Ontario

Capital Markets Tribunal | Tribunal des marchés financiers | 22nd Floor 20 Queen Street West Toronto ON M5H 3S8 | 22e étage 20, rue Queen ouest Toronto ON M5H 3S8

Citation: *Riot Platforms, Inc v Bitfarms Ltd*, 2024 ONCMT 27
Date: 2024-11-19
File No. 2024-11

RIOT PLATFORMS, INC.

Applicant

- and -

BITFARMS LTD. and ONTARIO SECURITIES COMMISSION

Respondents

REASONS FOR DECISION

(Section 127 of the *Securities Act*, RSO 1990, c S.5)

Adjudicators:	Timothy Moseley (chair of the panel) Mary Condon Dale R. Ponder	
Hearing:	July 22 and 23, 2024	
Appearances:	Kent E. Thomson Chantelle Cseh Chenyang Li Henry Machum Aaron Atkinson	For Riot Platforms, Inc.
	Brett Harrison Adam Chisholm Guneev Bhinder Paul Davis Charlotte Conlin	For the intervenor, Special Committee of the Board of Directors of Bitfarms Ltd.
	Dennis Peterson	For Bitfarms Ltd.
	Charlie Pettypiece Jason Koskela David Mendicino Jordan Lavi Gbemi Adekola	For the Ontario Securities Commission

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REASONS FOR DECISION

1. OVERVIEW

[1] The applicant Riot Platforms, Inc. is a Bitcoin mining and digital infrastructure company. Riot is the largest shareholder of Bitfarms Ltd., an Ontario reporting issuer and also a Bitcoin mining company.

[2] In 2023 and early 2024, Riot made several overtures to Bitfarms, to discuss a possible combination of the two companies. Those overtures were unsuccessful.

[3] In June 2024, Bitfarms adopted a shareholder rights plan with a "trigger" at 15%, meaning that the acquisition by any person of more than 15% of Bitfarms's outstanding shares would trigger the plan's provisions. Most significantly, all Bitfarms shareholders, except the shareholder that triggered the plan, would become entitled to purchase from Bitfarms additional shares at half price. At the time, Riot owned almost 15% of Bitfarms's outstanding shares. No other shareholder held close to that amount.

[4] Riot applied under s. 127 of the *Securities Act*[1] (the ***Act***) for an order cease trading the Bitfarms plan. Riot did not claim that the Bitfarms plan contravened Ontario securities law. However, Riot did contend that it would nevertheless be in the public interest to cease trade the plan, because the plan's 15% trigger was significantly below the take-over bid regime's 20% threshold, beyond which a person or company accumulating stock must make a take-over bid (among other requirements) unless an exemption applies.

[5] Shortly following the hearing of Riot's application, we granted the requested cease trade order, for reasons to follow.[2] These are our reasons, in which we review past Tribunal decisions that have described, in varying ways, the standard to be applied in determining whether an order under s. 127 of the *Act* is warranted in the absence of a contravention of Ontario securities law. We refine that standard, and conclude that in a case such as this (an application to

[1] RSO 1990, c S.5

[2] (2024) 47 OSCB 6228

cease trade a shareholder rights plan that is not alleged to contravene Ontario securities law), it would be in the public interest to grant the requested order:

a. only if the applicant demonstrates that the plan undermines, in a real and substantial way, and with public effect, one or more clearly discernible animating principles underlying Ontario securities law; and

b. the respondent does not demonstrate exceptional circumstances that would nonetheless justify allowing the plan to continue.

[6] We conclude that in this case:

a. the Bitfarms plan's 15% trigger undermined, in a real and substantial way, and with public effect, animating principles that underlie the take-over bid regime; and

b. there were no exceptional circumstances that would justify our allowing the plan to continue.

2. BACKGROUND

2.1 Relief sought

[7] In its application and in its written submissions, Riot sought wide-ranging relief beyond an order cease trading the Bitfarms plan. The requested relief included orders that would have affected a requisitioned meeting of Bitfarms shareholders.

[8] By the time we heard the application, Riot had abandoned all the relief it had been seeking except for the order cease trading the Bitfarms plan. Accordingly, we do not address the other requested relief.

2.2 Parties

[9] At a case management hearing early in the proceeding, before a differently constituted panel, the Special Committee of the Board of Directors of Bitfarms sought status to intervene in this proceeding. No party objected. The Tribunal granted the Special Committee's request.[3]

[3] (2024) 47 OSCB 5455

[10] The Special Committee participated fully at the hearing on the merits. Bitfarms was separately represented and appeared at the hearing, but was content to rely on the Special Committee, and did not actively participate. For convenience in these reasons, we refer to the Special Committee's submissions or positions as being those of Bitfarms.

2.3 Riot's standing

[11] In written submissions delivered before the hearing, Bitfarms challenged Riot's standing to seek certain of the relief or to argue certain issues. Once Riot indicated that it was pursuing only a cease trade order over the Bitfarms plan, Bitfarms withdrew its challenge to Riot's standing.

3. THE RIGHTS PLAN SHOULD BE CEASE TRADED

3.1 Introduction

[12] We turn now to the reasons for our decision to cease trade the Bitfarms plan. We begin by reviewing past decisions that discuss s. 127 of the *Act*, and the nature of the "public interest" test in that section. We then apply that test in our assessment of the 15% trigger in the Bitfarms plan.

3.2 Re-examining the Tribunal's "public interest" jurisdiction

3.2.1 Categories of proceedings in which this issue arises

[13] In most proceedings before this Tribunal, the applicant seeks relief under s. 127(1) of the *Act*, which empowers the Tribunal to make a wide range of orders. For any order under s. 127(1), the Tribunal must be of the opinion that it is "in the public interest" to make the order.

[14] Typically, the applicant is either:

a. the Ontario Securities Commission in enforcement proceedings; or

b. an aggrieved party in other proceedings, many of which relate in some way to control of an issuer, including proceedings that arise from transactions such as take-over bids.

[15] In either case, the applicant usually alleges a contravention of Ontario securities law in support of their claim for relief. Occasionally, however, we are called on to

decide whether we should grant relief under s. 127(1) despite there being no alleged contravention of Ontario securities law. This is one such case.

