would have remained unchanged had the TSX known of the new evidence. We find it insufficient to seek to rely on a mere conclusory assertion of counsel in the absence of a more persuasive analysis as to why this would be the case. Giving effect to such an assertion is prone to *ex post facto* reasoning rather than a clear assessment based on the circumstances that actually prevailed at the time of the decision.

[112] In addition, at a minimum, we know that with what the TSX subsequently learned or absorbed, a pause before closing would have been its preferred course of action.

3. The TSX's Interpretation of "Materially Affect Control"

[113] The second fundamental concern relates to the TSX's interpretation of the definition of "materially affect control," which draws a distinction between permanent and transient effects on control and which considers only permanent effects to be relevant to the definition.

[114] The contemporaneous notes of the Manager's analysis show that he limited his analysis to whether a new 20% shareholder was created or whether a voting trust among shareholders holding 20% was put into effect.

[115] Since the Manager was unaware of the proxy contest, he could not have engaged in a factual analysis in relation to the pending Meeting in light of the other facts and circumstances, including the support letters. If he had known of those circumstances, and exclusively applied a concept of "enduring control" as submitted by the TSX's counsel, he would have misapplied the standards set out in the rule.

[116] The TSX's counsel's oral submissions during the hearing continued this approach, expressly submitting that consideration of the effect of a share issuance on a transient vote at an upcoming meeting is inappropriate.

[117] The TSX's counsel, in describing the TSX's considerations regarding whether a placement materially affects control, submitted that:

> And the fact that when [the TSX is] looking, the factors it's considering – the distribution of voting securities, the possibility of a new holding of 20 percent, it's looking not at idiosyncratic meetings. It is not looking at one-off voting situations. It is looking at the concept of enduring control. That's what these factors go to. That's the lens through which TSX is viewing "materially affects control."

[118] The effect of the TSX's submissions is that a company's management, in the midst of a proxy contest with a group of its shareholders, can have knowledge through its proxy solicitor of where the vote stands for the election of a dissident slate and then issue enough shares to hand-picked investors who have indicated that they support management's direction and that the resulting transactions should not be viewed as affecting control. Instead, the TSX's approach would be limited to some abstract consideration of voting blocks, discounting knowledge of where the vote stands for a pending meeting involving a proxy contest. The definition on its face, however, relates to "a vote" and is case-specific, permitting the consideration of both an imminent meeting and the overall balance of voting power more generally for meetings in the future.

[119] The TSX itself, in its summary of comments on amendments to Part VI of the Manual published in January 2004 (*Request for Comments – Amendments to Parts V, VI and VII of the Toronto Stock Exchange Company Manual in Respect of Non-Exempt Issuers, Changes in Structure of Issuers' Capital and Delisting Procedures* (2004), 270 OSCB 249), responded to a comment regarding the definition of material effect on control that it should be strictly limited to the ability to consistently influence control rather than allowing for a *de facto* case-specific analysis (at 319):

> We agree that an objective assessment of the security holder's ability to consistently influence significant transaction or decisions would be preferable, however, we believe that there are factors which must be considered that are particular to each transaction and each issuer which may lead to a different determination depending on the fact pattern.

[120] Precluding consideration of the effect of a share issuance on a transient vote at an upcoming meeting, on the basis that it is an inappropriate interpretation of the definition, is an approach that was rejected by the TSX itself in addressing comments on this very subject. On that basis, we find that the TSX proceeded on incorrect principles in conditionally approving the issuance without shareholder approval and allowing its accelerated closing.

[121] To the extent that the TSX has commenced interpreting this definition in a manner that denies the ability to consider the facts and circumstances that may arise in relation to a pending vote for directors, it is denying itself the flexibility that it stated to commentators that it intended to preserve and apply. In light of the prior public comment process, any such change in interpretation raises fundamental public interest questions that would require further rule-making by the TSX to be effective.

[122] The Commission's recognition of the TSX as an exchange is reflected in the detailed Exchange Recognition Order issued by the Commission pursuant to section 21 of the Act (*Re TMX Group Limited* (2015), 38 OSCB 4335). The TSX's failure to engage in such a prior public comment process is inconsistent with the terms of the Exchange Recognition Order regarding public interest rule-making. The TSX erred in law by applying a "revised" definition of the material effect on control that was not adopted pursuant to its rule-making process. For a further discussion of the Commission's oversight of TSX rule-making, see Part V(D)(2) of these Reasons, below.

[123] The narrowing of this definition to prevent consideration of the effect on a pending vote during a proxy contest is also inconsistent with our view of the public interest and therefore engages the fifth of the *Canada Malting* grounds for intervention.

[124] In *Re HudBay Minerals Inc*. (2009), 32 OSCB 3733 at para 110 (***HudBay***), the Commission cited *Re Trizec Equities Ltd.* (1984), 7 OSCB 2034 at 2040 in explaining the important policy reason underlying the Commission's ability to retain its discretion to intervene in the public interest:

> We believe that the public will support the role of self-regulatory organizations provided that the standards applied by the self-regulatory organizations are or can be made the subject of an appeal to the Securities Commission, the government appointed overseer of the operation of self-regulatory organizations, on the basis that the Commission's perception of the public interest of a particular case should prevail.

[125] In our view, the public interest requires an evaluation of whether an issuance of shares by a listed issuer is for the purpose of entrenching management in the face of a proxy contest, thwarting the justified expectations of shareholders

trusting in a system that appropriately promotes shareholder democracy and board accountability.

4. The TSX's Process

[126] The degree of deference called for in *Canada Malting* is premised on the assumption of careful consideration by the filing committee of the TSX.

[127] The appropriateness of the TSX process when considering whether a share issuance by a listed issuer requires shareholder approval under the TSX's rules was considered in *HudBay*. In that case, the Commission reviewed the decision of the TSX to approve the issuance of shares by a listed issuer, HudBay Minerals Inc. (**HudBay**), to Lundin Mining Corporation (**Lundin**) shareholders pursuant to a plan of arrangement without approval of HudBay's shareholders. As a result of the transaction, Lundin would become a wholly-owned subsidiary of HudBay, and the shareholders of HudBay and the former shareholders of Lundin would each control approximately 50% of the shares of the continuing company. HudBay was paying a substantial premium for the Lundin shares based on the exchange ratio and market prices at the time of the transaction's announcement.

[128] A HudBay shareholder, Jaguar Financial Corporation (**Jaguar**), objected to the TSX decision. Jaguar, who acquired shares after the announced transaction but before the issuance of the TSX decision, asserted that the transaction involved a material change in control and that the TSX should have exercised its discretion under sections 603 or 604 of the Manual to require a HudBay shareholder vote. The TSX staff recommended that shareholder approval not be required since no new control person would result from the transaction and did not recommend the exercise of discretion to require a vote. The TSX's Filing Committee conditionally approved the listing of the additional shares, subject to ordinary conditions.

[129] HudBay subsequently purchased Lundin shares representing just under 20% of Lundin shares outstanding after giving effect to the private placement at a substantial premium. Because of their objections to these transactions, HudBay's shareholders then requisitioned a shareholders' meeting seeking to replace the board. HudBay scheduled this meeting to be held one day after the Lundin shareholders' meeting seeking approval of the arrangement. The requisitioning shareholders also commenced an oppression action in the Ontario Superior Court of Justice seeking a vote on the arrangement transaction and to elect a new board.

[130] In *HudBay*, the Commission ultimately conducted a *de novo* hearing due to the insufficiency of reasons for the TSX's decision. The Panel required a shareholder vote since the quality of the marketplace would be significantly and adversely affected if shareholders were treated unfairly by not submitting the transaction to a vote of HudBay shareholders.

[131] Notwithstanding that the TSX's reasons were found to be insufficient in *HudBay*, the Commission found the process undertaken by the TSX to be appropriate and described it in the following terms:

> The TSX made an administrative decision whether to accept the Additional HudBay Common Shares for listing and whether to impose conditions on that acceptance. In doing so, it had an obligation to identify and consider all the facts and circumstances relevant to that decision. The TSX did that through the

> correspondence it received from HudBay, Lundin, Jaguar and the other objecting shareholders and through its review of that correspondence. In our view, the TSX had no obligation to meet with Jaguar or the other objecting shareholders to discuss their views or to provide them an opportunity to make oral submissions. Nonetheless, the TSX gave Jaguar and the other objecting shareholders a reasonable opportunity to make their views known to the TSX and those views and submissions were before the Filing Committee when it made its decision.
>
> (*HudBay* at para 138)

[132] The Commission went on to say:

> While the TSX must be careful to ascertain that it has all the relevant facts, it does not generally have an obligation to conduct an investigation or carry out due diligence when it is considering the exercise of its discretion under a provision of the TSX Manual. The process followed by the Filing Committee in considering the complaints and submissions of Jaguar and the other objecting shareholders of HudBay was appropriate in the circumstances.
>
> (*HudBay* at para 139)

[133] In the case of the Eco Oro application, unlike in *HudBay*, there are material circumstances that were not considered by the Manager since there was an insufficient process to ascertain the relevant facts. No evidence was presented that, prior to the TSX Decision, this matter was elevated to more senior levels within the TSX to further consider the appropriate exercise of the TSX's discretion.

