ALBERTA SECURITIES COMMISSION

DECISION

Citation: Re Greenfire Resources Ltd., 2025 ABASC 104 **Date: 20250722**

Waterous Energy Fund III (Canadian) LP, Waterous Energy Fund III (US) LP, Waterous Energy Fund III (International) LP, Waterous Energy Fund III (Canadian FI) LP, Waterous Energy Fund III (International FI) LP, Allard Services Limited, Annapurna Limited and Modro Holdings LLC

-and-

Greenfire Resources Ltd.

Panel:	Tom Cotter Kari Horn, K.C. Bryce Tingle, K.C.
Representation:	Timothy Robson Danielle Mayhew Sebastian Maturana Tracy Clark Melissa Yeh for Commission Staff
	Renee Reichelt Ryan Morris Randell Trombley for Waterous Energy Fund III (Canadian) LP, Waterous Energy Fund III (US) LP, Waterous Energy Fund III (International) LP, Waterous Energy Fund III (Canadian FI) LP and Waterous Energy Fund III (International FI) LP
	David Bishop Stuart Olley Scott Kugler James Aston for Allard Services Limited, Annapurna Limited and Modro Holdings LLC

Andrew Sunter
Paul Chiswell
Julia Lisztwan
Karen McPeak
Ted Brown
William Maslechko
Bronwyn Inkster
Prateek Gupta
for Greenfire Resources Ltd.

Teresa Tomchak
Lipi Mishra
Tamara Kljakic
Julie Treleaven
for Brigade Capital Management LP and
M3-Brigade Sponsor III LP

Submissions Completed: November 5, 2024

Decision: July 22, 2025

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I. INTRODUCTION

[1] On September 26, 2024, several parties (the **Applicants**, described below) made an application (the **Application**) to the Alberta Securities Commission (the **ASC**) for cease-trade and other orders in relation to a shareholder rights plan (the **Rights Plan**) which had been implemented by Greenfire Resources Ltd. (**Greenfire**) on September 18, 2024. On October 2, 2024, Greenfire made a cross-application (the **Cross-Application**) for certain orders in relation to three share purchase agreements (the **SPAs**, described below) entered into by various of the Applicants two days before the Rights Plan was implemented. The underlying issues were the ownership of, and dealings involving, shares of Greenfire (the **Greenfire Shares**).

[2] Following receipt of extensive written materials and an oral hearing on November 5, 2024 (the **Hearing**), this panel gave an oral ruling on November 6, 2024, with written reasons to follow. We granted the Application and ordered, pursuant to s. 198(1)(a) of the *Securities Act* (Alberta) (the **Act**) and with immediate effect, that trading cease in respect of any securities issued or that may be issued in connection with or pursuant to the Rights Plan. We dismissed the Cross-Application. These are the written reasons for our ruling. We also provide a ruling and reasons for admission of and reliance on the expert evidence tendered by the parties, as well as reasons for allowing an application to intervene (the **Intervenor Application**).

II. BACKGROUND

A. Context

[3] On September 16, 2024, the SPAs were entered into for the purchase of a total of approximately 43.3% of the Greenfire Shares (we use 43% in this decision). The purchases were announced in news releases later that day. The purchasers were Waterous Energy Fund III (Canadian) LP; Waterous Energy Fund III (US) LP; Waterous Energy Fund III (International) LP; Waterous Energy Fund III (Canadian FI) LP; and Waterous Energy Fund III (International FI) LP (collectively, **WEF III**). The sellers were, respectively: Allard Services Limited (**Allard**); Annapurna Limited (**Annapurna**); and Modro Holdings LLC (**Modro**; and collectively with Allard and Annapurna, the **Selling Shareholders**). WEF III and the Selling Shareholders had been discussing this proposed transaction (the **Proposed Transaction**) for a short time before the SPAs were signed. The Proposed Transaction did not need to comply with the take-over bid requirements (the **TOB Regime**) under Alberta securities laws – it was not a take-over bid (**TOB**) because the Selling Shareholders did not reside in Alberta. Despite that, WEF III intentionally structured the Proposed Transaction to meet the parameters of an exemption from the TOB Regime: the **Private Agreement Exemption**. These aspects are discussed in detail below.

[4] On September 18, 2024, Greenfire implemented and announced the Rights Plan, under which one right (a **Right**) would be issued for each outstanding Greenfire Share. Once triggered, the Rights would allow their holders to purchase Greenfire Shares at a significant discount from the market price. The Rights would be triggered when an Acquiring Person "acquires or announces its intention to acquire 20% or more of the [Greenfire] Shares", unless that acquisition would be a **Permitted Bid**, as defined in the Rights Plan. When the Rights Plan was adopted, the Proposed Transaction had not closed because certain approvals were required under the *Competition Act* (Canada) (the **Competition Act**). The Rights Plan did not "grandfather" WEF III, stating that the shares subject to the SPAs were not considered beneficially owned by WEF III as of September 18. That meant that if the Proposed Transaction closed after the Rights Plan was adopted, the Rights would be triggered, significantly diluting WEF III's 43% holding in Greenfire.

B. Parties and Other Entities

1. Applicants

[5] Five of the Applicants are WEF III entities. Each of the WEF III entities is managed by Waterous Energy Fund Management Corp. (**Waterous Management**). Waterous Management is a Canadian private equity firm which invests in established oil and gas businesses. In the remainder of this decision, we refer to one or both of WEF III and Waterous Management as **WEF**, unless the context requires otherwise. **Adam Waterous** is the Chief Executive Officer (**CEO**) of "Waterous Energy Fund"; **Connor Waterous** is its managing director.

[6] The other three Applicants are the Selling Shareholders. These companies and their principals are based outside of Canada. Allard, controlled by Julian McIntyre (**McIntyre**), held approximately 28% of the Greenfire Shares. Annapurna, controlled by Venkat Siva (**Siva**), held approximately 10%. Modro, controlled by Joseph Pehar (**Pehar**), held approximately 5%. McIntyre and Siva were members of Greenfire's board of directors (the **Greenfire Board**) at the time they signed the SPAs (McIntyre was the chair). Once those agreements were signed, McIntyre and Siva immediately recused themselves from Greenfire Board meetings and resigned soon after. Although the corporate entities were the Selling Shareholders, we also refer in this decision to the respective individuals as Selling Shareholders.

[7] Also relevant is Strathcona Resources Ltd. (**Strathcona**), which some people at Greenfire thought might be interested in acquiring Greenfire (discussed below). Connor Waterous is the Senior Vice-President, Chief Financial Officer (**CFO**) and a director at Strathcona; Adam Waterous is a director. Strathcona was not one of the Applicants. However, the parties sometimes referred to Strathcona and WEF together or interchangeably.

[8] WEF tendered expert evidence from John Peltier (**Peltier**). The Selling Shareholders tendered expert evidence from Carol Hansell (**Hansell**). We discuss that material below.

2. Greenfire

[9] Greenfire was incorporated and registered in Alberta on December 9, 2022. Corporate documentation stated its principal business as "the production and development of upstream energy resources from the oil sands in Canada, using in situ thermal oil production extraction techniques". The Greenfire Shares are publicly traded on the Toronto Stock Exchange (the **TSX**) and the New York Stock Exchange. At the time of the Hearing, Matthew Perkal (**Perkal**) was the interim chair of the Greenfire Board. Perkal was also an independent director and the chair of Greenfire's special committee of independent directors (the **Special Committee**). Before the Proposed Transaction and its immediate aftermath, as noted, McIntyre had been chair of the Greenfire Board and a director, and Siva had been a director. Both planned to recuse themselves between the time the Proposed Transaction was announced until it closed, at which time they would resign; however, they resigned on September 30, 2024.

[10] Greenfire was created through a business combination (the **Business Combination**) between Greenfire Resources Inc. (**Old Greenfire**), M3-Brigade Acquisition III Corp. (**MBSC**, a special purpose acquisition company (**SPAC**)), and others. The Business Combination agreement was entered into in December 2022 and valued Greenfire at US$950 million. In September 2023, Greenfire issued notes worth US$300 million (the **New Notes**), which were still outstanding at the

time of the Hearing. In what was described as "a condition and inducement to enter into the Business Combination", the Selling Shareholders (and others) were parties to a shareholder support agreement (the **Shareholder Support Agreement**), under which they agreed to vote their Old Greenfire shares in favour of the Business Combination and to enter into an investor rights agreement (the **Investor Rights Agreement**) and a lock-up agreement (the **Lock-Up Agreement**). Each of the Selling Shareholders agreed, under the Lock-Up Agreement, not to sell any Greenfire Shares for the earlier of 180 days after the closing date, the date on which a multi-day Greenfire Share price calculation exceeded US$12.00 per share, and the date of an amalgamation or other transaction involving all of the Greenfire shareholders having the right to dispose of their Greenfire Shares. The Lock-Up Agreement expired in March 2024. It was not replaced or extended, and the evidence indicated that there were no negotiations to replace or extend it. Pursuant to the Investor Rights Agreement, MBSC Sponsor (defined below) had the right to nominate a director to the Greenfire Board and the Selling Shareholders were obliged to vote their Greenfire Shares for that nominee (that nominee was Perkal).

[11] Greenfire was a closely-held corporation, with approximately 90% of the Greenfire Shares held by only 14 shareholders. The Selling Shareholders held 43%, and we refer to the other 57% as being held by the **Non-Selling Shareholders**.

[12] In his affidavit, Robert Logan (**Logan**) stated that he had been the President, the CEO, and a director of Greenfire since April 2021 (which included Old Greenfire). He also owned approximately 5% of the Greenfire Shares at the time of the Hearing. The CFO of Greenfire was Tony Kraljic (**Kraljic**).

[13] Greenfire tendered expert evidence from Poonam Puri (**Puri**) and Edward Waitzer (**Waitzer**). We discuss that material below.

3. Brigade

[14] Brigade Capital Management LP (**Brigade Manager**, as manager of various funds and accounts (the **Brigade Funds**)) and M3-Brigade Sponsor III LP (**MBSC Sponsor**; and together with the Brigade Funds, the **M3-Brigade Shareholders**) brought the Intervenor Application, asking for standing to participate in the Hearing process. We granted that for reasons set out below. We refer to Brigade Manager and the M3-Brigade Shareholders together as **Brigade**, unless the context requires otherwise. Brigade opposed the Application and supported the Cross-Application.

[15] In his affidavit, Perkal described himself as a partner and Head of SPACS and Special Situations of one Brigade entity and CEO of another. He was MBSC Sponsor's nominee on the Greenfire Board (although, for simplicity, we refer in the rest of this decision to Perkal being Brigade's nominee). Perkal often spoke for Brigade and its position (for example, the parties referred to Perkal's position on selling Brigade's Greenfire Shares). Brigade entities owned approximately 13% of the Greenfire Shares at the time of the Hearing, over 2.5 million warrants (each to purchase one Greenfire Share at an exercise price of US$11.50), and over US$58 million in New Notes. Brigade initially purchased a stake in Old Greenfire in 2021 (bonds and warrants).

[16] Brigade tendered an affidavit from Sandro Carissimo (**Carissimo**), a research partner at Brigade who managed the Brigade Funds, including the investment in Greenfire Shares. He was also involved in the Business Combination.

4. Staff

[17] ASC staff (**Staff**) did not have an adversarial role in this proceeding and did not tender evidence or engage in cross-examinations on the various affidavits tendered. Their role was to provide submissions to assist the panel in examining the issues.

5. TD Securities Inc.

[18] TD Securities Inc. (**TD**) was involved in this matter because it was retained as Greenfire's financial advisor for a **Strategic Alternatives Process**, through which Greenfire was hoping eventually to attract offers for itself (discussed below). Robert Mason (**Mason**), a Managing Director at TD, was involved in that process.

C. Materials Before the Panel

[19] In addition to the details in the Application, Cross-Application, and Intervenor Application, we received voluminous affidavits from WEF, the Selling Shareholders, Greenfire, and Brigade. These were marked as exhibits during the Hearing (other than the evidence tendered as expert evidence, which was marked for identification subject to our decision as to admissibility and weight, discussed below).

[20] The following documents were in evidence (all dates are 2024):

- an affidavit of Connor Waterous, sworn October 2, with a cross-examination transcript dated October 18 and responses to undertakings;
- an affidavit of McIntyre, sworn October 15, with a cross-examination transcript dated October 18 and responses to undertakings;
- an affidavit of Logan, sworn October 9, with a cross-examination transcript dated October 16 and responses to undertakings;
- an affidavit of Perkal, sworn October 9, with a cross-examination transcript dated October 16 and responses to undertakings;
- an affidavit of Mason, sworn October 9, with a cross-examination transcript dated October 16 and responses to undertakings; and
- an affidavit of Carissimo, sworn October 9, with a cross-examination transcript dated October 17 and responses to undertakings.

[21] The following expert evidence was marked for identification at the time of the parties' oral submissions. As noted below, we admitted all of this as evidence.

- an affidavit and expert report of Puri, sworn October 10, with a cross-examination transcript dated October 17 (the **Puri Evidence**);

- an affidavit and expert report of Waitzer, sworn October 9, with a cross-examination transcript dated October 18 (the **Waitzer Evidence**);

- an affidavit and expert report of Peltier, sworn October 14, with a cross-examination transcript dated October 17 (the **Peltier Evidence**); and

- an affidavit and expert report of Hansell, sworn October 15, with a cross-examination transcript dated October 18 (the **Hansell Evidence**).

D. Submissions

[22] WEF, the Selling Shareholders, Greenfire, and Brigade tendered affidavit evidence, cross-examined affiants, and made submissions on the Application, Cross-Application and Intervenor Application (although Greenfire made no submissions on the Intervenor Application). Staff made submissions on the Application and the Cross-Application.

III. CHRONOLOGY

A. Approach

[23] We set out here the basic chronology and events surrounding the Application and the Cross-Application (which also, to a lesser extent, led to the Intervenor Application). Other details are discussed, as relevant, in other sections of these reasons. All dates listed in this chronology were in 2024, unless stated otherwise.

B. April 2023

[24] Carissimo, Perkal and Connor Waterous all agreed that Carissimo contacted Connor Waterous in April 2023 regarding whether Strathcona might be interested in acquiring Greenfire. We are satisfied that contact was initiated at Perkal's request.

[25] Connor Waterous deposed that he told Carissimo that Strathcona was not interested in acquiring Greenfire. Connor Waterous stated during cross-examination that he told Carissimo that Strathcona considered Greenfire "a tier 2 asset" and Strathcona "focused on tier 1 assets". He said that he also told Carissimo that if Strathcona were to acquire additional assets, they would be in Strathcona's three core areas of operation, but Greenfire was in a different region and not part of Strathcona's strategy. Carissimo stated that he recalled the conversation as Strathcona "not [being] interested in making such an acquisition at that time". During cross-examination, Carissimo said "timing was the biggest factor", and Connor Waterous "told me it could make sense to revisit this down the road and sent me an email saying as much shortly thereafter". Carissimo then said: "He never told me Strathcona was not interested in acquiring Greenfire, but given Greenfire going through the defac [sic], he felt the transaction would be more likely to occur or be more interesting in the future."

[26] McIntyre deposed that he had arranged in April 2023 to discuss Greenfire with Connor Waterous. Connor Waterous agreed there was a meeting, which he stated occurred on April 26, 2023. McIntyre deposed that Connor Waterous told him that Strathcona would not be interested in acquiring Greenfire after the Business Combination closed. Connor Waterous stated the same – he told McIntyre that Strathcona was not interested in a merger with, or acquisition of, Greenfire.

[27] Perkal did not meet with Connor Waterous in April or May 2023. However, Perkal said that he understood following the meeting between McIntyre and Connor Waterous that "Connor Waterous was interested in acquiring Greenfire", although the timing was not right for either company at the time.

[28] We rejected Perkal's evidence on this point. First, he said the meeting between McIntyre and Connor Waterous was in May 2023, when the other evidence indicated it was in late April 2023. Although not a significant difference, it did highlight that Perkal was not directly involved in the meeting. Second, Perkal's definitive statement that "Connor Waterous was interested in acquiring Greenfire" was contrary to the evidence from both McIntyre and Connor Waterous and was inconsistent in part with Carissimo's evidence, as the latter stated timing was the main issue, but did not say that Strathcona was definitely interested in acquiring Greenfire. We also disagreed with Carissimo's view that timing was the main issue. We concluded – as elaborated on below – that Perkal thought Strathcona (or WEF) should acquire all of the Greenfire Shares and coloured his evidence in an effort to convince us that it was a realistic possibility from the spring of 2023 until the time of the Hearing.

C. September 2023

[29] The Business Combination closed on September 20, 2023. Carissimo deposed that Brigade provided US$100 million in financing commitments (half in common equity and half in convertible notes). Of that US$100 million, US$52.6 million was allocated for distributions to Old Greenfire shareholders. As holders of approximately 71% of the Old Greenfire shares, the Selling Shareholders received that proportion of the US$52.6 million (approximately US$37.5 million). Brigade argued that was significant because that investment largely for the Selling Shareholders' benefit meant Brigade had a reasonable expectation that the Selling Shareholders would retain their Greenfire Shares for a longer period (discussed below).

D. July 2024

[30] The Greenfire Board and management met in early July for a three-day strategy session, which included group discussions of "a potential sales process to market Greenfire" (McIntyre's wording) or discussions between McIntyre and Perkal of "a sales process to obtain a potential value maximizing transaction for all shareholders" (Perkal's wording). Perkal deposed that, just prior to that three-day session, he and McIntyre had exchanged messages about contacting Strathcona and investment bankers.

[31] On July 10, McIntyre, Perkal, and Mason met (along with another TD employee). McIntyre later asked Mason to provide a sales process proposal to Greenfire. Perkal's and Mason's evidence indicated that TD thought Greenfire was underpriced. Mason also noted TD's view that "there would be significant interest in Greenfire from strategic and perhaps financial buyers". Perkal deposed that: "meeting attendees at the July 10 meeting with TD Securities, including myself, shared the view that Strathcona was the most likely candidate to acquire Greenfire, but TD Securities underscored that there were other potential acquirors".

[32] McIntyre deposed that he again asked Connor Waterous, during a July 11 meeting, if Strathcona might want to acquire Greenfire, and Connor Waterous told McIntyre "that Strathcona was not interested at that time". Connor Waterous confirmed that he told McIntyre again in this meeting "that Strathcona was not interested in acquiring Greenfire". Perkal's evidence was that

McIntyre told him the meeting "went well" and "Connor Waterous was following Greenfire". Perkal said he understood from McIntyre that McIntyre had the "impression that Strathcona was bullish on Greenfire and would likely participate in the Strategic Alternatives Process".

[33] On July 19, Mason sent a sales process proposal to Greenfire, after an email from McIntyre asking for one. After a July 22 meeting and McIntyre's request for an engagement letter, Greenfire retained TD on July 25 for the Strategic Alternatives Process.

[34] On July 30, Greenfire and TD participated in a kick-off meeting for the Strategic Alternatives Process, referred to in documentation as "Project Carrera". At that time, TD's preliminary timeline contemplated initial outreach to counterparties on October 8, a bid deadline of November 26, and an announced transaction in early January 2025 (23 weeks from the kick-off date), but noted that the timeline could be extended by three to four weeks if an updated reserves report (the **Updated Reserves Report**) were required.

E. August 1 to 19, 2024

[35] TD, Greenfire, and McDaniel & Associates Consultants Ltd. (**McDaniel**) decided on August 6 that Greenfire should obtain an Updated Reserves Report from McDaniel, which was to be completed by early November. They also decided that the "targeted outreach" would not start until after completion of the Updated Reserves Report. By our calculations, that would have delayed the targeted outreach from October 8 to sometime after early November, moving the proposed transaction date to February 2025 or later.

[36] Perkal and McIntyre attended an August 7 meeting between TD and Greenfire. TD provided a presentation called "Project Carrera Preliminary Observations" (the **August Presentation**). The "Preliminary Buyer List" of 14 names in the August Presentation included Strathcona. Mason stated that TD "had identified Strathcona and WEF as potential acquirors as early as the July 10th meeting". Mason stated during cross-examination that this list was of "higher probability parties at that time that we were planning to contact". Perkal descried this as a list of "companies likely interested in acquiring Greenfire" – others did not use the term "likely".

[37] At the August 7 meeting, TD recommended that the outreach to potential buyers not start until November 2024 (depending on whether, in Mason's words, "Greenfire had satisfied the key required milestones"). Mason deposed that if Greenfire had the Updated Reserves Report and achieved "its significant development opportunities", its value should significantly increase.

[38] On an August 19 call between TD and Greenfire management, it was "discussed that the Updated Reserves Report would not be completed until the end of 2024" to allow McDaniel to include two additional months of operating results, and that TD would not approach potential buyers until after receiving the Updated Reserves Report. Perkal and Mason acknowledged that the delay meant the sales process would start in January 2025, and the goal was a sale by mid- to late-April 2025. That would be over three months later than the original proposed date.

F. August 20, 2024

[39] Following an August 19 request from Connor Waterous to McIntyre to schedule a call, the two spoke on August 20. McIntyre told Perkal on August 19 about the request, and neither knew the purpose of the call.

[40] McIntyre's and Connor Waterous's evidence was consistent that the latter "raised the idea of WEF buying Allard's and Annapurna's shares in Greenfire" (in McIntyre's words), preferably under the Private Agreement Exemption (with a price of not more than 115% of the average market price over a previous period of days). McIntyre said he again asked Connor Waterous if he would buy all of Greenfire (presumably through Strathcona), and the latter again said he was not interested. McIntyre stated during cross-examination that Connor Waterous said "Strathcona was focussed on two regions in which it operated, had a lot that it was working on, and wasn't in a position to make acquisitions outside of those areas".

[41] McIntyre said that he told Perkal about the proposal from Connor Waterous, and "Perkal immediately raised the possibility of Brigade participating in the private agreement transaction with WEF, and we discussed ways in which we might negotiate a higher share price, including the possibility of including our Greenfire warrants in the deal. My impression was that Mr. Perkal was very keen to participate in a potential private agreement transaction."

[42] Perkal agreed that McIntyre told him about the proposal from Connor Waterous. Perkal deposed:

> Over the course of the following two to three days, I considered the implications of a partial sale by Mr. McIntyre and other shareholders, including Brigade. Initially I thought that this development was a positive indication for the Strategic Alternatives Process. But I also had very serious concerns about Mr. McIntyre or Brigade selling their respective Greenfire shares because of our positions as directors of the Company. I considered several issues at that time, including:
>
> (a) would director duties permit an entity associated with the director to sell shares in these circumstances;
>
> (b) were there potential issues regarding trading while in receipt of material non-public information;
>
> (c) if the two above issues could be addressed, would Brigade legally be permitted to sell its shares;
>
> (d) did I have an obligation to, or should I raise this issue with, [sic] the Board; and
>
> (e) if WEF wished to acquire only some shares in Greenfire, could this be done in a way such that the offer would be made to all shareholders?
>
> . . .
>
> Ultimately, I determined that neither Brigade nor Brigade Sponsor could transact under what I came to learn was the private agreement exemption because of how their Greenfire shares were held such that neither could qualify as one person for the purpose of the exemption. As a result of resolving that gating item, I did not need to reach a conclusion on the first two issues dealing with conflicts of interest and non-public information. On the fourth issue, I determined that the best course of action was to strongly urge Mr. McIntyre to get legal advice and tell him to raise his interaction with Mr. Connor Waterous with the Board. On the fifth issue, I determined that it was possible for WEF to acquire only some shares in Greenfire by making an offer to all shareholders. I thought this possibility could assist the Board in negotiating with WEF to obtain a benefit for all shareholders.

[43] McIntyre deposed that he spoke to Siva and Pehar, who were both interested in learning more about a possible sale to WEF.

G. August 21 to 22, 2024

[44] On about August 21, Perkal told McIntyre that Brigade would not be able to participate in a transaction using the Private Agreement Exemption because Brigade's Greenfire Shares were held in multiple funds.

[45] Siva contacted Kraljic about Siva purchasing additional Greenfire Shares to reach a 10% holding. Siva asked if the Strategic Alternatives Process had put Greenfire in a blackout. Kraljic and Chuck Kraus (**Kraus**, Greenfire's General Counsel) agreed with each other in an August 21 to 22 email chain that no blackout was warranted, with Kraljic stating (reproduced verbatim): "Based on our progress, still a lot of home work to do and unlikely we go external till end of year. My view is we do not need to be in blackout but wanted the teams thoughts for concurrence." Kraus responded that he agreed. Kraljic stated to Siva in an August 22 email (reproduced verbatim): "No material info position under current stage of our analysis of a future process". During cross-examination, Perkal stated that he did not believe he was aware of those communications at the time, but he was aware Greenfire was "not in blackout at or around that time".

[46] On August 22, Perkal sent McIntyre an email proposing a counter-offer for McIntyre to make to Connor Waterous, for 65% to 80% of the Greenfire Shares at a higher price than WEF was offering under the Private Agreement Exemption. Perkal also suggested that Greenfire "tell [WEF] about the TD process and that this is an opportunity for them to pre-empt it (I am strongly of the view that they already know given how small the Canadian market is and the timing of their outreach)". McIntyre stated that Perkal first mentioned shareholder rights plans (**SRPs**) on that day, although Perkal's evidence indicated he may have mentioned it a day or two earlier.

H. August 23, 2024

[47] McIntyre deposed that he asked Connor Waterous on August 23 if WEF would be interested in taking Greenfire private or launching a TOB for more Greenfire Shares, but Connor Waterous confirmed WEF was interested only in purchasing some Greenfire Shares using the Private Agreement Exemption. McIntyre further deposed that Connor Waterous stated his "goal was to help build an acquisition focused public company in the Athabasca area, and to 'share in the value creation' with the other shareholders". McIntyre deposed he told Connor Waterous that day "that I would consider selling my Greenfire shares at the right price, but that the maximum price allowed under the private agreement exemption was less than the price at which I was at that time willing to sell". Connor Waterous confirmed those points:

> I explained to Mr. McIntyre that a limited investment in a publicly-listed company provided optionality that was attractive to WEF. For so long as Greenfire remained public, Greenfire could use its shares as purchase price consideration for future acquisitions, and WEF's investment would be relatively liquid if it chose to exit its investment in the future. I indicated that WEF valued these features of Greenfire remaining public.
>
> I also stated that while WEF was not interested in taking Greenfire private at that time, in the future that could change. I indicated that any potential future take-private transaction would depend on a

> range of factors and that WEF would be unlikely to consider it in the near term. I reiterated that our preference was to keep the Greenfire business public.

