**ALBERTA SECURITIES COMMISSION**

**DECISION**

**Citation: Re PointNorth Capital Inc., 2017 ABASC 121** **Date: 20170718**

**PointNorth Capital Inc., PointNorth Capital (GP) LP, PointNorth Capital (O) LP and PointNorth Capital (PNG) LP**

**Applicants**

**- and -**

**Liquor Stores N.A. Ltd.**

**Respondent**

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| **Panel:** | Tom Cotter<br>Trudy Curran |
| **Appearing:** | Justin Lambert, Jon Truswell and Kelly Ford<br>for the Applicants<br><br>Jeffrey Sharpe and Andrew Sunter<br>for the Respondent<br><br>Tracy Clark and Denise Weeres<br>for Commission Staff |
| **Submissions Completed:** | June 16, 2017 |
| **Date of Oral Decision:** | June 19, 2017 |
| **Date of Written Reasons:** | July 18, 2017 |

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## I. BACKGROUND

[1] On June 13, 2017, PointNorth Capital Inc., PointNorth Capital (GP) LP, PointNorth Capital (O) LP and PointNorth Capital (PNG) LP (collectively, **PointNorth**) applied to the Alberta Securities Commission (the **ASC**) for certain orders under s. 198(1) of the *Securities Act* (Alberta) (the **Act**) against Liquor Stores N.A. Ltd. (**Liquor Stores**).

[2] As the matter related to a meeting of Liquor Stores' shareholders to be held on June 20, 2017 (the **Meeting**) at which directors were to be elected to the Liquor Stores board of directors (the **Liquor Stores Board**), we heard the matter on June 16, 2017. We received helpful written and oral submissions from both parties and from ASC staff (**Staff**). We received into evidence two affidavits from Philip Evershed, the Chair and Secretary of PointNorth Capital Inc., and one from Jim Dinning (**Dinning**), an independent director and the Chair of the Liquor Stores Board. The affidavits were dated June 12, 2017 (the **Evershed Affidavit**), June 14, 2017, and June 15, 2017 (the **Dinning Affidavit**).

[3] We rendered our decision on June 19, 2017, at which time we dismissed PointNorth's application with written reasons to follow. These are the written reasons for our decision.

## II. FACTS

[4] Liquor Stores is an Alberta-based reporting issuer with 251 retail liquor stores. As of the April 21, 2017 record date for the Meeting, approximately 57.8% of Liquor Stores' common shares were held by retail investors, 39% by institutional investors, and 3.2% by Liquor Stores' insiders.

[5] PointNorth held almost 10% of Liquor Stores' common shares as of November 2016, leading to discussions between Liquor Stores and PointNorth regarding PointNorth's desired representation on the Liquor Stores Board. In January 2017, Liquor Stores formed a special committee of independent directors "to assist the [Liquor Stores] Board in its response to the anticipated proxy contest initiated by" PointNorth. According to Dinning, PointNorth "demanded" control of the Liquor Stores Board, rejecting Liquor Stores' offer on January 23, 2017 of one seat on the Liquor Stores Board and on April 7, 2017 of two seats on the Liquor Stores Board.

[6] The anticipated proxy contest materialized. Liquor Stores and PointNorth each made arrangements to solicit proxies from shareholders. Liquor Stores prepared an April 28, 2017 information circular (the **Management Circular**), in which it solicited "white" proxies for the re-election of eight current directors (one of the then-nine directors not standing for re-election and the number of directors proposed to be reduced to eight). PointNorth prepared a May 15, 2017 information circular, in which it solicited "blue" proxies for the election of six directors. If all six were elected, they would form a majority of the Liquor Stores Board.

[7] Both parties agreed that the solicitation of proxies was difficult because many of the shareholders were "objecting beneficial owners" (**OBOs**). OBOs are shareholders who choose not to allow their contact information to be given to the issuer in which they hold securities. Therefore, OBOs cannot be contacted directly by the issuer (or others with access to a shareholder list), but only indirectly through intermediaries – brokers.