[16] Past Tribunal decisions have discussed principles to be applied in deciding whether relief should be granted where there is no contravention. However, the test has not always been described consistently. We had the benefit of thorough submissions on this question from the parties before us, so this case provides a good opportunity for us to synthesize and refine previous decisions.

[17] In doing so, we re-emphasize that there are different kinds of proceedings in which a question can arise about the suitability of a s. 127(1) order. At the highest level, there are two categories: (i) enforcement proceedings, and (ii) other, non-enforcement proceedings (such as this one). The second category can be further broken down into sub-categories that include, among others, those dealing with shareholder rights plans and those dealing with other defensive tactics such as private placements.

[18] As we explain in greater detail below, the "public interest" test under s. 127(1) has two features that apply across all proceedings:

a. the Tribunal need not find a contravention of Ontario securities law to make most types of orders under s. 127(1) (there are a few types of orders where s. 127(1) does expressly require such a finding); and

b. in giving content to "the public interest", the Tribunal must refer to the relevant "animating principles", which include:

   i. the purposes of the *Act*, as set out in s. 1.1;

   ii. the principles that "the Commission" should apply in carrying out those purposes, as set out in s. 2.1 of the *Act*; and

   iii. other fundamental principles that underlie particular provisions of Ontario securities law that are relevant to the particular proceeding.

[19] Beyond those two features, which are common to all public interest proceedings, the analysis diverges depending on the category. That is so because in determining the meaning of "public interest", context matters. The "public interest" in the context of enforcement proceedings shares characteristics with

the "public interest" in the context of non-enforcement proceedings, but there are differences as well. We focus our analysis on the sub-category before us (shareholder rights plans), and it will be for Tribunal panels hearing other kinds of proceedings to decide whether, and if so to what extent, to incorporate some of our analysis.

[20] We make one final introductory comment. The number of Tribunal decisions interpreting "the public interest" in the context of s. 127(1) is large. In our analysis, we have confined ourselves to previous decisions that the parties in this proceeding cited to us, and decisions to which those cited decisions refer.

3.2.2 Prerequisites for a s. 127(1) order

[21] We begin our analysis by examining the prerequisites for an order under s. 127(1). This portion of our analysis applies to all proceedings, no matter which category a proceeding may fall into.

[22] Proceedings without an alleged contravention are often called "public interest" proceedings, or proceedings involving the exercise of the tribunal's "public interest jurisdiction". However, those are misnomers, to the extent they purport to distinguish some s. 127(1) proceedings from others. They are misnomers because for all possible orders under s. 127(1), the Tribunal must be of the opinion that "it is in the public interest to make the order or orders [emphasis added]". Therefore, every s. 127(1) proceeding is, by definition, a "public interest proceeding", whether it involves a contravention or not.

[23] Indeed, with just a few exceptions, the "public interest" test is the only condition that must be satisfied for every type of order in s. 127(1). Of the 16 types of orders listed there, just three add one other condition – namely, a finding of non-compliance with Ontario securities law. Those three exceptions are:

a. administrative penalties;

b. disgorgement orders; and

c. specified orders relating to various documents (including prospectuses, offering memoranda, and take-over bid circulars).

[24] None of the other 13 possible orders in the current s. 127(1), including cease trade orders, requires proof of non-compliance with Ontario securities law.

[25] Even though very few types of orders under s. 127(1) require a finding of non-compliance, Tribunal decisions have for many decades drawn a strong connection between such a finding and any kind of s. 127(1) order. That connection is not a requirement, though, and the Tribunal made clear as far back as 1978, in *Re Cablecasting Inc*,[4] that it may make an order in the public interest without there being a contravention. However, such instances have been described as, and seen as, exceptions.

[26] There are sound policy reasons for thinking of a contravention as the primary justification for a s. 127(1) order. Linking a sanction or remedial order to one or more specific provisions of Ontario securities law fosters transparency, certainty and predictability.[5] Doing so also grounds the order in a prohibition or requirement that has undergone the legislative or rulemaking process, including the opportunity for public comment and debate.

[27] In contrast, an order under s. 127(1) made without a finding of a contravention has as its foundation one or more principles that inform the panel's view of the public interest. While such decisions do not provide the same measure of certainty and predictability as do proceedings involving contraventions, they are equally valid, and there are sound policy reasons for having that type of decision available. The capital markets are fast-moving, and developments in the market (*e.g.*, new products, new ways of victimizing investors, and new ways of circumventing the rules) can easily outpace the legislative and rulemaking processes. Statutes and regulations can never contemplate every possible kind of misconduct.[6] The authority to make a s. 127(1) order even absent a contravention is consistent with the Tribunal's essential role in the regulation of the capital markets in a way that promotes the *Act*'s objectives.

[28] Caution is warranted, though. Early Tribunal decisions on this question caused one commentator to warn that with the advent of confirmation that no contravention was required before a s. 127(1) order could be made, counsel and their clients now had to "divine the 'spirit' of the legislation", and that giving

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[4] *Cablecasting Inc (Re)*, (1978) OSCB 37 (***Cablecasting***)

[5] *Carnes (Re)*, 2015 BCSECCOM 187 at para 129

[6] *Re CTC Dealer Holdings Ltd and Ontario Securities Commission*, 1987 CanLII 4234 (ON SC) (***Canadian Tire Div Ct***) at para 73

"'clean' opinions in securities law matters is becoming nearly impossible."[7] In subsequent decisions, the Tribunal sought to answer that concern by emphasizing the importance of certainty and predictability, and by identifying principles and tests to be applied when deciding whether a s. 127(1) order is warranted. Over the years, there has been some variation in the way those principles and tests have been described. We hope, in these reasons, to bring greater clarity.

[29] A final word is in order before we embark on that task. The statute-imposed test of "public interest" must always be flexible. While it is appropriate for us to clarify the framework that the Tribunal expects to apply when interpreting that phrase, and as much as we may wish to foster certainty and predictability, we would be wrong if we purported to place inviolable limits on the test, when the legislature has placed no such limits.

3.2.3 Guiding principles of statutory interpretation

[30] As Riot submitted, s. 64 of the *Legislation Act, 2006*[8] provides that every Ontario statute shall be "interpreted as being remedial and shall be given such fair, large and liberal interpretation as best ensures the attainment of its objects." Accordingly, we should take a relatively expansive view of the public interest jurisdiction under s. 127(1).