[48] McIntyre called Logan on August 23 to tell him about the discussions with WEF and request a Greenfire Board meeting, as "the WEF proposal was sufficiently credible to disclose to the [Greenfire Board]". Logan confirmed the conversation and recalled McIntyre saying that the price being offered was too low, but that McIntyre wanted to discuss the development with the Greenfire Board.

I. August 25, 2024

[49] McIntyre stated that he told Perkal on August 25 (before a Greenfire Board meeting) that Connor Waterous "confirmed again . . . that WEF was not interested in acquiring Greenfire".

[50] The Greenfire Board met (the **August 25 Meeting**), and McIntyre told the Greenfire Board that WEF had approached him about buying his and Siva's Greenfire Shares. McIntyre deposed about the August 25 Meeting:

> . . . I reported to the board that I had enquired as to whether either Strathcona or WEF would consider making a full bid for the company, and [Connor] Waterous had confirmed that it was not being considered. I also told the board that while I wasn't currently interested in selling at the proposed price, I might be interested in selling at an increased price. This was true. I was not interested in selling my Greenfire shares to WEF at the proposed price at that time.

[51] Perkal confirmed that McIntyre and Siva told the Greenfire Board at that meeting about: the WEF offer; the parameters of the Private Agreement Exemption; WEF's intention to acquire a large stake, but not make a TOB for Greenfire; WEF's intention to keep Greenfire public; and McIntyre's and Siva's lack of interest in selling at the price offered by WEF.

[52] At the August 25 Meeting, the Greenfire Board authorized Perkal to negotiate with WEF in an attempt to have WEF bid for all of the Greenfire Shares. It was determined that any such communications would not occur at that time, but were possible in the future.

[53] McIntyre stated that the Greenfire Board discussed SRPs, with Perkal referring to advice he had received that SRPs were not enforceable in Canada, "and the board decided to take no further action in this regard. To make matters clear however, I also requested the board not to take any action that would prevent me from selling my Greenfire shares privately and no objections were raised at the meeting." Perkal did not give evidence on this point. Logan deposed that the Greenfire Board concluded no SRP or other defensive measure was needed at that time because McIntyre and Siva were not interested in selling at the proposed price. Logan stated during cross-examination that McIntyre "was laughing" when he asked the Greenfire Board not to take actions to prevent him selling his Greenfire Shares, meaning that it was not a serious request. We rejected Logan's evidence on that point, as discussed below.

[54] McIntyre stated that the Greenfire Board also discussed a trading blackout, concluding, "with advice from Mr. Kraus, that one was not needed given the company's state of affairs, i.e.[,] that the board did not have any material non-public information". Logan's and Perkal's evidence was consistent with McIntyre's on this point. Logan added during cross-examination that he did

not know of any changes between August 25 and September 16, 2024 which would have required a blackout.

[55] There was some controversy over the minutes for the August 25 Meeting (the **August 25 Meeting Minutes**). Draft minutes were circulated after the meeting, with McIntyre making some changes to the draft (those changes were largely approved). However, the August 25 Meeting Minutes were not finalized until the October 9, 2024 Greenfire Board meeting, after McIntyre and Siva were no longer directors (and after the Application and Cross-Application had been made). One change in the final version of the August 25 Meeting Minutes was the addition of specific wording regarding price: McIntyre might sell in the future, "but only if the price were closer to the de-SPAC price of US$10.10 per share". The other change was an additional sentence near the end: "The board of directors determined that, based on the representations from Messrs. McIntyre and Siva that they were not interested in selling to Waterous Energy Fund at current prices and that they would keep the board of directors apprised of any changing circumstances, no further action was required at this time." This was unnecessarily repetitious of earlier parts of the August 25 Meeting Minutes and seemed intended to bolster Greenfire's arguments in the Hearing.

[56] Ultimately, we did not need to rely on any of the disputed statements in the draft versus final versions of the August 25 Meeting Minutes. We did take from the non-controversial statements that:

- McIntyre informed the Greenfire Board of WEF's interest in acquisitions under the Private Agreement Exemption;
- McIntyre reported that neither Strathcona nor WEF was interested in making a full bid for Greenfire;
- McIntyre, Siva, and Perkal were not interested on August 25 in selling at WEF's offered price, but might be interested at a higher price (and Perkal agreed, also noting Brigade's issue of holding Greenfire Shares in multiple entities);
- Kraus gave the Greenfire Board legal advice about the TOB Regime and defensive measures such as SRPs (the evidence was clear that an SRP was not proposed, discussed, or voted on);
- the Greenfire Board "discussed the applicable fiduciary duties in their capacities as directors";
- the Greenfire Board determined that a blackout was not needed, but that any director who wished to trade should seek legal advice and comply with insider trading restrictions;
- the Greenfire Board determined that "no specific action" was needed at the time because no party was interested in selling at the offered price (the final version added as a second rationale that McIntyre and Siva said they would keep the Greenfire Board "apprised of any changing circumstances"); and

- McIntyre asked that the Greenfire Board "take no action that would impede a sale under a private agreement exemption".

J. August 26, 2024

[57] Perkal and McIntryre exchanged messages on August 26 regarding waiting until the end of 2024 to start the Strategic Alternative Process versus discussing with TD the option of accelerating the process. McIntyre thought that "Perkal was sceptical about an early commencement of the strategic alternatives process". Perkal stated in that message chain that "Logan thinks production will hit 25K and so of course we should wait for that. All comes down to if he hits the numbers which I would take the under on". During cross-examination, Perkal said he used "take the under" to mean that he saw some risk in the number. There was some dispute between Perkal and McIntyre regarding which of them wanted to tell TD about WEF's proposal to purchase some Greenfire Shares, but we did not need to resolve that difference in making our decision.

[58] Mason deposed that he received an August 26 email from McIntyre asking about re-evaluating the timing of the Strategic Alternatives Process. Mason agreed to a meeting, also stating in his email reply (reproduced verbatim): "FYI we had an update call with mgmt early last week, and the view from them (and McDaniel presumedly) was that the extra two months of production data from the re-drills and the new injector (ie. as at y/e vs. end of Oct.) would be materially, and potentially significantly, more impactful vs the earlier date due to more time on stream, etc."

K. August 27, 2024

[59] Adam Waterous requested a meeting with Mason, and they set one up for August 27. Before meeting with Adam Waterous, Mason emailed McIntyre and Logan asking if Adam Waterous knew TD was retained by Greenfire and if they knew why Adam Waterous wanted to meet. McIntyre asked to speak with Mason before Mason spoke with Adam Waterous.

[60] Mason deposed that on an August 27 call between him and McIntyre, McIntyre told him: about the offer from Connor Waterous; WEF was not interested in purchasing all of Greenfire; McIntyre was not interested in selling at the price offered by WEF; McIntyre had left the matter with Connor Waterous; McIntyre did not think the Greenfire Board would be interested in a transaction for Greenfire shareholders below USD$10 per Greenfire Share; and "McIntyre wanted to understand the potential to accelerate the solicitation phase of the Strategic Alternatives Process". Mason also deposed that he told McIntyre on that call: about WEF's history of making "creeping" bids; that a sale by McIntyre to WEF would put WEF in a position similar to when it acquired a 45% stake in another oil sands company (Osum, defined and discussed later); and Mason "thought that WEF was trying to obtain a strategic advantage by buying a significant block of Greenfire shares at a relatively low premium".

[61] Mason stated that Greenfire was not discussed in his subsequent call with Adam Waterous.

[62] Between August 27 and September 17, Jonathan Kanderka (**Kanderka**), the Chief Operating Officer and thus an insider of Greenfire, bought Greenfire Shares five times. Greenfire and Perkal had no concerns with these transactions, despite them occurring during the same period

of time that they later claimed McIntyre and Siva should have been restricted by a non-existent blackout period.

L. August 28, 2024

[63] On August 28, McIntyre and Perkal spoke with Mason and others at TD about the Strategic Alternatives Process. According to both McIntyre and Perkal, TD recommended that the timeline not be accelerated, with bids expected no sooner than April or May 2025 and any closing after that (McIntyre said several months later, while Perkal said May or June 2025). Despite that important discussion occurring, Mason's evidence about that day focused primarily on TD's concerns about WEF and the Proposed Transaction, including that TD warned about "expected negative consequences to the Strategic Alternatives Process if WEF gained a negative control block prior to the launch of the solicitation process".

[64] During that call, McIntyre and Perkal exchanged "WhatsApp" messages, which were in evidence. McIntyre noted in that message chain: "This is a long sales process" and "A transaction could be a year away!", to which Perkal replied: "I'm going to make that point". Perkal said during cross-examination that he was also concerned about a delay but thought McIntyre's statement about a year was an exaggeration and was "intentionally" so. Perkal thought a closing by May or June 2025 was the likely timing (two to three months sooner than McIntyre feared). Also during the August 28 message thread, McIntyre said: "These guys are like accountants", and Perkal responded: "This is not very strategic". Perkal did not refer to those messages in his affidavit. During cross-examination, Perkal acknowledged that he was expressing, "[i]n part", his disappointment about the anticipated timeline and his view that this "was more of a bean-counting activity".

[65] Perkal deposed that "Mason said that notwithstanding Mr. Connor Waterous' stated intentions [not to bid for 100% of the Greenfire Shares], in [Mason's] opinion there was a 90% chance that WEF would put in a bid to acquire all of Greenfire, so long as Mr. McIntyre made it clear and convinced Mr. Connor Waterous that he was not interested in selling his shares through the private agreement exemption. That is, I understood Mr. Mason's advice to be that it was highly likely that WEF would make an offer to all Greenfire shareholders if Mr. McIntyre did not undermine it by making a deal for himself." Mason deposed that, in TD's opinion, there was "a very high probability"; Mason did not refer to "a 90% chance".

[66] Perkal deposed that Mason did not want to ask WEF to make a higher offer to all shareholders to pre-empt the Strategic Alternatives Process – according to Perkal, Mason thought "that the Strategic Alternatives Process, with the Updated Reserves Report followed by a targeted outreach to potential acquirors, was the best way to maximize shareholder value". That was consistent with Mason's evidence, but only as a general statement, not specifically in relation to WEF.

[67] During cross-examination, McIntyre confirmed that he did not speak with TD about the Strategic Alternatives Process after August 28. He said he was "surprised that [TD] determined no change was required for the process [such as moving more quickly or aggressively, and] was surprised at how long the process was going to take".

M. September 6, 2024

[68] On September 6, WEF sent McIntyre a non-binding letter of intent (the **LOI**), proposing a cash acquisition by WEF, consistent with the Private Agreement Exemption, for the Greenfire Shares of McIntyre, Siva and "certain other shareholders" at US$8.05 per share. This was a 14% premium to the Greenfire Shares' 20-day simple average and a 17% premium to the Greenfire Shares' current price (both percentages are approximate). The LOI also provided that WEF could close the transaction on an expedited basis.

[69] McIntyre sent a copy of the LOI to the other Greenfire directors and general counsel by email. He stated, in part: "As a shareholder, I remain open to maintaining a dialogue and exploring their proposal, although consider the approach to be exploratory at this stage. I will keep the board fully abreast of any material developments and am available for a call if there are any questions." McIntyre deposed that his wording in the email was "to indicate that I was interested in the proposal, but recognized that the proposal was non-binding and did not include any terms and conditions". Siva responded to McIntyre's email with his own message to the same parties stating that "as a shareholder, I too am open to exploring their proposal" and "If there is anything material to update the board, I will certainly let you all know."

[70] Later on September 6, McIntyre asked Connor Waterous by email for a draft agreement,"[w]ithout any obligation, and to enable us to consider the proposal". McIntyre deposed that he had not then decided to sell his Greenfire Shares and thought he needed more details to make an informed decision. Connor Waterous deposed that he and McIntyre negotiated the terms of an agreement after September 6, with McIntyre negotiating for himself (Allard), Annapurna and Modro.

N. September 7 and 9, 2024

[71] McIntyre deposed that he and Perkal discussed the possible sale on September 7 and 9, and Perkal "assured me that he would 'not stand in our way' if we wished to sell our shares under a private agreement transaction". McIntyre agreed with Perkal's statement that the two of them discussed that Brigade might be worse off after such a sale by McIntyre, but McIntyre stated they also discussed that Brigade might be better off if the Greenfire Share price were to increase after such a sale (as it did). Perkal deposed that, because the LOI was for the same price McIntyre and Siva had previously said they would not accept, "I remained under the impression that Mr. McIntyre would not agree to WEF's proposal. However, I believed that this was an opportunity to get an offer for all Greenfire shareholders."

[72] Perkal deposed that, during the September 9 conversation, he "even proposed the prospect that Mr. McIntyre could sell a greater percentage of his holdings than pro rata with the other shareholders, but the offer would still be made to all shareholders and Mr. McIntyre would remain a shareholder. Mr. McIntyre said that he was open to considering all options but was pessimistic around WEF paying a higher price to make this proposal feasible and again advised that he was not interested in owning a large position with a reduced public float."

O. September 10, 2024

[73] Mason emailed to McIntyre, Perkal and Logan a presentation about WEF's past acquisitions (the **Acquisition Presentation**), following up on their discussions in late August. The Acquisition Presentation focused on two prior corporate acquisitions by WEF: Osum Oil Sands

Corporation (**Osum**) and Northern Blizzard Resources Inc. (**Northern Blizzard**). Greenfire and Brigade attempted to use the Osum and Northern Blizzard transactions as examples of "creeping take-over bids" and "coercive" actions by WEF in the past, so that WEF could not be trusted to deal fairly with Greenfire and its shareholders if it were to obtain a 43% stake through the SPAs. As discussed later, we concluded that the Osum and Northern Blizzard transactions were irrelevant to this Hearing.

[74] Logan said that the Acquisition Presentation "was consistent with my own views of [WEF's] coercive acquisition tactics. I had previously warned McIntyre about those same tactics and emphasised to him that any deal he did to sell his [Greenfire] Shares had to be part of a sale of the entire Company." During cross-examination on his affidavit, Logan somewhat qualified his view of WEF's previous transactions, including his use of the word "coercive". He said that was his speculation and identified the "piecemeal approach" to the Northern Blizzard acquisition as one factor in his conclusion. Mason acknowledged during cross-examination that he did not use the terms "creeping" or "coercive" in that discussion. Mason added that he had never used the word "coercive" for WEF's actions.

P. September 11 to 12, 2024

[75] McIntyre gave Perkal the contact information for Connor Waterous. Perkal and Connor Waterous spoke for the first time on September 11. Perkal deposed that he asked Connor Waterous if Strathcona or WEF "would be open to making a tender available to all shareholders at a premium . . . for [Greenfire] as a whole" or, alternatively, "whether he would do a partial bid to all shareholders". Perkal stated that "Connor Waterous did not rule out a bid to all shareholders [but] expressed a preference for using the private agreement exemption partly because a bid would take longer to execute and would need to comply with the tender rules, and because they were not keen to pay a higher share price". Connor Waterous deposed to a more straightforward response: "I advised Mr. Perkal that neither Strathcona nor WEF was interested in acquiring all of the Greenfire Shares at that time."

[76] Perkal and Connor Waterous both deposed that the latter asked if Brigade would sell its shares privately to WEF, and that Perkal said Brigade could not participate under the Private Agreement Exemption but would also want a higher price ("materially higher", according to Perkal; at least US$10, according to Connor Waterous). Connor Waterous stated that he told Perkal the higher price was not acceptable to WEF and was not possible under the Private Agreement Exemption. They both agreed that Perkal accepted Connor Waterous's offer to have someone look into Brigade's eligibility. McIntyre stated that Perkal said the next day that he was again looking into whether Brigade could sell to WEF under the Private Agreement Exemption (but Perkal did not confirm that).

[77] Perkal further deposed: "I was also concerned about a potential conflict of interest, and whether entering into such a transaction would be a breach of my fiduciary duties as a director." Perkal did not say that he mentioned any conflict or fiduciary concerns to Connor Waterous, and there was no evidence that he did so.

[78] Noting that the Greenfire Share price continued to decrease (US$6.40 at market close on September 11), McIntyre wrote to Perkal on September 11 that the share price was "getting smoked". Perkal replied that he thought WEF would still be interested in Greenfire, although at a

price lower than US$10 (which he thought was possible before), and would still pay the 15% premium – likely more "if we can come up with a mouse trap". Perkal stated during cross-examination that by "mouse trap" he meant a different deal structure to reach the result he wanted.

[79] McIntyre deposed:

> By this time [September 12], I was inclined to sell my shares to WEF if an acceptable form of agreement could be negotiated with WEF because I had little faith in the strategic alternatives process, which seemed uncertain of success and, even if it did succeed, projected closing almost a year away and secondly, at the same time, Greenfire's share price, and the benchmark price of WCS, were trending downwards.

[80] During cross-examination, McIntyre was asked what "new information" he learned between August 7 and September 11 to lead him to have little faith in the Strategic Alternatives Process and to be willing to accept a lower price. He stated:

> Well, to start with, I just want to be clear that I always viewed the strategic alternatives process as something worthy of exploring, but in my mind it was never the primary strategy of the company. The sales processes are inherently uncertain. When I first met with Toronto Dominion, I expected them to be sceptical, and I was presently [sic] surprised by their confidence. So when we started the process, I had some confidence that maybe they knew something that I didn't understand. As the process began, it became clear to me it was contingent upon a tremendous amount of work to map out the strategic plans that the company had that I personally considered to be fairly speculative. And TD really latched on to that, and I was a little surprised, to be honest with you. And then as we went through the process, the timetable just seemed to get longer. I was surprised that they didn't react to [WEF]. My experience with deal people is they accelerate and try and create tension, get deals done. These guys didn't seem to have any desire to do that, and at that point the market backdrop frankly was becoming more negative. Oil prices were falling, and I just felt at that point -- I always felt it was an option for the company. To me it was never the primary outcome. And at this point I felt it's incredibly speculative. Who knows where the world is going to be a year from now. So I must say I thought the probability of success was incredibly uncertain. I'll add to that, which is important, that TD when we first started the process, they were not as focused on the company's short-term production profile. And one material thing that probably you're aware is that on August the 14th, the company put out its second quarter results and materially reduced the four-year production targets, and this then became a major issue. I mean I think I could go as far as to say realistically TD said unless you hit your numbers at the end of the year, it's going to be difficult to sell this company. So there was a lot of uncertainty in the process, and at this point I have to say I felt probably success was very uncertain.
>
> . . .
>
> . . . Oil prices fell $10. The company's share price fell. My general view of oil markets became more bearish, and at the same time, the timetable on this strategic process was getting extended, and so my risk appetite changed during that period.

[81] McIntyre received a first draft of a share purchase agreement from WEF on September 12. Although he was more inclined by that point to accept the price offered by WEF, he was concerned about some other terms, including a "material adverse effect" clause, as well as some closing conditions and warranties.

Q. September 14 to 17, 2024

[82] McIntyre deposed that he, Siva and Pehar negotiated with WEF over this weekend (September 16 was a Monday), and that the three individuals "were only willing to enter into an agreement that was substantially in the form of a block trade and we would not have reached agreement if WEF had insisted on keeping certain representations, warranties, and closing conditions". During cross-examination, McIntyre elaborated on those concerns: (1) understanding tax implications (the possibility of WEF withholding tax from the purchase price); (2) "a material adverse affect [sic] clause"; and (3) "various reps and warranties".

[83] McIntyre deposed that it was only on the morning of September 16 that WEF's proposed terms were acceptable to him. He stated that he "immediately" sent an email to the Greenfire Board:

> I am writing to advise you that I have received this morning an acceptable agreement from [WEF] to acquire my shareholding in the company under a private share purchase agreement and that I intend to sign the agreement imminently, and prior to market open. I will concurrently be selling a small amount of shares to Annapurna to assist them with tax planning.
>
> Please find attached a copy of the agreement with [WEF]. We will shortly be making the relevant filings under 13(d) of the Exchange Act. Please let me know if the company can help me with the filing of any customary insider reports / early warning reports with the Canadian securities regulators that would be required as part of these transactions. If this is an issue, please let me know, so that I can make alternative arrangements.
>
> Closing of the sale is conditional upon [WEF] receiving Competition Act Clearance, which is anticipated to take 2-3 weeks, but could take up until November 8th. From today until closing, I will formally recuse myself from all board activities, including board meetings, and request that the company does not send me any board materials and removes me from the distribution of daily production reports.
>
> At closing, it is my intention to step down from the role as Chairman and Director, and alternatively, in the unlikely event that closing does not occur, I will request a reinstatement of these responsibilities.
>
> . . .

[84] Perkal stated that the email from McIntyre was within a minute of Siva's similar email, which Perkal received at approximately 6:10 am Mountain Time.

[85] WEF announced the transactions in a news release of the same date. The Selling Shareholders issued their own news release that evening.

[86] McIntyre deposed that he received several positive comments from Greenfire personnel. For example, Logan posted thanks in response to McIntyre's post on LinkedIn. Greenfire director Derek Aylesworth (**Aylesworth**) offered congratulations, and Greenfire director Jonathan Klesch (**Klesch**) wrote "great trade! extremely happy for you". In a message thread between McIntyre and Perkal, Perkal asked if McIntyre had sold his Greenfire warrants. McIntyre explained his reasoning for not selling, after Perkal commented about the price offered by WEF for the warrants: "Wow – that seems good! Why'd you turn down?" On that thread, Perkal made no negative comments about the sale to WEF, nor did he mention any concerns about fiduciary duties, confidential information,

or conflicts of interest. Perkal explained his curiosity about the warrant offer price as wanting to understand WEF's motivation. We do not know the content of any related conversations the two had, other than statements from Perkal during his cross-examination that he did not recall congratulating McIntyre and would be surprised if he had, but could not rule it out.

[87] Connor Waterous and Perkal spoke on September 17, after setting up a meeting the previous day (in one of the e-mails on September 16, Perkal expressed his surprise that McIntyre sold at that price, but said "perhaps he got spooked by the sharp downward move in oil prices"). Perkal deposed that Connor Waterous "indicated that WEF was considering making additional share purchases from one or two more Greenfire shareholders, which he expected would result in WEF having agreements in place to acquire greater than 50% of the issued and outstanding Greenfire shares (when aggregated with the Greenfire shares of the Selling Shareholders) – however, he was still not interested in making an offer to all Greenfire shareholders at that time". Connor Waterous deposed the same. However, Connor Waterous also stated that Perkal "indicated that it would be helpful if WEF could assist Greenfire to refinance its debt" and noted that Perkal did not suggest "opposition or concern related to WEF's investment in Greenfire". After September 17, there was little or no contact between Greenfire personnel and WEF personnel. Connor Waterous and Carissimo also spoke on September 17. Carissimo made positive comments about WEF's acquisition, but deposed that was because he did not have complete information and thought the Proposed Transaction had closed.

[88] On September 17, McIntyre (and, presumably, Siva) signed a waiver and consent regarding a Greenfire Board meeting to be held on September 18 (at Kraus's request and consistent with their expressed intention to recuse themselves from Greenfire Board meetings pending the closing of the Proposed Transaction).

R. September 18 to 30, 2024

[89] The Greenfire Board met (with McIntyre and Siva absent), adopted the Rights Plan, and announced the Rights Plan in a news release. The Rights Plan would effectively prevent WEF from acquiring the 43% interest in Greenfire from the Selling Shareholders – either by pressuring WEF not to close or by severely diluting WEF's interest after closing. That led to this Hearing. Greenfire's news release for the Rights Plan was clear regarding its purpose: "The effect of the Rights Plan is to prevent WEF from acquiring more than 20% of the outstanding [Greenfire] Shares pursuant to the Proposed [Transaction]" or as otherwise allowed under the Rights Plan.

[90] Perkal became the interim chair of the Greenfire Board and the chair of the newly established Special Committee, with Aylesworth and Klesch as the other two members of the Special Committee. The TSX deferred consideration of the Rights Plan while waiting to see if the ASC would intervene.

[91] On September 30, McIntyre and Siva resigned from the Greenfire Board.

S. October 2024

[92] Greenfire issued a news release summarizing future plans, stating that the plans "represent significant potential value for shareholders".

[93] Mason deposed that TD accelerated the solicitation process after the SPAs were announced and, by October, had increased the list of potential Greenfire purchasers from 10 or 14 to about 25. He acknowledged that some "may have a somewhat lower probability of offering". Mason also stated that conversations with those parties "in the past 36 hours" (with his affidavit being sworn on October 9) confirmed "that certain potential buyers would be very interested if the [SPAs] are not completed", might be interested if WEF had up to 19.9% of the Greenfire Shares, but were not interested if the SPAs were completed.

T. Oil Prices and Greenfire Share Price

[94] The Western Canadian Select oil price dropped from about $62.91 on August 29 to $53.87 on September 6 (approximately 14%). The Greenfire Share price dropped from about US$7.40 to US$6.87 during the same period (approximately 7%). At market close on September 11, the Greenfire Share price was down to US$6.40.

[95] The price of Greenfire Shares increased from September 13 (US$6.40) to October 11 (US$7.95).

IV. PRELIMINARY MATTERS

A. Credibility and Conflicting Evidence

[96] There was some conflicting factual evidence before us, primarily issues of inconsistency or contradiction between McIntyre and Perkal.

[97] ASC panels have discussed credibility in many enforcement decisions, including *Re Aitkens*, 2018 ABASC 27, in which the panel emphasized the need to: "consider the source of the evidence and whether or not the evidence is consistent with other reliable evidence, such as documents or the testimony of neutral parties with no motivation not to tell the truth"; and "consider whether the evidence makes logical sense in the circumstances" (at para. 52).

[98] In the present case, we found the majority of the affidavit and cross-examination evidence to be at least slightly slanted to present the particular person's interests in the best possible light. That is not unexpected, and panels have experience assessing and weighing such evidence. Although there was no *viva voce* testimony, the cross-examinations on the affidavits were helpful in highlighting certain aspects of the evidence. The documentary evidence, including contemporaneous written communications, was also of assistance.