[8] Each of Liquor Stores and PointNorth issued news releases during the course of the proxy contest. In a June 8, 2017 news release, Liquor Stores announced the recommendation of Institutional Shareholder Services Inc. (**ISS**) that proxies be exercised in favour of Liquor Stores' candidates. That news release also announced Liquor Stores' formation of a soliciting dealer group (the **Soliciting Dealer Group**):

> . . .
>
> Liquor Stores has initiated a plan to ensure that all shareholders have the benefit of the ISS recommendation. [Liquor Stores] will form a soliciting dealer group that will compensate brokers for time spent alerting clients to the importance of voting the white proxy to protect the future value of their investment in Liquor Stores.
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> Mr. Dinning said, "The [Liquor Stores] Board takes seriously its fiduciary duty to look out for the best interests of the company and its shareholders. We share ISS'[s] view that our plan will improve the company's competitive position in the long run and that PointNorth's plan is unsuitable for our competitive markets. Our retail shareholders need to know that the value of their investment in Liquor Stores is at risk under PointNorth. However, the current Canadian proxy system makes it impossible for us to communicate directly with the 49% of our shareholders who hold their shares in their brokers' name."
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> "The arrangement we have put in place addresses this critical problem with the Canadian proxy system. The soliciting dealer arrangement exists to ensure that shareholder democracy functions for small shareholders as well as the larger institutions. The June 20 Annual Meeting represents a critical turning point for the future of Liquor Stores. We urge all shareholders, no matter how small their share ownership, to vote their proxy and be sure their voice is heard."
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> . . .

[9] In a June 7, 2017 supplement to its Management Circular, Liquor Stores set out the details of the Soliciting Dealer Group plan (the **Soliciting Dealer Group Plan**):

> . . . Liquor Stores has retained Scotia Capital Inc. (the "Dealer Manager") to act as a dealer manager and form a soliciting dealer group comprised of members of the Investment Industry Regulatory Organization of Canada and the Toronto Stock Exchange (the "Soliciting Dealer Group") to solicit proxies and voting instruction forms from retail shareholders resident in Canada directing that the Common Shares held by such shareholders be voted for each of the director nominees of Liquor Stores set forth in the [Management] Circular (the "Liquor Stores Slate"). In connection therewith, in accordance with standard practice in Canada and as compensation for their time spent alerting clients to the importance of voting the **WHITE** proxy to protect the future value of their investment in Liquor Stores, Liquor Stores will pay (i) the Dealer Manager a work fee of $100,000 for services rendered in connection with the formation and management of the Soliciting Dealer Group, and (ii) a solicitation fee of $0.05 for each Common Share validly voted for each member of the Liquor Stores Slate at the Meeting to any member of the Soliciting [Dealer] Group who facilitates the voting of such Common Shares by a retail beneficial owner of Common Shares whose form of proxy or voting instruction form directing such vote bears a Canadian address, provided that the solicitation fee in respect of any single beneficial owner of Common Shares shall not be less than $100 (provided such beneficial owner holds a minimum of 500 Common Shares, all of which were voted for each member of the Liquor Stores Slate at the Meeting) or more than $1,500. No solicitation fees will be payable in respect of Common Shares voted (i) that are held by any member of the Soliciting [Dealer] Group for its own accounts as principal, (ii) that are owned, controlled or directed by directors, officers or employees of Liquor Stores, (iii) that are owned, controlled or directed by an institutional investor,

(iv) in respect of forms of proxy or voting instruction forms bearing a United States address or for which the beneficial owner of the Common Shares is in or a resident of the United States, or (v) prior to June 8, 2017. In addition, no solicitation fees will be payable if each member of the Liquor Stores Slate is not elected to the [Liquor Stores] Board at the Meeting.

Liquor Stores believes the current Canadian proxy system makes it impossible for it to communicate directly with the 49% of its shareholders who hold their shares in their brokers' name, and that the Soliciting Dealer Group addresses this critical problem with the Canadian proxy system. The Soliciting Dealer Group exists to ensure that shareholder democracy functions for small shareholders as well as the larger institutions.

. . . [Emphasis in original.]

[10] In a June 8, 2017 news release, titled "Exposing Liquor Stores N.A.'s Vote Buying Scheme", PointNorth strongly criticized the Soliciting Dealer Group Plan:

. . .

Liquor Stores' 'Hail Mary' vote buying scheme is an act of desperation to try to keep the old [Liquor Stores] Board in place. . . .