[134] Requiring more complete application materials from Eco Oro and its counsel, in the context of the adverse shareholder vote in 2016, and a scan of recent public filings relating to the issuer on SEDAR by the TSX would not unduly affect the efficiency of the TSX's processes — the concern expressed by the Alberta Securities Commission in *Re Hemostemix Inc.*, 2017 ABASC 14.

[135] The process followed in the case of the Eco Oro application did not unfold in a manner that allowed for complainants to be advised of the share issuance before the transaction closed and to be afforded the opportunity to raise concerns with the TSX. The TSX could therefore make no additional inquiries correcting earlier deficiencies before it made its decision, unlike in the case of *Re TerraNova Partners LP*, 2017 BCSECCOM 76.

[136] There was no evidence that the proxy contest was raised before the TSX's Listing Committee, which would have involved additional senior exchange personnel in assessing the matter. The Manager did not know or absorb some very material facts. The application was treated as a routine matter without regard to an ongoing proxy contest. The Manager's supervisor suggested a delay in closing, but it was too late because the Manager's decision permitted an accelerated closing without a prior public announcement. The application by Eco Oro to the TSX did not highlight these material facts. This was not the kind of careful consideration that the Commission in *Canada Malting* considered to warrant a degree of deference. This was not, in the language of the *HudBay* decision, a

process administered by the TSX that can be considered "appropriate in the circumstances."

5. Conclusion

[137] In light of the foregoing, we have determined to review this matter on a *de novo* basis based on the evidence adduced at the hearing.

B. The Commission's *De Novo* Consideration of the TSX Decision

1. Introduction

[138] In a hearing and review conducted on a *de novo* basis, the issue we must consider in exercising our power to substitute our own judgment for that of the TSX is whether the issuance of the New Shares in the context of the pending Meeting to elect directors materially affects control of Eco Oro and thus whether shareholder approval is required. This decision depends on the shareholder approval rules set out in Part VI of the Manual.

[139] The Commission's Decision is not in any way an assessment of the merits of either side in the proxy contest or the differing views of management and the Applicants of the corporate strategy that should best be followed by Eco Oro. Despite the efforts of counsel to advance arguments as to whether Eco Oro management or the Applicants were genuinely pursuing the best interests of the company, we are not engaged in an assessment of whether conduct is oppressive to shareholders or whether a board of directors has conducted itself in accordance with the standards set out in governing corporate statutes, including the business judgment rule.

[140] This decision is not based on corporate law considerations. Our role is to ensure that listing standards, which are required to be approved by the Commission as consistent with the public interest, are properly administered. It has always been recognized that listing standards for companies given the imprimatur of exchange listing go beyond the requirements of corporate law.

2. Analysis

[141] At the 2016 Meeting, at which a larger share issuance was considered, the disinterested shareholders present in person or by proxy voted down the issuance of the shares under Tranche 2. As noted in the TSX Memo, minority shareholders, other than the Applicants, also wrote to the TSX to request, among other things, that the TSX require shareholder approval of the CVRs in addition to the share issuances submitted for approval. In such a context, issuances to interested shareholders in a future vote should be carefully scrutinized and warrants a review by the TSX of the recent public filings relating to the issuer on SEDAR, which review may raise issues that necessitate further inquiry by the TSX.

[142] In connection with the requisitioned Meeting, each side, in competing press releases, claimed that they were close to winning the vote. Based on this record, a share issuance to Trexs of approximately 5.74% could reasonably tip the balance in favour of management.

[143] The evidence establishes that the shares were not issued until the support letters were obtained, most notably from Trexs, who became an insider as a result of

the issuance, going from owning 9.96% to 15.7% of the issued and outstanding shares.

[144] It was urged on us that the support letters are non-binding statements of intent and therefore not relevant. However, these letters obviously have value to Eco Oro's management and should be given significance since they were obtained right before the share issuances.

[145] Although Trexs consented to the share conversion on the understanding that both Amber and Paulson would also participate in the conversion, Eco Oro did not seek listing approval of the shares to be issued to Trexs, Amber and Paulson together. Rather, Eco Oro requested TSX approval for the Trexs share conversion when it had the Trexs support letter in hand, and it waited to request TSX approval for the Amber and Paulson share conversions until it received their support letters.

[146] Expressions of support, while short of a formal voting trust agreement, are nonetheless relevant expressions of intent to support management at a specific upcoming meeting at which dissident shareholders seek to remove the board of directors. Based on the proximity in time, in the context of a proxy contest, it is reasonable to infer that the support letters were a safety measure taken by Eco Oro management prior to the issuance of the New Shares and part of an effort of Eco Oro management to influence the vote.

[147] Trexs submitted evidence that it initially resisted the conversion of the Trexs Note. It ultimately relented as a further sign of support for management, and once it decided to proceed on this basis, Trexs strongly insisted that the transaction close prior to the Record Date so it could vote its New Shares at the Meeting.

[148] The notice periods in the conversion provisions of the Notes, requiring 30 days' prior written notice of conversion, were ignored or waived, permitting an accelerated closing. The TSX's decision to permit an accelerated closing further facilitated the goal of ensuring that these votes that were aligned with Eco Oro management would be counted at the Meeting.

[149] The fact that Eco Oro desired, as a general matter, to reduce indebtedness, as reflected in the affidavit of one of the independent directors, does not alter the fact that the transactions could also have a significant tactical purpose for which the TSX's shareholder approval policy is intended to provide a counterweight. This is especially true where: (i) the Participating Shareholders have the right to the vast majority of the proceeds from the company's sole material asset; (ii) all the restrictive covenants arising from the CVRs and the Notes remain in effect with no diminution; (iii) the interest rate on the outstanding debt is nominal; (iv) no new funding was obtained as a result of the transaction; and (v) from a legal and practical standpoint, no new funding is possible without the involvement and approval of the New Share Recipients. To the extent that the balance sheet was improved by this partial conversion, it had little practical positive effect for the company.

[150] Even if the transactions are supported by the objective of an improved balance sheet, there was no compelling business objective for the transaction to close prior to the Record Date that would negate the tactical motive to tip the vote in favour of management.

[151] The closing of these transactions with that timing was clearly designed to have a material effect on the Meeting. The transactions reflect the New Share Recipients' intention to support management by securing enlarged voting rights. While the motivation of the transaction is at best a mixed one that includes a *bona fide* business purpose, the evidence of the tactical motivation underlying the timing of the New Share issuance and the accelerated closing is overwhelming.

[152] This evidence of tactical motivation, in turn, demonstrates that Eco Oro's management sought to influence the vote at the upcoming Meeting that would decide whether the Board would be removed. Since the competing press releases issued during the proxy contest show a close vote, a view that was not contradicted by the parties at the hearing, it is reasonable for us to infer that a tipping of the balance was sought and could reasonably have been accomplished if the New Shares could be voted. The TSX's rules require a vote to consider whether this effect on control is supported by the shareholders overall, not just by management and certain handpicked shareholders.

[153] Even if the effect on control was not so apparent, in the context of a close vote on a board election such as this, the TSX should generally exercise its discretion to require a vote to promote the fair treatment of shareholders and the quality and integrity of Ontario capital markets, an approach that is consistent with the Commission's decision in *HudBay*.

[154] Whether management is pursuing the best course of action for Eco Oro or whether the Eco Oro Board should be reconstituted is for the shareholders to decide without management's ability to manipulate the vote. Allowing such conduct would directly affect the integrity of Ontario capital markets contrary to the Commission's mandate and the public interest.

3. Conclusion

[155] For the reasons set out above, we set aside the TSX Decision to approve the transaction without a shareholder vote and to permit an accelerated closing prior to the Record Date.

C. Terms and Conditions of the Commission's Decision

1. Introduction

[156] Subsection 8(3) of the Act authorizes the Commission, if it does not confirm the decision of the exchange upon a hearing and review, "to make such other decision as the Commission considers proper."

[157] For Eco Oro to fail to reverse the transaction, if the shareholders were to vote against the New Share issuance, would be to deny shareholders the consequences of their vote to which they are entitled under TSX rules. It would reward Eco Oro for its less than forthcoming disclosure when seeking TSX approval and would fail to provide redress for an inadequate TSX process. Accordingly, and for the reasons set out herein, we decided that a shareholder vote on the issuance of New Shares is required under TSX rules.

[158] We are therefore required to fashion appropriate terms and conditions in the Commission's Decision, so as to give effect to the requirement of a shareholder vote on the issuance of the New Shares, despite the fact that they have already been issued.