[99] Generally, when there were inconsistencies between the evidence of Perkal and other affiants, we preferred the evidence of the other affiants. Specific instances are discussed throughout this decision; however, one example will suffice here for illustration. Perkal insisted throughout his affidavit and cross-examination that he was confident from as early as April or May 2023 that Connor Waterous (through Strathcona or WEF) "was interested in acquiring Greenfire". Perkal made similar statements for all the various times from the spring of 2023 until the date of his cross-examination (October 16, 2024), repeatedly stating his conviction that WEF was interested in making an offer for all of the Greenfire Shares – and at a price significantly higher than it was offering the Selling Shareholders under the parameters of the Private Agreement Exemption. We found that Perkal's insistence on this characterization of WEF's interest was exaggerated at best and fabricated at worst. There was simply no other evidence – from affiants or in any documents – supporting Perkal's stance. Perkal's evidence on this point was not logical in

all the circumstances and was inconsistent with other reliable evidence, both as to WEF's interest in making an offer for the entire company and as to the price WEF would be willing to pay. For example, it was illogical that WEF would be willing as of September 2024 to spend approximately twice the SPA amount to acquire all of the Greenfire Shares (Perkal insisted that WEF would pay more per Greenfire Share and would buy 100% instead of the 43% in the SPAs or even the slightly over 50% WEF was apparently considering increasing its position to after the September 16 purchases). It was also inconsistent to claim repeatedly, as Greenfire and Brigade did, that WEF's inevitable pattern was to purchase a large stake then take over the rest of the shares, yet argue that, in this case, WEF would be willing to buy all of the Greenfire Shares at once.

B. Intervenor Application

1. Nature of Application

[100] Brigade sought leave to participate as a non-party (referred to by the parties here as an application to intervene) on the grounds that it: (1) was directly affected by the matters at issue; and (2) could present the position of "all other minority shareholders", which was that the Proposed Transaction would significantly impair the Strategic Alternatives Process and be abusive to the Non-Selling Shareholders.

2. Parties' Positions: Intervenor Application

(a) Brigade

[101] Brigade emphasized that the test for granting intervenor status is case-specific, with the factors from s. 6.1 of ASC Rule 15-501 *Rules of Practice and Procedure for Commission Proceedings* (**Rule 15-501**) guiding the panel's discretion. Brigade specifically argued:

- the panel should hear the views of the Non-Selling Shareholders, who collectively held 57% of the Greenfire Shares (13% held by Brigade and 44% held by others) and "whose interests will be directly and substantively affected by the outcome of the hearing";

- Brigade had a direct economic interest because of its 13% holding of Greenfire Shares and its investment of over US$100 million in Greenfire;

- Brigade's ability to sell its Greenfire Shares at a fair price would be negatively affected if WEF purchased the 43% because that would adversely affect the Strategic Alternatives Process and reduce liquidity (relying, in part, on Mason's statement of "a significant chilling, if not terminal, effect" on the Strategic Alternatives Process);

- with 43% of the Greenfire Shares, WEF would be able to block certain corporate changes and exert significant control over Greenfire;

- Brigade was in a different position than the other Non-Selling Shareholders, including because of the history of the Business Combination and Brigade's entitlement to nominate a director to the Greenfire Board (with Allard and Annapurna committed to voting for that nominee);

- Brigade sought to challenge some of the assertions made about Brigade (the Applicants' claim that Brigade's first interest was selling to WEF under the Private Agreement Exemption; Peltier's assertion that Brigade's expectation of a high premium over the then-current price would have had more of an effect on the Strategic Alternatives Process than WEF completing the SPAs; and McIntyre's statement that Brigade supported the Proposed Transaction);

- Brigade's contribution would be useful, "advancing arguments and evidence not otherwise presented", so that the interests of Brigade and other Non-Selling Shareholders would be protected;

- despite Brigade's unique interest, it also wanted to make submissions relevant to the other Non-Selling Shareholders, and those interests may not otherwise be represented by Greenfire's corporate-focused submissions;

- some of the Non-Selling Shareholders supported the Rights Plan;

- no other entities requested intervenor status, and Brigade's position "represents the interests of all opposing shareholders";

- Brigade could present its perspective of its "reasonable expectations", including "that the Selling Shareholders would remain in the business and seek a liquidity event for all shareholders";

- this novel case would benefit from the additional perspective; and

- Brigade's participation would not cause prejudice or impair efficiency because it coordinated with other counsel and complied with directions from the panel.

(b) WEF

[102] WEF submitted that Brigade's position was "largely or entirely duplicative" of Greenfire's position, and that Brigade inconsistently described itself as having unique interests yet also as representing all Non-Selling Shareholders. WEF further contended that Perkal of Brigade controlled the Greenfire Board and the Special Committee, and that Brigade was in a conflict of interest because Perkal's goal was to sell Brigade's Greenfire Shares at a price he considered high enough. Based primarily on those assertions, WEF argued that Brigade would add nothing to the Hearing as an intervenor, other than "to pile on the position taken by Greenfire".

(c) Selling Shareholders

[103] The Selling Shareholders argued that Brigade should not be granted intervenor standing because Perkal already represented Brigade's interests through his control of the Greenfire Board and the Special Committee and because Brigade's interests were no different than the other Non-Selling Shareholders. Therefore, the Selling Shareholders submitted that Brigade had no unique interest and could make no useful contributions.

3. Legal Principles: Intervenor Application

[104] There was no dispute that s. 6.1 of Rule 15-501 applies here. It provides:

> **6.1 Non-Parties Seeking to Appear before a Panel**
>
> When a non-party requests to be designated as a party to a proceeding or to be heard by a panel during a proceeding, the panel may consider the following in determining whether or not to grant the request:
>
> (a) the nature of, and the issues raised in, the proceeding;
>
> (b) the extent to which the non-party will be affected by the proceeding;
>
> (c) the likelihood that the non-party will make a useful contribution to the proceeding;
>
> (d) any delay or prejudice to the parties; and
>
> (e) any other factor the panel considers relevant.

[105] Those factors essentially codify common law principles and are intended "to guide a panel's exercise of discretion, as they focus the inquiry on the relevant facts and circumstances of a given case, as well as the circumstances of the party seeking to intervene" (*Re Lutheran Church-Canada, the Alberta-British Columbia District*, 2019 ABASC 43 at para. 67). It is clear that "each decision on an application for standing will be case-specific and its outcome discretionary" (*Lutheran* at para. 68).

4. Discussion: Intervenor Application

[106] Based on the materials tendered and the written submissions received, we were in a position to make a determination on the Intervenor Application before the parties made their oral submissions. We informed the parties on November 1, 2024 that we were granting Brigade intervenor status. These are the reasons for our conclusion.

[107] We instead could have waited to hear oral submissions on the Intervenor Application and made our ruling on it during the Hearing or as part of these written reasons. As stated in *Lutheran*, a panel may determine standing as a preliminary threshold issue or after hearing all of the evidence and submissions (at paras. 63 and 64, citing *Finlay v. Canada (Minister of Finance)*, [1986] 2 S.C.R. 607 at para. 16 and *Re Catalyst Capital Group Inc.*, 2016 LNONOSC 213 at para. 45). Based on the nature of the issue and the material before us, we had a proper understanding by November 1, 2024 and were able to reach a conclusion. Informing the parties of our determination several days before the Hearing enabled us to make the Hearing more efficient by setting a schedule for the parties' oral submissions and encouraging the parties to focus those submissions on the Application and the Cross-Application.

[108] We considered each of the factors in s. 6.1 of Rule 15-501, with s. 6.1(b) and (c) being the most relevant.

[109] Brigade would be significantly affected by our decisions on the Application and the Cross-Application. As a 13% shareholder in Greenfire, the lead in the Business Combination, and entitled to a nominee for the Greenfire Board, Brigade had views and interests not completely reflected in

Greenfire's submissions which, necessarily, focused on the company as a whole. For example, Brigade contended that it would be financially affected if we were to grant the Application because that would (according to Brigade, although we concluded below there was insufficient evidence to support Brigade's contention) effectively end the Strategic Alternatives Process. We were also satisfied that Brigade was in a position to communicate the probable position of at least some of the other Non-Selling Shareholders, although we noted the potential inconsistency of Brigade's position on this point (having a unique perspective, yet representing all other Non-Selling Shareholders, at least to an extent). Brigade further asserted a "reasonable expectations" argument (addressed below) which was unique to Brigade.

[110] Brigade said it was also directly affected given some of the statements in the Applicants' materials that Perkal (therefore, Brigade) had initially supported the Proposed Transaction and wanted to find a way to sell Brigade's Greenfire Shares to WEF under the Private Agreement Exemption.

[111] In *Re Magna International Inc.* (2010), 34 O.S.C.B. 1290, an Ontario Securities Commission (**OSC**) panel stated that a direct effect on shareholders is a well-accepted basis for granting standing, as long as they "would likely make a useful and unique contribution" (at para. 61; similar statements were made in *Re ESW Capital, LLC*, 2021 ONSEC 7 at paras. 62-67). We found such a useful and unique contribution here. We reached our conclusion about the effects on Brigade despite our recognition of the Applicants' assertions that Perkal was chair of the Greenfire Board, chair of the Special Committee, and the apparent decision-maker for any disposition of Brigade's Greenfire Shares – it was evident that Perkal influenced the positions of both Greenfire and Brigade, but the interests of the two parties still had some differences.

[112] We were satisfied that Brigade's participation would not cause delay or prejudice to the other parties. Overall, we concluded that Brigade was in a position to provide a useful and unique perspective and would not merely be duplicating Greenfire's evidence and arguments.

5. Determination: Intervenor Application

[113] As stated, we granted the Intervenor Application before the Hearing, and Brigade made its oral submissions on the merits of the Application and the Cross-Application at the Hearing.

C. Expert Evidence

1. Nature of Concerns

[114] The proposed expert witnesses were variously criticized as providing evidence which was not helpful for different reasons, including opining on the ultimate issue, making erroneous statements, and lacking independence. We set out in this decision the most important points from the proposed expert witnesses, but did not include every relevant statement or opinion.

2. Summary of Expert Evidence

(a) Puri

(i) Qualifications

[115] Greenfire tendered Puri as an "expert in corporate governance and capital markets public policy". Among other positions and achievements, Puri is a law and research professor at Osgoode Hall Law School, York University and is a former OSC commissioner. She has taught and researched "corporate law, securities law and corporate governance for over 27 years".

(ii) Scope and Summary of Opinion

[116] Greenfire asked Puri to provide an expert opinion on four questions. We reproduce here the questions and her summaries of her opinions on each:

> [Question 1] Does the conduct of directors of a reporting issuer matter from a capital markets public policy perspective. If so, why? What about in the context of a strategic alternatives process being undertaken by the reporting issuer?
>
> [Summary Opinion 1] The conduct of a director of a reporting issuer matters significantly from a capital markets public policy perspective. A director is bound by fiduciary obligations to the reporting issuer. Any personal interests, including any personal shareholding interest, must be secondary to their fiduciary obligations to the company. If directors use their insider status to take a corporate opportunity and transact business in their own personal financial interest, and if they otherwise use confidential information and allow conflicts of interest to guide their decisions, that poor behaviour may harm all shareholders of the company and undermine confidence in the public capital markets. This concern is heightened during a strategic alternatives process. In this situation, director conduct that falls below the expected standard is even more detrimental to investor confidence in the capital markets. Even when a director is also a shareholder, and therefore wearing two hats, that person's fiduciary duties as a director may trump their rights as a shareholder and may under certain circumstances limit their ability to transfer their shares.
>
> [Question 2] From a capital markets public policy perspective, and based on the assumptions provided, was the conduct of Julian McIntyre and Venkat Siva consistent with that expected of directors of a public company engaged in a strategic alternatives process?
>
> [Summary Opinion 2] From a capital markets public policy perspective, the conduct of Julian McIntyre and Venkat Siva fell below the standard expected of directors engaged in a Strategic Alternatives Process. Julian McIntyre and Venkat Siva's conduct effectively precludes Greenfire from pursuing and meaningfully negotiating a possible deal with WEF to buy all of the issued and outstanding shares of Greenfire at a premium that would benefit all Greenfire shareholders. Julian McIntyre and Venkat Siva enabled WEF to potentially obtain a negative control block, causing Greenfire to lose the opportunity to fully pursue the Strategic Alternatives Process, thus likely thwarting the possibility of a value-enhancing transaction for all shareholders. They were in a conflict when they sold their shares, they misappropriated a corporate opportunity and they were not sufficiently candid with the other Greenfire directors.
>
> [Question 3] From a capital markets public policy perspective, and based on the assumptions provided, was the Greenfire Board's response to the Proposed [Transaction], including the establishment of the Special Committee, the adoption of the Rights Plan and the acceleration of the Strategic Alternatives Process consistent with expected practice in the circumstances?
>
> [Summary Opinion 3] The establishment of the Special Committee, the adoption of the Rights Plan and the acceleration of the Strategic Alternatives Process were all consistent with expected practice of the board of a reporting issuer in the circumstances. The establishment of the Special Committee allowed the Greenfire Board to remove Julian McIntyre and Venkat Siva from confidential information and decision-making. The process used by the [Greenfire] Board in adopting the Rights Plan was sound and reasonable, with reliance on outside legal and financial experts. If Greenfire did not adopt the [Rights Plan], then WEF would be able to acquire a 43.3% interest in Greenfire – a figure that is well above the 20% ownership threshold that would ordinarily trigger the formal take[-]over bid process, with all the minority shareholder protections that come with it. WEF's potential holding under the Proposed [Transaction] constitutes a negative control block and would frustrate the Strategic Alternatives Process. Lastly, accelerating the Strategic Alternatives Process allows the [Greenfire] Board an opportunity to protect the best interests of the company and minority shareholders in light of the Proposed [Transaction].

> [Question 4] Comment on the attempted use of the private agreement exemption in connection with the Proposed [Transaction] in this context.
>
> [Summary Opinion 4] From a public policy perspective, capital markets participants seeking to rely on this exemption should adhere to both the letter and the spirit of the exemption and the overall take-over bid regime rules, which are intended to guarantee equal treatment of shareholders in the course of a take-over bid. The exemption has been limited or restricted by securities commissions in Canada where they have decided that its use would, for example, cause unfairness to minority shareholders or have the effect of thwarting a take-over bid. If investors are allowed to use take-over bid exemptions in the way WEF has in connection with the Proposed [Transaction], they are ultimately able to thwart the foundational policy objective of protecting the interests of all shareholders equally and treating them all fairly. Based on the facts in the present case, the use of the private agreement exemption for the acquisition of shares from two directors (one of which was the board chair), while [Greenfire] was undertaking the Strategic Alternatives Process, is particularly problematic and contrary to the public policy objectives of the Canadian take-over bid regime.

[117] Puri's view that directors are sometimes constrained from dealing with their securities is not in itself controversial, and there are established methods for addressing such concerns, such as corporate blackouts and regulatory restrictions on corporate insiders trading in securities while in possession of material non-public information (**MNPI**). However, Puri's opinion went beyond this accepted standard, stating, for example, that directors' fiduciary duties trump their rights as shareholders, apparently based on what she called a capital-market perspective. We discuss this below, ultimately giving Puri's evidence no weight on this point. On other matters, Puri also went too far – or expressed opinions on the issues for this panel – as discussed below.

(iii) Cross-Examination of Puri

[118] Counsel for WEF and counsel for the Selling Shareholders cross-examined Puri on her affidavit on October 17, 2024. Puri agreed that Hansell and Puri had used some different assumptions and specifically mentioned that the assumed facts given to Hansell had more details about the Proposed Transaction. A comparison of those showed, for example, that Perkal's interest in selling was not mentioned to Puri, nor were various meetings between McIntyre and Perkal about the Proposed Transaction. Despite this, Puri held to her opinion that McIntyre and Siva thwarted Greenfire's corporate opportunity and did not properly inform the Greenfire Board.

[119] Puri expressed her view that the context and timeframe of the Strategic Alternatives Process were important here. She stated that it might be reasonable for director-shareholders to be prohibited from selling their shares for as long as a year during a strategic process. She also stated that the size of the shareholding for sale under the Proposed Transaction was a concern, and she would have been less concerned with a smaller shareholding being sold. Further, she would have been concerned with a large position being sold even if no strategic process had been started. However, she later agreed that the Private Agreement Exemption is intended to be an exemption from the underlying equal treatment principles of the TOB Regime, and clarified that she agreed the exemption was available, subject to commissions' authority to restrict it for reasons including unfairness to minority shareholders or prejudice to the public interest. She acknowledged that the lack of a blackout in a company typically means that its board of directors has determined that there is no MNPI and, therefore, no need for a blackout.

(b) Waitzer

(i) Qualifications

[120] Greenfire tendered Waitzer as an "expert in the Canadian take-over bid framework, Canadian [mergers and acquisitions] practice, and the use of shareholder protection rights plans". Waitzer is a former chair of the OSC, among other significant securities market legal experience. He described himself as "directly involved in the formulation of the take-over bid framework in place in Canada since the late 70s", although he was not involved as a regulator in important changes made to the TOB Regime in 2016 (the **2016 Amendments**).

(ii) Scope and Summary of Opinion

[121] Waitzer stated that his opinion addressed two questions:

> a. What are the benefits to minority shareholders of the Canadian take-over bid regime . . .?
>
> b. Based on the assumptions provided,
>
> i. Was there a legitimate purpose for [the Greenfire Board] to have adopted the [Rights Plan] on September 18, 2024 …; and
>
> ii. Was the [Greenfire] Board's adoption of the Rights Plan consistent with the TOB Regime?

[122] Waitzer described the primary benefits to minority shareholders of the TOB Regime as equal treatment, disclosure, time, and a control premium – some or all of which could be lost if a party were to acquire more than 20% of the shares of the target without making a TOB. He noted that the equal treatment arises once a TOB has been made and is subject to exemptions (including the Private Agreement Exemption). Disclosure encompasses both the early warning regime (not relevant here) and required disclosure about the TOB, the offeror, and the target's recommended response. Time is important because a TOB must be open for 105 days. Waitzer stated that a control premium is typically required to convince enough target shareholders to tender to the TOB, and he defined it as the additional consideration the offeror must pay to become a control person. He described one goal of the TOB Regime as ensuring that all target shareholders benefit from the control premium paid by the TOB offeror.

[123] Waitzer concluded that there was a legitimate purpose for the Greenfire Board to adopt the Rights Plan and that that action was consistent with the TOB Regime. Although not within the requested scope of his opinion, Waitzer also stated his view that McIntyre's and Siva's "conduct was clearly contrary to the objectives of the TOB Regime" and implied they had breached their fiduciary duties because the completed SPAs "would result in all other Greenfire Shareholders losing the benefits and protections of the TOB Regime". Although Waitzer mentioned the existence of the Private Agreement Exemption and that the Proposed Transaction fit within those parameters, he did not seem to consider the underlying purpose of the Private Agreement Exemption or how its purpose interacts with the rest of the TOB Regime.

(iii) Cross-Examination of Waitzer

[124] On October 18, 2024, Waitzer was cross-examined on his affidavit by counsel for WEF and counsel for the Selling Shareholders.

[125] Waitzer agreed that, in general, an SRP's purpose is not to allow a board to decide who the shareholders of a company will be or to treat a potential shareholder with favour or disfavour. Waitzer had noted in his report that a 43% position would enable WEF to block other transactions, including during the Strategic Alternatives Process, although he acknowledged during cross-examination that he had seen no evidence that WEF would refuse to sell that 43% if an offer were made by another party.

[126] Waitzer stated that he would have advised the Greenfire Board to implement an SRP earlier. He also opined that Greenfire should have been in a blackout as of July 2024 because the existence of the Strategic Alternatives Process was MNPI. In his view, that also meant that McIntyre and Siva acted dishonourably because they had MNPI and did not communicate honestly with the Greenfire Board. These views were based on the limited facts given to him, as experts can work only with the facts provided.

[127] His understanding of the Rights Plan seemed to be that it delayed completion of the SPAs for six months, but did not prevent the agreements from being effected. Waitzer deposed that the Strategic Alternatives Process was "well advanced", but stated during cross-examination that he was given as a fact that the Strategic Alternatives Process was in the "early stages". When challenged on his assertion that the Strategic Alternatives Process was "well advanced", he explained that was "in the sense that they had retained advisors", "were engaged in the process", and were updating valuation work. He stated that he did not think the two statements – "well advanced" and "early stages" – were inconsistent.

(c) Peltier

(i) Qualifications

[128] WEF described Peltier as "the only expert put forward by the parties with the independence and qualifications to provide credible opinion evidence about the character of the [Proposed Transaction] and the effect of the Rights Plan on capital markets". Peltier had a lengthy career in financial services, primarily investment banking. He had worked at CIBC Capital Markets (**CIBC**) for 16 years, covering oil and gas producers and energy-focused funds, retiring in October 2023.

(ii) Scope and Summary of Opinion

[129] Peltier listed the questions WEF asked and his summarized responses:

> [Questions]
>
> A. Does the purchase by WEF of approximately 43% of the issued and outstanding Greenfire shares, comprised of the respective 28%, 10%, and 5% interests of Allard Services Limited, Annapurna Limited, and Modro Holdings LLC, have any material effect on the:
>
> a. Shareholder composition of Greenfire, including the balance of influence held by minority shareholders of Greenfire and the control of Greenfire generally?
>
> b. Ability of Greenfire to ensure fair and equal treatment of minority shareholders in relation to any potential future attempt to acquire control of Greenfire, whether by a third party or WEF?
>
> c. Ability of Greenfire to maximize shareholder value, including the ability of the Greenfire Board to:

I. Identify, develop, and negotiate value-enhancing alternatives; or

II. Pursue an evaluation of strategic alternatives.

B. What would be the effect, if any, on capital markets in Alberta and Canada if the use of shareholders rights plans in the manner proposed by Greenfire was permitted, including in relation to:

a. Actions and behaviours of boards of directors and corporate management?

b. The value and marketability of large share positions?

c. Investor certainty, market efficiency, and investor and public confidence more generally?

[Executive Summary Responses]

In my opinion, for the reasons, and subject to the assumptions and limitations, set forth below:

1. The [Proposed Transaction] does not represent a material change in the shareholder profile of Greenfire. Prior to the [Proposed Transaction], Greenfire had a concentrated shareholder base with multiple potential positive and negative control groups, a status quo that will remain unchanged after the [Proposed Transaction]. More particularly, aside from the three [Selling Shareholders], ten shareholders hold approximately 45% of the outstanding Greenfire shares, five of those shareholders hold approximately 35% of the outstanding Greenfire shares, and directors other than the principals of the [Selling Shareholders] control close to 20% of the outstanding Greenfire shares. The [Proposed Transaction] will simply have the effect of substituting three highly aligned shareholders, who have longstanding business associations, with one shareholder. Any negative control position that WEF would inherit from the [Selling Shareholders] has been a feature of Greenfire's shareholder composition since Greenfire was founded in its existing form, i.e.[,] at all times that Greenfire's current shareholders have held their shares in Greenfire.

2. The purchase of shares by WEF will not negatively impact either the ability of Greenfire to ensure fair and equal treatment of minority shareholders, or the ability of Greenfire to maximize shareholder value. As a rational economic actor, WEF, like other minority shareholders and Greenfire generally, has an interest in the fair and equal treatment of minority shareholders and in maximizing shareholder value. Based on the affidavit of Connor Waterous sworn October 2, 2024, there appears to be alignment between the objectives of WEF and the Greenfire Board and management. As a result, there is unlikely to be any negative impact on Greenfire's ability to implement a strategic alternatives process or on Greenfire's ability to pursue its corporate strategy. In contrast, other factors such as current market conditions, a small universe of potential buyers of Greenfire as a whole, and Greenfire's value expectations may negatively impact a strategic alternatives process.

3. Notably, WEF's interests as a shareholder are better aligned with the Greenfire Board, management, and Brigade than the interests of the [Selling Shareholders]. The [Selling Shareholders] are motivated sellers at a share price that the Greenfire Board, management, and Brigade have represented is below fair value. As a result, during a strategic alternatives process, the [Selling Shareholders] would presumably support bids below a price acceptable to the Greenfire Board, management, and Brigade. That misalignment could negatively impact or outright impede the possibility of a value-enhancing transaction for all shareholders. In contrast, the cost base of WEF's shares implies that WEF will not be a seller at a price the [Selling Shareholders] would consider, but would consider a sale at a

> higher price that aligns more closely with the position of the Greenfire Board, management, and Brigade.
>
> 4. The use of a shareholder rights plan in the manner contemplated by Greenfire, if permitted, will set an unreasonable and dangerous precedent that will erode the confidence in and integrity of the Canadian capital markets. That precedent would reflect an endorsement of the authority of boards of directors to unilaterally and retroactively restrict shareholders from disposing of freely-trading shares, restrict investors from purchasing shares lawfully in accordance with the regulations that govern the Canadian capital markets, and discriminate against specific shareholders within the same class of shares. The consequence will be less liquidity for investors, a less robust market for companies seeking to raise capital, and ultimately persistent lower valuations for Canadian publicly-listed securities.

(iii) Cross-Examination of Peltier

[130] A portion of Peltier's cross-examination centred on the extent of the financial contribution made by WEF-related entities as payments to Peltier's former employer, CIBC. Peltier stated that some fees from WEF entities may have indirectly affected his compensation, as all fees were pooled and compensation was paid from the pool. He acknowledged that Strathcona (connected to WEF) had been one of his clients at CIBC.

[131] Peltier acknowledged that if WEF were to acquire additional shares through the Private Agreement Exemption for a total of more than 50% ownership of Greenfire Shares, that would change the shareholder profile of Greenfire. Peltier distinguished that from acquiring the 43% from three shareholders which were already aligned in interest.

[132] Peltier agreed that he did not know at what price WEF, Brigade, or the Greenfire Board members would consider selling Greenfire Shares, although he said Brigade's minimum price was US$10.05. He emphasized that "a rational investor" would sell for "an attractive rate of return".

(d) Hansell

(i) Qualifications

[133] Hansell was tendered by the Selling Shareholders as an expert in corporate governance. They submitted that the Hansell Evidence was "necessary to correct the many misstatements of law that Greenfire makes throughout its written submissions, largely in reliance on Ms. Puri's faulty evidence on corporate governance principles".

(ii) Scope and Summary of Opinion

[134] Hansell was provided with the expert reports of Puri and Waitzer and asked to reply to them. She summarized her conclusions:

> 2.1 In my view, directors of a corporation have the same right to sell their shares as any other shareholder (subject to insider trading restrictions or voluntary blackout policies). It is common for shareholders to sit on the board of directors. It is also common for directors to sell their shares from time to time.
>
> 2.2 Puri's report conflates the role of directors and the rights of shareholders. She argues that the shareholder rights of a board member must be suspended for the benefit of the other shareholders. There is no basis for Puri's view and it is completely incorrect. If it were true, it would come as a mighty shock to directors of all corporations – both public and private.

> If it were true, shareholders would not be prepared to serve on boards of companies in which they have an interest, and directors would not invest in the corporations they serve.
>
> 2.3 Waitzer suggests that the directors of a company are obliged to deal with their rights as shareholders in the best interest of other shareholders. This would be a new and distressing development for directors of Canadian companies that hold shares in the company on whose board they serve. There is no basis for Waitzer's view, and it is completely incorrect.