[31] This is confirmed by the Supreme Court of Canada, which held in *Committee for the Equal Treatment of Asbestos Minority Shareholders v Ontario (Securities Commission)* (***Asbestos***) that the public interest jurisdiction is intended to give the Tribunal "a broad discretion to intervene" in the capital markets,[9] and that "the legislature clearly intended that the [Tribunal] have a very wide discretion" with respect to activities related to the Ontario capital markets.[10] The Court also found this conclusion to be supported by the "unrestricted discretion [under s. 127(2)] to attach terms and conditions to any [s. 127(1)] order".

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[7] *HERO Industries (Re)*, 1990 CarswellOnt 132, Editor's Note

[8] SO 2006, c 21, Sch F1

[9] 2001 SCC 37 at para 45

[10] *Asbestos* at para 39

3.2.4 Early decisions describing the public interest authority

[32] With those guiding principles in mind, we begin our review of past decisions with *Cablecasting*, the 1978 case mentioned above. In *Cablecasting*, the Tribunal dismissed a request to cease trade an intended corporate reorganization. The dismissal was for reasons unrelated to our discussion here, but the Tribunal did reject an argument, made at the hearing, that a contravention was a necessary pre-condition to a cease-trade order. The Tribunal said that imposing that condition would allow "the individual with an imagination sufficiently fertile to invent an unethical scheme which skirts the words of all published pronouncements [to] carry out that scheme with impunity".[11]

[33] The issue resurfaced in 1987, when the Tribunal issued its decision in *Canadian Tire*.[12] That decision, and the Divisional Court's affirmation of it,[13] are widely seen as the starting point for cases involving s. 127(1) orders absent a contravention. In that case, the Tribunal cease traded (under then s. 123, the predecessor to the current s. 127):

a. the take-over bid by CTC Dealer Holdings Limited for 49% of the shares of Canadian Tire Corporation; and

b. the common shares of Canadian Tire Corporation held by three individuals ("the Billeses").

[34] The Tribunal found that the transaction in question was artificial and therefore abusive; indeed, "as grossly abusive a transaction as the Commission has had before it in recent years". Despite the appearance that the offer was for 49% of the shareholdings of Canadian Tire, in reality the offer was structured to accommodate the Billeses' desire to sell their entire control position without triggering a coattail provision in Canadian Tire's Articles.[14]

[35] In affirming the Tribunal's decision to grant the cease trade order, the Divisional Court endorsed as "fair warning"[15] comments made by the Tribunal six years

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[11] *Cablecasting* at 43
[12] (1987) 10 OSCB 857 (***Canadian Tire OSC***)
[13] *Canadian Tire Div Ct*
[14] *Canadian Tire OSC* at paras 150-151
[15] *Canadian Tire Div Ct* at para 77

earlier in *Re Federal Commerce & Navigation Ltd*.[16] In that earlier case, the Tribunal said it expected that participants in the capital markets would be "guided by the basic philosophy and rationale" underlying securities laws, and that "[t]echnical interpretations that run contrary to" that philosophy and rationale would be unacceptable.

[36] It is now well settled that no contravention of Ontario securities law is required as a condition for issuing a s. 127(1) order, except for the three types of orders where s. 127(1) itself expressly prescribes that condition.[17]

3.2.5 Development of the idea of "animating principles"

[37] The concept of a "basic philosophy and rationale" underlying Ontario securities law, articulated by the Tribunal in *Federal Commerce* in 1981, has continued to the present day, although, beginning with the Tribunal's 1987 decision in *Canadian Tire*, the term "animating principles" has been used for the same idea. In *Canadian Tire*, the Tribunal stated that "transactions that are clearly designed to avoid the animating principles" behind securities legislation would be closely scrutinized and would be subject to the Tribunal's intervention where appropriate.[18]

[38] In *Canadian Tire*, the Tribunal did not clarify exactly what the "animating principles" were. At the time, the *Act* did not include what is now s. 1.1, which sets out the purposes of the *Act*, and which, in its current form, identifies the following:

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

b. to foster fair, efficient and competitive capital markets and confidence in capital markets;

c. to foster capital formation; and

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[16] (1981) 1 OSCB 20 (***Federal Commerce***)

[17] *Central GoldTrust (Re)*, 2015 ONSEC 44 at para 15; *Patheon Inc (Re)*, 2009 ONSEC 13 (***Patheon***) at para 114

[18] *Canadian Tire OSC* at para 132

d. to contribute to the stability of the financial system and the reduction of systemic risk.

[39] In *Asbestos* in 2001, the Supreme Court of Canada reinforced the wisdom of referring to the purposes set out in the *Act.* The Court held that the nature and scope of the Tribunal's public interest jurisdiction should be assessed with reference to the fact that the jurisdiction "is animated" by the purposes set out in s. 1.1 of the *Act* (which list of purposes was shorter at the time).[19]

[40] In later cases, it became clear that the animating principles were not limited to the general purposes set out in s. 1.1 of the *Act*. Animating principles could also be found elsewhere in Ontario securities law or in Tribunal decisions that identify the policy underpinnings of parts of Ontario securities law. For example, certain fundamental characteristics of the take-over bid regime are seen to be animating principles of that regime and can serve as the baseline for assessing impugned conduct.[20]

[41] Finally, s. 2.1 of the *Act* contains a list of "fundamental principles" to which the Commission shall have regard in pursuing the purposes of the *Act*.[21] The *Act* imposes that obligation on "the Commission" and not on the Tribunal, and some of the principles are clearly aimed not at the Tribunal but at the Commission's regulatory function (*e.g.*, administration and enforcement of the *Act*, and harmonization of securities regulation regimes). However, the Tribunal has previously held that the "fundamental animating principles of securities regulation" include the principles set out in s. 2.1,[22] and in this hearing Riot submitted that the animating principles include content from s. 2.1. We agree.