[159] Since the New Shares have already been issued, the usual consequence of a negative shareholder vote, namely the aborting of the transaction, is not available. The only way to give effect to the requirement of a shareholder vote in the present case is to provide appropriate consequences if Eco Oro shareholders vote against the New Share issuance. Such consequences necessarily affect not only Eco Oro but the Intervenors as well.

[160] Beyond making the general submission that no meaningful remedy is available under subsection 8(3) of the Act in the present circumstances, the Respondent and the Intervenors made no submissions on the specific question of appropriate terms and conditions in a decision under subsection 8(3) if we were to require a shareholder vote.

[161] The Respondent's and Intervenors' submissions on remedies focus exclusively on the lack of the Commission's jurisdiction to grant a remedy under subsection 8(3) of the Act, due to the transaction having closed, and the availability and appropriateness of a remedy under section 127 of the Act. The question of jurisdiction is considered below in Part V(D) of these Reasons.

[162] In the context of the appropriateness of an order under section 127, Trexs argues that the Commission, in exercising its public interest jurisdiction, must consider the impact of its decision on potentially affected parties, market practice and the interests of market participants. The Commission must weigh and balance a variety of factors, such as transaction and regulatory certainty, the fair treatment of affected shareholders and other companies and individuals and any harm to capital markets from such intervention.

[163] While advanced by Trexs in the context of a section 127 analysis, these factors are also relevant in the context of a subsection 8(3) decision and have largely been considered under the *Canada Malting* analysis above. The factor that remains to be addressed is the impact of a decision on the Intervenors.

[164] Amber and Paulson, again in the context of a section 127 analysis but nonetheless relevant to a subsection 8(3) discussion, referred to *Re MI Developments Inc.* (2009), 32 OSCB 126 (***MI Developments***), in which the Commission noted at paragraph 127:

> The general principle that we apply is to issue the least intrusive order that is sufficient in the circumstances to accomplish our regulatory objectives.

[165] Amber and Paulson emphasize the manifest unfairness of any order of the Commission that would harm their interests, absent any wrongdoing on their part. At paragraph 5 of their written submissions, they argue:

> It would be extraordinary and manifestly unfair for the Commission to prejudicially interfere with the vested rights of long-term, innocent, independent investors in Eco Oro pursuant to the exercise of its public interest jurisdiction.

[166] For the reasons set out below, we reject the submissions of the Respondent and the Intervenors, and impose three terms and conditions in the Commission's Decision to require a shareholder vote on the New Share issuance. These terms and conditions are designed to give practical and legal effect to the Commission's Decision, despite the transaction having already closed. We have determined

that these terms and conditions are as minimally intrusive to the Intervenors' interests as is reasonably possible in these circumstances and not unduly burdensome to Eco Oro. We consider each of these terms and conditions in turn.

2. Analysis

(a) Requirement of a Shareholder Vote to Approve or Reverse the Share Issuance

[167] Reversing transactions, even at the direction of shareholders, cannot be undertaken lightly. In cases such as this where the share issuance in question has closed, the Panel must consider whether there are considerations relating to the affected parties or the public interest more generally that outweigh the benefit conferred on the Applicants by rendering a meaningful decision to require a shareholder vote on the issuance of the New Shares.

[168] Staff's submissions include a number of factors for the Panel's consideration relating to the opportunity of an applicant to have objected in advance of the closing of a transaction, the ability of affected parties to make submissions and the practicability of the reversal. These submissions were of assistance in formulating the non-exhaustive list of relevant factors below.

[169] If shareholder approval is required for a transaction that has already closed and the shareholders, when given the opportunity, vote against it and direct the issuer to take the necessary steps to reverse the transaction, the factors we consider to be relevant in determining whether it is in the public interest to order that a completed transaction be reversed on the basis of such shareholder instruction include:

a. whether the issuer afforded those that it knew were likely to object to the share issuance an opportunity to raise their objections to the decision maker, in this case the TSX, in advance of the transaction closing, including by means of a press release sufficiently in advance of closing;

b. whether those directly affected by the reversal of the transaction entered into the transaction knowing of the likelihood of objections;

c. whether those directly affected by the reversal of the transaction had an opportunity to be heard and/or make submissions; and

d. whether it is impractical for the transaction to be reversed in the circumstances.

[170] In this case, Eco Oro knew that shareholders had previously objected to the TSX's approval of the issuance of the CVRs without shareholder approval in 2016 and could reasonably expect shareholders, in the context of the proxy contest, to raise objections to the TSX's approval of the issuance of the New Shares without shareholder approval. Nonetheless, Eco Oro deliberately chose to close the New Share issuance without a prior public announcement and without time for the Applicants or other shareholders to effectively communicate their objections to the TSX or the Commission.

[171] Trexs, Amber and Paulson were granted full standing to participate in the Hearing and Review Application, and their views were fully presented. They object to any reversal of the New Share issuance. They submit that a reversal would have a disproportionate and inequitable effect on them and their

investors, especially in circumstances where the Applicants do not allege that these investors have breached Ontario securities laws or engaged in any wrongful conduct. They argue that it would be punitive because the rights attaching to their New Shares have already accrued to them, having paid fair value for those rights on behalf of their own investors.

[172] No argument of hardship or impracticability was advanced by the Intervenors—only an argument of entitlement based on the transaction having closed.

[173] We reject the argument that a regulatory requirement of a shareholder vote on a new share issuance can be flouted, absent illegal conduct of the recipients of the shares issued, simply because the new share issuance has closed. To endorse the position of the Intervenors would be to prioritize their commercial interests ahead of the interests of the Applicants and other Eco Oro shareholders, in a fairly conducted vote on the composition of Eco Oro's Board and the future direction of the company, and ahead of the public interest, in compliance with capital markets regulation. The impact of a reversal of the New Share issuance on the Intervenors, if the shareholders of Eco Oro so direct, is not so profound so as to outweigh the Applicants' interest or the public interest.

[174] The Notes held by the Intervenors and the other New Share Recipient, Ms. Stylianides, were convertible at the option of Eco Oro and not the holders.

[175] The New Share Recipients, at the time that Eco Oro approached them with the proposed conversion and issuance of the New Shares, knew of the proxy contest, having been solicited to sign support letters. They could have reasonably expected that management's decision to convert their Notes would be subject to TSX and Commission scrutiny, and possible intervention, when in close proximity in time to a shareholder meeting at which a board of directors faced potential removal. The New Share Recipients can also be reasonably expected to be aware that the TSX, and the Commission upon a review of a TSX decision, has discretion to require shareholder approval in appropriate circumstances.

[176] Different considerations would come into play if the Notes were convertible solely at the option of holders who had acquired the notes in the past without a proxy contest in contemplation. In those different circumstances, holders could more reasonably assert that they did not receive reasonable notice of possible regulatory intervention that would prevent their right to vote.

[177] Here, however, with a proxy contest underway and the conversion right lying with the issuer's management, the holders can reasonably be expected to be aware of the possibility that if a transaction were to have an effect on control, management's actions may well be subject to regulatory review and possible intervention by the TSX or the Commission.

[178] A potential reversal of a transaction in this case would not involve a return of proceeds to the subscribers who provided capital through such issuance for a compelling corporate purpose since no new proceeds were obtained. In this case, if the shareholders vote down the transaction and the Eco Oro Board takes the necessary steps to reverse the issuance of the New Shares and restore the original amount of the Notes, the practical effect on Eco Oro and the New Share Recipients is minimal.

[179] There were no persuasive submissions that the reversal of the New Share issuance is impracticable or imposes any particular hardship that the Panel ought

to take into consideration. A reversal of the New Share issuance only requires that the convertible Notes be restored to their original amounts, with interest accrued on the original amounts at the nominal rate in effect.

[180] In *Re Geosam Investments Limited*, 2009 BCSECCOM 695 (***Geosam***), the BC Securities Commission required the issuer to deposit an amount equal to the private placement proceeds in trust pursuant to a temporary hearing pending a hearing and review of the decision of the TSX Venture Exchange (the **TSX-V**) to allow for a practical reversal of the transaction. In the present case, since no new funds were provided as a result of the partial conversion, a reversal of the transaction, if the issuance is voted down by the shareholders, is not the empty remedy feared by the Panel of the BC Securities Commission in *Geosam*.

[181] Indeed, Eco Oro could consider effecting these issuances again in the future in a manner that does not materially affect control of Eco Oro.

[182] Any complexity in such a reversal is outweighed by the public interest in that it does not take away the right to have an appropriate vote of shareholders on the composition of Eco Oro's Board and the future direction of the company.

[183] For the reasons set out above, we impose a term and condition in the Commission's Decision that requires Eco Oro to not only seek shareholder approval of the issuance of the New Shares but to do so by asking shareholders to either ratify the issuance of the New Shares or instruct Eco Oro's Board to reverse the issuance of the New Shares. If the shareholders are to vote to instruct Eco Oro's Board to reverse the issuance, we require the Eco Oro Board to implement those instructions.