(iii) Cross-Examination of Hansell

[135] Hansell confirmed during cross-examination that she received no instructions from the Selling Shareholders other than to reply to Puri's and Waitzer's respective reports.

[136] Hansell stated that she agreed with Puri's statement that directors' conduct matters "from a capital markets public policy perspective". However, she did not agree with all of the restrictions Puri would put on directors' conduct based on that perspective. Hansell also disagreed with Puri's statements that corporate conflicts of interest standards and provisions prohibit directors from engaging in apparent or perceived conflicts of interest (in contrast to prohibitions on actual conflicts, which was not a controversial position).

[137] In the course of an extensive discussion about McIntyre's statements and conduct relating to the August 25 Meeting, Hansell stated that McIntyre did not have a continuing duty to update the information he gave to the Greenfire Board on that date because his statements about his intentions were made as a shareholder – only shareholders can deal with shares, so his statements were not made as a director.

3. Legal Principles: Expert Evidence

[138] As a starting point, ss. 29(e) and (f) of the Act give broad discretion to ASC hearing panels when deciding what evidence to admit and what weight to assign that evidence – relevance is the key:

> (e) the [ASC] shall receive that evidence that is relevant to the matter being heard;
>
> (f) the laws of evidence applicable to judicial proceedings do not apply[.]

[139] Despite not being required to follow the laws of evidence, we do generally consider underlying policy reasons when making decisions about admissibility and weight. ASC panels are expert panels which do not require expert evidence on matters within their areas of expertise and experience. However, such expert evidence may (or may not be) useful in particular circumstances. (See *Re Bison Acquisition Corp.*, 2021 ABASC 188 at paras. 45-46.)

[140] The Supreme Court of Canada (the **SCC**) set out in *R. v. Mohan*, [1994] 2 S.C.R. 9 (at paras. 17 and 21) the principles for the admissibility of expert evidence in court proceedings: (1) relevance; (2) necessity (outside the trier of fact's ordinary knowledge and experience); (3) not otherwise required to be excluded; and (4) tendered through a properly qualified expert. The Alberta Court of Appeal has held that the *Mohan* criteria are not applicable in determining the admissibility of expert evidence in ASC proceedings, although those criteria may be useful when determining the weight assigned to such expert evidence – *Alberta (Securities Commission) v. Workum*, 2010 ABCA 405 at paras. 82-84 (affirming *Re Workum and Hennig*, 2008 ABASC 363

(***Workum (ASC)***)), as discussed in *Bison* at para. 49 (*Bison* (at para. 48) also noted that an OSC panel's reliance on *Mohan* in *Re Solar Income Fund Inc.*, 2021 ONSEC 2 did not reflect the law in Alberta).

[141] Connected to admissibility and weight is whether an expert's opinion is on the "ultimate issue" which the trier of fact is to decide. The SCC in *Mohan* noted that expert evidence would no longer be excluded merely because it opined on the "ultimate issue" (at paras. 24-25). However, *R. v. Solleveld*, 2014 ONCA 418 referred to *Mohan* in stating "that increased scrutiny of relevance and necessity [is] called for the closer one comes to the ultimate issue" (at para. 20). Although *Solleveld* was determining admissibility (in the criminal context), we considered such increased scrutiny as a helpful factor in assessing the weight to assign to particular expert opinions.

[142] In *Workum (ASC)* (at para. 105), an ASC panel did not need the expert evidence tendered (it did not "present or illuminate new and unknown principles"), but referred to it as confirming the panel's conclusions. An ASC panel and an OSC panel admitted unnecessary but useful or confirmatory expert evidence in, respectively, *Re Ironside*, 2006 ABASC 1930 at paras. 78 and 300 (aff'd. *sub nom. Ironside v. Alberta (Securities Commission)*, 2009 ABCA 134) and *Re Biovail Corporation* (2010), 33 O.S.C.B. 8914 at paras. 80, 201, 213, and 238 (all as noted in *Bison* at paras. 51-53).

[143] The panel in *Bison* (at para. 54) also cited *Re De Gouveia*, 2013 ABASC 106 (at paras. 66 and 71), in which that panel held that it was not bound by the expert's opinion regarding the ultimate issue but needed to consider and weigh the expert's evidence with all of the other relevant evidence. The *De Gouveia* panel also stated (at para. 104, cited in *Bison* at para. 54):

> . . . We found Stewart [the expert] to be a credible witness. We gave great weight to her explanations of various trading practices and their consequences, and her testimony was of considerable assistance to us in our review of some of the documentary trading evidence. That said, we were not bound to accept her conclusions. Rather, we considered and analyzed all the evidence and reached our own conclusions, taking into account, but not dictated by, Stewart's opinions and conclusions. Although her conclusions did not dictate our findings, we regard the parallels between them as important corroborations of our analysis.

[144] In *Bison* (at para. 55), the panel accepted expert evidence from Puri (the same expert whose evidence was tendered before us), as it was "helpful and relevant to the issues" although "not strictly necessary given [that] panel's expertise and experience". The panel in *Bison* also stated that it was not bound by that evidence, but "took her evidence on certain matters into account and gave it commensurate weight where we concluded it was appropriate and useful to do so, and where it corroborated our own independent conclusions". Finally, the panel there gave little or no weight to that proposed expert evidence "where her opinions were more in the nature of legal argument or policy recommendation".

4. Parties' Positions: Expert Evidence

(a) WEF

[145] WEF criticized Greenfire's two expert witnesses, Puri and Waitzer, submitting that neither the Puri Evidence nor the Waitzer Evidence should be admitted or, if admitted, should be given no weight. WEF also contended that the panel should disregard the part of Mason's evidence which

was opinion because Mason was not independent. WEF defended its own expert witness, Peltier, as sufficiently independent.

[146] WEF argued that the Puri Evidence should not be admitted for three reasons: she lacked practical capital market experience; she opined on the ultimate issues before the panel; and she made improper legal arguments disguised as opinions. WEF contended that Waitzer also gave opinion evidence on the ultimate issue, so that the Waitzer Evidence should be rejected (or given no weight, if admitted). WEF submitted that both Puri and Waitzer came "very close to exclusively providing opinions about the ultimate issues". WEF referred to panels of the Ontario Capital Markets Tribunal (the **OCMT**; successor to the OSC's adjudicative division) rejecting expert evidence from Waitzer in two cases. However, a determination by a different tribunal in different circumstances was unhelpful, and we did not need to address that argument.

[147] WEF initially objected to Mason's evidence on grounds that he lacked independence and impartiality because his employer, TD, was Greenfire's financial advisor at the time, and TD's compensation was linked to the success of the Strategic Alternatives Process. However, as Mason was not tendered as an expert witness, we did not need to address this argument.

[148] WEF argued that Peltier was an independent and necessary expert witness (and implied the same for Hansell), but did not make extensive submissions on the admissibility of that evidence because it was not challenged (only the appropriate weight was disputed).

(b) Selling Shareholders

[149] The Selling Shareholders submitted that the panel should admit the Hansell Evidence as necessary to correct what they characterized as misstatements of the law made by Greenfire, largely in reliance on the Puri Evidence. They did not comment on the Peltier Evidence.

[150] In contrast, the Selling Shareholders urged the panel not to admit the Puri Evidence and the Waitzer Evidence because they both addressed only "domestic law and the ultimate issue". They also argued that the Puri Evidence was not helpful because "she focused on the 'capital market public policy perspective'", which is within the panel's expertise. They referred to Waitzer's expert evidence being rejected in OCMT proceedings; we already noted that was irrelevant here. They further stated that Waitzer was not an expert on materiality.

[151] However, the Selling Shareholders also submitted that it might be appropriate for the panel to be mindful of Waitzer's statements contrary to the position of Greenfire (which tendered him as an expert), regardless of other concerns the panel might have with Waitzer's evidence – that was in reference to Waitzer's statement during cross-examination on his affidavit that, had he been asked, he would have advised Greenfire to adopt an SRP in August 2024 when the Greenfire Board learned of WEF's interest in acquiring a significant position in Greenfire. We noted that Greenfire did not address that argument directly, replying only that a board can implement an SRP at any time (subject to a court or commission striking it down) and that an SRP could not have been implemented sooner because Greenfire Board members held a majority of Greenfire Shares (57%) as at August 25, 2024, with none of them expressing an intention to sell at that time and the possible concern that a dispute over an SRP could have fractured the relationship among the Greenfire Board members.

(c) Greenfire

[152] Greenfire referred to the law discussed above, submitting that: the *Mohan* criteria do not apply to administrative proceedings in Alberta; there is no rule against experts opining on the ultimate issue; expert evidence need not be necessary but only helpful; and ASC panels "routinely" admit expert evidence to assist in reaching their own conclusions. Based on those statements, Greenfire argued that there was no reason to reject any of the expert evidence (including WEF's experts), leaving the weight of the expert evidence as the only issue.

[153] Greenfire sought to distinguish between Hansell's description as a corporate governance expert and Puri's description as an expert in both corporate governance and capital markets public policy – or as an expert in corporate governance "from a capital markets public policy perspective". Greenfire stated that Hansell had "limited recent professional experience relating to capital markets public policy". Greenfire also noted that Hansell was asked only to respond to Puri's and Waitzer's reports, not to answer specific questions, and that Hansell did not review materials such as literature and jurisprudence when preparing her report.

[154] Greenfire argued that Peltier was not independent or impartial, and suggested that the panel give minimal or no weight to the Peltier Evidence.

[155] Regarding both Puri and Waitzer, Greenfire pointed to statements they made denying that they gave legal opinions. However, Greenfire also contended that if they did give legal opinions, those could be dealt with on a weight basis rather than by ruling all of their evidence inadmissible.

(d) Brigade

[156] Brigade referred to some of the expert evidence in its submissions, but did not take a position on its admissibility or weight.

(e) Staff

[157] Staff highlighted the basic principles regarding the admissibility and weight of expert evidence, noting that the panel has the discretion to "admit and rely on [expert evidence] if it is helpful to the analysis, even if it simply confirms the panel's own views" and is not, therefore, strictly necessary. Staff also submitted that the panel should give limited weight to any admitted expert evidence if "expressed as opinions in the nature of legal argument or policy recommendations".

[158] Staff further stated:

> Staff have concerns about the volume of expert evidence adduced in this matter given the very limited time available to the Panel to consider the issues and all of the evidence before it. We question whether it is efficient or even practicable for the Panel to consider over 900 pages of affidavit evidence from four different experts and transcripts of over eight hours of cross-examination on that evidence, much of which was dedicated to pointing out contradictions between the various expert reports.
>
> The Panel may wish to consider whether the volume of expert evidence provided is necessary or appropriate in the context of an expedited hearing, most of which is squarely within the Panel's expertise and experience. Staff would welcome any guidance the Panel may consider appropriate with respect to the use of expert evidence in future proceedings of this type before the [ASC].

5. Discussion: Expert Evidence

(a) General

[159] We adopted the principles as set out in *Bison* and the other cases discussed earlier. To summarize, ASC panels are able to admit expert evidence which is relevant and which may be useful, even when not necessary for the panel's understanding of the matter. This applies as well to expert evidence directed at the ultimate issue. We noted below some of the circumstances in which an expert's conclusions corroborated our analysis, although the final determinations were and always will be the panel's. There were also issues with some of the opinions, based on the limited facts the experts were given by the party calling them – for example, Greenfire did not give Puri and Waitzer a complete chronology of McIntyre's communications with Perkal and with the Greenfire Board. That necessarily affected our ability to give weight to Puri's and Waitzer's opinions on such points.

[160] We admitted the expert evidence tendered here, for the reasons stated below. We also discuss some of the specific points made by these various affiants in our analysis of the Application and the Cross-Application.

[161] That said, ASC panels have expertise on, experience with, and knowledge of capital market matters. While expert evidence may be helpful in some circumstances, it is generally not necessary. In some situations, the tendering of excessive expert evidence can cause significant efficiency concerns that outweigh any potential usefulness. This was such a case.

[162] The Application was dated September 26, 2024. The first affidavits were received on October 2, 2024, the first expert reports one week later, and the first written submissions on October 22. Staff noted that the expert information comprised about 900 pages – that was in addition to the thousands of pages of evidence, cases and submissions the panel members reviewed and considered before the start of the oral submissions on November 5, 2024.

(b) Puri Evidence

[163] With great reluctance – and only for the purpose of understanding and giving context to Greenfire's and Brigade's unorthodox views on the scope of fiduciary duties and conflicts relating to directors who are also shareholders – we admitted the Puri Evidence. We seriously considered not admitting her evidence and ultimately gave it very little weight.

[164] Puri stated that she had not provided legal opinions or legal advice, especially on the ultimate issues. However, we find that she did. This was unhelpful. Such comments in expert reports consume time that a panel could better spend on reviewing other material from the parties in such complex matters.

[165] As an expert panel, we are well aware of the importance of the capital market, capital-market regulation, and the existence and scope of basic directors' fiduciary duties. We are also extremely well versed in the requirements and underlying principles of the TOB Regime. We did not need any of that explained to us.

[166] Puri went further than that, framing her assertions about directors' conduct "from a capital markets public policy perspective". The limits of this were unclear, but it seemed to be an argument

by Puri to extend directors' duties beyond corporate law principles into a sphere in which any conduct that may possibly have a negative effect on any aspect of investor protection, capital-market efficiency, or confidence in our capital market could or should be curtailed by the exercise of our public interest powers on the basis that such conduct is inherently clearly abusive or contrary to the animating principles of securities laws. That is not a tenable position, as discussed in our analysis below.

[167] Puri was entitled to rely on the assumed facts she was given, such as the effect of the Proposed Transaction on the Strategic Alternatives Process. However, we found some of those to be incorrect, which undermined her conclusions. As an example, she stated that, if the Proposed Transaction were to be completed, "Greenfire *will have* lost out on" opportunities from the Strategic Alternatives Process (emphasis added); the evidence and our conclusions did not support such a definitive statement.

[168] Puri also stated that McIntyre and Siva had breached their fiduciary duties by selling to WEF. One of the grounds she relied on was that they kept "the financial benefits of [the] control premium for themselves". This reflected a misunderstanding or misapplication of the Private Agreement Exemption as an exemption to the otherwise-required equal treatment of target shareholders, based on the policy choice to allow certain shareholders the ability to take a limited 15% control premium for themselves in certain well-defined circumstances (discussed in more detail elsewhere in this decision).

(c) Waitzer Evidence

[169] We admitted the Waitzer Evidence. Some of his opinions were marginally helpful and relevant.

[170] Waitzer's opinions were mostly unnecessary because they spoke directly to matters within the panel's own expertise and experience. Some of his opinions were unhelpful, as they seemed to treat the Proposed Transaction by WEF as akin to a TOB, which would have triggered the application of the TOB Regime and been a basis for Greenfire to engage in defensive tactics to a TOB. This missed the fact that the TOB Regime was not engaged because the Selling Shareholders were located outside the jurisdiction. More significantly, it missed the significance in these circumstances of the fact that the Private Agreement Exemption, on which WEF modeled the Proposed Transaction, is a thoroughly considered and long-standing exemption from the TOB Regime and its underlying principles. We discuss those points below.

[171] Some of Waitzer's opinions were on the ultimate issue. As with some of the Puri Evidence, that was not helpful and we gave such opinions very little weight. For example, he described the Rights Plan as having "a legitimate purpose" and not being "exercised for an improper purpose".

[172] We did find interesting Waitzer's statement that he would have advised Greenfire to implement an SRP sooner. As he acknowledged, Waitzer commented on McIntyre's and Siva's conduct despite not being asked to do so. We gave no weight to that comment because it was out of the scope of the opinion sought and was a matter for this panel to decide (as concluded below, it was also incorrect in these circumstances).

(d) Peltier Evidence

[173] We admitted the Peltier Evidence. Peltier's opinions were helpful in addressing some minority shareholder issues and some of the factors involved in the future of Greenfire's Strategic Alternatives Process. We rejected Greenfire's argument that Peltier's independence was fatally compromised by his previous employment activities involving some WEF entities. Peltier was not currently employed by CIBC, and there was no indication that any of his current or future income prospects depended on WEF. We did, however, remain aware of his background when reviewing his evidence and assigning weight to it, as we would with any witness.

(e) Hansell Evidence

[174] We admitted the Hansell Evidence. Some of Hansell's opinions were not strictly necessary because they were directly on matters of the panel's own expertise and experience. However, some of her opinions were helpful and relevant, particularly as a response to the Puri Evidence (for example, Hansell's rebuttal to some of the exaggerated and incorrect assertions by Puri and Waitzer was useful). We rejected Greenfire's argument that Hansell's comments on directors conducting themselves as shareholders failed to consider the capital-market perspective of such conduct.

(f) Admission of Evidence

[175] In admitting the expert evidence, we assigned the following exhibit numbers:

- Puri Evidence: Exhibit 13 (her October 10, 2024 affidavit, formerly Exhibit A for Identification) and Exhibit 14 (her October 17 cross-examination transcript, formerly Exhibit E for Identification);

- Waitzer Evidence: Exhibit 15 (his October 9, 2024 affidavit, formerly Exhibit B for Identification) and Exhibit 16 (his October 18 cross-examination transcript, formerly Exhibit F for Identification);

- Peltier Evidence: Exhibit 17 (his October 14, 2024 affidavit, formerly Exhibit C for Identification) and Exhibit 18 (his October 17 cross-examination transcript, formerly Exhibit G for Identification); and

- Hansell Evidence: Exhibit 19 (her October 15, 2024 affidavit, formerly Exhibit D for Identification) and Exhibit 20 (her October 18 cross-examination transcript, formerly Exhibit H for Identification).

6. Determination: Expert Evidence

[176] We admitted all of the expert evidence, but were bound by none of it. We took the admitted evidence into account where it was useful to do so and gave it appropriate weight. Where the expert evidence admitted was a legal argument or a policy recommendation, we gave it no weight. We treated carefully evidence tending toward the ultimate issues before us, as set out in *Mohan* and *Solleveld*. We obviously gave no weight to the expert evidence we considered to be incorrect. We had the most difficulty with the scope and content of the Puri Evidence. Further specifics of the expert evidence are discussed during our analysis, as warranted.

[177] Although we did admit this evidence, we urge parties in future matters to use better judgment when tendering expert evidence, as the majority of the expert evidence tendered here was unnecessary, unhelpful, irrelevant, or, in some cases, incorrect. Despite this absence of relevance and utility, each panel member had to spend considerable time reading and assessing the material, which caused inefficiency in dealing with this urgent matter during a condensed schedule. There were also increased costs to all parties because of the amount and scope of tendered material. Greenfire submitted that a panel may admit expert evidence, even if it merely confirms the panel's own views, then argued that expert evidence is "routinely admitted" and there was no reason to reject it here. We disagreed – it cannot be the case that ASC panels should effectively be required to admit evidence from any and all experts as a matter of routine. None of the cases cited by Greenfire supported such an approach.

[178] As noted, we admitted Mason's evidence as fact evidence, not opinion evidence. We applied the reasoning from *Bison* (at paras. 56-57) to Mason's evidence in assessing it, as with all evidence, for reliability and for consistency with other reliable evidence.

V. ANALYSIS

A. Public Interest Jurisdiction

1. Legal Principles: Public Interest Jurisdiction

[179] Both the Application and the Cross-Application sought relief under s. 198 of the Act, relying on the ASC's broad public interest jurisdiction. None of the parties alleged contraventions of Alberta securities law. Under s. 198, we may make orders if we consider that "it is in the public interest to do so".

[180] As noted by the ASC panel in *Bison* (at para. 74), a securities commission's public interest jurisdiction was addressed in 1987 by an OSC panel in *Re Canadian Tire Corp.* (1987), 10 O.S.C.B. 857, discussing what is now s. 127 of the *Securities Act* (Ontario) (the **Ontario Act**), which is the comparable provision to our s. 198. (The OSC decision was affirmed on appeal (1987), 59 O.R. (2d) 79.) In *Canadian Tire*, the OSC panel stated that the public interest jurisdiction could be exercised "to deal with situations that are inconsistent with the best interests of investors or where a transaction constitutes a flagrant abuse of the marketplace" and "to restrain a transaction that is clearly abusive of investors and of the capital markets, whether or not that transaction constitutes a breach of the [Ontario Act], the regulations or a policy statement" (at para. 124 and para. 130, respectively).

[181] The panel in *Bison* (at para. 73) also summarized principles set out by the SCC in *Committee for the Equal Treatment of Asbestos Minority Shareholders v. Ontario (Securities Commission)*, 2001 SCC 37:

- Section 127 of the Ontario Act provides the OSC with very wide discretionary power to intervene in the public interest in activities related to the Ontario capital market. The section's permissive language expresses a legislative intent "to leave it for the OSC to determine whether and how to intervene in a particular case" (at paras. 39 and 49).

- While no breach of the statute is required to trigger the section, the OSC's public interest jurisdiction "is not unlimited" (at paras. 41-42).

- The precise nature and scope of the public interest jurisdiction should be assessed by considering the OSC's mandate "to provide protection to investors from unfair, improper or fraudulent practices" and "to foster fair and efficient capital markets and confidence in the capital markets." Therefore, both "the fair treatment of investors" and "[t]he effect of an intervention in the public interest on capital market efficiencies and public confidence in the capital markets" should be considered before making an order in the public interest (at para. 41).

- In deciding whether to exercise its public interest discretion in the *Asbestos* case, the OSC panel below correctly considered whether the transactions at issue were "clearly abusive" of investors and the integrity of the capital market (at para. 52).

[182] A crucial factor for a panel considering the exercise of its public interest jurisdiction is market certainty. As stated in *Canadian Tire* (at para. 154, cited in *Bison* at para. 75), the public interest mandate "is not to interfere in market transactions under some presumed rubric of insuring fairness", as such interference "would wreak havoc in the capital markets". Similar comments by a panel of the British Columbia Securities Commission (the **B.C. Commission**) in *Re Carnes*, 2015 BCSECCOM 187 at para. 129 were also highlighted by the panel in *Bison* (at para. 76):

> We recognize that when a panel issues an order in exercise of its public interest jurisdiction, the order has the effect of restraining or prohibiting conduct that is not prohibited specifically by legislation. Market participants should be able to structure their affairs within the context of the specific provisions of the [*Securities Act* (British Columbia) (the **B.C. Act**)], without fear of enforcement actions alleging wrongdoing that is not encoded in the [B.C.] Act, regulation or rules of the [B.C. Commission].

[183] There has been some question in various decisions of ASC panels and panels in other Canadian jurisdictions regarding the standard for public interest intervention: clearly abusive or animating principles. The former standard comes from *Canadian Tire*. The claimed abusive conduct is often considered to involve taking advantage of a gap or loophole in an otherwise comprehensive area of securities laws in a manner causing risk of harm or actual harm to the public interest (see, e.g., *Re PointNorth Capital Inc.*, 2017 ABASC 121 at paras. 36-38). The latter standard is considered lower and is engaged when securities laws themselves have been complied with, "but the animating principles underlying those rules have not" (see, e.g., *Re Patheon Inc.* (2009), 32 O.S.C.B. 6445 at para. 116; and *ESW* at para. 83).

[184] In *Riot Platforms, Inc. v. Bitfarms Ltd.*, 2024 ONCMT 27, an OCMT panel discussed the two standards and developed an approach to reconcile them in some circumstances. However, that decision was issued after the arguments and oral ruling in the present matter. Given the result and reasons for our decision here, we need not address the newly formulated OCMT approach, and we prefer to leave that for a case in which all parties are able to present submissions on whether the OCMT approach should be adopted by ASC panels.

2. Additional Case Discussion: Public Interest Jurisdiction

Financial Models (2005)

[185] An OSC panel dismissed an application to cease-trade a share sale or offer in *Re Financial Models Company Inc.* (2005), 28 O.S.C.B. 2184. In that case, Katotakis held approximately 40% of the closely-held company, Financial Models. He and two other major shareholders were party to a shareholder agreement which included rights of first offer and first refusal, using a "Selling

Notice" stating at what "Set Price" the party wanting to sell shares was willing to sell. After discussions between Financial Models and another company about an offer for the Financial Models shares, Katotakis received Selling Notices from the other two major shareholders. He accepted the Selling Notices to acquire an additional 42% of the Financial Models shares, then launched a TOB. He proposed to count the new 42% in calculating majority of the minority approval for a future amalgamation transaction. The Financial Models special committee argued that Katotakis's actions and approach were clearly abusive and would ultimately deprive Financial Models shareholders of the opportunity to receive maximum value for their Financial Models shares through a competitive bid process.

[186] The OSC panel concluded that Katotakis had not breached securities laws, leaving only a public interest remedy potentially available (at paras. 48-50). Relying on *Canadian Tire*, among other cases, the panel stated that the transactions were not artificial, proper disclosure had been made with no material omissions, and Financial Models shareholders could not have reasonably expected an auction – there could have been no auction in these circumstances under the shareholder agreement's terms (at paras. 56-58). The shareholder agreement and the applicable securities laws were part of the public record: "capital market participants, including Katotakis, are entitled to rely on those instruments" (at para. 60).

Patheon (2009)

[187] In *Patheon*, an OSC panel considered an application by a target company's special committee to prohibit certain conduct and acquisitions under a TOB until changes were made to provide for identical consideration and other aspects. The panel concluded that a cease-trade order could confuse the market in the circumstances (at para. 133). It instead accepted a proposal made by the offeror, with additional conditions. The central underlying dispute was a voting agreement entered into by the offeror and a minority shareholder of the target between the time the offeror announced its intention to make the TOB and the day the formal TOB was made. The panel found that the voting agreement could have breached securities legislation because it provided a valuable and unequal opportunity to the minority shareholder and enhanced the offeror's ability to complete a subsequent privatization transaction. The panel cited previous decisions, including *Asbestos* and *Re H.E.R.O. Industries Ltd.* (1990), 13 O.S.C.B. 3775, in concluding that it had the public interest jurisdiction to deal with the application because the issues "directly engage the animating principles underlying our takeover bid regime" (at para. 120). It distinguished *Canadian Tire* because the impugned transaction there fully complied with securities laws (at para. 120).