. . . Attempting to justify the use of the vote buying scheme under the premise of increasing participation but then only paying those who vote FOR all management nominees is deplorable and misleading to shareholders. This is not an effort to increase the retail vote in the interests of shareholder democracy – brokers are only paid in the event that all management nominees are elected. Further, because the vote buying scheme favours the WHITE proxy, it undermines the integrity and propriety of the voting process for the Meeting, which is contrary to the [Liquor Stores] Board's fiduciary duties and is oppressive to PointNorth and its fellow shareholders.

**LEGAL WARNING TO BANKS AND BROKERS**

Participating in the vote buying scheme presents serious legal and ethical challenges and risks to banks and brokers and results in the tainting of the democratic process. PointNorth recommends that any broker or financial advisor should terminate their agreement with Liquor Stores or seek legal advice regarding proxy solicitation rules.

The legality of vote buying through soliciting dealer fee arrangements is doubtful for three reasons:

- The schemes constitute a breach of directors' fiduciary duties on the basis that corporate resources are used to entrench directors and management;

- The schemes are oppressive to shareholders in that they result in an unfair shareholder vote; and

- The schemes violate securities laws in that brokers engage in proxy solicitation without complying with applicable disclosure rules.

PointNorth will pursue all remedies available to it through the applicable securities commissions and courts.

. . . [Emphasis in original.]

[11] We note that despite the wording of the last quoted bullet point, PointNorth acknowledged in its submissions "that the Act contains no express prohibition against a scheme like the [Soliciting Dealer Group Plan]", although PointNorth maintained that the plan was "clearly not in the public interest".

[12] Liquor Stores responded later that day with another news release. This further explained the Liquor Stores Board's rationale for implementing the Soliciting Dealer Group Plan:

> . . . The fact that the Canadian proxy voting system makes it impossible for Liquor Stores to communicate directly with almost half of its shareholders makes a soliciting dealer arrangement necessary for shareholder democracy to function for the benefit of all shareholders and not just the large institutions.
>
> "By instigating this proxy fight, activist shareholder PointNorth is to blame for the cost of protecting our shareholders' interests. We are not going to let PointNorth take advantage of the Canadian proxy system or our retail shareholders, especially in light of ISS'[s] recent analysis that shareholders will suffer if PointNorth is successful," said Jim Dinning, Chair of the [Liquor Stores] Board.
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> As Liquor Stores has clearly stated in the Management Information Circular Supplement mailed to shareholders, filed on SEDAR [System for Electronic Document Analysis and Retrieval] and posted on the Liquor Stores website this morning, [Liquor Stores] will compensate brokers for soliciting white management proxies only. [Liquor Stores] is not prepared to waste shareholders' money by compensating brokers for dissident proxies, since shareholder value will clearly be destroyed if the dissident nominees are elected.
>
> . . .

[13] Commenting in the Evershed Affidavit on the Soliciting Dealer Group Plan, Evershed asserted:

> . . . Dealers are clearly financially incentivized to deliver votes in favour of the Liquor Stores Slate rather than provide unbiased, impartial advice to their clients based upon a review of the merits of the recommendations contained in the Management Circular and the PointNorth Circular. Adding to the offensiveness of the Liquor Stores Vote-Buying Scheme is the fact that Shareholders will likely not know of the financial incentive being provided to their broker and will therefore believe that their broker is acting in their best interest.

[14] PointNorth sought orders that would reprimand the Liquor Stores Board, terminate the Soliciting Dealer Group Plan, require Liquor Stores to communicate such reprimand and termination through a news release and a shareholder communication, and require Liquor Stores to issue a supplement to the Management Circular disclosing the termination of the Soliciting Dealer Group Plan.

[15] PointNorth acknowledged that soliciting dealer plans had been used in the past, but directed us to unfavourable commentary made following such a plan used in a 2013 proxy contest.

[16] Liquor Stores contested the application, characterizing soliciting dealer plans as having "significant precedent in Canada", being "previously used in at least three proxy contests and 43 [merger and acquisition] transactions in Canada within the past decade". The Dinning Affidavit

also noted that such plans "do not violate existing securities laws" and that "there have been no policy statements, rules or regulations issued by Canadian securities commissions or major Canadian stock exchanges regarding the use of these kinds of compensation arrangements".