3.2.6 Assessing conduct against the animating principles

[42] Animating principles became the benchmark against which conduct would be assessed. However, a question remained – by how much or in what way would

[19] *Asbestos* at para 41
[20] *Patheon* at para 116; *Neo Material Technologies Inc (Re)*, 2009 ONSEC 32 at para 37
[21] *Act*, s 2.1
[22] *Stinson (Re)*, 2023 ONCMT 26 (***Stinson***) at para 75

the impugned conduct have to be inconsistent with the relevant animating principles in order to justify the use of s. 127(1) without a contravention?

[43] Up to this point in the analysis, the principles we have discussed apply to all proceedings. It is here that the analysis diverges somewhat depending on the category of proceeding. We concentrate on non-enforcement proceedings, and specifically on proceedings involving shareholder rights plans, although we consider the approaches taken in enforcement proceedings as well.

[44] In *Canadian Tire*, the Tribunal considered what the gap would have to be between the animating principles and the conduct, to justify a s. 127(1) order without a contravention. The Tribunal expressly rejected a simple fairness standard as too low a bar, the adoption of which "would wreak havoc in the capital markets".[23] Instead, the Tribunal asked whether the conduct in question was "clearly … demonstrated to be abusive of shareholders in particular, and of the capital markets in general." The Tribunal noted that abuse is "different from, and goes beyond, unfairness". (We address below whether the later addition of s. 1.1 of the *Act* diminishes the value of *Canadian Tire* as a precedent.)

[45] The Tribunal also held that a question of the public interest must be involved, which would "almost invariably" mean showing "a broader impact on the capital markets and their operation."[24]

[46] The Tribunal thus identified two characteristics, both of which would generally have to be present if the Tribunal were to make an order under s. 127(1) absent a contravention of Ontario securities law:

a. the conduct under scrutiny must have been abusive, as opposed to merely unfair, when viewed against the animating principles underlying securities laws; and

b. the conduct must have had an impact not just on the parties involved, but also on the capital markets as a whole (a point reinforced by the Supreme Court of Canada in *Asbestos*[25]).

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[23] *Canadian Tire OSC* at para 154

[24] *Canadian Tire OSC* at para 155

[25] *Asbestos* at para 45

[47] We address each of these in turn.

3.2.7 Abusive vs. unfair, or somewhere in between

[48] In the 1990 case of *HERO Industries*, soon after *Canadian Tire*, the Tribunal reiterated the "abusive" standard. The Tribunal described the issue before it as "the extent to which the 'animating principles'" of the relevant part of the *Act* should compel the Tribunal to intervene against transactions "that may be found to be abusive …".[26]

[49] The Tribunal adopted a more expansive view in 2010, in *Magna International Inc*,[27] by which time s. 1.1 had been added to the *Act*. The Tribunal described the reasoning from *Canadian Tire* as being that the Tribunal could intervene in a transaction "that is technically in compliance with securities law requirements but that is inconsistent with the animating principles [emphasis added]" or is abusive of investors or of the capital markets.[28]

[50] That summary of *Canadian Tire* repeated the "abusive" standard as a possible basis for a s. 127(1) order, but the panel also added an element that went beyond the *Canadian Tire* test. The idea that mere inconsistency with the animating principles (without a need to show abusive conduct) would be sufficient was new. The *Magna* panel made clear that it could "invoke its public interest jurisdiction" not only where a contravention is present, or where the transaction is abusive of shareholders or the capital markets (as set out in *Canadian Tire*), but also where there is a "breach of… the animating principles underlying" applicable securities law.[29]

[51] The Tribunal thus appeared to equate "inconsistency with" animating principles with "breach of" animating principles. Some later decisions that refer to the animating principles adopt one or both of those formulations. Others employ

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[26] *Hero Industries* at para 4
[27] 2010 ONSEC 14 (***Magna***)
[28] *Magna* at paras 184 and 186
[29] *Magna* at para 185

different variants, including "engages",[30] was "contrary to",[31] "undermine",[32] "offended",[33] "contravened",[34] or resulted in "non-compliance with"[35] the animating principles.

[52] In our effort to refine and bring consistency to the standard to be applied, we respectfully (and contrary to the Commission's submissions in the case before us) reject "engages" as the appropriate standard. Simply asking whether conduct "engages" the animating principles is too low a bar and does not address the question of whether the conduct at issue harmed investors or the capital markets. All conduct in the capital markets engages (*i.e.*, has a connection to) the *Act*'s broadly stated animating principles, whether the conduct is compliant or not. The important question is whether the conduct engages the principles in a positive, neutral or negative way, and the extent to which it does so. We do think it is appropriate to speak of "engaging" the Tribunal's public interest jurisdiction,[36] as in, providing a basis for exercising that jurisdiction in the absence of a contravention. But for that jurisdiction to be engaged, the impugned conduct must do more than simply engage the *Act*'s animating principles.

[53] We also endorse the Tribunal's move away from "abusive" as a necessary part of the standard. *Canadian Tire* held that abuse was always necessary to justify a s. 127(1) order, but:

a. the panel in *Canadian Tire* was in previously uncharted territory in issuing an order under s. 127(1) without a contravention;

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[30] *Biovail Corporation (Re)*, 2010 ONSEC 21 (***Biovail***) at para 382; *Daley (Re)*, 2021 ONSEC 27 at para 48; *Kitmitto (Re)*, 2022 ONCMT 12 at paras 176, 243, 382, 420; *Stinson* at para 74

[31] *Federal Commerce* at 25-26; *Azeff (Re)*, 2015 ONSEC 11 at paras 66 and 182

[32] *GrowthWorks Canadian Fund Ltd (Re)*, 2011 ONSEC 17 (***GrowthWorks***) at para 59

[33] *ESW Capital, LLC (Re)*, 2021 ONSEC 7 (***ESW Capital***) at para 83; *Stinson* at para 77; *Mughal Asset Management Corporation (Re)*, 2023 ONCMT 39 at para 114

[34] *Western Wind Energy Corp (Re)*, 2013 ONSEC 25 (***Western Wind***) at para 38

[35] *Patheon* at para 116

[36] *See, e.g.*, *Stinson* at para 77; *Biovail* at para 388

b. that case involved a transaction that was "grossly abusive", so that was the context in which the panel was operating, and the panel did not have to decide about a transaction that was less offensive; and

c. over time, the Tribunal has not adopted *Canadian Tire*'s absolute requirement for a finding of abuse, instead allowing the law to evolve to focus on animating principles as a robust foundation for the appropriate standard.