Magna (2010)

[188] An OSC panel in *Magna* discussed its broad public interest jurisdiction at para. 186, referring to both the clearly abusive and animating principles standards. That panel also noted it would be less reluctant to exercise such jurisdiction if the issue being assessed had been foreshadowed by existing policy rather than being "an entirely new principle". The panel discussed the concept of "reasonable expectation" from *Canadian Tire*, noting that the public holders there had a reasonable expectation of sharing in any control premium because of "coat-tail protection", and that they were being denied that reasonable expectation because the impugned transaction was designed to avoid triggering the coat-tail protection (at para. 188). In finding that the Magna shareholders had no comparable reasonable expectation, the OSC panel stated that there was no coat-tail or sunset provision, and Class A shareholders "knew when they purchased their shares that they had no right to participate in" an offer for the Class B shares and any control premium

associated with such an offer (at para. 189). The panel also noted that "[a] controlling shareholder is entitled to decide whether and on what terms it is prepared to sell its control block", as long as such sale is not abusive (at para. 194; and see para. 195).

PointNorth (2017)

[189] In *PointNorth*, an ASC panel adjudicated issues surrounding a proxy contest. The panel was satisfied that the matter raised securities laws aspects, not only corporate law issues which would be under the court's jurisdiction. All parties agreed that no Alberta securities laws were contravened. The panel discussed the clearly abusive and animating principles approaches, citing *Canadian Tire*, *Re ARC Equity Management (Fund 4) Ltd.*, 2009 ABASC 390, *Asbestos*, and other decisions. The panel concluded that the clearly abusive standard was appropriate in *PointNorth* (at paras. 37-38):

> Here, Alberta securities laws set out comprehensive and detailed requirements for proxy solicitation and for the conduct of brokers. Soliciting dealer arrangements are not proscribed, despite previous use (and some public criticism of such use) in director elections.
>
> In these circumstances, it could create considerable uncertainty – in the context of proxy solicitations and, possibly, beyond – if we were to base our decision on a standard lower than that of "clearly abusive".

[190] The *PointNorth* panel found no potential or actual harm to the capital market. It stated that it would "not speculate in an evidentiary vacuum" (at para. 52). It also noted that, despite commentary over several years, "securities regulators have not banned the practice of which PointNorth complained here" (para. 51). In the circumstances, the panel concluded that it could "not accept that our public interest mandate includes imposing new policy requirements in such circumstances, which would essentially be the outcome here if we were to grant the orders sought by PointNorth" (at para. 51). As the appropriate standard was clearly abusive and there was no clearly abusive conduct, PointNorth's application was dismissed.

ESW (2021)

[191] In *ESW*, an OSC panel dismissed an application for exemptive relief in the context of a proposed TOB by a 28% control-block shareholder, stating (at para. 10):

> [T]here were no exceptional circumstances or abusive or improper conduct that undermined minority shareholder choice to warrant intervention by the [OSC]. Predictability is an important aspect of take-over bid regulation and the [OSC] must be cautious in granting exemptive relief that alters the recently recalibrated bid regime.

[192] ESW had announced its intention to make a TOB for Optiva Inc., conditional on obtaining exemptive relief from the minimum tender condition (50% of shares not owned by the offeror must be tendered). ESW argued that two other control-block shareholders – holding 22.4% and 18.1%, respectively – had stated they would not tender to the proposed offer. ESW wanted to exclude that 40.5% of Optiva shares from the minimum tender requirement calculation.

[193] The panel noted that the minimum tender condition could be waived by an offeror prior to the 2016 Amendments, at which time it became mandatory and could no longer be waived. The panel referred to *Re Aurora Cannabis Inc.* (2018), 41 O.S.C.B. 2325, which was an application for an exemption from the mandatory minimum bid period added in the 2016 Amendments. The panel

agreed with statements in *Aurora* that predictability is important to ensure market participants know the TOB rules with reasonable certainly (at para. 80, citing *Aurora* at para. 73). The panel further stated (at paras. 81-83):

> The minimum tender requirement is part of a material recalibration of bid dynamics designed to facilitate collective shareholder action. The [OSC] must be cautious in granting exemptive relief that alters these recalibrated control dynamics among the bidder, the target and control block holders. The [OSC] should not intervene absent exceptional circumstances or clear improper or abusive conduct by the target, bidder or control block holders that undermines minority shareholder choice.
>
> Such caution promotes the integrity of the bid regime. It does so by ensuring a clear and predictable framework, while still allowing for intervention to address circumstances that unfairly deny shareholder choice and to deter the target and other stakeholders from engaging in abusive tactics.
>
> The public interest discretion ensures the flexibility necessary to address any particular circumstances that offend the animating principles of the bid regime.

[194] That panel did not have any concerns with ESW's conduct in connection with the fairness or integrity of the bid process (at para. 168). Despite that, the panel denied the exemptive relief because "preserving the minimum tender requirements [in those circumstances] holds open the possibility of superior offers and protects against the potential for coercion of the minority shareholders" (at para. 170). Although Greenfire relied on the panel's reference to "animating principles", the panel also assessed whether ESW engaged in abusive conduct. Further, as noted, the panel's finding was made on the basis of protecting shareholder choice, not on grounds of clearly abusive conduct or conduct contrary to the animating principles of the TOB Regime. Accordingly, we did not find this case useful in the matter before us.

CatalX (2024)

[195] An ASC panel in *Re CatalX CTS Ltd.*, 2024 ABASC 23 exercised its public interest jurisdiction to extend a protective interim order while Staff continued investigating an alleged breach of Alberta securities laws. The case involved crypto-asset trading platforms. The panel concluded that Staff had met the interim order test by establishing, *prima facie*, that the respondents contravened the Act and engaged in conduct contrary to the public interest because it was clearly abusive of both investors and the capital market. The *CatalX* panel stated that the *PointNorth* panel found the appropriate test to be "'clearly abusive' when securities laws articulate 'specific acts which constitute misconduct'" (at para. 41, quoting from para. 36 of *PointNorth*).

3. Parties' Positions: Public Interest Jurisdiction

[196] The majority of the arguments relied on both the clearly abusive and animating principles approaches, in which each side claimed that the other had acted contrary to the public interest.

[197] Staff suggested that if the panel were to find clearly abusive conduct, it would not need to address the question of animating principles, but may need to address the latter if it did not find the former. Staff submitted that the focus would be on whether the impugned conduct was covered by "comprehensive and detailed requirements" in Alberta securities laws. Staff seemed to propose that the clearly abusive standard was appropriate for analyzing both the Application and the Cross-Application.

[198] An additional complication was the scope of our jurisdiction to deal with alleged contraventions by directors of their fiduciary duties. We address that later in this decision.

4. Discussion: Public Interest Jurisdiction

(a) Scope

[199] As noted, an ASC panel's public interest jurisdiction is broad (based on the ASC's mandate to protect investors and foster a fair and efficient capital market), yet is to be exercised with caution (to avoid causing uncertainty and unfairness through the guise of protection and fairness). We adopted and applied the principles set out in *Bison* at para. 73, quoted above, regarding the broad scope of our public interest jurisdiction.

[200] The statements from, respectively, *ESW* (at para. 10), *Canadian Tire* (at para. 154; also in *Bison* at para. 75), and *Carnes* (at para. 129; also in *Bison* at para. 76) about market certainty are particularly important in this context of complex commercial transactions involving sophisticated parties represented by capable legal counsel:

- "Predictability is an important aspect of take-over bid regulation and [a commission panel] must be cautious in granting exemptive relief that alters the recently recalibrated bid regime";
- a commission panel should not "interfere in market transactions under some presumed rubric of insuring fairness"; and
- capital-market "participants should be able to structure their affairs within the context of the specific provisions of" securities legislation.

(b) Clearly Abusive or Animating Principles

[201] There remains some debate regarding the use of a "clearly abusive" standard versus an "animating principles" standard. The arguments here were based on both standards – separately, together, and as alternatives.

[202] The clearly abusive standard is generally viewed as applying when securities laws set out "specific acts which constitute misconduct" (*Carnes* at para. 137; cited in *PointNorth* at paras. 30 and 36). The animating principles standard may be applied when the impugned conduct is contrary to certain underlying principles and when securities laws are generally silent with respect to such conduct.

5. Determination: Public Interest Jurisdiction

[203] We were satisfied that we had the public interest jurisdiction to determine both the Application and the Cross-Application. We concluded that "clearly abusive" was the appropriate standard for assessing both the Application and the Cross-Application. The TOB Regime is a comprehensive and long-standing framework, with transactions, SRPs, and exemptions – such as the Proposed Transaction, the Rights Plan, and the Private Agreement Exemption – having been discussed over many years by regulators, counsel, courts, and academics.

[204] As discussed below, we granted the Application because Greenfire's adoption of the Rights Plan was clearly abusive. It was not saved by consideration of the business judgment rule. It

follows that, had we needed to assess the matter based on the animating principles standard, we also would have found that the Rights Plan was contrary to the animating principles of the TOB Regime.

[205] As discussed below, we dismissed the Cross-Application because McIntyre's and Siva's conduct was not clearly abusive. Had we found that the animating principles approach was the appropriate standard, we also would have found that their conduct was not contrary to the animating principles of directors' fiduciary duties in the securities law context. It was also significant, in our view, that shareholders in a minority position after a single shareholder acquires a large position in a company have the protections of other provisions in securities laws, including Multilateral Instrument 61-101 *Protection of Minority Security Holders in Special Transactions* (**MI 61-101**).

[206] In other words, we would have reached the same conclusions regardless of which test or standard we applied. Although our reasons below are primarily focused on the clearly abusive standard, we also discuss animating principles for clarity and in the interests of capital-market certainty. We left for a more appropriate case a determination of the demarcation and interaction between the two standards. As noted, this was not the appropriate case in which to analyze and discuss the OSC's recent decision in *Bitfarms*, which was issued after the submissions and oral ruling in this matter.

B. The Application

1. Legal Principles: TOB Regime

(a) Objectives of TOB Regime

[207] Much of the structure of the TOB Regime is set out in National Instrument 62-104 *Take-Over Bids and Issuer Bids* (**NI 62-104**). Also important are National Policy 62-203 *Take-Over Bids and Issuer Bids* (**NP 62-203**) and National Policy 62-202 *Take-Over Bids – Defensive Tactics* (**NP 62-202**), both of which outline the objectives of the TOB Regime (at s. 2.1 and s. 1.1(2), respectively):

> 2.1 The [take-over bid regime in NP 62-203 and NI 62-104] is designed to establish a clear and predictable framework for the conduct of bids in a manner that achieves three primary objectives:
>
> - equal treatment of offeree issuer security holders,
> - provision of adequate information to offeree issuer security holders, and
> - an open and even-handed bid process.
>
> 1.1(2) The primary objective of the take-over bid provisions of Canadian securities legislation is the protection of the bona fide interests of the shareholders of the target company. A secondary objective is to provide a regulatory framework within which take-over bids may proceed in an open and even-handed environment. The take-over bid provisions should favour neither the offeror nor the management of the target company, and should leave the shareholders of the target company free to make a fully informed decision. The Canadian securities regulatory authorities are concerned that certain defensive measures taken by management of a target company may have the effect of denying to shareholders the ability to make such a decision and of frustrating an open take-over bid process.

(b) Engagement of TOB Regime

[208] The TOB Regime is engaged when there is a "take-over bid". A take-over bid is defined in s. 1.1 of NI 62-104:

> "take-over bid" means an offer to acquire outstanding voting securities or equity securities of a class made to one or more persons, any of whom is in the local jurisdiction or whose last address as shown on the books of the offeree issuer is in the local jurisdiction, where the securities subject to the offer to acquire, together with the offeror's securities, constitute in the aggregate 20% or more of the outstanding securities of that class of securities at the date of the offer to acquire . . .

[209] National Instrument 14-101 *Definitions* defines "local jurisdiction" (s. 1.1(3)). The local jurisdiction was Alberta, and the Selling Shareholders were not located in Alberta, or even in Canada. Therefore, the Proposed Transaction was not a "take-over bid" – the contemplated acquisition of more than 20% of the Greenfire Shares did not meet the definition.

[210] The TOB Regime also provides for several exemptions – situations in which regulators have determined that the requirements and protections of the TOB Regime are not warranted. One of those is the Private Agreement Exemption. WEF structured the Proposed Transaction to comply with the Private Agreement Exemption, even though it was not necessary to do so (as the TOB Regime was not engaged). The essential requirements of the Private Agreement Exemption are in s. 4.2(1) of NI 62-104 (we need not set out the other subsections):

> A take-over bid is exempt from Part 2 [of NI 62-104] if all of the following conditions are satisfied:
>
> (a) purchases are made from not more than 5 persons in the aggregate, including persons located outside the local jurisdiction;
>
> (b) the bid is not made generally to security holders of the class of securities that is the subject of the bid, so long as there are more than 5 security holders of the class;
>
> (c) if there is a published market for the securities acquired, the value of the consideration paid for any of the securities, including brokerage fees or commissions, is not greater than 115% of the market price of the securities at the date of the bid as determined in accordance with section 1.11 [of NI 62-104]; . . .

[211] The parties all agreed that the Proposed Transaction was within the parameters of the Private Agreement Exemption, although Greenfire and Brigade still claimed that it was contrary to the public interest in the circumstances.

[212] As the Proposed Transaction was not subject to the TOB Regime, WEF did not need to comply with the TOB Regime requirements in NI 62-104. Those requirements include making a TOB to all target security holders, offering identical consideration to all target security holders, leaving the TOB open for a certain length of time, preparing and sending a TOB circular to all target security holders, and being subject to restrictions on acquisitions and sales (see Part 2 of NI 62-104). Greenfire argued that implementing the Rights Plan was justified in the circumstances to give its shareholders the protections of the TOB Regime and to allow the Strategic Alternatives Process to continue without WEF owning any Greenfire Shares. That stance was a central point of disagreement, as discussed below.

(c) Private Agreement Exemption

(i) History

[213] The history of and amendments to the Private Agreement Exemption were important in this case because each party urged the panel to find in its favour, largely based on its own interpretation of the principles underlying the TOB Regime in general and the Private Agreement Exemption in particular.

[214] TOBs were not regulated in any Canadian jurisdiction until after the 1965 *Report of the Attorney General's Committee on Securities Legislation in Ontario* (the **Kimber Report**). The Kimber Report led to the drafting and implementation of the first *Ontario Securities Act* in 1966 and comparable Alberta legislation in 1967. TOB legislation has been largely consistent in all provinces since the beginning and was eventually moved to NI 62-104 (and other instruments and policies) – accordingly, we refer to the relevant TOB regulation without distinguishing among provinces or among the different types of legislation or regulatory instruments, except where noted.

[215] The 20% TOB threshold originated from the Kimber Report's recommendations, as did the Private Agreement Exemption, although its parameters were different at that time. The Private Agreement Exemption was originally available when an offer was made "to a limited number of shareholders" (Kimber Report at para. 3.11). Although no number of shareholders or percentage of their holdings was specified, it was clear from the Kimber Report that this would allow a change of legal or effective control – that is, the exemption deliberately allowed a transfer of control to occur without always attracting the protections of the TOB Regime, including the opportunity for all shareholders to sell their shares and participate in an available control premium (Kimber Report at para. 3.12).

[216] In 1970, the *Report of the Committee of the Ontario Securities Commission on the Problems of Disclosure Raised for Investors by Business Combinations and Private Placements* (the **Merger Report**) considered the Private Agreement Exemption. There was discussion about the balance between two competing factors: the desire for all shareholders to receive the benefit of a control premium compared to the desire to encourage entrepreneurship by permitting control block shareholders to receive the advantage of such a premium when selling (at paras. 7.08-7.09). The Merger Report recommended restricting the Private Agreement Exemption to fewer than 15 sellers – significantly, no maximum share percentage was recommended. In 1972, Alberta limited the exemption to fewer than 15 sellers.

[217] A 1973 Ontario report (*Report on Mergers, Amalgamations and Certain Related Matters by Select Committee on Company Law*) also discussed the balance between the two contrasting policy perspectives. There were two reports in 1983: the *Report of the Committee to Review the Provisions of the Securities Act (Ontario) Relating to Take-over Bids and Issuer Bids*; and the *Report of the Securities Industry Committee on Take-over Bids*. These discussed similar issues and proposals to address them.

[218] Staff noted that the current form of the Private Agreement Exemption was largely in place by 1989 in Alberta (and some other provinces): (1) maximum five persons purchased from; (2) no bid made to all shareholders; and (3) maximum 115% of the market price could be paid. Staff stated:

> . . . By allowing the payment of a premium, but restricting it to 15%, the legislation attempted to achieve a balance between the competing policy objectives of equal treatment of security holder[s] and the private property view that security holders should be able to freely dispose of their securities without legislative interference.

[219] As context for that comment, we also refer back to the Merger Report's fundamental rationale for allowing such free disposition of control-block securities (within limits): to avoid discouraging corporate investment and entrepreneurial risk-taking.

[220] Proposals to amend the Private Agreement Exemption were considered in 1990 and 2006. Consistent with the history of the exemption, those reform proposals discussed the balance. The Canadian Securities Administrators (the **CSA**) decided against amendments both times. Staff submitted that keeping the Private Agreement Exemption in its long-standing form made clear "that preserving the ability of holders of large blocks of shares to dispose of their shares in limited circumstances outside of a formal take-over bid continues to be an important feature of the Canadian take-over bid regime".

(ii) Cases Discussing Private Agreement Exemption

[221] The parties referred to some of the small number of cases from across Canada which have dealt with the Private Agreement Exemption.

Forest Products (1981)

[222] An OSC panel in *Re British Columbia Forest Products Limited*, [1981] 1 O.S.C.B. 116C (at pp. 118C-119C) discussed the Private Agreement Exemption and emphasized the importance of protecting minority shareholders, holders of large blocks of shares, and confidence in the market (at p. 120C). The concern in *Forest Products* was whether the market price on which the exemption's premium was based had been affected by an anticipated take-over, with the panel there noting that the market-price-premium calculation for the Private Agreement Exemption "is susceptible to improper manipulation" (at p. 119C). The panel found no manipulation, but found an effect on the market price and had the discretion under the law at that time to determine what the market price would have been in the absence of such anticipation. (That had implications for the follow-up offer required at the time in Ontario, which has never been a requirement in Alberta securities laws.)

Selkirk (1988)

[223] In *Re Selkirk Communications Ltd.* (1988), 11 O.S.C.B. 285, a panel of nine OSC members wrote three sets of reasons, each set signed by three members. The parties in this Hearing (other than Staff) cited various statements from these three sets of reasons. Selkirk was the target of a TOB by Rogers Communications Inc. at $35 per Selkirk share, announced on October 15, 1987. Southam Inc., which held approximately 42% of Selkirk's Class A shares and 20% of its Class B shares, announced on October 22, 1987 that it would not tender to the Rogers TOB. The TOB announcement was followed by a significant increase in the Selkirk share price; the Southam announcement was followed by a significant decrease in the Selkirk share price. In early November 1987, Southam agreed to purchase 6% and 3% of the Selkirk shares from two separate sellers for $26.50 per share. Both agreements had an "upside price protection" provision in the sellers' favour for any sales by Southam at a higher price after the date of the agreement. Under the terms of the

Private Agreement Exemption, relied on for both acquisition transactions, the maximum prices Southam could pay to the sellers were $29.96 and $29.44, respectively. The transaction prices were below those respective maximums, but the upside price protection arrangement meant that the price ultimately paid could have exceeded the 115% allowable premium – although the terms were amended to cap the upside amounts at 115%. Southam applied to the OSC for an exemption because it was unclear if the Private Agreement Exemption would apply. OSC staff opposed Southam's application and applied for an order cease trading the two sales transactions. As part of both positions, OSC staff argued that there was distortion of the Selkirk Class A share price on the six trading days between the TOB announcement on October 15 and Southam's announcement on October 22 that it would not tender to the TOB. OSC staff submitted that Southam should not be able to take advantage of that distortion to offer a higher premium to the sellers of the 6% and 3%, with other Southam shareholders excluded from that premium.

[224] The first set of three OSC panel members (the **Beck Group**) would have denied both applications. They stated that both of Southam's agreements followed the Private Agreement Exemption, but Southam had the onus of satisfying the panel that the exemption sought would not be prejudicial. As Southam was already the dominant shareholder of Selkirk and was taking advantage of the market impact of the intended Rogers TOB, the Beck Group concluded that Southam should have considered the minority shareholders' position in those circumstances. The Beck Group also would have dismissed OSC staff's application, stating that it was not abusive for Southam to rely on the increased price, and any attempt to preclude such reliance should be done through a policy statement or legislative amendment.

[225] The second set of three OSC panel members (the **Salter Group**) would have prohibited both purchases by denying Southam's application and prohibiting Southam's use of the Private Agreement Exemption. The Salter group seemingly would have granted OSC staff's application, but that would not have been necessary. The Salter Group found Southam's reliance on the six-day price increase to be contrary to the public interest, and thus considered it in the public interest to prohibit both purchases. The Salter Group also stated that it considered the purchases even more offensive because Southam itself had blocked the TOB.

[226] The third set of three OSC panel members (the **Blain Group**) would have granted Southam's application and denied OSC staff's application. The Blain Group emphasized the need for market certainty: participants should be able to structure transactions "based on the regulatory environment . . . without fear of intervention by the [OSC] except in cases of clear abuse and perhaps manifest unfairness" (at para. 69). The Blain Group considered that eliminating the six disputed trading days would be akin to the OSC panel setting the market value – a power which had been taken away by legislative amendment and should not be exercised through public interest powers, "unless there are other compelling reasons" (at para. 70). The Blain Group found no abuse or manifest unfairness which would justify such an intervention, and no basis on which to treat a significant shareholder any differently than any other person seeking to rely on the Private Agreement Exemption, absent abuse (at paras. 72-73).

[227] The split reasons and conclusions of the three OSC panel groups – and the completely different circumstances from the present case – make the *Selkirk* case of very limited use here.

H.E.R.O. (1990)

[228] In *H.E.R.O.*, Gordon Capital Corporation owned approximately 14% of the common shares of H.E.R.O. and made a June 12, 1990 TOB at $0.85 per share for the remaining ones. At the time, Middlefield Capital Fund and New Frontiers Development Trust PLC owned, respectively, approximately 30% and 19% of the H.E.R.O. shares. The market price of the H.E.R.O. shares rose after the Gordon TOB announcement. On July 3, 1990, 115% of the average market-price of the previous 20 days exceeded the $0.85 TOB price for the first time and continued to rise. On July 4, 1990, when the 115% premium was at $0.87, Middlefield offered to purchase New Frontiers' H.E.R.O. shares at $0.87 per share, and New Frontiers accepted the offer the next day. The evidence showed that Middlefield had monitored the increase in share price, but did not affect it (at para. 9). After the purchase, Middlefield held approximately 49% of the H.E.R.O. shares. As in the present case, the offer to purchase from New Frontiers was made to a seller outside the relevant jurisdiction, so that it was not a "take-over bid" under the Ontario legislation (at para. 16). The OSC panel also found that the acquisition complied with the strict terms of the Private Agreement Exemption (at para. 17).

[229] The OSC panel then considered whether the acquisition was contrary to the public interest. The OSC panel stated that there were greater concerns in *H.E.R.O.* than in *Selkirk* because the proposed TOB did not materialize in *Selkirk* but was already in progress for H.E.R.O. at the time of Middlefield's purchase of shares from New Frontiers (at para. 27). Middlefield's new aggregate holdings of 49% of the H.E.R.O. shares effectively ended the Gordon TOB, which the OSC panel found was "manifestly unfair to the public minority shareholders of H.E.R.O., who lose the opportunity to tender their shares to the Gordon bid" (at para. 29). Further, the OSC panel found it would be unfair to allow Middlefield to use the Private Agreement Exemption when Gordon could not (at para. 29). Ultimately, the OSC panel concluded that Middlefield's conduct was clearly abusive of the capital market because Middlefield was expected to "adhere to both the letter and the spirit of the rules that are intended to guarantee equal treatment of offerees in the course of a take-over bid" (at para. 29). A cease-trade order was extended, preventing Middlefield from trading in H.E.R.O. shares, subject to certain conditions.

Med-Tech (1998)

[230] In *Re Med-Tech Environmental Ltd.* (1998), 21 O.S.C.B. 7607, Stericycle, Inc. and BFI Medical Waste Ltd. had each made a TOB to purchase Med-Tech. Both attempted to rely on TOB exemptions, including Stericycle's reliance on the Private Agreement Exemption for a second tranche of purchases. The panel held that no exemptions were available. In particular, the panel determined that the Private Agreement Exemption could not be used for the second tranche because it was not a separate transaction but was part of a single TOB: "To fabricate an artificial series of closings [to take advantage of an exemption] seems to us to violate not only the spirit, but also the letter, of the take-over bid provisions". The panel stated that it would have cease-traded the Stericycle offer as abusive on that basis, but did not need to because it instead ordered the single offer to be made compliant with the legislation.

(d) SRPs

[231] SRPs are contemplated under NP 62-202 as defensive responses to TOBs. They were historically used primarily as protection against an unsolicited TOB, and sometimes implemented proactively before a TOB was made. An extensive body of case law developed regarding SRPs, specifically when they would be allowed to continue and when they would be cease-traded

(essentially rendered ineffective). Eventually, commission panels concluded that the primary issue would often be when, not if, the SRP needed to be cease-traded (see, for example, *Bison* at para. 147, citing: *Re High Arctic Energy Services Limited Partnership*, 2006 ABASC 1510 at para. 74; *Re Pulse Data Inc.*, 2007 ABASC 895 at para. 96; and *Re Icahn Partners LP*, 2010 BCSECCOM 432 at paras. 32-33).