[184] We find it appropriate to provide commercial flexibility to Eco Oro and the Intervenors to reach an agreement to avoid a shareholder vote by reversing the New Share issuance, in whole or in part, of their own volition. The Commission's Decision reflects this in an exclusion from the requirement to seek shareholder approval of the issuance of the New Shares, which exclusion is available to the extent that Eco Oro and a New Share Recipient reverse the issuance.

(b) Requirement that the Intervenors not Trade the New Shares Pending the Shareholder Vote

[185] The terms and conditions in the Commission's Decision include a cease trade order (the **Cease Trade Order**) that the New Shares not be traded unless and until the shareholders of Eco Oro ratify the issuance of the New Shares. While we refer in these Reasons to the Cease Trade Order as a term and condition that gives practical effect to our decision under subsection 8(3) of the Act to require a shareholder vote, the Cease Trade Order is issued under subsection 127(1).

[186] The Cease Trade Order addresses the risk of a New Share Recipient frustrating a share reversal by transferring the New Shares in advance of a shareholder vote on the New Share issuance.

[187] The Intervenors object to the Cease Trade Order, arguing that it is inappropriate in the circumstances given the prejudicial impact and consequences to them and their investors. They also submit that an order cease trading the New Shares issued to them is disproportionate and unfair. As a cease trade order is an extraordinary remedy, the party requesting the order has a heavy onus to

provide sufficient evidence to support the issuance of such an order in the public interest, which onus they submit the Applicants have not met.

[188] We reject these submissions on the basis that, in the present case, the Cease Trade Order is necessary to prevent circumvention of the Commission's Decision under subsection 8(3) of the Act to require a shareholder vote on the New Share issuance.

[189] First, by preventing transfers of the New Shares to persons who were not intervenors at the hearing, the Cease Trade Order avoids the risk of intervening share transfers rendering the reversal of the New Share issuance, which is not impractical today, impractical at a future date.

[190] Secondly, the Cease Trade Order is necessary to prevent the Commission's Decision to require a shareholder vote from being circumvented by a transfer of the New Shares to others who were not intervenors at the hearing and who might seek to vote the New Shares in a manner that affects the vote at the pending Meeting or a later meeting to approve the issuance of the New Shares. A share transfer with these purposes is contrary to the public interest, calling into question the integrity of the meeting process and the effect of the TSX's shareholder approval rule.

(c) Requirement that Eco Oro not Consider the New Shares Outstanding for Purposes of Voting Pending the Shareholder Vote

[191] The Commission's Decision contains a further term and condition in the form of an order that Eco Oro, and the Chair of any Eco Oro shareholder meeting, not consider the New Shares to be issued and outstanding for the purposes of voting on any matter, unless and until the shareholders vote to approve their issuance.

[192] This term and condition addresses the imperative that Eco Oro shareholders are entitled to have an appropriate vote on the issuance of the New Shares, where the outcome of that vote may subsequently determine the composition of Eco Oro's Board and the future direction of the company. For Eco Oro to hold a fairly conducted vote on the New Share issuance, it cannot consider the New Shares to be issued and outstanding.

[193] The Intervenors strenuously object to both the appropriateness of this term and condition and the jurisdiction of the Panel to impose it as part of the Commission's Decision. We turn first to their objections based on inappropriateness, and we address jurisdiction below.

[194] The Intervenors object to this term and condition as inappropriate in the circumstances given the prejudicial impact and consequences to them and their investors. We reject this argument. This term and condition is designed to deprive Eco Oro's management of the benefit of having issued the New Shares without a required shareholder vote on their issuance.

[195] This term and condition is required in this case since the Respondent and the Intervenors at the hearing were unwilling to express a view in response to a question from the Panel as to whether, if we were to reverse the TSX Decision, the New Shares would be voted at the shareholders' meeting two days later.

[196] The necessity for this term and condition would not have arisen had there been a pause to elevate the issue of shareholder approval at the TSX before the

transaction closed. If, following consideration of the proxy contest and the surrounding circumstances, shareholder approval had been required as a condition of the issuance of the New Shares, the New Shares could not have been voted at the requisitioned Meeting.

[197] Such a state of affairs ought to be respected pending the shareholder vote on the issuance of the New Shares. Absent a voluntary commitment at the hearing by the Intervenors to respect the requirement of a shareholder vote and not vote their New Shares, if we were to decide that such approval is required, this term and condition is required to ensure compliance. It ensures that shareholders of Eco Oro have a fairly conducted vote on the issuance of the New Shares, where the outcome of that vote may later determine the composition of Eco Oro's Board and the future direction of the company.

3. Conclusion

[198] For the reasons set out above, the three terms and conditions in the Commission's Decision (*i.e.*: (i) the requirement for a shareholder vote to approve or reverse the transaction; (ii) the requirement that the Intervenors not trade the New Shares pending the shareholder vote; and (iii) the requirement that Eco Oro not consider the New Shares outstanding for the purposes of voting pending the shareholder vote) are necessary and appropriate in order to give practical and legal effect to the Commission's Decision and to ensure that the public interest in the integrity of the vote and compliance with law is respected.

D. Jurisdiction to Render the Commission's Decision

1. Introduction

[199] Eco Oro and the Intervenors argue that the Commission lacks the authority under subsection 8(3) of the Act to render a decision purporting to "unscramble the egg" by including the first and third of the three terms and conditions discussed above, namely:

a. the requirement that Eco Oro take the necessary steps to reverse the issuance of the New Shares if the shareholders so direct; and

b. the requirement that Eco Oro not consider the New Shares to be issued and outstanding for the purposes of a shareholder vote pending the outcome of a shareholder vote on the issuance of the New Shares.

[200] Central to the question of the Commission's jurisdiction to include these two terms and conditions in the Commission's Decision is the scope of the authority conferred upon the Commission under subsection 8(3) of the Act, which authorizes the Commission, upon a hearing and review, to "by order confirm the decision under review or make such other decision as the Commission considers proper."

[201] The authority conferred by the phrase "such other decision as the Commission considers proper" is not unlimited; it is circumscribed by the purposes of the Act and the specific context of the TSX decision under review and must be exercised in light of the Commission's mandate to protect investors from unfair practices and to foster confidence in our capital markets.

2. The Commission is not Restricted under Subsection 8(3) of the Act to What the TSX Can Decide

[202] More particularly, the Respondent and the Intervenors argue that we can do no more than the TSX can do itself since we stand in its shoes in a *de novo* hearing and review.

[203] This argument, in our view, fails to consider that the application for a hearing and review arises because the regulatory functions exercised by the TSX stem from the Commission's recognition of the TSX as an exchange.

[204] The Commission's recognition of the TSX involves the TSX performing regulatory functions in a manner that the Commission has established is consistent with its mandate.

[205] To give effect to the Commission's duty to ensure that regulatory decisions by exchanges are consistent with the purposes of the Act, subsection 8(3) confers upon the Commission the authority, upon an application for a hearing and review, "by order to confirm the decision under review or make such other decisions as the Commission considers proper."

[206] As such, our authority is necessarily broader than that of the TSX, and the Commission is not limited by the TSX's power to suspend trading or delist a company.

[207] The Commission's authority under subsection 8(3) of the Act must be interpreted in light of the Commission's recognition of the TSX as an exchange, which supports a considerably broader authority of the Commission, as compared to that of the TSX, to make decisions and issue orders affecting other persons in accordance with the Act.

[208] This necessarily broader authority arises from the critical role that the TSX, other recognized exchanges and SROs, fulfills in each aspect of the Commission's mandate that is not applicable to most private enterprises.

[209] The Commission's latitude in making orders affecting recognized exchanges is reinforced by the Commission's comprehensive oversight of recognized exchanges, including paragraphs (a) and (e) of subsection 21(5) of the Act, which empowers the Commission, if it considers it in the public interest, to make any decision with respect to the manner in which a recognized exchange carries on business or with respect to any policy or practice of a recognized exchange:

> 21.(5) The Commission may, if it considers it in the public interest, make any decision with respect to,
>
> (a) the manner in which a recognized exchange carries on business;
>
> (b) the trading of securities or derivatives on or through the facilities of a recognized exchange;
>
> (c) any security or derivative listed or posted for trading on a recognized exchange;
>
> (d) issuers, whose securities are listed or posted for trading on a recognized exchange, to ensure that they comply with Ontario securities law; or

(e) any by-law, rule, regulation, policy, procedure, interpretation or practice of a recognized exchange.

[emphasis added]

[210] As discussed above at paragraph [122] of these Reasons, the Commission's oversight of the TSX is also reflected in the detailed Exchange Recognition Order issued by the Commission, which grants and continues the recognition of the TSX as an exchange, pursuant to section 21 of the Act. Schedule 10 to the Exchange Recognition Order provides the process for review and approval of any TSX rules and policies (other than rules of an administrative nature) that have an impact on the exchange's market structure, members, issuers, investors or the capital markets, which are known as "Public Interest Rules." Public Interest Rules include policies relating to listed companies, and they are subject to: (i) public comment, and (ii) review and approval by the Commission. When reviewing rules, the Commission considers the public interest and the Commission's mandate as set out in section 1.1 of the Act. This review and approval authority extends to the TSX's rules that were applied in rendering the TSX Decision.