[54] An "abusive" standard would be too high a bar in cases like the one before us. That word at least implies a degree of intentionality, whereas a s. 127(1) order may well be in the public interest where conduct departs sufficiently from animating principles, even though the departure is unintentional (a point we return to below).

[55] We note that in *Hecla Mining Company*,[37] a 2016 decision, the Tribunal concluded that it should block a private placement only "where there is a clear abuse of the target shareholders and/or the capital markets."[38] Riot urged us to disregard *Hecla* for the purposes of this case, on the basis that *Hecla* involved a private placement, not a take-over bid. We agree that we should disregard *Hecla* in this case, given our earlier conclusion that different contexts (*e.g.*, defensive measures vs. take-over bids) may require different analysis.

[56] On the other end of the spectrum from "abusive", we do adopt the *Canadian Tire* panel's view that a fairness standard alone would be too low a bar.[39] That is not to say that unfair conduct is acceptable; rather, unfairness to one party is not, without more, necessarily sufficient to justify a s. 127(1) order in the absence of a contravention of Ontario securities law. The legislature's inclusion of "fairness" in s. 1.1 of the *Act*, as an aspirational goal of the entire regulatory regime, did not replace the "public interest" test of s. 127(1). The "public interest" test will often include consideration of whether the conduct under scrutiny was unfair, and if so to whom, but that will be only one consideration among others.

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[37] 2016 ONSEC 31 (***Hecla***)

[38] *Hecla* at paras 88-89, citing with approval *ARC Equity Management (Fund 4) Ltd (Re)*, 2009 ABACC 390

[39] *Canadian Tire OSC* at para 154

[57] Having rejected unfairness alone as being too low a bar, we discard formulations such as "inconsistent with", "contrary to", "contravene", or "breach of" the animating principles for similar reasons. Those formulations lack any sense of degree, and the following example illustrates why we reject them. Because one of the animating principles is "fair" capital markets, it follows that any unfair conduct (no matter how minor the unfairness and how limited its effect) is, by definition, inconsistent with that animating principle. Therefore, if "inconsistent with" animating principles were to be the governing standard, any unfair conduct (again, no matter how minor) would justify a s. 127(1) order. Using that standard would be adopting a fairness standard by another route.

[58] Therefore, in the context of shareholder rights plans, the appropriate standard must require the applicant to show something more than unfairness, but not necessarily that the impugned conduct was abusive. In our view, the Tribunal captured this idea aptly in its 2011 decision in *GrowthWorks Canadian Fund Ltd. (Re)*, where it found that certain support agreements, which prevented shareholders from choosing between competing proposals, "undermine[d] one of the animating principles" of the *Act*.[40] To us, the notion of "undermining" conveys something more than a mere inconsistency with the animating principles.

[59] We therefore conclude that the applicant's burden is to show that the conduct undermines one or more clearly discernible animating principles in a real (*i.e.*, well-grounded, reasonably likely, and not illusory) and substantial (*i.e.*, serious and non-trivial) way.

[60] Requiring that one be able to discern and specify the animating principles that the impugned conduct undermines brings some measure of predictability, and thereby minimizes the extent to which the Tribunal could be, in effect, legislating through its interventions.

[61] Requiring that the way in which the conduct undermines those principles be real and substantial reflects the cautious approach that the Tribunal should adopt when intervening without a contravention.

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[40] *GrowthWorks* at para 59

3.2.8 A public aspect is necessary

[62] In addition to the requirement that the applicant demonstrate that the conduct undermines animating principles in a real and substantial way, the applicant must also show that the necessary "public" aspect is present, given the wording of s. 127(1). The applicant must satisfy the Tribunal that it is in the public interest to make the requested order, *e.g.*, by establishing that:

a. the impugned conduct has a harmful effect on investors generally, on the capital markets as a whole, or on the pool of actual and potential investors in a public issuer;[41] or

b. the impugned conduct, if condoned, would likely have a negative effect in future transactions.[42]

[63] In that regard, we decline to follow Riot's submission that we should rely on cases in which, Riot says, the Tribunal held that reference to the animating principles is sufficient, with no need for a negative effect. In Riot's submission, previous decisions that adopt that approach include:

a. *Patheon*, in 2009: the Tribunal "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";[43]

b. *Magna*, in 2010: the Tribunal may intervene in conduct "that is inconsistent with the animating principles … or is abusive of investors or the capital markets";[44]

c. *Biovail*, in 2010: "where market conduct engages the animating principles of the *Act*, the [Tribunal] does not have to conclude that an abuse has occurred in order to exercise its public interest jurisdiction";[45]

d. *Western Wind*, in 2013: the Tribunal may intervene if an offer is abusive, or it contravenes Ontario securities law, or it contravenes an animating

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[41] *HERO Industries* at para 4; *Sterling CentreCorp Inc (Re)*, 2007 ONSEC 9 at para 205; *Northern Financial Corporation v Jaguar Nickel Inc*, 2007 QCBDRVM 15 (***Jaguar***)

[42] *Jaguar* at 23

[43] *Patheon* at para 116

[44] *Magna* at paras 184 and 186

[45] *Biovail* at para 382

principle, or it "brings the integrity of the capital markets into disrepute."[46]

[64] We regard the last of those alternatives from *Western Wind*, *i.e.*, bringing the integrity of the capital markets into disrepute, as being synonymous with defeating the "confidence in the capital markets" imperative in s. 1.1 of the *Act*.

[65] In our view, previous Tribunal decisions should not be read as setting up watertight compartments with mutually exclusive content. Conduct that seriously undermines an animating principle may well, in and of itself and by definition, have a harmful effect not just on the particular parties but also on the capital markets generally, including because that conduct, if left unaddressed, would undermine confidence in the capital markets.