[232] In determining whether an SRP should be cease-traded, commission panels determined that the appropriate time was when the purpose for adopting the SRP had been achieved (or could no longer be achieved) and it no longer enhanced shareholders' choice. Panels also developed a list of factors commonly considered – these became known as the *Royal Host* factors, as set out in *Re Royal Host Real Estate Investment Trust* (1999), 22 O.S.C.B. 7819 (at para. 74). The ASC panel in *Bison* set out the test and the *Royal Host* factors (at para. 156-161):

> Accordingly, shareholder rights plans should cease to have effect once they no longer benefit shareholders and enhance their choice, but instead interfere with that choice or otherwise "impair [shareholders'] ability to exercise their fundamental right to decide whether to accept or reject a take-over bid for their shares" ([*Re Afexa Life Sciences Inc.*, 2011 ABASC 532] at para. 28).
>
> Similar conclusions were drawn in [*Re Canadian Jorex Ltd.* (1992), 15 O.S.C.B. 257] (at p. 4), *Icahn* (at para. 47), [*Aurora*] (at para. 148), [*Re Baffinland Iron Mines Corp.* (2010), 33 O.S.C.B. 11385] (at para. 26), and [*Re Neo Material Technologies Inc.* (2009), 32 O.S.C.B. 6941] (at para. 144). As the *Afexa* panel described it, the applicable test is "whether there is, and remains, a real and substantial possibility that, given a reasonable period of further time under the protection of the plan, the directors of the target company can increase shareholder choice and maximize shareholder value" (at para. 28).
>
> If the answer to that inquiry is "no" and a shareholder rights plan impedes shareholders' ability to choose, a securities commission may intervene ([*Re BGC Acquisition Inc.*, [1999] 25 B.C.S.C.W.S. 44] at pp. 4-5). Hearing panels have the discretion to make that determination, which will depend upon the facts and circumstances of the case (*Afexa* at para. 28; see also *High Arctic* at para. 76 and [*Re Falconbridge Ltd.* (2006), 29 O,S.C.B. 6783] at para. 36).
>
> To guide the determination, many past decisions cite the non-exhaustive list of factors set out in *Royal Host* (at para. 74, cited, e.g., in *Falconbridge* at para. 35, *Pulse Data* at para. 96, *High Arctic* at para. 76, [*Re Suncor Energy Inc.*, 2015 ABASC 984] at para. 14 *et seq.*, and *Neo* at paras. 40-42):
>
> - whether shareholder approval of the rights plan was obtained;
> - when the plan was adopted;
> - whether there is broad shareholder support for the continued operation of the plan;
> - the size and complexity of the target company;
> - the other defensive tactics, if any, implemented by the target company;
> - the number of potential, viable offerors;
> - the steps taken by the target company to find an alternative bid or transaction that would be better for the shareholders;
> - the likelihood that, if given further time, the target company will be able to find a better bid or transaction;
> - the nature of the bid, including whether it is coercive or unfair to the shareholders of the target company;
> - the length of time since the bid was announced and made;
> - the likelihood that the bid will not be extended if the rights plan is not terminated.

> Not all of these factors will apply in every case, and despite listing them, the *Royal Host* panel recognized that no specific test would provide the answer in every situation: "Take[-]over bids are fact specific; the relevant factors, and the relative importance to be attached to each, will vary from case to case" (at para. 76; see also *Icahn* at paras. 32-33 and *Neo* at para. 43).
>
> Likewise, in *Baffinland* (at para. 29), an OSC panel adopted some of the language from the *Royal Host* decision and held that, "at the end of the day, there is no one test or consideration that constitutes the 'holy grail' when deciding whether a rights plan should remain in place or be cease traded"; the hearing panel must decide what course of action is in the public interest in the circumstances. The primary consideration is always the best interests and fair treatment of the target shareholders (*ibid.*; see also [*Re Cara Operations Ltd.* (2002), 25 O.S.C.B. 7997] at para. 55, *Pulse Data* at para. 94, and *High Arctic* at paras. 48 and 76).

[233] When the 2016 Amendments to the TOB Regime were implemented, certain features common to many SRPs became part of the TOB Regime, such as a longer mandatory minimum deposit period for securities tendered to a TOB. As Staff noted in their submissions, the CSA therefore anticipated that defensive tactics, including SRPs, would be used less frequently after the 2016 Amendments. There have not been many applications and decisions on SRPs since then, and we were not aware of any dealing with circumstances comparable to those in the present case. There is some debate over the continued relevance of the *Royal Host* factors. The parties were aware of the potential limited use of these factors, but still addressed them.

2. Legal Principles: Business Judgment Rule

[234] The business judgment rule was part of Greenfire's argument supporting its implementation of the Rights Plan. The panel in *Bison* discussed the business judgment rule (at paras. 87-91):

> Despite the broad discretion Canadian securities commissions have to act in the public interest, it is also true "that a degree of deference is owed to the decision of the board of directors of a market participant with respect to the issue under review" (*Neo* at para. 35). This is to give effect to the well-known "business judgment rule" that is also applied in the courts. The Court described the rule in *Mudrick Capital Management LP v. Wright*, 2019 ABQB 662 (at para. 92):
>
> > The Business Judgment Rule is a rebuttable presumption, originating in US law, that the decisions of corporate directors are made on an informed basis and in good faith and therefore in the best interests of the company. Judges are not to second-guess the decisions of duly elected directors but rather, deferring to their autonomy and expertise, consider only whether the decision was reasonable, not whether it was perfect . . .
>
> As long as a decision made by a board of directors falls within the range of reasonable alternatives in the circumstances, deference to the decision should be shown (*Neo* at para. 103; see also *CW Shareholdings Inc. v. WIC Western International Communications Ltd.* (1998), 39 O.R. (3d) 755 (Ont. Gen. Div.) (***CW Shareholdings (Ont. Gen. Div.)***) at para. 66, and *Pente Investment Management Ltd. v. Schneider Corp.* (1998), 42 O.R. (3d) 177 (ONCA) at paras. 34 and 36).
>
> The Ontario Court (General Division) explained further in the context of a contested take-over bid (*CW Shareholdings (Ont. Gen. Div.)* at para. 62):
>
> > The directors' actions are not to be judged against the perfect vision of hindsight, and should be measured against the facts as they existed at the time the impugned decision was made. In addition, the court should be reluctant to substitute its own opinion for that of the directors where the business decision was made in

> reasonable and informed reliance on the advice of financial and legal advisors appropriately retained and consulted in the circumstances.
>
> In *Pente*, the Ontario Court of Appeal drew the same conclusion if a board acted on the advice of an independent committee that made an informed, good-faith recommendation as to the best available transaction for shareholders (at para. 38).
>
> This is not to suggest that blind deference should be shown to any decision made by a board of directors in any circumstances, as Brookfield cautioned against in its written submissions. The board's decision must still be a reasonable one given the situation and the applicable law and policy. In the present context, that includes the overall objectives of the take-over bid regime.

[235] In *BCE Inc. v. 1976 Debentureholders*, 2008 SCC 69, the SCC stated (at para. 40):

> In considering what is in the best interests of the corporation, directors may look to the interests of, *inter alia*, shareholders, employees, creditors, consumers, governments and the environment to inform their decisions. Courts should give appropriate deference to the business judgment of directors who take into account these ancillary interests, as reflected by the business judgment rule. The "business judgment rule" accords deference to a business decision, so long as it lies within a range of reasonable alternatives . . . . It reflects the reality that directors, who are mandated . . . to manage the corporation's business and affairs, are often better suited to determine what is in the best interests of the corporation. This applies to decisions on stakeholders' interests, as much as other directorial decisions.

[236] *Neo* also discussed the business judgment rule. There, an OSC panel concluded that the implementation of an SRP was a valid exercise of the board's business judgment (at para. 105). It was held to be a valid defensive tactic to a TOB and had been strongly ratified by shareholders (at paras. 105-106).

3. Parties' Positions: TOB Regime and Business Judgment Rule

(a) WEF

[237] WEF submitted that Greenfire's implementation of the Rights Plan was abusive and contrary to the animating principles of Alberta securities laws, given the comprehensive nature of the TOB Regime and the long-standing existence of, and underlying policy reasons for, the Private Agreement Exemption. To the extent that animating principles might have been relevant, WEF submitted that the ones claimed by Greenfire did not exist or did not apply, particularly since the Private Agreement Exemption intentionally allows a modest control premium to be paid to the sellers without being shared among all shareholders.

[238] WEF supported its assertion with several points: (1) the Rights Plan purported to operate retroactively; (2) the Rights Plan did "not otherwise comply with the limited permitted purposes of shareholder rights plans"; (3) the Greenfire Board improperly enacted the Rights Plan; and (4) Greenfire did not justify the Rights Plan.

(b) Selling Shareholders

[239] The Selling Shareholders argued that the Proposed Transaction was lawful and non-abusive, in contrast to the Rights Plan, which "discriminates amongst beneficial shareholders and is abusive to the capital markets". They also stated that the Private Agreement Exemption is an exemption from the TOB rules and from the underlying animating principles.

[240] The Selling Shareholders summarized their arguments that the Rights Plan was clearly abusive by stating that the Rights Plan "was plainly and obviously adopted retrospectively for the purpose of preventing WEF . . . from closing the [Proposed Transaction]" as "a targeted dilution of one shareholder's publicly traded shares implemented for the sole purpose of interfering with lawful private share transactions":

> (a) There is no statutory, regulatory or public policy basis to support a plan that interferes with a lawful existing agreement.
>
> (b) The take[-]over bid rules do not and cannot apply to exempt transactions after the [SPAs] were signed.
>
> (c) The integrity of [the] capital market requires that market participants be able to [rely] on compliance with the existing and established legal regime.
>
> (d) The share sale does not disadvantage minority shareholders – there is no alternative transaction that is impeded by the share sale and the share sale does not substantially change the control structure of the business.
>
> (e) There is no evidence of any independent shareholder support for the shareholder rights plan.
>
> (f) Greenfire's false and irrelevant allegations against McIntrye and Siva do not justify the defective and abusive shareholder rights plan. It is not disputed that at all material times, the selling shareholders were not in possession of material non-public information and were not restricted by the imposition of a blackout period or a lockup agreement.

[241] The Selling Shareholders also contended that an SRP adopted in response to a TOB allows the offeror and the target shareholders the ability to adjust their behaviour in response. Here, however, WEF and the Selling Shareholders were committed to binding agreements.

[242] The Selling Shareholders would not have relied on the animating principles standard for the Application, stating that there was no loophole or gap – the matter was entirely covered by the TOB Regime provisions, primarily the Private Agreement Exemption (referring to *PointNorth*, *Selkirk*, and *H.E.R.O.*, among others). They also contended that the animating principles of the Private Agreement Exemption were followed, had that standard been relevant.

(c) Greenfire

[243] In responding to the Application, Greenfire continually referred to the Proposed Transaction as a TOB, then criticized it for not following the animating principles of the TOB Regime as it was not an equal bid to all Greenfire shareholders. Greenfire argued that the Applicants should have expected an SRP in response to "a take-over bid that does not treat the target's shareholders fairly".

[244] Greenfire contended that SRPs are appropriate in many circumstances and that the business judgment rule should be applied when assessing the actions of a board of directors. Greenfire submitted that the Rights Plan was consistent with other SRPs and did not unfairly or retroactively target the Applicants. Greenfire characterized the Proposed Transaction as "a future transfer" of Greenfire Shares – as a "future contingent event", there was no retroactive component to the Rights Plan. Greenfire also argued that Perkal was independent when considering an SRP because

Brigade was "fully aligned" with all Non-Selling Shareholders (WEF had argued he was personally motivated).

[245] Regarding the effect of the Rights Plan on the Applicants' interests, Greenfire submitted that the panel should not be concerned about that because the Applicants "promote[d] their own self-interests with no consideration for the interests of Greenfire, the other shareholders or the capital markets" – "their private commercial interests in the Proposed [Transaction] cannot trump the right of all Greenfire shareholders to be treated fairly".

[246] Greenfire relied on certain statements that SRPs still have a purpose, including the ASC panel's statements in *Bison* (at para. 153) quoting a document from Institutional Shareholder Services that SRPs will continue to have a role (following the 2016 Amendments) because they ensure equal treatment of target shareholders "by precluding creeping acquisitions or the acquisition of a control block through private agreements between a few large shareholders".

(d) Brigade

[247] Brigade adopted Greenfire's submissions, then focused on "the abusive effect of the Proposed [Transaction] on [Brigade and] all other minority shareholders". Brigade claimed animating principles were relevant, specifically those relating to "procedural fairness and the fair and equal treatment of shareholders, and the protection of good faith interests of target shareholders, ensuring fairness to shareholders", and time to find an alternative transaction (footnotes omitted; citing *Neo* at para. 37, *Patheon* at para. 120, *Bison* at para. 81, and *ESW* at para. 72).

[248] Brigade's position was primarily based on its contention that it had "reasonable expectations that the Selling Shareholders would remain as shareholders of Greenfire and committed to its growth for a reasonable period following closing of the Business Combination and that they would seek a value-maximizing transaction for all shareholders". Brigade relied heavily on Perkal's statements that he thought WEF would be willing to make a bid for all of the Greenfire Shares at a higher price than WEF was offering for some of them under the Private Agreement Exemption.

(e) Staff

[249] Staff raised several points for possible consideration by the panel, including:

- The Rights Plan was not a defensive tactic to a TOB because there was no bid. Therefore, "NP 62-202 provides an imperfect framework for assessing whether the Rights Plan is contrary to the public interest". The traditional jurisprudence about SRPs was also difficult to apply (for example, it was applied with difficulty to cease-trade an SRP in *Northern Financial Corporation v Jaguar Nickel inc.*, 2007 QCBDRVM 15).

- Based on decisions such as *Re Eco Oro Minerals Corp*. (2017), 40 O.S.C.B. 5321 (at paras. 246-251), it would be appropriate for the panel to consider the core principles of fairness and market integrity in the present case, even though there was no TOB and no defensive tactic to a TOB.

- The following principles were suggested for consideration, based on NP 62-202, the TOB Regime following the 2016 Amendments, and *Royal Host*:

  (a) Given that the Rights Plan is a tactical plan that has not been approved by Greenfire shareholders, is there evidence of significant shareholder support for the Rights Plan?

  (b) [Do] the timing and circumstances of the adoption of the Rights Plan by [Greenfire] in response to the announcement of the [SPAs] raise a significant public interest concern?

  (c) Is [Greenfire's] strategic alternatives process sufficiently advanced and robust that it is reasonably likely to result in an alternative transaction for the benefit of all shareholders in the relatively near future?

  (d) [Are the SPAs] unfair to Greenfire shareholders, other than the Selling Shareholders, or likely to lead to a coercive transaction involving [Greenfire] and its shareholders in the future?

  (e) Are any public interest concerns surfaced by the above questions outweighed by the countervailing public interest concerns that may result if a lawful transaction such as [an SPA] is thwarted by the Rights Plan?

- The SPAs were "completely legal" and "in accordance with the letter and spirit of the Private Agreement Exemption". There is an "important public interest in ensuring that businesses can be confident regarding the 'rules of the game' when entering a commercial transaction".

- Staff stated that the panel might consider deferring to the Greenfire Board's business judgment in implementing the Rights Plan, if Greenfire could "demonstrate that it identified legitimate concerns with the [SPAs] and acted to protect the *bona fide* interests of the [Non-Selling Shareholders]". However, Staff also noted that the business judgment rule should not be applied too broadly because an SRP implementation must still be reasonable in the circumstances, including the relevant legal and policy considerations. In this context, Staff emphasized that applying the business judgment rule in this case "could unduly jeopardize commercial certainty and be contrary to the objectives of the [TOB Regime], including the exemptions thereto".

4. Discussion: TOB Regime and Business Judgment Rule

(a) TOB Regime, Including the Private Agreement Exemption

[250] A fundamental tenet of the TOB Regime is the equal treatment of target shareholders (see NP 62-203, s. 2.1, NP 62-202, s. 1.1(2), and the cases discussed earlier in this decision). However, the purpose and history of the entire TOB Regime, including the principles underlying the Private Agreement Exemption, must not be ignored.

[251] We earlier set out that purpose and history. The most important aspects for this Application are: (1) the TOB Regime is engaged only where there is a TOB, which there was not here; and (2) there are intentional exemptions from the TOB Regime's provisions for equal treatment of

target shareholders. The history of the Private Agreement Exemption shows that its implementation and long-standing continuation (with some modifications over the years, although none recently) were the result of deliberate decisions by securities regulators in Canada, including Alberta, to permit unequal treatment by allowing a limited control premium to be transferred in certain circumstances without all target shareholders being involved and benefiting from that premium.

[252] Greenfire ignored that history, instead tendering evidence, opinions, and submissions which minimized everything other than equal treatment. For example, Greenfire relied on Puri's statement that anyone relying on the Private Agreement Exemption "should adhere to both the letter and the spirit of the exemption and the overall take-over bid regime rules", not "thwart the foundational policy objective of" equal treatment of shareholders. She concluded that using the Private Agreement Exemption here was "contrary to the public policy objectives of the Canadian take-over bid regime".

[253] Such statements and conclusions ostensibly focused on the letter and spirit of the TOB Regime as a whole, but did not actually do so. We found the Puri Evidence misguided and unhelpful on this point, and we did not rely on it. We also considered significant the fact that directors of a company are often shareholders – and often significant shareholders – yet nothing in the Private Agreement Exemption forbids director-shareholders from selling their shares under that exemption.

[254] We rejected the contention that adherence to the letter and spirit of the long-standing and well-supported Private Agreement Exemption can undermine the policy objectives of the TOB Regime. That exemption is an integral part of that regime.

[255] In addition, we rejected Greenfire's reliance on decisions such as *Selkirk* and *H.E.R.O.* Those were very different situations, and we disagreed that *H.E.R.O.*, in particular, was relevant here. Greenfire submitted that *H.E.R.O.* showed that regulators are reluctant to condone the use of the Private Agreement Exemption "in a manner that is contrary to the animating principles of the [TOB] Regime". In *H.E.R.O.*, there was already a TOB, that TOB was effectively ended by Middlefield's use of the Private Agreement Exemption, and Middlefield had already owned 30% of the target shares. The *H.E.R.O.* panel was, as a result, concerned with unequal treatment of target shareholders during the course of an active TOB. There was also an announced TOB in *Selkirk*, and six of the nine OSC panel members concluded that Southam tried to take unfair advantage of the impact of the TOB on the Selkirk share price. In the present case, no TOB had been made (and there was no evidence one would have been contemplated for at least several months, if at all). Other Greenfire shareholders were, therefore, not deprived of the opportunity to tender to an existing – or even imminent – TOB, nor were WEF and the Selling Shareholders taking advantage of an existing TOB's positive effect on the Greenfire Share price (in fact, the Greenfire Share price had been decreasing before the SPAs were signed).

(b) Retroactive Effect of Rights Plan

[256] As part of our consideration of the TOB Regime and the Private Agreement Exemption, it was crucial to examine the retroactive effect the Rights Plan would have had on the Proposed Transaction. Allowing such a retroactive effect – contrary to the policies underlying the entire TOB Regime – would gravely affect the efficiency of and confidence in our capital market. In

other words, certainty in the capital market and the legitimate expectations of capital-market participants must be examined when we are asked to exercise our public interest jurisdiction, including in the context of the TOB Regime. We should not "interfere in market transactions under some presumed rubric of insuring fairness" (see *Canadian Tire* at para. 154 and *Bison* at para. 75). Here, any such interference would not be in the name of presumed fairness but would actually defeat fairness.

[257] It was clear that the Rights Plan would have prevented WEF and the Selling Shareholders from completing the Proposed Transaction as intended. Had there been no need for Competition Act approval, the Proposed Transaction could have closed before Greenfire was notified of it (or at approximately the same time as the notification). At that time, September 16, 2024, Greenfire did not have an SRP in place, despite having the ability to adopt one at any time (which, of course, could also have been challenged).

[258] Allowing the Rights Plan to stay in place would send a message to the capital market that an issuer could implement an SRP after a private transaction has been signed and all but finalized, despite that private transaction complying with both the law (the TOB Regime as a whole, had it applied) and the animating principles underlying the law (the rationale for the Private Agreement Exemption). Therefore, denying the Application and leaving the Rights Plan in place would defeat both fairness and market certainty.

[259] It was no answer to claim, as Greenfire and Brigade did, that WEF and the Selling Shareholders could have expected an SRP to be implemented in response to the announcement of the SPAs or that *Bison* (at para. 53) had mentioned SRPs being considered by some to have a role in precluding private-agreement acquisitions. We are not aware of any common or expected practice of implementing SRPs targeting an already-announced private transaction (as opposed to a TOB). Greenfire had several opportunities over several months to consider and possibly implement an SRP, new lock-up provisions, or any other restriction to prevent transactions such as the SPAs or in anticipation of a hostile TOB (given the Strategic Alternatives Process and the fact that Perkal, in particular, seemed to consider the Greenfire Shares to be significantly underpriced). Even Greenfire's expert, Waitzer, stated that he would have advised implementing an SRP sooner. Related to timing, we also noted that, until at least September 11, 2024, Perkal was still potentially interested in selling Brigade's Greenfire Shares to WEF, when he discussed that with Connor Waterous and the latter offered to check with WEF's legal counsel regarding Brigade's ability to sell under the Private Agreement Exemption. We considered Perkal's motivation to be a factor in Greenfire not seriously considering an SRP until after the SPAs were signed and announced on September 16, 2024.

[260] In other words, SRPs may still play a role for various reasons, if considered and implemented at an appropriate time for proper reasons. That was not the case here.

(c) Business Judgment Rule

[261] Greenfire had argued for considerable deference, under the business judgment rule, for its decision to implement the Rights Plan, largely on the basis that it responded with a reasonable defensive tactic not only to a take-over bid but also to "the *worst kind* of take-over bid" (Greenfire's emphasis).

[262] As quoted above from *Bison* (at paras. 87-91), a board's exercise of business judgment must fall "within the range of reasonable alternatives", but there should not be "blind deference" to a board decision. The reasonableness of a board's decision is assessed based on the circumstances. Here, that included the TOB Regime's overall objectives – all of its underlying principles and the need for market certainty.

[263] Contrary to Greenfire's assertion, the Proposed Transaction was not a TOB, let alone the worst kind of TOB. The SPAs effecting the Proposed Transaction were signed before the Greenfire Board implemented the Rights Plan. The Rights Plan thus would have retroactively affected a private share transaction between WEF and the Selling Shareholders, when that transaction fell within the letter and the spirit of the TOB Regime. We also questioned whether the actions of the Greenfire Board, particularly Perkal, met the standard of good faith required by the business judgment rule, as set out in *Mudrick* and *Pente* (discussed earlier).

[264] In the circumstances, the Greenfire Board's decision to implement the Rights Plan was not within a range of reasonable alternatives and was thus not entitled to deference.

(d) "Reasonable Expectations" Claim

[265] Brigade argued that shareholders (particularly Brigade) had "reasonable expectations" that the Selling Shareholders would hold their Greenfire Shares for a longer period – until a deal could be struck to sell all of the Greenfire Shares at once. Brigade asserted that transactions should not be allowed if they defeat investors' reasonable expectations, "including [by being] structured to circumvent protections otherwise available for the benefit of shareholders", relying on *Patheon* at para. 119, *Magna* at para. 177, and *Financial Models* at paras. 50 and 56.

[266] In contrast, WEF and the Selling Shareholders argued that the parties' reasonable expectations were in line with the TOB Regime, including the Private Agreement Exemption, and should be upheld for market certainty reasons. WEF contended that allowing the Rights Plan to stand or granting the Cross-Application would defeat those reasonable expectations. The Selling Shareholders acknowledged that shareholders' reasonable expectations may be a relevant consideration when a panel assesses whether conduct or a transaction was clearly abusive. However, they disputed Greenfire's and Brigade's description of the reasonable expectations here, and argued that the important consideration was the market's expectations that the TOB Regime would be respected. We concluded that WEF and the Selling Shareholders were correct on this point.

[267] We were not convinced by any of the cases Brigade cited. In *Canadian Tire*, it was relevant that shareholders reasonably expected they would share in a control premium because of coat-tail protection. In *Magna*, there was no coat-tail protection, thus no reasonable expectation by shareholders that they would share in a control premium. In *Financial Models*, the application was dismissed because the respondent had properly exercised his rights under a shareholders' agreement, so that no reasonable expectations were defeated.

[268] We also considered the following to be important to the issue of reasonable expectations as raised in the different contexts by the different parties:

- Brigade argued that the expiry of the Lock-Up Agreement was irrelevant because it was a standard term for the purpose of supporting the Greenfire Share price right after the de-SPAC transaction. Brigade stated there was no "negotiated lock-up period" for a different purpose. That seemed to us to be precisely the point – there was no agreement that the Selling Shareholders would refrain from selling their Greenfire Shares until some future offer Perkal and Brigade hoped for and would deem sufficient. That was also significant here because Brigade had a higher cost base for its Greenfire Shares than did the Selling Shareholders, meaning that Brigade knew the Selling Shareholders would face different considerations when looking to sell their Greenfire Shares. Brigade could have tried to negotiate a longer or broader lock-up agreement, but either did not try or was unsuccessful. The important fact was that there was no such agreement. Brigade and the Selling Shareholders had turned their minds to a lock-up agreement and agreed to the six-month Lock-Up Agreement, which expired several months before the SPAs were signed. Further supporting our conclusion, Carissimo had deposed that Brigade attempted to ensure that the Selling Shareholders would remain committed to Greenfire, its growth, and an eventual liquidity event by entering into the Shareholder Support Agreement, the Investor Rights Agreement, and the Lock-Up Agreement – yet none of those were operable to stop the Proposed Transaction.

- The Proposed Transaction was not a TOB, but still complied with the TOB Regime, specifically the parameters of the Private Agreement Exemption. That meant that the Proposed Transaction was consistent with what the market and market participants would have expected from a control-block transaction. That included the Selling Shareholders' point that Greenfire's concentrated shareholder base meant there was a reasonable expectation that any purchase under the Private Agreement Exemption (from up to five shareholders) might give the purchaser a large block of shares.

- Greenfire was not in a blackout. It considered whether to impose a blackout and decided it was neither necessary nor appropriate because there was no MNPI (including information about the preliminary stages of the Strategic Alternative Process) which would restrict insiders from trading in Greenfire Shares. Therefore, Greenfire – and the market in general – would have had a reasonable expectation that some Greenfire directors or officers might buy or sell Greenfire Shares. That was confirmed by Kanderka's purchases of Greenfire Shares between August 27 and September 17, 2024 while an insider. Perkal acknowledged during cross-examination on his affidavit that Kanderka's purchases were consistent with Greenfire not being in a blackout. Perkal did not answer whether he thought there was MNPI, stating that was a matter for legal advice and that he did not need to consider it at the time because he had concluded Brigade could not participate in the Proposed Transaction. We found Perkal's evidence on that point to be self-serving and evasive.

- There were no provisions or agreements which would lead Greenfire shareholders to hold a reasonable expectation that they would share in a control premium,

including one paid within the parameters of the Private Agreement Exemption (unlike in *Canadian Tire*, for example, as noted above).

- The Selling Shareholders argued that it would have been almost impossible for McIntyre and Siva, given the size of their respective shareholdings in Greenfire, to have sold their Greenfire Shares on an exchange. We accepted that it would have been difficult for any of the significant shareholders to sell on an exchange. It was, therefore, reasonable to conclude that the market might have expected some or all of the significant Greenfire shareholders to sell their Greenfire Shares in an exempt transaction. As noted, the Private Agreement Exemption has been in place for many years as a mechanism for selling a control-block interest with a limited premium, an intentional policy choice which the market knows, understands, and expects. This is particularly important in closely-held companies so that shareholders have an incentive to invest significantly in such companies, knowing that they will have the possibility of divesting and receiving a control premium.