[211] We reject the submissions of the Respondent and the Intervenors that the Commission, in making a decision under subsection 8(3) of the Act, is limited to what the TSX could have required in a decision to approve or reject the issuance of the New Shares.

3. Principle of Statutory Interpretation: Implied Exclusion

[212] Terms and conditions are an established means for the Commission to craft relief under the Act that is adapted to specific statutory and public interest concerns and balances the interests of participants in the capital markets, including issuers and investors.

[213] Eco Oro and the Intervenors argue that the Commission lacks the authority to impose the terms and conditions in question as part of the Commission's Decision based on the legal maxim of statutory interpretation, *expressio unius est exclusio alterius*: to express one thing is to exclude another. They cite Professor R. Sullivan from Ruth Sullivan, *Sullivan on The Construction of Statutes*, 6th ed (Toronto: LexisNexis Canada, 2014) at para 8.90:

> An implied exclusion argument lies whenever there is reason to believe that if the legislature had meant to include a particular thing within its legislation, it would have referred to that thing expressly. Because of this expectation, the legislature's failure to mention the thing becomes grounds for inferring that it was deliberately excluded. … As Laskin J.A. succinctly put it, "legislative exclusion can be implied when an express reference is expected but absent". The force of the implication depends on the strength and legitimacy of the expectation of express reference.

[214] Based on this principle of statutory interpretation, Eco Oro and the Intervenors argue that prohibiting Eco Oro from counting the New Shares, if the Meeting proceeds, and requiring Eco Oro to take steps to reverse the transaction, if the shareholders so direct, involve powers that are reserved to the Ontario Superior Court of Justice under section 128 of the Act and therefore unavailable to the Commission. They argue that for the Commission to restrain voting rights or to

reverse a transaction, the Commission must apply to the court under subsection 128(1) of the Act for a declaration that a person or company has not complied with or is not complying with securities law and seek an order prohibiting the exercise of voting rights and cancelling or rescinding the transaction.

[215] The relevant portion of subsection 128(3) of the Act, regarding the remedial powers of the court, reads as follows:

> 128(3) If the court makes a declaration under subsection (1), the court may, despite the imposition of any penalty under section 122 and despite any order made by the Commission under section 127, make any order that the court considers appropriate against the person or company, including, without limiting the generality of the foregoing, one or more of the following orders:
>
> …
>
> 4. An order rescinding any transaction entered into by the person or company relating to trading in securities including the issuance of securities.
>
> 5. An order requiring the issuance, cancellation, purchase, exchange or disposition of any securities by the person or company.
>
> 6. An order prohibiting the voting or exercise of any other right attaching to securities by the person or company.

[216] We have considered whether the implied exclusion argument is persuasive. The force of the implication to be drawn from the omission depends on the strength and legitimacy of the expectation of express reference, which, in turn, is tied in the present case to the degree of the comparability of subsection 8(3) with section 128 of the Act.

[217] The argument advanced by Eco Oro and the Intervenors gives insufficient regard to the difference between a hearing and review proceeding and the nature of a decision in the present case, on the one hand, and the nature of proceedings and orders under section 128 of the Act, on the other.

[218] A proceeding pursuant to section 128 of the Act is predicated on a breach of Ontario securities legislation. An order of rescission or prohibition on voting is available under section 128, which is found in Part XXII of the Act entitled "Enforcement" as a sanction in enforcement cases where there has been a breach of Ontario securities law. In the present case, section 128 is not engaged because the hearing and review of an exchange's decision is not an enforcement case since there has been no breach of Ontario securities law by Eco Oro, notwithstanding that the resulting actions contravene an exchange listing standard and are contrary to the public interest.

[219] The decision under subsection 8(3), which is found in Part V of the Act entitled "Administrative Proceedings, Reviews and Appeals," is a remedy to the Applicants for the TSX's error in approving the transaction without a shareholder vote and permitting an accelerated closing prior to the Record Date despite the transaction materially affecting control of Eco Oro.

[220] Unlike an order under section 128 of the Act for rescission of a transaction or a prohibition on voting, which can each stand alone as a remedy for a breach of Ontario securities law, the terms and conditions in the Commission's Decision under subsection 8(3), which refer to the issuer taking steps to reverse the transaction and prohibiting shares from being considered issued and outstanding for the purposes of a shareholder vote, are not stand-alone orders to rescind a transaction or prohibit a vote. They are terms and conditions designed to craft relief that is adapted to specific statutory and public interest concerns and that balances the interests of participants in the capital markets, including issuers and investors.

[221] There are past examples of provincial securities commissions imposing such highly tailored terms and conditions in similar circumstances. For example, in *Re Mercury Partners & Company Inc.*, 2002 BCSECCOM 173 (***Mercury***), the BC Securities Commission required an issuer to obtain shareholder approval of a private placement and ordered terms to maintain the status quo to the greatest extent possible until the required shareholder meeting. Likewise, in *Geosam*, the BC Securities Commission temporarily stayed a decision of the TSX-V and, considering it to be in the public interest, ordered a number of terms and conditions to effect the stay and ensure its efficacy.

[222] It should also be recognized that the terms and conditions set out in the Commission's Decision do not purport, in and of themselves, to either rescind a transaction or prohibit the exercise of voting rights. The terms and conditions in the Commission's Decision address these matters by directing the issuer, the Board and the chair of its shareholder meeting to take certain actions or to refrain from certain actions to achieve an outcome in compliance with the issuer's regulatory obligations. These terms and conditions, by virtue of being included in the Commission's Decision, become part of "Ontario securities law," capable of being enforced pursuant to section 127 or 128 of the Act.

[223] The terms and conditions in the Commission's Decision that refer to the issuer taking steps to reverse the transaction and prohibiting shares from being considered issued and outstanding for the purposes of a shareholder vote are terms and conditions customized to the present case and tailored to right the wrong of the TSX Decision in a manner entirely consistent with the purposes of a hearing and review under subsection 8(3) of the Act. They are aimed at depriving Eco Oro's management of the benefit of having issued the New Shares, without shareholder consideration of the matter, by requiring that Eco Oro not consider the New Shares to be issued and outstanding for the purposes of voting on any matter pending the outcome of the shareholder vote on the issuance of the New Shares.

[224] The application of the implied exclusion principle of statutory interpretation in this case depends on the relative strength and legitimacy of the expectation of express reference in subsection 8(3) of the Act to our authority to impose terms and conditions as part of a decision made on a hearing and review of an exchange's decision. Here, those terms and conditions require an issuer to take steps, if instructed by its shareholders, to reverse a transaction, as well as prohibit an issuer from considering shares that have been issued without requisite shareholder approval to be outstanding for the purposes of a shareholder vote. In our view, the strength and legitimacy of the expectation

that a specific statutory reference contemplates precise categories of tailored terms and conditions is weak: the breadth of the Commission's authority on a hearing and review of the many decisions subject to subsection 8(3) necessitates varied remedial terms and conditions to address the circumstances that may arise.

[225] While not expressly argued by the Respondent or the Intervenors, we considered the potential argument that the implied exclusion principle of statutory interpretation precludes an interpretation of subsection 8(3) of the Act that authorizes the Commission to impose terms and conditions more generally as we have in the Commission's Decision.

[226] The authority to impose terms and conditions is expressly granted in various sections of the Act, including for example:

a. subsection 1(12): An order [designating a person or company to be an insider] under subsection (10) may be made subject to such terms and conditions as the Commission may impose;

b. subsection 2.2(4): The order [to suspend trading] may be subject to such terms and conditions as the Commission may impose;

c. subsection 17(4): An order under subsection (1) or (2.1) [to disclose certain confidential information] may be subject to terms and conditions imposed by the Commission;

d. subsection 21(3): A recognition [of an exchange] under this section shall be made in writing and shall be subject to such terms and conditions as the Commission may impose;

e. subsection 21.11(4): The Commission may, by order, give its approval to a person, company or transaction, for the purposes of subsection (1) or (3) [to hold more than the prescribed percentage of the TSX], and may impose such terms and conditions on the approval as the Commission considers appropriate;

f. subsection 127(2): An order under this section [127] may be subject to such terms and conditions as the Commission may impose; and

g. section 147: Except where exemption applications are otherwise provided for in Ontario securities law, the Commission may, on the application of an interested person or company and if in the Commission's opinion it would not be prejudicial to the public interest, make an order on such terms and conditions as it may impose exempting the person or company from any requirement of Ontario securities law.

[227] These examples illustrate that express references to statutory authority to impose terms and conditions are made in contexts where the Commission is doing something more specific than making a decision, namely: making an order that a person or company do a certain thing, granting recognition to an exchange or granting an approval. The express reference is required in these contexts to provide the Commission with the authority to craft orders, recognitions and approvals that are customized and tailored to the circumstances.