## III. ANALYSIS

### A. Corporate Law or Securities Law?

[17] Staff noted the statements made by PointNorth that the Liquor Stores Board: (i) had potentially breached its fiduciary duties by choosing to expend Liquor Stores' corporate resources on the Soliciting Dealer Group Plan; and (ii) was acting in a manner that oppressed Liquor Stores' shareholders. Staff submitted that those matters would fall under the jurisdiction of the courts rather than the ASC.

[18] PointNorth responded that this matter was "fundamentally a capital markets issue", that courts and securities regulators may have "overlapping and concurrent jurisdiction", and that securities regulators are able to move more quickly than courts "to regulate public markets".

[19] We are satisfied that there are securities laws aspects to this matter that could properly engage our public interest jurisdiction.

### B. Scope of Public Interest Jurisdiction

[20] We now turn to the appropriate scope of our public interest jurisdiction.

[21] PointNorth, Liquor Stores and Staff all agreed that Liquor Stores did not contravene any provisions of Alberta securities laws. They all agreed that the ASC has broad – but not unlimited – powers to act protectively and preventively in the public interest, even in the absence of a contravention of Alberta securities laws (*Committee for the Equal Treatment of Asbestos Minority Shareholders v. Ontario (Securities Commission)*, 2001 SCC 37 at paras. 39-45). Finally, all three agreed that the standard test for exercising such jurisdiction was whether the impugned conduct was "clearly abusive" to shareholders and the capital market.

[22] Liquor Stores contended that this test – clearly abusive – was the appropriate test, as recently confirmed by the ASC in *Re Perpetual Energy Inc.*, 2016 ABASC 2 at paras. 45-46. Staff agreed. PointNorth, although arguing that the clearly abusive test was satisfied here, urged us also to consider exercising our public interest jurisdiction on broader grounds, stating that "securities regulators have found [that] conduct less than abusive [has] warranted a sanction under the public interest remedy", based on the concept of conduct being contrary to the "animating principles" of securities laws.

[23] We discuss both concepts below.

#### 1. "Clearly Abusive"

[24] *Re Canadian Tire Corp.* (1987), 10 O.S.C.B. 857 (affirmed (1987), 59 O.R. (2d) 79 (Div. Ct.), leave to appeal to Ont. C.A. refused (1987), 35 B.L.R. xx) is commonly referred to when discussing the exercise of a securities commission's public interest jurisdiction in the absence of a breach of securities laws. The Ontario Securities Commission (**OSC**) stated in *Canadian Tire* that the OSC "should act to restrain a transaction that is clearly abusive of investors and of the

capital markets, whether or not that transaction constitutes a breach of [Ontario securities law]. Such occasions may be rare, but the power is there . . . and it ought to be used in appropriate circumstances", "with caution" (at 933).

[25] The ASC stated in *Re ARC Equity Management (Fund 4) Ltd.*, 2009 ABASC 390 at paras. 69-70):

> In our view, this cautious approach recognizes the danger that a well-intentioned panel minded to address a harm discerned in a particular set of facts could inadvertently respond too aggressively or with too broad a brush, with unintended and undesirable consequences, including consequences for participants in other, unobjectionable transactions or circumstances. . . .
>
> In short, our public interest jurisdiction is available to address a clearly demonstrated abuse of investors and the integrity of the capital market, even in the absence of a contravention of Alberta securities laws. However, our public interest jurisdiction is to be exercised with restraint.

**2. "Animating Principles"**

[26] In setting out the proposition that there is an "animating principles" standard and that it is lower than the "clearly abusive" standard, PointNorth cited *Re John Richard Carnes*, 2015 BCSECCOM 187.

[27] In *Carnes*, the British Columbia Securities Commission (**BCSC**) dismissed fraud allegations against Carnes, then considered whether orders should be made in the public interest in the absence of findings that Carnes contravened the *Securities Act* (British Columbia). The BCSC considered *Canadian Tire* and *Asbestos* (beginning at para. 108). Noting that those two decisions were "in the context of the review and regulation of capital markets transactions", the BCSC also considered several OSC enforcement decisions (*Re Biovail Corp.* (2010), 33 O.S.C.B. 8914, *Re Suman* (2012), 35 O.S.C.B. 2809, *Re Donald* (2012), 35 O.S.C.B. 7383, and *Re Jowdat Waheed and Bruce Walter* (2014), 37 O.S.C.B. 8007).