- There could have been no reasonable expectation in the circumstances that the Selling Shareholders would continue to hold out for a higher price than that being offered by WEF. As noted, both the Greenfire Share price and the price of oil had been decreasing leading up to the September 16, 2024 SPA date. That made it reasonable for the Selling Shareholders to consider a lower price as time elapsed, particularly since the price WEF was offering would have soon decreased (as a result of applying the maximum 115% 20-day average price parameter). Perkal knew this – as did Brigade – and we concluded that the Greenfire Board also knew this. Perkal deposed to his understanding of McIntyre's changing price expectations: on July 10, 2024, McIntyre expected the Strategic Alternatives Process to yield more than US$12 per Greenfire Share; and by about August 20 to 22, 2024, "McIntyre was interested in selling [to WEF at] between US$9-US$10 per share or greater". Perkal therefore realized that McIntyre's target selling price had decreased approximately US$2 to US$3 per Greenfire Share in that six-week period, with McIntyre continuing to inform Perkal and the Greenfire Board into September of WEF's offer and LOI (and Perkal himself speaking with Connor Waterous on September 11, 2024, knowing that WEF was still in discussions with the Selling Shareholders). We were also satisfied that Perkal and the other Greenfire Board members were aware that the Selling Shareholders had a low cost base for their Greenfire Shares, and should have expected that cost base to factor in to the Selling Shareholders' decision on WEF's offer.

[269] Overall, we concluded that Perkal, Brigade, the Greenfire Board, and the market in general would have had reasonable expectations that shareholders in the position of the Selling Shareholders might sell their Greenfire Shares in an exempt transaction. We disagreed with Brigade's characterization of the Proposed Transaction as circumventing protections provided to shareholders by the TOB Regime. Market participants would reasonably expect that a virtually completed share purchase transaction which complied (although it did not have to) with the letter and spirit of the TOB Regime, including the Private Agreement Exemption, would be upheld by an ASC panel. Market participants would not anticipate that an ASC panel would conclude that a sophisticated party – Brigade – would have a reasonable expectation that other sophisticated

shareholders would refrain from selling their shares when the respective parties negotiated no restrictions and no blackout was in place. To the contrary, market participants would expect an ASC panel to promote market certainty and confidence in such certainty – as the Selling Shareholders phrased it, protecting "reasonable reliance on the rules of the game".

[270] Therefore, WEF and the Selling Shareholders did not engage in clearly abusive conduct (or conduct contrary to any animating principles, had we held that to be the relevant standard) on the grounds of reasonable expectations. Their conduct was consistent with market participants' reasonable expectations of the operation of the TOB Regime, including the Private Agreement Exemption.

(e) SRP: Cease-Trade Considerations

[271] The *Royal Host* factors did not apply easily here because the Rights Plan was not adopted as a defensive tactic to a TOB or even in anticipation of a TOB (and, of course, because those factors were developed before the 2016 Amendments). The Rights Plan was adopted – as Greenfire admitted – to prevent WEF from acquiring 43% of the Greenfire Shares from the Selling Shareholders. Despite these points, the law involving traditional SRPs was helpful to an extent.

[272] The case law has held that an SRP should be cease-traded when its purpose cannot be achieved or can no longer be achieved. That purpose was typically to stall a TOB or proposed TOB for a reasonable length of time, long enough for the target company to search for more attractive offers for the benefit and protection of the target shareholders (although the 2016 Amendments imposed mandatory provisions designed to achieve the same effect). As noted, one primary purpose of TOB legislation is the protection of target shareholders.

[273] In the present case, the Selling Shareholders held 43% of the Greenfire Shares and agreed to sell them to WEF. The SPAs were signed but not completed when the Rights Plan was implemented, and the closing had not happened because of a necessary Competition Act approval. Greenfire and Brigade characterized the Proposed Transaction as a "creeping take-over", which WEF and the Selling Shareholders denied. The parties did not agree on what exactly constituted a creeping take-over, but this was not it. WEF's ownership of Greenfire Shares was to go from 0% to 43% at one time in a transaction exempt from the TOB Regime (but still compliant with it). The other members of the Greenfire Board knew WEF was talking at least to McIntyre and Siva (the evidence indicated those other Greenfire Board members may not have known until September 16, 2024 that Pehar's 5% of Greenfire Shares was also involved).

[274] As noted, the *Royal Host* factors were not determinative, but they did provide some guidance as to considerations assessed by other commission panels in other circumstances:

- *Shareholder approval*. The Greenfire shareholders did not have the opportunity to approve the Rights Plan before it was implemented or before this Hearing, nor were there plans to seek shareholder approval. Greenfire tendered evidence supposedly indicating shareholder support but was not forthcoming about the percentages and composition of that support. Although Brigade at times purported to speak for all Greenfire shareholders other than the Selling Shareholders, we did not accept that characterization (for example, Klesch expressed after the SPAs were announced that he was interested in selling his Greenfire Shares and appeared to criticize the

implementation of the Rights Plan, and there may have been Greenfire Shareholders other than the Selling Shareholders that had a comparable low cost base for their Greenfire Shares or otherwise would have had a reason for not wanting the Rights Plan to be implemented). In the result, we were left with no vote from Greenfire shareholders, the knowledge that at least 43% of Greenfire shareholders did not support the Rights Plan, and insufficient evidence as to what percentage of the other Greenfire shareholders would support it. This factor did not support the Rights Plan.

- *When the Rights Plan was adopted*. It was adopted two days after WEF's purchase was announced and would have affected WEF's purchase. There was evidence that Greenfire considered adopting an SRP earlier, and that McIntyre asked Greenfire not to adopt one. Greenfire's own expert, Waitzer, stated that he would have advised implementing an SRP earlier. This factor did not support the Rights Plan.

- *Number of potential and viable offers, steps to find an alternative transaction, and the likelihood of a better transaction*. There were no immediate potential and viable offers for Greenfire. The Strategic Alternatives Process was intended to generate such interest, but that process was at a preliminary stage, waiting for key information, and not expected to start generating any possible bids until at least April or May 2025. Greenfire and Brigade argued that WEF would be willing to make a TOB for all of Greenfire if only the Rights Plan were left in place. As we stated elsewhere in this decision, there was no evidence that WEF had any interest in making a TOB for Greenfire, other than Perkal's evidence, which we rejected on that point.

- *Nature of the bid, including whether it is coercive or unfair to the target shareholders*. This factor clearly did not apply directly, as there was no TOB, but we considered it in the context of the nature and history of the SPAs. As often stated herein, WEF's purchase was exempt from the TOB Regime, yet still was designed to comply with the Private Agreement Exemption. We also found that WEF did not intend to make a TOB for Greenfire, despite Perkal's assertions to the contrary. Greenfire and Brigade characterized the Proposed Transaction as coercive because of their interpretation of previous acquisitions made by WEF and because WEF would become a 43% shareholder in Greenfire after the Proposed Transaction closed. They argued that WEF would block any potential future transactions to the detriment of the other 57% of the Greenfire shareholders. The Applicants submitted that the Proposed Transaction was not coercive, that WEF's past acquisitions of Osum and Northern Blizzard were not coercive or otherwise improper (and were irrelevant here), and that there was no evidence WEF would block any future transaction if such a transaction were advantageous to WEF. We agreed with the Applicants' submissions on these points. The Proposed Transaction and any future plans of WEF were not coercive. Had the Osum and Northern Blizzard acquisitions been relevant, we would also have concluded that they were not coercive. The SPAs were agreements between sophisticated parties in a closely-held company, complying with the spirit of the TOB Regime (and complying, although not needing to, with the letter of the TOB Regime). As noted, Mason stated that he did not

characterize WEF's conduct as coercive and Logan also retreated during cross-examination from his use of that word to characterize WEF's past acquisitions. Perkal's own actions further supported our conclusion. He initially considered selling Brigade's Greenfire Shares to WEF, but learned that Brigade apparently could not fit within the parameters of the Private Agreement Exemption. However, as of at least September 11 – five days before the SPAs were signed and seven days before the Rights Plan was adopted – Perkal was still considering the possibility that Brigade might be able to sell to WEF. It defied belief and common sense that the Proposed Transaction was appropriate to consider one day but was coercive, unfair, and had to be stopped at all costs seven days later. This factor did not support the Rights Plan.

5. Determination: Application

[275] When assessing the Application, we necessarily had to examine all of the TOB Regime's public policy objectives. That could not be limited to the purpose of the main regulatory requirements, but had to include an analysis of the rationale for the Private Agreement Exemption, as that exemption and others are crucial components of the TOB Regime as a whole. That structure – broad regulatory requirements with narrow, targeted exemptions – is the foundation of many areas of securities regulation, not only TOB regulation. We also considered the effect on market certainty if we were to allow the Rights Plan to affect retroactively the pre-existing and binding contractual arrangement between WEF and the Selling Shareholders, who relied on the Private Agreement Exemption and its underlying principle that control block transfers are permitted in certain circumstances.

[276] We cannot upend the deliberately balanced TOB Regime by sweeping away the ability of parties such as WEF and Selling Shareholders to rely on the parameters of, and underlying rationale for, the Private Agreement Exemption. We concluded that the Proposed Transaction complied with the letter and spirit of the Private Agreement Exemption. It was not clearly abusive on that ground, and it did not contravene or undermine the animating principles of the TOB Regime (which includes the Private Agreement Exemption).

[277] We rejected Greenfire's and Brigade's interpretations of various provisions and cases. Both parties took statements and conclusions out of context in an effort to minimize or completely ignore the validity of properly structured control-block transfers.

[278] The Rights Plan and its implementation did not stand up to scrutiny, based on the TOB Regime, the 2016 Amendments, and the principles and factors considered by commission panels. The Rights Plan was premised on Greenfire's desire to stop at all costs the acquisition by WEF of any Greenfire Shares outside of a TOB. It was also not saved by consideration of the business judgment rule. We did not need to decide if we would have upheld the Rights Plan had it been implemented before the Proposed Transaction was signed.

[279] Therefore, the implementation of the Rights Plan was clearly abusive.

[280] Although we did not need to address the animating principles standard, we would have also found that the implementation of the Rights Plan was contrary to the animating principles of the TOB Regime as a whole. Greenfire and Brigade would have had us uphold only the underlying

principle of equal treatment for a target company's shareholders (even though this was not a TOB). However, the animating principles of the carefully considered, implemented, and long-standing Private Agreement Exemption are also important as part of the entire TOB Regime. The Proposed Transaction was consistent with the Private Agreement Exemption, and the Rights Plan attempted to prevent that legitimate transaction.

[281] Accordingly, we granted the Application and ordered the Rights Plan cease-traded on the terms set out in our oral ruling and repeated at the end of this decision.

C. The Cross-Application

1. Legal Principles: Directors' Fiduciary Duty

(a) Scope

(i) Issue

[282] The parties all agreed on the basic components of directors' fiduciary duties. However, there were considerable differences on the scope of those duties when the directors are also shareholders with significant shareholdings.

(ii) Basic Fiduciary Duty

[283] A director's basic fiduciary duty is to act in the company's best interests. This was set out in *BCE* (at paras. 36-37). It is also in corporate legislation, including the *Business Corporations Act* (Alberta), s. 122(1)(a) – a director must "act honestly and in good faith with a view to the best interests of the corporation". Although directors owe a duty of care as well (as mentioned in some of the materials below), that was not raised by the parties.

[284] The SCC has made clear that the fiduciary duty is owed to the company itself, not to shareholders or minority shareholders. In *BCE*, a group of debentureholders unsuccessfully brought an oppression claim against a plan of arrangement because it would decrease the value of their debentures. The SCC made several statements in *BCE* about directors and their fiduciary duty, including (at paras. 39 and 66):

> In [*Peoples Department Stores Inc. (Trustee of) v. Wise*, 2004 SCC 68], this Court found that although directors *must* consider the best interests of the corporation, it may also be appropriate, although *not mandatory*, to consider the impact of corporate decisions on shareholders or particular groups of shareholders. . . . [original emphasis]
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> The fact that the conduct of the directors is often at the centre of oppression actions might seem to suggest that directors are under a direct duty to individual stakeholders who may be affected by a corporate decision. Directors, acting in the best interests of the corporation, may be obliged to consider the impact of their decisions on corporate stakeholders, such as the debentureholders in these appeals. This is what we mean when we speak of a director being required to act in the best interests of the corporation viewed as a good corporate citizen. However, the directors owe a fiduciary duty to the corporation, and only to the corporation. People sometimes speak in terms of directors owing a duty to both the corporation and to stakeholders. Usually this is harmless, since the reasonable expectations of the stakeholder in a particular outcome often coincide with what is in the best interests of the corporation. However, cases (such as these appeals) may arise where these interests do not coincide. In such cases, it is important to be clear that the directors owe their duty to the corporation, not to stakeholders, and that the reasonable expectation of stakeholders is simply that the directors act in the best interests of the corporation.

[285] We were pointed to principles from various other cases, including:

- There is a long-standing principle that a director who is also a shareholder "is not generally prohibited from acting in his or her own best interest" (*R. v. Regulvar Canada Inc.* (2004), 70 O.R. (3d) 641 (C.A.) at para. 19, citing *Thompson v. Canada Fire & Marine Insurance Co.* (1885), 9 O.R. 284 (C.A.) and *Canadian Western Gas Co. v. Central Gas Utilities Ltd.*, [1966] S.C.R. 630).

- In *Polar Star Mining Corp. v. Willock* (2009), 96 O.R. (3d) 688 (S.C.J.), a proxy solicitation case, a company unsuccessfully sought a declaration that a director's news releases violated the proxy solicitation provisions of the *Canada Business Corporations Act*. The court held that the legislative provision relied on by the company did not apply to "a director, who is also a shareholder, and acting qua shareholder" (at paras. 6-7 and 34).

- In *Ascent One Properties Ltd. v. Liao*, 2017 BCSC 1017 (appeal dismissed 2020 BCCA 247; application for leave to appeal dismissed [2020] S.C.C.A. No. 389), the court concluded that Liao had not breached her fiduciary duty as a director of Ascent One. The three directors (who were also the only three shareholders) had signed a shareholders' agreement. There were disagreements over aspects of a property development project, and Liao was blamed by the other two. Although the court stated (at para. 178) that directors' interests as shareholders "must be subservient to [their] fiduciary duty", the court also noted that "[a] director will not be liable for breach of fiduciary duty when the conduct at issue is *qua* shareholder and not *qua* director" (at para. 181, citing *Polar Star* at paras. 33-34). Liao had filed a lawsuit as a shareholder. The court found that she brought the action to protect the company, not harm it. She engaged in or refrained from other activities as well, which the court also found did not breach her fiduciary duty.

(iii) Proposed Expansion of Fiduciary Duty

[286] Greenfire sought to have us impose on McIntyre and Siva an expanded scope of fiduciary duty, which Greenfire (through the Puri Evidence) described as fiduciary duty from a "capital market public policy perspective". Brigade supported Greenfire's submissions on this point.

[287] As discussed in detail below, we rejected Greenfire's attempt to expand the scope of fiduciary duty applicable here.

(b) ASC Panel's Role in Adjudicating Fiduciary Duty Issues

[288] There was also some dispute over our role in adjudicating directors' fiduciary duty issues, as those are generally for a court to determine.

[289] Staff submitted that the fiduciary allegations against McIntyre and Siva would be better dealt with by a court because courts have jurisdiction to oversee corporate legislation and are better equipped to address the procedural, evidentiary, and remedial aspects.

[290] There is, however, some scope for a panel to assess whether a director's conduct can form part of the facts supporting a public interest order. This was stated by the OSC in the *Canadian Tire* decision (affirmed on appeal) and has often been cited and followed (at paras. 161-164):

> Moreover, the argument that this matter more properly belongs before the Courts, mistakes the respective roles of the Courts and the [OSC] in overseeing the management and actions of public companies and protecting shareholders' interests. The [OSC] is vested with the power to regulate the capital markets in the public interest and is given broad powers to do so. The power to intervene includes the power to cease trade and to do so, at least initially, without a public hearing if satisfied of the necessity. In carrying out its regulatory function, the [OSC] necessarily impacts on the rights and obligations of companies, directors and shareholders. But it does so from the perspective of the regulation of the public markets and their fair and efficient operation. The subjecting of take-over bids to an elaborate code of rules and regulations, backed by the power to issue a cease-trade order, if conduct during the course of a bid calls for it, is perhaps the best known example of this regulatory function.
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> The Courts, on the other hand, adjudicate rights between shareholders and their companies. In so doing, the judicial process has the advantage of the refinement of issues provided by pleadings, examinations for discovery and the trial process. Moreover, the Courts are able to provide remedies appropriate to the individual case. What the Courts are not structured to do, is to move quickly to regulate public markets through regulating shareholder and/or corporate conduct. To be sure, the injunction remedy is available in the proper case, but it is not a remedy designed to be used as a regulatory tool.
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> The line between when [OSC] action or judicial process is appropriate in shareholder and corporate matters is, of course, not so clearly marked as the foregoing comments would indicate. There is bound to be overlap as there is no clear line between securities and corporate matters and many issues before the [OSC] involve the conduct of fiduciaries. But the role of the [OSC] is not to determine breaches of fiduciary duty, or to deal with a breach of a corporate statute, in order to provide a private remedy. Rather, it is to regulate shareholder and corporate conduct in the context of, and for the purpose of, regulating the public securities markets. Again, the line will not always be clear as intervention in matters that from one aspect are of a private nature will, from another aspect, be seen to have public market implications. If the [OSC] should mistake its role in a particular case, or act beyond the jurisdiction granted, the Courts can rectify the matter and set out a new balance through the appeal procedure granted under section 9 of the [Ontario] Act.
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> As to the allegations of breach of fiduciary duty here, we agree that, in most cases, that is a matter best left to the Courts to determine. Indeed, we declined to hear evidence on the allegation in paragraph 14(v) of the notice of hearing on just that basis. Our decision to impose a cease-trading order does not depend on a finding of breach of fiduciary duty. However, an allegation of breach of fiduciary duty, and evidence which clearly concerns the conduct of those who are fiduciaries, can be important in supporting facts which otherwise would support a s. 123 order. That is the case here. The Billeses are in a fiduciary position in at least two categories – as directors of Tire and as Tire's controlling shareholders.

[291] The parties cited some of the other cases in that line of authority, including:

- *Re Tarxien Corp.* (1996), 19 O.S.C.B. 6913. This related to a TOB by Ventra Group Inc. for all of the shares of Tarxien Corp.; other parties were also interested in purchasing Tarxien. Ventra applied to the OSC to cease-trade Tarxien's SRP. One issue regarding the SRP was whether Tarxien's board had acted in the Tarxien shareholders' best interests and whether the president, chair and a director (Zarboni)

had breached his fiduciary duties. Zarboni and his company owned more than 33% of the Tarxien shares. The OSC said there was no evidence that Zarboni breached fiduciary duties, although such a determination was a matter for the court (at para. 25).

- In *Re CW Shareholdings Inc.* (1998), 21 O.S.C.B. 2910, CW unsuccessfully applied for a cease-trade order and a revocation order for exemptions granted to Shaw companies in connection with a bid by the Shaw companies for shares of WIC Western International Communications Ltd. CW claimed it was excluded from a prematurely ended bid process. CW complained that the WIC board had breached its fiduciary duties by entering into a pre-acquisition agreement with Shaw. The OSC concluded that the court (in which a parallel application had already been commenced) was the appropriate forum for the fiduciary duty analysis in those circumstances (at para. 49).

- The OSC panel in *Magna* also discussed directors' fiduciary duties, because one argument was that the Magna directors had breached their fiduciary duties by letting Class A shareholders and the court decide whether the proposed transaction there was in Magna's best interests (at para. 197). The panel stated that it is primarily for the court as a matter of corporate law to assess compliance with directors' fiduciary duties, particularly given a short hearing with a limited record before the panel (at paras. 198 and 203). However, a panel may have a role in assessing board actions when exercising its public interest jurisdiction.

[292] Although the court is generally the appropriate forum for disputes about directors' fiduciary duties, we concluded that ASC panels have a limited jurisdiction to consider – in the context of whether to make a public interest order – whether certain actions by directors rise to the level of clearly abusive conduct (or, if the lower standard were to be warranted, conduct which contravenes the relevant animating principles).

2. Parties' Positions: Cross-Application

(a) Greenfire

[293] Although conceding that an ASC hearing "is not the forum for a formal determination of whether McIntyre or Siva breached their fiduciary duties or a corporate statute", Greenfire argued that this panel should consider if there had been *prima facie* misconduct, such that public interest orders were appropriate (citing *Canadian Tire* at paras. 161 and 166 and *H.E.R.O.* at paras. 28-30).

[294] Greenfire conceded that "from a strict corporate law perspective, directors' fiduciary duties are owed to the corporation, and not its shareholders". However, Greenfire said this did not consider "the capital markets impact of the conduct in question", with a focus on an alleged duty to shareholders, particularly minority shareholders. Greenfire therefore argued for a capital-market perspective of fiduciary duties, focused on its characterization of McIntyre and Siva each wearing two "hats" – one as director and one as shareholder. It argued that the line between them can blur, but the "director hat" always has primacy. Building on that premise, Greenfire contended, for example, that "[d]irectors' interests as shareholders are subservient to their duties of loyalty".

[295] Here, Greenfire argued that McIntyre and Siva did not meet the expectation and requirement to "use their office for the benefit of all shareholders and not their own personal benefit", thus their conduct was clearly abusive (as well as unfair and unethical):

- McIntrye and Siva did not keep the Greenfire Board properly or fully informed, thus making misrepresentations by omission.
- McIntyre and Siva's disclosure to the Greenfire Board was misleading and incomplete.
- McIntyre and Siva did not recuse themselves from Greenfire Board discussions about a blackout period or an SRP.
- McIntyre and Siva did not give the Greenfire Board "adequate time to respond and exercise its fiduciary duties to protect the other Greenfire shareholders before executing their SPAs".
- McIntyre and Siva knew their sale to WEF "would likely kill the ongoing Strategic Alternatives Process that was intended to maximize value for all shareholders".
- McIntyre and Siva relied on confidential Greenfire information.

[296] Greenfire sought a cease-trade order for up to six months of: the transfer of Greenfire Shares under the Proposed Transaction; "all other transfers" of Greenfire Shares between WEF and the Selling Shareholders other than pursuant to a Permitted Bid under the Rights Plan; and "all transfers" of Greenfire Shares from the Selling Shareholders "to any other party", other than through an exchange or as a Permitted Bid under the Rights Plan. In its submissions, Greenfire also proposed an order prohibiting WEF and the Selling Shareholders from entering a voting arrangement or other tendering agreements.

(b) Brigade

[297] Brigade adopted Greenfire's submissions. Brigade added that the ASC panel's role "is to ensure that all security holders are treated in a manner that is fair and that is perceived to be fair, particularly in circumstances where certain parties to the transaction have superior information or influence".

(c) Selling Shareholders

[298] The Selling Shareholders characterized Greenfire's material as "replete with half-truths and false innuendo in an attempt to quash three binding [SPAs] that comply in all respects with securities laws, regulations and policies". They called the allegations in the Cross-Application "meritless and legally untenable", designed to elicit "unprecedented punitive restrictions on McIntyre and Siva's rights as shareholders". The Selling Shareholders contended that:

- There was no clearly abusive behaviour and no breach of any animating principles (even though the animating principles standard did not apply).

- McIntyre and Siva did not breach any duties or otherwise act in a way which would justify an ASC panel interfering with the Proposed Transaction, even if this were the proper forum for considering fiduciary duties. The Selling Shareholders disputed Greenfire's argument for a "broader" view of directors' fiduciary duties instead of considering and applying "strict corporate law" duties. Finally, the Selling Shareholders contended that neither McIntyre nor Siva breached those supposed fiduciary duties outlined by Greenfire, even if the panel were to find that those duties existed.

(d) WEF

[299] WEF criticized the Cross-Application as Greenfire attempting to have the ASC determine who Greenfire shareholders can be. WEF said the Cross-Application "is abusive to shareholders and the capital markets, relies on conjecture about past events and speculation about future events, and is intended to distract from the conflicts and conduct of the current Greenfire [Board]". WEF emphasized the danger of uncertainty if the panel were to exercise its public interest jurisdiction with "unintended and undesirable consequences [of interference by a securities commission], including consequences for participants in other, unobjectionable transactions or circumstances" (quoting *ARC* at para. 69 and referring to *Bison* at para. 76).

[300] WEF submitted that the remedies sought in the Cross-Application would have the same (and an expanded) retroactive effect as the Rights Plan: "This transparent attempt to regulate who may own Greenfire Shares reflects the extreme extent of the overreach by the current Greenfire Board."

[301] WEF stated that, even if McIntyre's and Siva's conduct had been objectionable (which WEF argued it was not), it was not clearly abusive (or contrary to any animating principles) and, therefore, did not warrant the exercise of the panel's public interest jurisdiction. WEF also noted that the proper forum for such a contention by Greenfire would typically be the court.

(e) Staff

[302] Staff submitted that an assessment of any challenged aspects of McIntyre's and Siva's conduct would be better addressed by a court, not by an ASC panel in this type of hearing because courts are charged with overseeing fiduciary duties and have appropriate remedial powers.

[303] Overall, Staff stated that some aspects of McIntyre's and Siva's conduct "may be questioned", but Staff did not express a view on "whether their actions constituted a breach of fiduciary duty or rose to the 'clearly abusive' level" likely necessary for such a severe remedy. In addition to the obvious implications of the remedy sought by Greenfire, Staff noted it would also require McIntyre and Siva to make ongoing public disclosure and could lead "to a stigmatic effect" in the capital market. If the panel were to conclude that sanctions were warranted for McIntyre's and Siva's conduct, Staff suggested a more limited and proportional alternative than the orders sought in the Cross-Application.

3. Discussion: Cross-Application

(a) Scope and Assessment of Fiduciary Duty

(i) Best Interests of the Corporation

[304] All parties agreed on the basic fiduciary duty of directors, which we set out above: directors are to act in the best interests of the corporation.

(ii) Greenfire's Proposed Expanded Fiduciary Duty

[305] WEF and the Selling Shareholders disagreed with Greenfire's proposal for expanded directors' fiduciary duties from a capital-market public policy perspective.

[306] Greenfire cited the Puri Evidence and several cases in support of its proposition, although we did not find any of those references compelling or persuasive. We set out here several specific passages from Greenfire's submissions, along with our conclusions about them:

- A B.C. Commission panel in *Re Mountainstar Gold Inc.*, 2019 BCSECCOM 123 at para. 21 stated that directors and officers need "an ability to act in the best interests of shareholders". However, that was a sanction decision discussing a respondent's fitness to be a director and officer, which was a different context and not helpful in the present case.