[228] The implied exclusion principle of statutory interpretation does not govern the interpretation of subsection 8(3) of the Act so as to preclude the authority of the Commission to impose terms and conditions on a decision made under that subsection. On the contrary, the authority of the Commission to craft terms and conditions in a decision made under subsection 8(3) is conferred by the reference to the authority of the Commission to "make such other decision as the Commission thinks proper" [emphasis added].

[229] In this case, an improper application of the implied exclusion principle of statutory interpretation would defeat the purposes of the Act by depriving the Applicants of any remedy at all and permitting regulatory non-compliance without appropriate consequences.

4. Purposive Interpretation

[230] The Commission should apply a purposive approach to the interpretation of the Act and, in doing so, should consider the regulatory objectives of the Act. As the Commission stated in *MI Developments* at para 77, citing *Bell ExpressVu Limited Partnership v Rex*, 2002 SCC 42 at para 26, the proper approach to statutory interpretation is as follows:

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

[231] It is a basic canon of statutory interpretation that we interpret our authority under the Act in a contextual and purposive way, considering the purpose and objectives of the Act. We must therefore interpret subsection 8(3) in light of its purpose, which is the review of an exchange's decision, and we must do so not in a vacuum, but in the context of the entire Act and the securities law regime as a whole.

[232] The Commission's jurisdiction is animated in part by both of the purposes of the Act described in section 1.1, namely "to provide protection to investors from unfair, improper or fraudulent practices" and "to foster fair and efficient capital markets and confidence in capital markets." In contradistinction, it is for the courts to punish or remedy past conduct under sections 122 and 128 of the Act, respectively (*Committee for Equal Treatment of Asbestos Minority Shareholders v Ontario (Securities Commission)*, 2001 SCC 37 at paras 41–43).

[233] A remedy under section 128 of the Act is not available in the present case without the issuance of the Commission's Decision. If we are unable to make orders disregarding the New Shares for the vote and requiring measures to reverse the transaction if shareholders vote it down, there is no order, constituting an element of Ontario securities law, for which the Commission could apply to the court for enforcement under section 128 of the Act.

[234] If the Panel lacks authority under subsection 8(3) of the Act to impose the terms and conditions in the Commission's Decision to require a shareholder vote in the present case, there would be no remedy at all under Ontario securities law, at the Commission or before the courts, for the improper issuance of securities or for a flawed exchange process. If this were the case, the Commission's mandate could not be fulfilled—merely because a reporting issuer was less than candid with the TSX and rushed to close.

5. The Doctrine of Jurisdiction by Necessary Implication

(a) Introduction

[235] The Respondent and the Intervenors refer us to the doctrine of jurisdiction by necessary implication for the appropriate framework to analyze the question of whether the Commission has the authority, on a hearing and review of a TSX decision permitting a share issuance to close on an accelerated basis, to impose the terms and conditions described above as part of the Commission's Decision to require a shareholder vote.

[236] The Respondent and the Intervenors submit that the doctrine of jurisdiction by necessary implication leads one to conclude that the Commission does not have the authority under subsection 8(3) of the Act to impose the two terms described in paragraph [199] of these Reasons as part of the Commission's Decision.

[237] We agree that the doctrine of jurisdiction by necessary implication provides a helpful framework within which to analyze the question, but we disagree with the Respondent and the Intervenors on their conclusion.

(b) The Law

[238] In *ATCO Gas & Pipelines Ltd v Alberta (Energy & Utilities Board)*, 2006 SCC 4 (***ATCO***), the Supreme Court of Canada provided guidance on the doctrine of jurisdiction by necessary implication. The question before the Alberta Energy and Utilities Board was whether the board had jurisdiction to order ATCO to allocate a portion of proceeds from the sale of property owned by ATCO to rate-paying customers rather than to ATCO's shareholders. The board determined that it had the jurisdiction to reallocate ATCO's proposed distribution of proceeds, pursuant to the powers granted to it under its enabling statute. The Supreme Court held that there was neither explicit nor implicit legislative authority to allow the board to reallocate the proceeds of the sale.

[239] The parties referred to the following passages of the decision.

[240] At paragraph 49 of *ATCO*, the Supreme Court stated:

> The provisions at issue are found in statutes which are themselves components of a larger statutory scheme which cannot be ignored:
>
> > As the product of a rational and logical legislature, the statute is considered to form a system. Every component contributes to the meaning as a whole, and the whole gives meaning to its parts: "each legal provision should be considered in relation to other provisions, as parts of a whole" ….
> >
> > (P.-A. Côté, *The Interpretation of Legislation in Canada* (3rd ed. 2000), at p. 308)
>
> As in any statutory interpretation exercise, when determining the powers of an administrative body, courts need to examine the context that colours the words and the legislative scheme. The ultimate goal is to discover the clear intent of the legislature and the true purpose of the statute while preserving the harmony, coherence and consistency of the legislative scheme (*Bell ExpressVu* [*Ltd. Partnership v. Rex*, 2002 SCC 42], at para. 27; see also *Interpretation Act*, R.S.A. 2000, c. I-8, s. 10 (in Appendix)).

[241] The Supreme Court continued at paragraphs 50–51 of *ATCO*:

> In the same vein, it is useful to refer to the following passage from *Bell Canada v. Canada (Canadian Radio-Television and Telecommunications Commission)*, [1989] 1 S.C.R. 1722, at p. 1756:
>
> > The powers of any administrative tribunal must of course be stated in its enabling statute but they may also exist by necessary implication from the wording of the act, its structure and its purpose. Although courts must refrain from unduly broadening the powers of such regulatory authorities through judicial law-making, they must also avoid sterilizing these powers through overly technical interpretations of enabling statutes.
>
> The mandate of this Court is to determine and apply the intention of the legislature (*Bell ExpressVu*, at para. 62) without crossing the line between judicial interpretation and legislative drafting (see *R. v. McIntosh*, [1995] 1 S.C.R. 686, at para. 26; *Bristol-Myers Squibb Co.* [*v. Canada (Attorney General)*, 2005 SCC 26], at para. 174). That being said, this rule allows for the application of the "doctrine of jurisdiction by necessary implication"; the powers conferred by an enabling statute are construed to include not only those expressly granted but also, by implication, all powers which are practically necessary for the accomplishment of the object intended to be secured by the statutory regime created by the legislature (see Brown [*Energy Regulation in Ontario* (loose-leaf ed.)] at p. 2-16.2; *Bell Canada*, at p. 1756). Canadian courts have in the past applied the doctrine to ensure that administrative bodies have the necessary jurisdiction to accomplish their statutory mandate:
>
> > When legislation attempts to create a comprehensive regulatory framework, the tribunal must have the powers which by practical necessity and necessary implication flow from the regulatory authority explicitly conferred upon it.

[242] At paragraph 73 of *ATCO*, the Supreme Court cited with approval a decision of the Ontario Energy Board (*Re Consumers' Gas Co.*, E.B.R.O. 410-II/411-II/412-II, March 23, 1987) that enumerated the circumstances when the doctrine of jurisdiction by necessary implication may be applied:

> * [when] the jurisdiction sought is necessary to accomplish the objectives of the legislative scheme and is essential to the Board fulfilling its mandate;
> * [when] the enabling act fails to explicitly grant the power to accomplish the legislative objective;
> * [when] the mandate of the Board is sufficiently broad to suggest a legislative intention to implicitly confer jurisdiction;

- [when] the jurisdiction sought must not be one which the Board has dealt with through use of expressly granted powers, thereby showing an absence of necessity; and
- [when] the Legislature did not address its mind to the issue and decide against conferring the power upon the Board.

[243] It is incumbent upon us to consider the presence or absence of each of these factors in the present case.

(c) Application of the ATCO Factors

i. Is the Jurisdiction Sought Necessary to Accomplish the Objectives of the Legislative Scheme and Essential to the Commission Fulfilling its Mandate?

[244] For the reasons set out above, the jurisdiction we assert in the present case is necessary to accomplish the purposes of the Act. Whether management is pursuing the best course of action for Eco Oro or whether the Board should be reconstituted is for the shareholders to decide without management being permitted to manipulate the vote. To allow a vote to proceed that has been affected by such conduct would directly affect the integrity of Ontario capital markets, contrary to the Commission's mandate and the public interest.

[245] The public interest is served by respecting the right of shareholders of TSX-listed issuers to have a fairly conducted vote to determine the composition of their boards of directors. The issuance of the New Shares in the present case must be properly submitted to a vote of shareholders. The outcome of that vote will allow the shareholders to then consider the composition of Eco Oro's Board and the future direction of the company. Until the meeting is held, it is imperative that the status quo be maintained to the greatest extent possible and that the New Shares not be counted towards the vote on the approval of their issuance.

