"Acting Jointly or in Concert"

By Paul Davis, Leila Rafi and Sandra Zhao

Lack of Clarification and Guidance has Created Unnecessary Legal Wrangling, Particularly in Contested Transactions; A New Path Forward is Needed

We have seen increased attention to contested transactions in Canada – namely, unsolicited take-over bids and proxy contests – in recent years.

Over the years, the phrase "acting jointly or in concert" has led to much legal uncertainty and unnecessary litigation costs for market participants, typically in the context of contested transactions. It is our contention that securities regulators should provide clarity regarding the meaning of these words.

As a finding of "joint actor" or "acting jointly or in concert" can result in significant obligations[1], we have published a paper that seeks to outline a possible new path forward in an attempt to provide clarity.[2]

In the paper, we reviewed the legislative history of "acting jointly or in concert" and the relevant jurisprudence. Based on such review, we gleaned the following:

1. The analysis regarding whether someone is a joint actor must occur on an individual basis, establishing acting jointly or in concert or a joint actor relationship for each person separately.
2. When purchasing shares, the key factor for a finding of "acting jointly or in concert" is whether the parties have a common investment or purchase program.
3. A finding of acting jointly or in concert requires that the "acting" be for a specific purpose or transaction, and the joint actor must have played an active and significant role.
4. Parties will not be found to be "acting jointly or in concert" where no planned result was agreed upon, committed to, or understood by the parties.
5. For a joint actor relationship to be established, it is critical that the joint actors have a commonality of commercial or financial interest.
6. The fact that parties had been joint actors in the past will not be sufficient to establish that they are currently joint actors.
7. A finding of acting jointly or in concert is more likely where there exists a close working or familial relationship between the parties.
8. Courts and securities regulatory authorities appear to be more likely to consider an insider's role with a propensity towards making a joint actor determination.
9. Persons acting solely in an agency capacity are unlikely to be found to be acting jointly or in concert unless their conduct goes beyond the customary functions of their role.

Based on the foregoing guiding principles, we believe that a finding of "acting jointly or in concert" or "joint actors" is likely based on whether two or more persons reach an agreement or understanding as a result of which they actively seek to implement a specific transaction or to bring about a planned outcome, and such persons have a commonality of commercial or financial interest in respect of that specific transaction or planned outcome.

As "acting jointly or in concert" has never been strictly defined, we wanted to provide meaningful guidance to understanding the phrase based on the legislative history and jurisprudence. In our paper, we have suggested a legislative definition which we believe is a suitable response to the numerous requests for clarification by market participants over the last 35 years.

The most significant change to the current legislative language we proposed in our paper is to provide for a comprehensive definition of "acting jointly or in concert", and thereby reject the view that because the determination of whether someone is "acting jointly or in concert" is fact specific, it would be imprudent to provide for a concise definition. We recognize that as the Canadian capital markets evolve, our proposed definition could face challenges. However, in those circumstances, guidance could be given through policy statements or Staff Notices, or further amendments of the regulations could be made if warranted. We would suggest that it is in the public interest to provide clarity rather than focus on regulatory flexibility.

Our hope is that our paper, and the draft statutory language will, at the very least, ignite a healthy debate that will eventually lead to a modification to the current legislative language.

If you have any questions about our paper, or otherwise require assistance in connection with a contested transaction, please do not hesitate to contact one of the lawyers in our Capital Markets and M&A Group who would be happy to assist you.

For more information on this topic, please contact:

Toronto	*Paul Davis*	*416.307.4137*	*paul.davis@mcmillan.ca*
Toronto	*Leila Rafi*	*416.945.8017*	*leila.rafi@mcmillan.ca*
Toronto	*Sandra Zhao*	*416.865.7808*	*sandra.zhao@mcmillan.ca*

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1. These obligations include the imposition of public disclosure obligations, increased costs and delays to completing a transaction, potential liability for breach of securities legislation, impeding the ability to successfully complete a take-over bid and the loss of the ability to vote on certain matters.

2. Paul Davis, Leila Rafi and Sandra Zhao are partners of McMillan LLP and authors of our paper. The opinions expressed therein, are those of the authors and not McMillan LLP or its clients.