3.2.9 Relevance of motive

[66] A brief word is in order about the relevance of motive in the determination of whether impugned conduct undermines animating principles in a real and substantial way. In *Asbestos* (an enforcement proceeding), the Tribunal held that motive (*i.e.*, the question of whether the impugned activity was designed to avoid applicable requirements) was a relevant factor but not a precondition to the making of a s. 127(1) order. The Supreme Court of Canada endorsed that view.[47]

[67] The principle is equally applicable in proceedings involving shareholder rights plans. While the Tribunal has long made clear that the central question in such proceedings is whether "the time had indeed come 'when the pill has got to go'",[48] the focus on that question does not preclude consideration of the purposes for which the plan was designed or implemented. There is a direct connection between the *Act*'s expressly stated purpose of fostering confidence in the capital markets and the motivations behind conduct that risks undermining that confidence.

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[46] *Western Wind* at para 38

[47] *Asbestos* at paras 53-56

[48] *Canadian Jorex Ltd (Re)*, (1992) 15 OSCB 257 at 265

3.2.10 Conclusion on the appropriate standard under s. 127(1)

[68] We conclude that in proceedings where an applicant seeks to cease trade a shareholder rights plan, without establishing that the plan contravenes Ontario securities law, the Tribunal will consider whether the applicant has shown that:

a. the plan undermined, in a real and substantial way, one or more clearly discernible animating principles underlying applicable provisions of Ontario securities law; and

b. the plan's existence causes an effect that has a public dimension, such that it is in the public interest for the Tribunal to intervene.

3.3 Assessment of the 15% trigger

3.3.1 Introduction

[69] We turn to our analysis of the 15% trigger in the Bitfarms plan. We begin by finding that we should use the bid regime's 20% threshold as a benchmark, even though there is no live bid here, and despite the bright-line nature of the 20% threshold. We then explain our conclusions that:

a. a 15% trigger would undermine, in a real and substantial way, the animating principles underlying the take-over bid regime, absent exceptional circumstances sufficient to overcome that presumption;

b. Bitfarms has not proven exceptional circumstances sufficient to meet that burden here; and

c. our endorsement of Bitfarms's 15% trigger would have a public dimension, such that it is in the public interest to cease trade the plan.

3.3.2 Suitability of a take-over bid threshold as a benchmark, absent a live bid

[70] Riot submitted that the context that is relevant to the application of an animating principles analysis is that of the take-over bid regime. The Commission took a similar position. Bitfarms countered that there was no live bid here, so we should consider the broader purposes of shareholder rights plans, which it said include the ability of directors to act in the best interests of shareholders.

[71] We agree with Riot and the Commission that the take-over bid regime is the appropriate context in which to consider whether we should cease trade the Bitfarms plan, for the following reasons.

[72] A review of the historical policy underpinnings of that regime makes clear that, for decades, a primary purpose has been to provide an orderly process for changes of control of publicly traded entities. This process prioritizes the interests of target shareholders, which include transparency, equality of treatment, and time to consider offers being made to them. It also aims to provide predictability for market participants generally, and particularly for those market participants who are actively accumulating shares, about when enhanced rule requirements (*e.g.*, disclosure and insider reporting provisions) related to their accumulations begin.

[73] The regime includes several elements beyond the provisions dealing with the definition and conduct of a take-over bid. These include:

a. the possibility of accessing exemptions to the take-over bid regime; and

b. the insider reporting and early warning disclosure requirements, which among other things may provide early disclosure of a potential bid, a fact that is likely to be of significant interest to target shareholders.

[74] These requirements represent a policy compromise between allowing accumulations up to 20% to take place in the ordinary course, and disclosure to shareholders about significant market activity. In short, the entirety of the take-over bid regime contains elements that govern accumulations of shares both below and above a 20% threshold.

[75] Bitfarms did not persuade us that we should instead be guided primarily by directors' duties. We do accept Bitfarms's submission that shareholders generally should be entitled to expect that, in appropriate circumstances, the board will engage in a strategic review process with the goal of obtaining the highest value for their shares, and that the board will not "roll over and play dead".[49] We also note Bitfarms's submissions that:

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[49] *Rogers Communications Inc v Maclean Hunter Ltd*, [1994] OJ No 408 (Ont Ct J (General Div), Commercial List) at para 18

a. its true motivation in introducing its plan was to preserve shareholder choice;

b. Riot was intent on "killing a process right now so there's nobody else at the table to make a bid"; and

c. despite this, Bitfarms did not put the plan in place because of "the various threats" that Riot was making.

[76] The implication of these submissions is that we should view the introduction of the plan in the context of the duties of target directors rather than in the context of the principles underlying the take-over bid regime. However, Bitfarms's own submissions suggest that its directors were guided by considerations specific to the take-over bid context. As noted above, shareholder choice is an important principle embedded in the take-over bid regime.

[77] In assessing the Bitfarms plan, it is therefore appropriate for us to use the principles that underlie the bid regime, which governs not just activity at the 20% threshold, but also share accumulation above 10%.

3.3.3 Is the 20% threshold suitable despite its "bright-line" nature, or does this context demand a more nuanced approach?

[78] Bitfarms submitted that even if we use the bid regime as the context in which to assess its plan, we would be making new policy if we use the 20% threshold as a bright-line requirement in doing so. Bitfarms urged that any bright-line rule against triggers of less than 20% should be implemented only through appropriate policy channels, where detailed consideration could be given to the issues at play.

[79] Riot and the Commission responded by defending the bright-line nature of the 20% threshold, arguing that having that as a benchmark is consistent with the policy underlying the bid regime. We agree. We do note that, in reaching that conclusion, we are not finding that the 20% rule is inviolable.

[80] Bitfarms submitted that if we choose to guide ourselves by the bid regime, it would be more appropriate to anchor our analysis firmly within the principles established in National Policy 62-202 *Take-Over Bids – Defensive Tactics* and the jurisprudence that has interpreted that policy. Specifically, Bitfarms argued that

the Tribunal should continue to consider the following factors it articulated in 1999, in *Royal Host Real Estate Investment Trust*:[50]

a. whether shareholders approved of the rights plan;

b. when the plan was adopted;

c. whether there was broad shareholder support for the plan to continue;

d. the target company's size and complexity;

e. other defensive tactics, if any, that the target company implemented;

f. the number of potential viable offerors;

g. the steps the target company took to find an alternative bid or transaction that would be better for the shareholders;

h. the likelihood that the target company would be able to find a better bid or transaction if it had more time;

i. the nature of the bid, including whether it was coercive or unfair to the target company's shareholders;

j. the length of time since the bid was announced and made; and

k. the likelihood that the bid would not be extended if the rights plan was not terminated.