[246] Considered more broadly, the jurisdiction asserted in the present case, which involves a contest for control of a public company by way of a proxy contest, can be analogized to the jurisdiction of the Commission over change of control transactions effected by way of a takeover bid. Proxy contests and takeover bids provide alternative means of effecting a change of control of a public company that have very material consequences for shareholders. Issuances of shares as a defensive measure in the face of a contest for control of a public company to influence the outcome in management's favour are subject to review by the Commission. Private placements with this tactical motivation have more typically arisen in the context of takeover bids and may constitute defensive tactics contrary to the public interest and to *National Policy 62-202 – Take-Over Bids - Defensive Tactics* (***National Policy 62-202***), which provides:

> 1.1(4) … defensive tactics that may come under scrutiny if undertaken during the course of a bid, or immediately before a bid, if the board of directors has reason to believe that a bid may be imminent, include
>
> (a) the issuance … of … securities representing a significant percentage of the outstanding securities of the target company.

[247] Where a party wishes to contest such an issuance under Ontario securities law, they may seek to persuade the TSX to require shareholder approval, and if shareholder approval is not required by the TSX, to have that decision reviewed by the Commission. The Commission reviews the TSX's decision in the same manner as in this proceeding. Whether or not there is an exchange decision, a person may also seek to invoke the Commission's public interest jurisdiction under section 127 of the Act based on the underlying policies in *National Policy 62-202*, as the Applicants did here.

[248] If the share issuance is challenged as a defensive tactic in relation to a take-over bid, the Commission must necessarily delve into the purpose of the issuance. In *Re Hecla Mining Co.* (2016), 39 OSCB 8927, the Commission and the BC Securities Commission provided a framework for considering these matters where the first inquiry is whether the issuance is clearly not for a defensive purpose and the onus is initially on the target company in that context.

[249] When the Commission considers the public interest, whether under subsection 8(3) or section 127 of the Act, fairness to shareholders and therefore the integrity of the markets may well yield the same result in assessing a private placement designed to thwart a bid as it does in the case of an issuance designed to tip the balance in a proxy contest.

[250] Although *National Policy 62-202* addresses takeover bids, the public interest in promoting fairness to shareholders clearly extends to ensuring fair contests for control whether pursued through the proxy solicitation process for contested shareholder meetings or by way of a takeover bid. In considering whether to exercise our discretion to require shareholder approval based on our view of the public interest, control transactions, regardless of form, may involve similar public interest concerns.

[251] The policy considerations underlying the fair treatment of shareholders in the Act and as reflected in *National Policy 62-202* applicable to takeover bids are also applicable to proxy contests. The ability to craft terms and conditions to address inappropriate defensive tactics is necessary to fulfill the Commission's mandate to provide investor protection and to foster confidence in capital markets in connection with change of control transactions implemented through a bid or a vote.

ii. Does the Enabling Act Fail to Explicitly Grant the Power to Accomplish the Legislative Objective?

[252] The Act does not explicitly grant the Commission specific authority to impose the terms and conditions at issue, which are necessary to accomplish the legislative objectives in this Hearing and Review Application.

[253] The legislative objective is to empower the Commission to make its own proper decision, and this must, by necessary implication, include the power to give full effect to the proper decision.

iii. Is the Commission's Mandate Sufficiently Broad to Suggest a Legislative Intention to Implicitly Confer Jurisdiction?

[254] Eco Oro and the Intervenors argue that the Commission's mandate is not sufficiently broad to suggest a legislative intention to implicitly confer jurisdiction to impose the terms and conditions at issue in the Commission's Decision under subsection 8(3) of the Act.

[255] In support of this position, they point to section 128 of the Act, which sets out the circumstances in which the Commission may bring an application for declaratory relief from the Ontario Superior Court of Justice and the remedial powers of that court. They argue that, under section 128, the Commission must go to the court for remedial orders like those sought by the Applicants, which relief would affect commercial interests and property rights. We disagree.

[256] Under section 1.1 of the Act, the Commission's broad mandate is to provide protection to investors from unfair, improper or fraudulent practices and to foster fair and efficient capital markets and confidence in capital markets. Under section 127, the Commission is empowered to make certain orders and impose terms and conditions if, in the Commission's opinion, it is in the public interest to do so.

[257] If the legislature had wanted to limit or fetter the Commission's discretion, the legislature could have said, under subsection 8(3) of the Act, that the Commission could make such other decision as the Commission considers proper, *other than a decision for relief set out in section 128*. But it did not follow this course. Rather, the Act simply allows the Commission to make the decision it considers proper on a hearing and review. While this power certainly must be limited to a decision that is proper in the context of a hearing and review, and with a consideration of the Act's purposes, the remedy cannot be empty. If the Commission finds that a TSX decision is wrong, it must be empowered to take the necessary steps to prevent that decision from harming investors or impairing confidence in the capital markets. The Commission's mandate is sufficiently broad to establish such a legislative intention to implicitly confer that jurisdiction.

iv. Is the Jurisdiction Sought One Which the Commission Has Dealt With Before Through Use of Expressly Granted Powers, Thereby Showing an Absence of Necessity?

[258] The Commission has not previously considered a situation such as the one before us, other than in a dissenting opinion in *Canada Malting*.

[259] In his dissent in *Canada Malting*, Vice-Chair Salter parted with the majority on the question of whether to confirm the TSX's decision to approve a private placement. He noted that, given that the transaction had already closed, he would have ordered that the TSX's decision be reversed and that the disinterested shareholders vote and either ratify the impugned private placement or instruct the board of directors of the listed issuer to take all necessary steps to reverse the transaction.

[260] We considered whether other securities commissions in Canada have considered the present situation and, if so, what remedies they considered to be available in these circumstances.

[261] The Applicants referred us to *Mercury*, a decision of the BC Securities Commission in which the Panel addressed a situation similar to the one before us and issued an order consistent with the Commission's Decision.

[262] In *Mercury*, the BC Securities Commission found that the TSX-V did not appropriately consider all the circumstances affecting a private placement and was unaware of certain relevant circumstances when the exchange concluded that an issuance that created the single largest shareholder of the company, with ownership of between 19% and 30% depending on certain variables, did not materially affect control of the company. The BC Securities Commission applied the *Canada Malting* factors but did so in accordance with a BC Securities Commission Policy that provided that if an exchange's decision is "reasonable and has been made in accordance with the law, the evidence and the public interest," the BC Securities Commission is generally reluctant to interfere simply because it would have come to a different conclusion in the circumstances.[4]

[263] We note that the BC Securities Commission's standard for review, while overlapping with the role this Commission performs on an application for hearing and review, is more circumscribed in its approach than that of the Commission. While affording a degree of deference to the decisions of exchanges, this Commission considers that hearings and review more readily become *de novo* hearings and not be limited to the more circumscribed grounds of an appeal.[5]

[264] In *Mercury*, the BC Securities Commission overturned the decision of the TSX-V, concluding that the exchange had not considered all the relevant circumstances. Like the case before us, the private placement in *Mercury* was already concluded. Unlike this case, $1 million of new capital was put into the company. Based on the order that Vice-Chair Salter posited in his dissent in *Canada Malting*, the BC Securities Commission issued an order that included provisions prohibiting the voting of the private placement shares and requiring the unwinding of the transaction if the shareholders voted down the issuance. The BC Securities Commission cited its broader authority to issue orders affecting an exchange, equivalent to subsection 21(5)(a) of the Act, but concluded that its order under the BC equivalent of section 21.7 of the Act was sufficient and that an additional order was unnecessary in light of the terms and conditions it imposed. The BC Securities Commission also issued orders pursuant to its public interest authority to support compliance with its terms and conditions, as we have done in this case.

[265] The BC Securities Commission in *Mercury* went on to state the following:

> In our view, it is imperative that the status quo be maintained to the greatest extent possible until the meeting is held. For example, we expect that, until the meeting, [the Company] will carry out only those activities and incur only those expenses that arise in the ordinary course of business.
>
> (*Mercury* at para 104)

[4] *Mercury* at para 49.

[5] In many cases, the BC Securities Commission's approach and this Commission's approach will produce similar results since we both examine the *Canada Malting* factors and assess the robustness of the exchange's process in considering the degree of deference to be afforded.

[266] While the Respondent and the Intervenors correctly note that a decision of a provincial securities commission cannot provide authority for the proposition that an order is within our jurisdiction to make, we do find the decision of the BC Securities Commission in *Mercury* persuasive in demonstrating that another provincial securities commission with a similar mandate and similar legislation in a similar situation concluded that it was necessary and appropriate to issue a comparable order. Similar to the Commission's Decision, both the order contemplated by Vice-Chair Salter and the Order of the BC Securities Commission in *Mercury* involved tailored conditions directed to persons to achieve defined and narrowly constructed ends.

v. Did the Legislature Address its Mind to the Issue and Decide against Conferring the Power upon the Commission?