[28] At issue in *Biovail* were alleged misstatements in certain public disclosure. OSC staff unsuccessfully alleged that the actions of Melnyk, a respondent, had contravened Ontario securities law. The OSC panel then considered if those actions were contrary to the public interest. The OSC first examined "the regulatory context in which [the alleged misconduct] occurred" (at para. 373). After reviewing cases including *Asbestos*, *Canadian Tire*, and *Re Cablecasting Ltd.*, [1978] O.S.C.B. 37, the OSC stated in *Biovail* (at para. 382):

> In our view, where market conduct engages the animating principles of [Ontario securities law], the [OSC] does not have to conclude that an abuse has occurred in order to exercise its public interest jurisdiction. That is no doubt one of the reasons why the [OSC] concluded in *Re Standard Trustco* [*Ltd.* (1992), 15 O.S.C.B. 4322] that the issue of a misleading news release is itself injurious to capital markets. We should not interpret or constrain our public interest jurisdiction in a manner that condones inaccurate, misleading or untrue public disclosure regardless of whether that disclosure contravenes Ontario securities law. The issues raised by this matter directly engage the fundamental principle recognised in [Ontario securities law] for timely, accurate and efficient disclosure.

[29] The BCSC also referred to *Suman*, in which (as paraphrased in *Carnes* at para. 119) the OSC "held that it was not necessary to make a finding that the conduct was abusive to the capital

markets. It held that the conduct in that case was merely inconsistent with the intent of the Ontario insider trading legislative provisions and therefore contrary to the public interest." *Carnes* then turned to *Donald* and *Waheed*. In *Donald*, the OSC made orders using its public interest jurisdiction, concluding that Donald's conduct was abusive to the capital market. In *Waheed*, the OSC did not find contraventions of insider trading laws and determined that "it would be inappropriate to make a public interest order for using confidential information that was neither a material fact nor a material change for the issuer" (*Carnes* at para. 125).

[30] The BCSC concluded its review of these OSC decisions by stating (at paras. 128-29, 132, 137):

> As can be seen, the OSC cases diverge on whether to take a narrower or a broader basis for exercising the public interest jurisdiction. The narrower basis requires a finding that the conduct was abusive of capital markets, or that a particular financial structure was used with the intent of avoiding contravening a specific provision of [securities laws]. The broader basis, represented by the *Biovail* decision, is founded upon the concept that a range of factors should be considered but that an order may be made without a finding of abuse where the conduct is inconsistent with the animating principles of [securities laws].
>
> 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 [securities laws], without fear of enforcement actions alleging wrongdoing that is not encoded in [securities laws].
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> . . .
>
> Where [securities laws are] generally silent with respect to a type of conduct alleged as the basis for a public interest order, . . . then [abuse] may or may not be the applicable test. . . .
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> . . .
>
> . . . In these circumstances, given that the central element of the impugned conduct is the content of the disclosure, which is an area where the [securities laws have] articulated specific acts which constitute misconduct, the appropriate test is whether the conduct is abusive to the capital markets.

[31] In *Carnes* – using the "clearly abusive" test – the panel did not make an order in the public interest, concluding that such an order "would, in effect, be creating a new requirement" for published statements (at para. 140).

[32] PointNorth relied on the OSC's decision in *Re VenGrowth Funds (Special Committee of Directors)* (2011), 34 O.S.C.B. 6755, in which the OSC found that animating principles were undermined and thus granted some orders in the public interest. In *VenGrowth*, the target of a hostile merger proposal asked the OSC to exercise its public interest jurisdiction by ordering that GrowthWorks (the company targeting VenGrowth) cease soliciting irrevocable powers of attorney from VenGrowth shareholders. No VenGrowth shareholders had complained about the solicitation. The OSC discussed its "broad discretion", noting that this "public interest jurisdiction must be exercised 'with caution and restraint'" (at paras. 32, 33, citing several previous OSC decisions).