- Puri stated: "[i]t is reasonable for shareholders to expect that the directors they have elected will use their office for the benefit of all shareholders and not their own personal benefit". We disagree. Shareholders have a reasonable expectation that directors – in their roles as directors – will act in the company's best interests, not those of "all shareholders". The latter would be an impossible standard, as the interests of all shareholders will not always align. Further, our regulatory system allows, even encourages, directors to hold shares in a company for which they are directors. It also imposes restrictions on such director-shareholders, including prohibiting illegal insider trading and the taking of corporate opportunities. Outside of those restrictions, directors – in their roles as shareholders – are free to structure their share transactions for their own benefit, not the benefit of other shareholders.

- Directors must act in the corporation's best interests "at all times" and their interests as shareholders are "subservient to [their] fiduciary duty", citing, respectively, Mark Ellis, *Fiduciary Duties in Canada*, loose-leaf (Toronto: Thomson Reuters, 2024) at para. 20:5 and *Ascent One* at para. 117. Significantly, however, Greenfire (and Puri) seemed to ignore the necessary qualifier that directors' actions are constrained in that way when they are acting as directors, not as shareholders. The statements cited by Greenfire did not support its claimed capital-market perspective on fiduciary duties – specifically that any rights of a director as shareholder are always secondary to a fiduciary duty. Instead, these statements support the contention that when directors are making decisions as directors, they need to act in the best interests of the corporation.

- A director, as a fiduciary, "cannot keep secrets" from the beneficiary, citing *Colborne Capital Corp. v. 542775 Alberta Ltd.*, 1999 ABCA 14 (at para. 180). In

our view, that situation and conclusion were irrelevant to the present case – in *Colborne*, the director secretly signed agreements without authorization and contrary to the company's best interests. Further, in the present case, McIntyre and Siva did not keep secrets from Greenfire or the Greenfire Board.

- Failure by a director to disclose to the corporation material information is a misrepresentation (*Borrelli v. Chan*, 2018 ONSC 1429 at paras. 912 and 914) (affirmed *SFC Litigation Trust v. Chan*, 2019 ONCA 525; application for leave to appeal dismissed [2019] S.C.C.A. No. 314). Greenfire did not mention the context of that case, where the Superior Court of Justice held: "Among other things, Mr. Chan purposely and with intent to deceive failed to disclose non-arm's-length transactions and caused Sino-Forest to invest hundreds of millions of dollars without disclosing these conflicts" (at para. 914). Moreover, that decision followed a multi-week trial and resulted in a $2.6 billion damage award. The *Chan* decision was irrelevant to the present case.

- Presumably recognizing, despite its attempts to argue to the contrary, that directors cannot be prevented from dealing with their shares in a company "at all times", Greenfire relied on cases such as *Polar Star*, *Ascent One*, and *H.E.R.O.* in submitting: "The fact that an individual's conduct was *qua* shareholder, rather than *qua* director, *or a mix of the two* (which is the case with McIntyre and Siva here), does not mean that it is not unfair to shareholders or abusive to the capital markets, or does not warrant [ASC] intervention" (Greenfire's emphasis). This was not a determinative point, but merely returned the analysis to the main underlying theme of the Cross-Application, which was whether there was clearly abusive conduct (or conduct contrary to the animating principles of the specific aspect of securities regulation).

[307] Greenfire pointed to nothing in *BCE*, *Canadian Tire*, or other cases to support the proposed expanded perspective when determining the scope and application of fiduciary duty.

(iii) Determination on Expanded Scope of Fiduciary Duty

[308] We did not accept that any materials before us supported the proposition that there is some expanded fiduciary duty for commission panels to assess in the context of applications such as those before us. The Puri Evidence favoured such a proposition, but we found it unconvincing. There is a statement in *Canadian Tire* (at para. 161, quoted earlier) that: "In carrying out its regulatory function, the [commission panel] necessarily impacts on the rights and obligations of companies, directors and shareholders. But it does so from the perspective of the regulation of the public markets and their fair and efficient operation." This, perhaps, was the origin of Greenfire's capital-market perspective proposition for fiduciary duties. In our view, however, that wording referred to a commission panel's jurisdiction to make orders in the public interest, after considering its mandate to protect investors and promote capital-market efficiency. It was not intended to create expanded fiduciary duties for commission panels' adjudication.

[309] Further, the passage cited earlier from *BCE* (at para. 66; emphasis added) put some of Greenfire's other materials in context:

> *. . . People sometimes speak in terms of directors owing a duty to both the corporation and to stakeholders. Usually this is harmless*, since the reasonable expectations of the stakeholder in a particular outcome often coincide with what is in the best interests of the corporation. However, *cases (such as these appeals) may arise where these interests do not coincide. In such cases, it is important to be clear that the directors owe their duty to the corporation, not to stakeholders, and that the reasonable expectation of stakeholders is simply that the directors act in the best interests of the corporation.*

[310] Greenfire made McIntyre's and Siva's conduct as directors a central point in this proceeding. We concluded that their conduct was a factor to be examined in determining whether to exercise our public interest jurisdiction – certainly for the Cross-Application but also for the Application, to an extent. Our assessment was based on the traditional scope of fiduciary duties, not an expanded scope. As set out below, we did not find concerns with McIntyre's and Siva's conduct that would support Greenfire's and Brigade's contentions.

(b) Elements of McIntyre's and Siva's Conduct

(i) Relevance and Allegations

[311] Despite our conclusion that there was no expanded fiduciary duty, we examined the elements of Greenfire's and Brigade's arguments to determine if any aspects of McIntyre's and Siva's conduct were relevant in our assessment of the public interest in the context of the Proposed Transaction and the SPAs.

[312] Greenfire and Brigade alleged the following improper conduct: (1) selling Greenfire Shares (and thus competing with Greenfire or stealing a corporate opportunity) if there were any possibility that Greenfire could be the subject of a TOB or other acquisition transaction in the next several months, possibly up to a year or more, even though the Greenfire Board had not considered there to be MNPI and a process to solicit offers was at only a preliminary stage; (2) not telling the Greenfire Board extensive and continually updated details of possible or proposed securities transactions, regardless of the circumstances, including materiality; and (3) selling Greenfire Shares while in possession of any "confidential or superior" information, rather than the MNPI standard on which insider trading laws are based.

(ii) Perkal's Criticisms

[313] Criticisms from Perkal were addressed here because they were relevant to our public interest determination and formed much of the basis for Greenfire's and Brigade's submissions.

[314] Perkal stated that he "had very serious concerns about" Greenfire directors (including himself) selling Greenfire Shares to WEF. Perkal clearly intended to imply that although he recognized certain limits placed on directors' conduct, McIntyre and Siva neither recognized nor felt constrained by any such limits. In addition to our comments in this decision that we did not accept Greenfire's and Brigade's submissions as to the content of directors' fiduciary duties in these circumstances, we set out here our reasons for rejecting Perkal's framing of the issues and his attempts to suggest that fiduciary duties were a primary concern for him.

[315] Perkal's evidence was carefully constructed and worded. For example, Perkal stated that he "considered" fiduciary duty implications, but learned Brigade could not sell under the Private Agreement Exemption, so he "did not need to reach a conclusion" regarding conflicts or MNPI. He did not state that he had mentioned those concerns to anyone, other than McIntyre (discussed

below). Further, Perkal stated that he "was also concerned" about conflicts and fiduciary duties during his September 11, 2024 conversation with Connor Waterous, but did not claim that he mentioned any concerns at that time.

[316] Perkal's evidence was internally inconsistent. He deposed that he told McIntyre that McIntyre "would be acting in a conflict of interest" if he were to sell to WEF. However, Perkal also said that he had not determined that point in his own mind because he did not get past the "gating" issue of Brigade not being able to sell within the parameters of the Private Agreement Exemption. It would be illogical to accept that Perkal had not made up his mind about the existence of a conflict, yet had definitively told McIntyre that there was such a conflict. McIntrye deposed that Perkal did not suggest on August 20, 2024 (when McIntyre told Perkal about WEF's proposal) that their duties as Greenfire directors might restrict their respective abilities to sell their Greenfire Shares. McIntyre further stated that, prior to the Application, neither Perkal nor any other Greenfire director or officer "ever suggested to me that my duties as a Greenfire director might prevent me from selling Allard's shares, although Mr. Perkal did encourage full disclosure of the discussions to the board".

[317] The other evidence supported McIntyre's version of the conversations, not Perkal's. That support included the evidence that directors' duties were discussed at the August 25 Meeting: the August 25 Meeting Minutes reported that the Greenfire Board "discussed the applicable fiduciary duties in their capacities as directors". However, those minutes did not refer to a discussion or determination by the Greenfire Board about conflicts. To the contrary, Logan described that discussion as relating to take-over bid regulation, defensive measures, and the need for the directors considering such a sale (which, at the time, potentially still included Perkal) to seek independent legal advice and comply with insider trading laws and policies. There was also no indication that the Greenfire Board discouraged or forbade any of the directors from engaging in discussions with WEF, and the Greenfire Board knew that McIntyre and Siva, at least, were still open to further discussions with WEF. The congratulations received by McIntyre from Klesch and Aylesworth (and a thank you to McIntyre from Logan) when the SPAs were announced also suggested that at least some of the Greenfire Board members apparently had no concerns with a conflict. Had any such concerns been raised at the August 25 Meeting or subsequently, it seems unlikely that unqualified congratulations on the SPAs would have been given. Logan also confirmed that Perkal said during meetings that Brigade could not sell because there were too many Brigade entities to fit within the Private Agreement Exemption and he did not want to sell at the price WEF offered; Logan reported no comments by Perkal about conflicts or fiduciary duties. Further, Perkal acknowledged that he accepted Connor Waterous's September 11, 2024 offer to have WEF legal counsel assess Brigade's ability to participate in a deal using the Private Agreement Exemption. That was well after Perkal's purported concerns and after the discussions at the August 25 Meeting, yet Perkal did not raise any conflict or fiduciary concerns with Connor Waterous. This was also after TD's September 10, 2024 Acquisition Presentation (and discussions of the same issues in late August 2024), which Greenfire and Brigade relied on as showing WEF's coercive intentions.

[318] In contrast, we accepted Perkal's evidence that he recommended that McIntyre advise the Greenfire Board about WEF's proposal and seek independent legal advice. We considered those points to be related to regular obligations as a company director and insider – consistent with Logan's evidence about the Greenfire Board's discussions during the August 25 Meeting – not a

statement by Perkal or an acceptance by McIntyre of the enhanced or expanded fiduciary duties argued for by Greenfire and Brigade during this Hearing.

[319] Perkal continually stated that his primary or sole concern was getting the best deal for all Greenfire shareholders, and criticized McIntyre and Siva for sacrificing other Greenfire shareholders to their own interests. We found those criticisms to be self-serving and insincere, given Perkal's interest in selling Brigade's Greenfire Shares to WEF as soon as McIntyre told Perkal on August 20, 2024 about WEF's proposal. Perkal was stopped by his understanding that Brigade could not participate (and by his desire for a higher price), but his interest continued to at least the September 11, 2024 meeting he had with Connor Waterous. Perkal claimed that only he, in contrast to McIntyre and Siva, was trying to obtain a higher price from WEF for the benefit of all Greenfire shareholders. We rejected that evidence. We concluded that Perkal did want a higher price, but was primarily interested in the price Brigade could obtain, not all Greenfire shareholders.

[320] For these reasons, we found Perkal's evidence – on which Greenfire's and Brigade's submissions were largely based – to be unhelpful.

(iii) Strategic Alternatives Process, "Corporate Opportunity", and Negative Control Block

[321] Greenfire and Brigade initially argued that directors must "at all times" give their roles as directors priority over their roles – and rights – as shareholders. We have already rejected that contention.

[322] Greenfire and Brigade then submitted that the Strategic Alternatives Process had started, so that Greenfire directors could not deal with their Greenfire Shares until that process had run its course and either started the outreach stage or resulted in an offer to all Greenfire shareholders. In a related argument, Greenfire and Brigade asserted that that the Proposed Transaction "would likely kill" the Strategic Alternatives Process because WEF would own 43% of the Greenfire Shares and would be unwilling to sell them, thus discouraging other potential offerors and thwarting the Strategic Alternatives Process. Finally, Greenfire and Brigade characterized McIntyre and Siva as competing with Greenfire or stealing a corporate opportunity from it.

[323] Greenfire argued that the Strategic Alternatives Process was well-advanced (although also acknowledging no outreach had started), with TD initially identifying 14 potential counterparties, then increasing that list to 25 counterparties in an accelerated push starting after WEF and the Selling Shareholders announced the SPAs. Greenfire also emphasized Perkal's evidence that WEF was a promising potential bidder before and after the Strategic Alternatives Process began.

[324] We found that the Strategic Alternatives Process had started, but only in a preliminary sense. It was effectively on hold while Greenfire and TD waited for some operational results and for the Updated Reserves Report. The target date for a completed transaction had changed from January 2025 to no earlier than June 2025. The evidence on this point was overwhelming and convincing, and we rejected statements to the contrary (such as those from Puri and Waitzer that the process was active or advanced, and Perkal's statement that he thought a closing could happen by May 2025). TD acknowledged that not all of those it identified as possible acquirors for Greenfire were strong candidates, particularly when the list was expanded to 25. We earlier

dismissed as groundless Perkal's repeated claims that WEF had been interested since 2023 – and remained interested – in acquiring Greenfire.

[325] The alleged corporate opportunity was that, absent the Proposed Transaction, Greenfire would have attracted a bidder – WEF, Strathcona, or another bidder – at a considerably higher price than the share price on which the Proposed Transaction was based. In addition to the claims by Perkal, this argument stemmed from the Puri Evidence, in which Puri stated that McIntyre and Siva "misappropriated a corporate opportunity" by "causing Greenfire to lose the opportunity to fully pursue the Strategic Alternatives Process, thus likely thwarting the possibility of a value-enhancing transaction for all shareholders". Hansell countered by characterizing Puri's statements as "novel" for describing this as a corporate opportunity.

[326] The Selling Shareholders argued that there was no corporate opportunity and that McIntyre and Siva did not misappropriate any corporate opportunity. We would have found it challenging to adopt Puri's extension of the corporate opportunity doctrine to cover the present case, but did not need to decide that point. It was, however, necessary for us to determine if McIntyre's and Siva's conduct in this context was contrary to the public interest.

[327] We concluded that the lost opportunity argument was groundless. First, as stated earlier, we rejected Perkal's evidence that WEF (or Strathcona) had always been interested in making an offer for all of the Greenfire Shares (and making that at a higher price than offered to the Selling Shareholders). The other evidence before us was contrary to Perkal's claim. Second, the Strategic Alternatives Process was still preliminary, as discussed above. Third, Mason's evidence did not show that the 14 names on TD's preliminary buyer list were strong options or otherwise convince us that Greenfire's hoped-for bid was a strong or realistic possibility. It was simply too early in a process which was still subject to too many variables. TD's longer secondary list of 25 names, following the announcement of the SPAs, was necessarily composed of weaker contenders. The additional names on that list did not, as implied by Perkal, indicate an even stronger chance that Greenfire could find an attractive bidder for all of the Greenfire Shares, if only the Proposed Transaction were ended and WEF were not to acquire 43% of the Greenfire Shares.

[328] Therefore, if there were to be a case in which directors were prohibited from selling their shares on the grounds of a lost corporate opportunity to other shareholders, this was not that case.

[329] Largely based on TD's Acquisition Presentation and other discussions of the Osum and Northern Blizzard acquisitions by WEF, and on the Puri Evidence and Waitzer Evidence, Greenfire and Brigade characterized the Proposed Transaction as inevitably leading to WEF gaining and using a negative control block to engage in coercive behaviour towards the remaining Greenfire shareholders (even though TD had not used the term "coercive"). Greenfire and Brigade contended that McIntyre and Siva knew that selling to WEF would effectively destroy the Strategic Alternatives Process. In contrast, the Applicants pointed to the Peltier Evidence that: (1) the three Selling Shareholders had aligned positions before the Proposed Transaction, meaning there was effectively a negative control block already; (2) WEF was "a rational economic actor" and would therefore have an interest in maximizing shareholder value; and (3) WEF's higher cost base for the Greenfire Shares meant its economic interests in a future sale of Greenfire Shares were more likely to align with the Non-Selling Shareholders' interests.

[330] We found no convincing evidence to support Greenfire's and Brigade's submissions, including their characterization of WEF's previous conduct as coercive and creeping. As discussed above in the context of the *Royal Host* factors, we did not find that WEF had acted in a coercive manner. Nor did we presume that WEF would plan on coercive action in the future. We also earlier rejected the contention that this was, or was akin to, a creeping TOB.

[331] There was also no evidence that WEF would refuse to sell the 43% if an offer were to be made through the Strategic Alternatives Process. In a September 17, 2024 "WEF Discussion" document, TD noted that Greenfire could pursue a third-party sale of 57% or of 100%, with the latter viable "assuming WEF [is] willing to sell at a higher valuation". Mason stated that Adam Waterous "was never willing to acknowledge that he would [sell the 45% Osum shareholding]" if another bidder were to offer more. Carissimo stated that Connor Waterous did not say, during their September 17, 2024 conversation, that WEF would not sell the Greenfire Shares acquired under the SPAs, but Carissimo assumed that WEF would not sell. The speculation underlying those last two statements – what Adam Waterous may have intended or not in the past and what Connor Waterous may have intended or not in the present – did not rise to the level of convincing or cogent evidence on this point. While WEF could certainly decline to participate in a transaction stemming from the Strategic Review Process, we agreed with Peltier's view that, as a rational economic actor, WEF would at least consider an offer if one were made, and WEF's cost base would be more in line with shareholders such as Brigade than with the Selling Shareholders. Finally, minority shareholders have certain protections under securities laws, including MI 61-101, meaning that minority shareholders would not have been without options and recourse should WEF significantly increase its ownership of Greenfire Shares above 43%.

(iv) Directors' Communications with Greenfire Board

[332] Puri stated that McIntyre sold his Greenfire Shares "without adequate warning or consultation with the Greenfire Board". Greenfire and Brigade relied on that opinion to support their contention that McIntyre and Siva breached their duty of communicating with the Greenfire Board. There is an obligation for directors to communicate certain information to their board, but we declined to take that duty as far as Greenfire and Brigade suggested. We did consider their assertion in the public interest context.

[333] We disagreed with Puri's and Greenfire's characterization of the events here. McIntyre and Siva (with Siva acting largely through McIntyre rather than always acting directly himself) did inform the Greenfire Board about WEF's expression of interest, offer, and other follow-up communications. They informed the Greenfire Board at the August 25 Meeting of WEF's proposal (although McIntyre had told Perkal and Logan before that). McIntyre and Siva told the Greenfire Board on September 6, 2024 when WEF sent the LOI and said they would inform the Greenfire Board of any "material" developments. The context during this time was important, specifically: (1) the Greenfire Board knew the Greenfire Share price and the price of oil were both declining, which had the effect of making the WEF offer more valuable and at increasing risk of reduction (as discussed in detail elsewhere in this decision); and (2) the Greenfire Board knew that McIntyre and Siva had a very low cost base for their Greenfire Shares, had expressed an interest in selling, had expressed dissatisfaction with the length of time to start the Strategic Alternatives Process in a meaningful way (at least McIntyre had expressed that), had no restrictions (such as a lock-up agreement) on selling the Greenfire Shares, and had (again, at least McIntyre) directly asked the

Greenfire Board members not to take defensive measures, such as implementing an SRP, because he wanted the flexibility to be able to sell his Greenfire Shares.

[334] We concluded that McIntyre and Siva made appropriate disclosure to the Greenfire Board and that their statements were not misleading in the circumstances. They did not tell the Greenfire Board that they would provide constant updates, instead stating that they would provide "material" updates – and the next material development after the September 6, 2024 letter of intent was the acceptable offer from WEF on September 16. Although there were perhaps moments when McIntyre and Siva could have made some additional statements to the Greenfire Board about their intentions, we did not find that such statements were required, particularly given the sophistication and experience of the Greenfire Board members and the fact that they were receiving advice from legal counsel in connection with SRPs at least by August 25, 2024. In other words, the duty to keep a board informed does not require a standard of perfection in hindsight.

[335] The evidence showed that McIntyre asked the Greenfire Board on August 25, 2024 not to take actions which would impede his sale of Greenfire Shares under the Private Agreement Exemption. Logan later tried to frame that as something other than a serious request because, he claimed, McIntyre laughed when he said it and had no reason to worry about an SRP (or other defensive measures) because he was not interested in the WEF offer.

[336] Logan's statements on this point were unsupported and nonsensical. McIntyre had been offered approximately US$158 million for his Greenfire Shares – shares for which his cost base was very low. The price of the Greenfire Shares and the price of oil were both falling, meaning that WEF would likely have had to decrease the offered price in a few days, based on the parameters of the Private Agreement Exemption (which WEF was following, even though it was not required to). Perkal even stated in a September 16, 2024 e-mail to Connor Waterous that McIntyre had perhaps sold at the SPA price because he was "spooked by the sharp downward move in oil prices". The Greenfire Board knew of the delays in the original timeline for the Strategic Alternatives Process and knew McIntyre was still in conversations with WEF about the Proposed Transaction. Given that background and knowledge, it was unreasonable for Logan to claim that McIntyre was not serious when he asked that no defensive measures be taken. Neither the draft nor final version of the August 25 Meeting Minutes supported that interpretation – and had it been seen as a cavalier and humorous comment, it seems unlikely it would have been included in the August 25 Meeting Minutes. Finally, had the Greenfire Board as a whole thought that an SRP was warranted, none of McIntyre's and Siva's actions, statements, or requests prevented it from adopting an SRP (or taking any other measures) before the SPAs were signed on September 16, 2024.

[337] Greenfire also asserted that McIntyre and Siva should have recused themselves from any discussion of an SRP. As the Greenfire Board was aware of WEF's interest and there was no vote on an SRP, we found no need for a recusal. We also noted that Perkal was still potentially interested in selling Brigade's Greenfire Shares to WEF at the time of the August 25 Meeting when SRPs were briefly discussed, but there was no assertion from Greenfire that Perkal breached his fiduciary duties by failing to recuse himself.

(v) Confidential or Superior Information

[338] Greenfire argued that McIntyre and Siva could not sell their Greenfire Shares when they did because they were in possession of confidential or superior information – primarily the existence of the Strategic Alternatives Process and the plan for an Updated Reserves Report. Brigade also used the term "superior information or influence". McIntyre and Siva knew about the start of the Strategic Alternatives Process, including that an Updated Reserves Report had been requested and future production results would be important. However, they also knew that the process was at a preliminary stage, nothing would be properly under way for several months, and no potential transaction would be identified or closed for months after that.

[339] Information about a sales process, reserve reports, or general company plans will, at some point, be considered material information. When that stage is reached, insiders are restricted from trading in or purchasing securities until such material information is disclosed and disseminated. That is the purpose of insider trading regulation and a company's blackout policy. In their respective affidavits and cross-examinations, both Perkal and Logan admitted there was no blackout at the relevant time. Perkal implied and Logan claimed that there could be MNPI without a blackout, so that trading would still be restricted. However, the fact that Greenfire – after considering the matter as it was obliged to do – had concluded there was no need for a blackout meant that it had concluded that the existence of the Strategic Alternatives Process and the surrounding context did not, at that time, reach the level of material information which would prevent insiders from trading in Greenfire Shares. It was neither necessary nor appropriate for the panel to second-guess Greenfire's decision not to impose a blackout. Greenfire also asserted that McIntyre and Siva should have recused themselves from any discussion of a blackout period. As the Greenfire Board was aware of WEF's interest and there was no vote on a blackout, we found no public interest need for a recusal.

[340] It would be ludicrous for us to conclude that directors could never buy or sell securities in their company while in possession of "confidential or superior" information. We were unable to think of a situation in which directors would not have such information. If that were the standard on which blackouts and insider trading laws were based, directors (and other insiders) would never be able to transact in their company's securities. Therefore, we did not find McIntyre's and Siva's trading contrary to the public interest on any of these grounds.

(vi) Nature of Private Agreement Exemption

[341] Much of Greenfire's opposition to the Proposed Transaction, including the specifics of the breach of fiduciary duty claim in the Cross-Application, seemed to be based simply on Greenfire's view of the Private Agreement Exemption. In Greenfire's view, it was unfair for WEF and the Selling Shareholders to engage in a transaction based on the parameters of the Private Agreement Exemption. Greenfire even expressed concern with WEF being allowed to acquire more than 15% of the Greenfire Shares. In Greenfire's view, all of the Greenfire shareholders should have participated in the control premium which WEF was willing to pay to the Selling Shareholders. Based on this supposed unfairness, Greenfire's position was that McIntyre and Siva therefore must have breached their fiduciary duty to act in the best interests of Greenfire (and, in Greenfire's and Brigade's contention, to act in the best interests of Greenfire's other shareholders, particularly Brigade).

[342] As discussed, despite the Proposed Transaction falling outside the purview of the TOB Regime, WEF, with the agreement of the Selling Shareholders, voluntarily structured the Proposed Transaction to fit within the parameters of the Private Agreement Exemption. Also as discussed, that exemption has a long-standing purpose in the TOB Regime – that purpose is to allow the transfer of a control block outside of the TOB Regime, with specific limitations developed over decades. Our capital market has operated for years under the expectation that the TOB Regime, including the Private Agreement Exemption, is a consistent and certain system governing share transactions.

[343] Therefore, to the extent that Greenfire's and Brigade's interpretation of directors' fiduciary duties were affected by their disagreement with the purpose and application of the Private Agreement Exemption, their arguments failed on that basis as well.

4. Determination: Cross-Application

[344] For all of the reasons given, we concluded that the standard scope of directors' fiduciary duties applied here, and that McIntyre's and Siva's actions while directors of Greenfire were not clearly abusive (or contrary to animating principles) and thus were not contrary to the public interest.

[345] Therefore, the basis for the Cross-Application failed, and we dismissed it.

VI. CONCLUSION

[346] On November 6, 2024, we granted the Application and dismissed the Cross-Application.

[347] In granting the Application, we ordered, pursuant to s. 198(1)(a) of the Act and with immediate effect, that trading cease in respect of any securities issued or that may be issued in connection with or pursuant to the Rights Plan.

[348] This proceeding is now concluded.

July 22, 2025

For the Commission:

"original signed by"
Tom Cotter

"original signed by"
Kari Horn, K.C.

"original signed by"
Bryce Tingle, K.C.