[81] In submitting that the above factors continue to be relevant even following the introduction of National Instrument 62-104 – *Takeover Bids and Issuer Bids* (**NI 62-104**), Bitfarms relied on the 2021 decision of the Alberta Securities Commission in *Bison Acquisition Corp*.[51] In that decision, the panel allowed a shareholder rights plan to persist despite the 2016 amendments that rebalanced the bid regime, and considered the factors set out in *Royal Host* in reaching its decision.

[82] Riot and the Commission did not go so far as to say that we could never consider the *Royal Host* factors. They submitted that it was necessary to apply the 20% threshold in order to achieve the underlying goals of the take-over bid regime,

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[50] (1999) 22 OSCB 7819 at para 74

[51] 2021 ABASC 188 (***Bison Acquisition***)

including, in particular, predictability. The ability of participants in the capital markets to predict with reasonable certainty whether a rights plan would be upheld helps promotes the efficiency of, and participants' confidence in, those markets. Deviating from that threshold would send a message to issuers that it is appropriate to set individualized limits on the accumulation of shares by shareholders. Doing so would undermine market participants' expectations in a way that would cause harm to the overall efficiency of the market and to investors relying on that certainty.

[83] The Commission further submitted that if we were to allow a plan with a 15% trigger to survive (absent exceptional circumstances not present here), our decision would spawn significant litigation and would require the Tribunal to revert to the type of case-by-case decision making about defensive tactics that the 2016 amendments to the take-over bid rules were intended to prevent.

[84] We agree with Riot and the Commission that the bright-line nature of the 20% threshold increases certainty and predictability for market participants, and thereby contributes to the efficiency of the capital markets. The 2016 amendments to the take-over bid regime were designed to reduce significantly (if not nearly eliminate) the need for case-by-case assessments of the circumstances in which shareholder rights plans were adopted. A main goal of the amendments was to enhance predictability and address many of the reasons that historically had caused issuers to adopt shareholder rights plans.

[85] We also agree that if we were to open the door to frequent litigation about shareholder rights plans, we would be undoing much of what the bid regime amendments sought to accomplish.

[86] Bitfarms did not persuade us that we should follow *Bison Acquisition* here, by applying the factors set out in *Royal Host*. Our review of those factors suggests that the underlying assumption is that they apply to a context in which a shareholder rights plan is operative in the face of a take-over bid. That is not the situation here, since there is no take-over bid.

[87] We therefore concluded that it was appropriate to use the 20% threshold as a basis for assessing the Bitfarms plan. However, as we explain below, in doing so we do not rule out the possible existence of exceptional circumstances that

would cause the Tribunal to give more weight to them than to the 20% bright-line test.

3.3.4 A departure from the 20% take-over bid threshold should be justified by exceptional circumstances

[88] We turn now to the principles and circumstances that we should consider when evaluating a shareholder rights plan that includes a trigger below 20%.

[89] Bitfarms submitted that there is no unfettered right to accumulate up to 20% of shares before the board of an issuer can take action to slow down that accumulation. We agree, in that there are requirements that apply below the 20% level, *e.g.*, with respect to disclosure. The question, though, is whether it is in the public interest to permit the Bitfarms shareholder rights plan to continue to fetter accumulation by Riot or by any other shareholder that acquires more than 15% of Bitfarms's shares.

[90] In our view, if an issuer were to prevent a market participant from continuing to accumulate shares freely up to the 20% threshold, that would be a significant departure from long-established market expectations. It would greatly alter the dynamics of share accumulation by giving the issuer power to influence this process outside of the take-over bid context, it might remove a willing buyer from the trading environment, and it would affect the interests of all shareholders by failing to treat shareholders equally. We agree with the Commission that, in general, permitting this to occur could negatively affect the capital markets, including by reducing their efficiency.

[91] However, in view of the inherent discretionary nature of the public interest standard in s. 127(1) of the *Act*, there must always remain the possibility that the Tribunal would choose not to cease trade a plan even though the plan's trigger is below 20%.

[92] Historically, in shareholder rights plan cases, the Tribunal sought to find the appropriate balance between, on the one hand, permitting a board to fulfill its goal of increasing shareholder choice or shareholder value as it saw fit and, on the other hand, protecting the right of shareholders to decide. In deciding when it was time for "the pill … to go", the Tribunal focused on the likelihood that,

given a reasonable period of further time, the board of the target could increase shareholder choice and maximize shareholder value.[52]

[93] That focus in cases involving unsolicited take-over bids or ongoing auction processes was especially sensible before the bid regime amendments, given that, before those amendments, the minimum deposit period for offer acceptance by shareholders was significantly shorter than the currently prescribed 105 days.[53] As the Tribunal has previously noted, the rebalancing of the bid regime limits the usefulness of decisions issued before those amendments.[54]

[94] With that caution in mind, we note that there are only three decisions between 2001 (when the bid regime was harmonized across Canada) and 2016 (when the bid regime was rebalanced) in which a tribunal considered a shareholder rights plan that contained a trigger of less than 20%.

[95] In the 2007 decision of Québec's Bureau de Décision et de Révision en Valeurs Mobilières in *Northern Financial Corporation v Jaguar Nickel Inc*[55] (***Jaguar***), the Bureau cease traded a shareholder rights plan with immediate effect, on facts remarkably similar to those before us. In *Jaguar*, as here, there was no real or apprehended bid. Jaguar implemented a shareholder rights plan with a 15% trigger almost immediately after Northern Financial, a shareholder, disclosed that it had accumulated a toehold position of approximately 14.6% and that it intended to requisition a special meeting to elect new directors. Jaguar argued that Northern Financial was accumulating Jaguar shares so that it could block transactions, and that a toehold at 15% would likely be sufficient to block a proposal for a merger between Jaguar and another company. Jaguar said that it was justified in implementing a plan with a 15% trigger even in the absence of a bid.