[33] In addition to confirming that it had authority to intervene in cases of abuse, the OSC noted that it "will intervene in the public interest where the take-over bid rules have been complied with but the animating principles underlying those rules have not" (at para. 37, citing *Re Patheon Inc.* (2009), 32 O.S.C.B. 6445 at para. 116). The OSC concluded in *VenGrowth* that the solicitation of powers of attorney was not the same as the solicitation of proxies, so that the proxy solicitation requirements did not apply and there was no breach of Ontario securities law (at para. 52). The OSC also concluded there was no abuse (at para. 62). However, the OSC stated that a shareholder's ability to make an informed decision and to change that decision was a requirement of the take-over bid and proxy regimes, so that the solicitation of the irrevocable powers of attorney undermined an animating principle of securities law (at paras. 59-60).

### 3. Conclusion on Scope of Public Interest Jurisdiction

[34] PointNorth relied on *Carnes* in contending that when Alberta securities laws are silent on a topic (here, not banning soliciting arrangements with brokers), "then the test is probably not the abusive test. There might be a lower bar for that particular conduct."

[35] Staff submitted that PointNorth's interpretation of "animating principles" was unworkably broad. Referring to *Cablecasting* (cited in *ARC* at para. 66) for the principle that a commission is more likely to exercise its public interest discretion when "the transaction under attack was of an entirely novel nature" or when a new policy issue has been "foreshadowed", Staff noted "that the dealer conflict issue is not novel", nor has there been anything "in securities [laws] or proposals that would foreshadow that this [Liquor Stores' impugned conduct in establishing the Soliciting Dealer Group Plan] would be considered contrary to the public interest".

[36] In our view, PointNorth's reliance on *Carnes* is misplaced in the current circumstances. As stated in *Carnes* at para. 137 (and reproduced above), the appropriate test is "clearly abusive" when securities laws articulate "specific acts which constitute misconduct".

[37] 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.

[38] 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".

[39] We are satisfied that the proper scope of our public interest jurisdiction in this case is to determine whether the Soliciting Dealer Group Plan was clearly abusive of shareholders and of the capital market in general.

## C. Exercise of Public Interest Jurisdiction

[40] Having determined that this matter falls within our public interest jurisdiction and that the scope of our jurisdiction is determining whether Liquor Stores' conduct was "clearly abusive" of the Alberta capital market in general and of shareholders in particular, we now consider whether the circumstances here warranted our intervention by granting remedies in the public interest.

### 1. Positions

[41] PointNorth argued that Liquor Stores' impugned conduct here met "the high bar" of being clearly abusive conduct, based either on self-evident harm or the potential for harm. PointNorth also contended that the public interest jurisdiction is appropriate for "ongoing, fast-moving proxy solicitation battles" to protect "the integrity of [that] ongoing contest when there hasn't been time to regulate the behaviour".

[42] Liquor Stores and Staff disagreed that the impugned conduct was clearly abusive. Liquor Stores based its argument primarily on "the nature of the relief sought and the total lack of evidence of abuse to shareholders or the capital markets". Staff submitted that PointNorth has "not established the necessary criteria to invoke the [ASC's] public interest jurisdiction". Staff also noted that regulators have neither proposed nor taken steps to ban such conduct.

### 2. Determination

[43] In determining whether the impugned conduct was clearly abusive, we examine harm actually or potentially caused by the Soliciting Dealer Group Plan to shareholders and to the capital market in general.

[44] PointNorth described the clearly abusive standard as "a loose and flexible test". For example, PointNorth submitted that "regulators have preserved for themselves the ability to recognize abusive conduct when they see it and impose relief when the public interest demands it". Although we agree there is a necessary element of flexibility, we consider it crucial to emphasize the need for caution and the awareness of consequences, as mentioned in *ARC*.

[45] PointNorth cited the conclusion in *Standard Trustco* that no evidence needed to be "led as to actual injury" because of "the potential for substantial harm resulting from the respondents' conduct". PointNorth submitted that no proof of actual harm was required here, or was indeed possible in a "fast-moving and real-time" situation such as this. In any event, PointNorth seemed to consider the potential harm to the capital market to self-evidently be potential harm to individual shareholders:

> The public interest power is meant to preserve the integrity of the capital markets. What we need to do is present evidence of a risk of harm or ongoing harm to the integrity of the capital markets. We've done that. That doesn't require that we need to prove evidence of actual harm to any particular investor. It's that the capital markets are being skewed or undermined in such a way that people could be hurt or that the protections the [ASC] wants in place for those people are being undermined.