[267] Eco Oro and the Intervenors argued that the inclusion of powers of a court under section 128 of the Act to restrain voting rights and rescind transactions is an indication that the legislature did in fact address its mind to the issue and decide against conferring the power on the Commission.

[268] This argument, in essence, repeats the argument considered above based on the implied exclusion principle of statutory interpretation. Eco Oro and the Intervenors argue that prohibiting Eco Oro from counting the New Shares, if the meeting proceeds, and requiring Eco Oro to take steps to reverse the transaction, if the shareholders so direct, involve powers that are reserved to the courts under section 128 of the Act and therefore unavailable to the Commission.

[269] For the reasons set out above under Part V(D)(3) of these Reasons, "Principle of Statutory Interpretation: Implied Exclusion," we reject this argument.

[270] We are satisfied that the legislature intended to confer on the Commission flexible authority to impose carefully crafted terms and conditions in an order resulting from a hearing and review of an exchange's decision to fulfill the Commission's mandate, including terms and conditions to support a shareholder vote and potentially instruct the listed company to take measures to rescind transactions that are voted down, when required to ensure compliance with listing rules and the public interest.

(d) Broadly versus Narrowly Drawn Powers

[271] We appreciate that the doctrine of jurisdiction by necessary implication will be of less help in the case of broadly drawn powers than for narrowly drawn powers. Broadly drawn powers will necessarily be limited to only what is rationally related to the purpose of the regulatory framework. As cited in the *ATCO* decision, Professor R. Sullivan explains this principle of statutory interpretation:

> Narrowly drawn powers can be understood to include "by necessary implication" all that is needed to enable the official or agency to achieve the purpose for which the power was granted. Conversely, broadly drawn powers are understood to include only what is rationally related to the purpose of the power. In this way the scope of the power expands or contracts as needed, in keeping with the purpose.

(*ATCO* at para 74, citing Ruth Sullivan, *Sullivan and Driedger on the Construction of Statutes*, 4th ed (Markham, Ont: Butterworths, 2002) at 228)

[272] Though the Commission's powers on a hearing and review are broadly drawn, the doctrine of jurisdiction by necessary implication still assists in the current case because the terms of the Commission's Decision are rationally related to the purpose of the regulatory framework. The Commission's Decision is not an attempt to augment its powers in a way that does not fit with the purpose of the statute, as was found to be the case in *ATCO*. Rather, unlike in *ATCO*, there is evidence that the power to order the terms and conditions in the Commission's Decision is a practical necessity for the Commission to accomplish its prescribed legislated objectives. The terms and conditions in the Commission's Decision are intentionally tailored so as to give efficacy to its order to set aside the TSX Decision, and to right the wrong of the TSX Decision, in a manner entirely consistent with the broad purposes of a hearing and review under subsection 8(3) of the Act.

6. Conclusion

[273] For the reasons set out above, we conclude that the scope of the Commission's jurisdiction under the Act on a hearing and review is sufficient to enable the Panel to render the Commission's Decision.

E. Alternative Grounds for Relief Sought Further to the Commission's Public Interest Jurisdiction under Section 127 of the Act

[274] Separate and apart from the hearing and review of the TSX Decision, the Applicants ask that the Commission make an order under its broader public interest jurisdiction, pursuant to section 127 of the Act. Arguing that the issuance of the New Shares has an abusive effect on Eco Oro's minority shareholders, the Applicants seek an order under section 127 to cease trade the New Shares, or deny the use of exemptions, until Eco Oro and the New Share Recipients reverse the issuance of the New Shares.

[275] In light of our above reasons for the Commission's Decision on the hearing and review pursuant to sections 8(3) and 21.7 of the Act, it is not necessary for us to address these alternative grounds for relief in this case, and we decline to do so.

VI. CONCLUSION

[276] For all of the above reasons, the Commission's Decision sets aside the TSX Decision and orders that, at a meeting of shareholders to be held no later than September 30, 2017, Eco Oro shall seek approval of the issuance of the New Shares to the New Share Recipients to the extent that Eco Oro and a New Share Recipient have not otherwise reversed the issuance of that New Share Recipient's New Shares. If the shareholders vote to instruct the Eco Oro Board to take all necessary steps to reverse the issuance of the New Shares, the Board is ordered to forthwith implement those instructions. Pursuant to the Commission's Decision, unless and until the shareholders of Eco Oro ratify the issuance of the New Shares, the New Shares are cease traded pursuant to subsection 127(1) of the Act, and Eco Oro and the Chair of any Eco Oro shareholder meeting shall not consider the New Shares to be issued and outstanding for the purposes of voting at the Annual General and Special Meeting of Shareholders scheduled for

April 25, 2017, and any adjournment thereof, and at any other meeting of shareholders of Eco Oro.

Dated at Toronto this 16th day of June, 2017.

"*D. Grant Vingoe*"

D. Grant Vingoe

"*Monica Kowal*"	"*Frances Kordyback*"
Monica Kowal	Frances Kordyback

SCHEDULE 'A'

Ontario Securities Commission | Commission des valeurs mobilières de l'Ontario | 22nd Floor, 20 Queen Street West, Toronto ON M5H 3S8 | 22e étage, 20, rue queen ouest, Toronto ON M5H 3S8

IN THE MATTER OF
THE *SECURITIES ACT*, RSO 1990, c S.5

- AND -

IN THE MATTER OF
ECO ORO MINERALS CORP.

- AND -

IN THE MATTER OF
A HEARING AND REVIEW OF A DECISION OF THE TORONTO STOCK EXCHANGE

ORDER
(Sections 8(3), 21.7 and 127(1) of the *Securities Act*)

WHEREAS:

A. On March 27, 2017, pursuant to sections 8(3), 21.7 and 127(1) of the *Securities Act*, RSO 1990, c S.5 (the "**Act**"), Courtenay Wolfe and Harrington Global Opportunities Fund Ltd. (collectively, the "**Applicants**") filed a Notice of Application with the Ontario Securities Commission (the "**Commission**") for a hearing in respect of the issuance of 10,600,000 common shares (the "**New Shares**") of Eco Oro Minerals Corp. ("**Eco Oro**") by Eco Oro to four shareholders of Eco Oro on or about March 16, 2017, and the decision of the Toronto Stock Exchange (the "**TSX**") on March 10, 2017 (the "**TSX Decision**") to grant conditional approval for the issuance of the New Shares (the "**Application**");

B. On April 7, 2017, the Commission granted leave to intervene in the Application to three intervenors, namely Trexs Investments, LLC, Amber Capital LP and Paulson & Co. Inc. (collectively, the "**Intervenors**");

C. The Commission heard the Application on April 19, 20 and 21, 2017 and oral and written submissions were delivered by the Applicants, the TSX, Eco Oro, the Intervenors and Staff of the Commission ("**Staff**");

D. The Commission is of the opinion that the TSX Decision should be set aside and that it is in the public interest to make an order under sections 8(3) and 21.7 of the Act to require shareholder approval for the issuance of the New Shares; and

E. Since the issuance of the New Shares has closed, the Commission is of the opinion that the additional orders below are necessary and in the public interest to give effect to the Commission's decision to require such shareholder approval so that it operates, to the extent practicable, as if the issuance of New Shares had not been permitted to close prior to the date hereof;

IT IS HEREBY ORDERED THAT:

1. The TSX Decision is set aside;

2. At a meeting of shareholders to be held no later than September 30, 2017, Eco Oro shall seek approval, as described in paragraph 3 below, of the issuance of New Shares to the Intervenors and Anna Stylianides (each a "**New Share Recipient**") to the extent that Eco Oro and a New Share Recipient have not otherwise reversed the issuance of that New Share Recipient's New Shares;

3. The shareholder approval sought by Eco Oro under paragraph 2 shall be calculated in accordance with the TSX Company Manual and shall ask shareholders to either:

   (a) ratify the issuance of the New Shares; or

   (b) instruct the board of directors of Eco Oro to take all necessary steps to reverse the issuance of the New Shares;

4. If the shareholders vote to instruct the board of directors of Eco Oro to take all necessary steps to reverse the issuance of the New Shares, the board of directors of Eco Oro shall forthwith implement those instructions;

5. Unless and until the shareholders of Eco Oro ratify the issuance of the New Shares:

   (a) the New Shares are cease traded pursuant to subsection 127(1) of the Act; and

   (b) Eco Oro and the Chair of any Eco Oro shareholder meeting shall not consider the New Shares to be issued and outstanding for the purposes of voting at the Annual General and Special Meeting of Shareholders scheduled for April 25, 2017, and any adjournment thereof, and at any other meeting of shareholders of Eco Oro; and

6. If any issue arises in connection with this Order, any of the parties may apply to the Commission for further direction.

DATED at Toronto, this 23rd day of April, 2017.

"*D. Grant Vingoe*"
_____
D. Grant Vingoe

"*Monica Kowal*"
_____
Monica Kowal

"*Frances Kordyback*"
_____
Frances Kordyback