[46] PointNorth expanded on this, arguing that Liquor Stores had, through the Soliciting Dealer Group Plan, "single-handedly created a conflict of interest for brokers and dealers" because "[b]rokers are immediately incentivized and encouraged to deliver a slanted point of view in favour of the Liquor Stores' slate." PointNorth described brokers and dealers as being turned "into partisan solicitors and vote-takers". PointNorth also characterized the Liquor Stores Board as "hopelessly conflicted" because the Liquor Stores Board members' "interests are not necessarily aligned at this point in a proxy contest with the interests of the company" such that the Liquor Stores Board "cannot independently sit and assess the best interest of the company". PointNorth distinguished the use of soliciting dealer plans in a proxy contest for the election of

directors from the use of such plans in a merger and acquisition context: the latter do not involve the same level of board conflict; retail investors can more easily assess pros and cons in a merger situation than in a board election situation; and, even if brokers have a conflict in a merger situation, "at least we're assured that the board has sat in relatively independent judgment and has looked out for the best interests of the corporation and the stakeholders".

[47] Liquor Stores argued that PointNorth tendered no evidence of harm, but only presented "speculation", "opinion" and "unsupported inferences"; there was no evidence that any brokers breached any duties or would breach any duties. Liquor Stores pointed to the Dinning Affidavit, which stated that the Liquor Stores Board's independent committee took into account that "[d]ealers and advisors owe independent professional duties to their shareholder clients and it was expected that they would act in accordance with these duties in connection with any solicitation of retail shareholders".

[48] Staff agreed that there was "no evidence as to whether any dealers have actually provided advice that they would not otherwise have provided and . . . no information with respect to what disclosure was made to clients in the context of any recommendation". Staff submitted that any concerns that arrangements such as the Soliciting Dealer Group Plan could potentially cause harm would be "more appropriately addressed through dealer compliance oversight functions and policy development", rather than through "enforcement sanctions".

[49] We were not convinced by PointNorth's argument. *Standard Trustco* involved a misleading news release, a situation in which we can understand that harm could be considered self-evident. Here, in contrast, we are being asked to assume, without evidence, that brokers would violate their legal and ethical duties – essentially allowing themselves to be corrupted – for the possibility of earning $0.05 per share voted a certain way. We are also asked to assume that the Liquor Stores Board's members would improperly use corporate funds to put their interests ahead of their fiduciary duties.

[50] We are satisfied that PointNorth did not establish actual harm caused by the Soliciting Dealer Group Plan. Concerns expressed about skewing or undermining the capital market did not equate to actual harm, nor did PointNorth's concerns about broker corruption. We are also satisfied that PointNorth did not establish potential harm, even if we were to consider potential harm sufficient to establish clear abuse of shareholders and the capital market.

[51] Alberta securities laws set out detailed and comprehensive regimes for the solicitation of proxies and for the obligations of brokers and dealers. Although there was some unfavourable public commentary a few years ago in the course of a different proxy contest, securities regulators have not banned the practice of which PointNorth complained here. We do 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. We are particularly mindful that the imposition of any new policy requirements addressing potential dealer conflict issues may well have broader and unintended consequences.

[52] PointNorth has asked us to make unsupported assumptions, with serious implications for this case and, perhaps, for others. In light of our obligation to use caution and to consider the consequences of exercising our extraordinary public interest jurisdiction, we refuse to make such assumptions. We will not speculate in an evidentiary vacuum.

[53] In the result, we cannot find the Soliciting Dealer Group Plan – or Liquor Stores' actions in implementing it – to be clearly abusive. It is thus not appropriate for us to exercise our public interest jurisdiction.

## IV. CONCLUSION

[54] For the reasons stated above, we dismissed the application.

July 18, 2017

**For the Commission:**

"original signed by"
Tom Cotter

"original signed by"
Trudy Curran