[96] The Bureau disagreed, holding that Jaguar had failed to prove that there was any "exceptional circumstance" sufficient to override the strong presumption underlying the 20% bid threshold, and to justify the continuation of the plan. In

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[52] *Chapters Inc (Re)*, (2001) 24 OSCB 1657 at para 24

[53] NI 62-104, s 2.28.1

[54] *Aurora Cannabis Inc (Re)*, 2018 ONSEC 10 (***Aurora***) at para 149

[55] 2007 QCBDRVM 15 (CanLII)

our view, the Bureau's reasoning remains sound even after the 2016 bid regime amendments.

[97] Neither of the other two decisions (the 2011 decision of the Alberta Securities Commission in *Afexa Life Sciences Inc* [56] or the British Columbia Securities Commission's 2014 decision in *Hudbay Minerals Inc and Augusta Resource Corporation*[57]) provides additional guidance that we consider to be persuasive in the post-2016 context.

[98] Following the 2016 amendments, this Tribunal has underscored the primacy of the bid regime's essential components. In 2018, in *Aurora Cannabis Inc (Re)*,[58] the Tribunal emphasized that securities regulatory authorities would continue to scrutinize the use of shareholder rights plans as a defensive tactic. The Tribunal held that it would be "a rare case" when a tactical plan would be allowed to "interfere with established features of the take-over bid regime".[59]

[99] In 2021, in *ESW Capital, LLC*,[60] the Tribunal was not reviewing a shareholder rights plan, but the applicant's request for exemptive relief from the minimum tender requirement did cause the Tribunal to consider a proposed departure from the bid regime. The Tribunal emphasized that "[p]redictability is an important aspect of take-over bid regulation and the [Tribunal] must be cautious in granting exemptive relief that alters the recently recalibrated bid regime."[61] The Tribunal found that there were no "exceptional circumstances or abusive or improper conduct" to justify granting the requested relief.

[100] We adopt the reasoning in *Jaguar*, *Aurora* and *ESW Capital*. An issuer defending a shareholder rights plan that departs from the bid regime's core components should have a high burden, in light of the well-established nature of the take-over bid regime's fundamental principles of predictability, transparency,

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[56] 2011 ABASC 532
[57] 2014 BCSECCOM 154
[58] 2018 ONSEC 10
[59] *Aurora* at para 152
[60] 2021 ONSEC 7
[61] *ESW Capital* at para 10

and fair treatment of target shareholders. The Tribunal should be reluctant to permit such a plan to continue unless exceptional circumstances are present.

3.3.5 Are exceptional circumstances present?

3.3.5.a Introduction

[101] We turn now to assess whether Bitfarms demonstrated the existence of exceptional circumstances sufficient to justify a departure from the 20% benchmark. We concluded that it did not.

[102] According to Bitfarms:

a. Riot was an "aggressive", "strategic" buyer;

b. Riot had accumulated a "blocking position" with respect to any shareholder vote called, which would result in a two-thirds majority being necessary;

c. Riot would not participate in Bitfarms's strategic alternative review process;

d. Riot made aggressive public allegations about the governance practices of Bitfarms and the Special Committee;

e. the Special Committee was, and continued to be, engaged with other potential bidders as part of its strategic alternative review process; and

f. the market does not ordinarily see this kind of accrual and market conduct.

[103] We begin by examining Riot's conduct, including its accumulation of a toehold share position in Bitfarms. We then assess whether Bitfarms's strategic alternative review process constituted exceptional circumstances.

3.3.5.b Riot's conduct

[104] Riot and the Commission submitted that none of the factors cited by Bitfarms concerning Riot's conduct, individually or collectively, constituted exceptional circumstances. We agree.

[105] Buyers are entitled to engage in rapid and strategic stock accumulation below the 20% bid threshold, as long as they comply with applicable securities laws.

Similarly, buyers are entitled to decide whether to participate in a target's auction or strategic alternative processes and whether to issue public commentary on the governance practices of the companies in which they invest.

[106] There was no allegation or evidence that Riot's actions failed to comply with applicable securities laws or that they undermined the integrity of the bid regime, including the primary objective of protecting shareholder choice. Increasingly, participants in Ontario's capital markets engage in conduct of this nature not only in the bid context but also in the context of contests for board representation.

[107] Bitfarms adduced written expert testimony from Susy Monteiro, Managing Director, Head of M&A and Proxy Advisory Group at Morrow Sodali (Canada) Ltd., a global corporate advisory firm. Monteiro testified that at an approximately 14% shareholding, Riot would hold a blocking or veto position on any Bitfarms shareholder vote requiring a two-thirds majority approval, because of the typical low shareholder representation at its shareholder meetings.

[108] Bitfarms also adduced evidence suggesting that at the time it adopted its shareholder rights plan, it had received advice on Riot's blocking position from Laurel Hill Advisory Group and from Innisfree M&A Incorporated, its strategic advisors. Bitfarms argued that this was relevant to our assessment of the reasonableness of Bitfarms adopting the plan's 15% threshold and constituted exceptional circumstances justifying that choice.

[109] In response, Riot adduced written expert testimony from Christine Carson, President and Chief Executive Officer of Carson Proxy, a shareholder communications and corporate governance consulting firm. Carson challenged the assumptions, methodologies and conclusions in the Bitfarms expert evidence. She cited the limited reliability of vote projections in hypothetical situations and testified that such projections were highly sensitive to the assumptions made and methodologies used in arriving at those projections.

[110] We did not find Bitfarms's position that Riot held a blocking position at a 14% shareholding compelling, for the following reasons:

a. the Monteiro opinion was not given in the context of any current proxy campaign, and it therefore lacked critical information concerning the shareholdings and shareholder profile of Bitfarms;

b. there was no concrete issue before Bitfarms shareholders to be voted upon and analyzed, and therefore the dynamics of shareholder behaviour concerning the particular subject matter of a vote could not form part of the analysis (*e.g.*, attendance at a change of control transaction meeting would likely be quite different than attendance at an ordinary course annual meeting);

c. the calculation of what might constitute a blocking position was highly sensitive to changes in inherently debatable assumptions; and

d. Bitfarms had issued additional shares since the most recent blocking position analysis, thereby diluting Riot's holdings and introducing new shareholders.

[111] The evidence about a potential blocking position did not help us decide whether exceptional circumstances exist. We do not express a view on whether, in another case featuring compelling evidence of a blocking position, it might be appropriate to allow a plan with a trigger of less than 20% to remain in place.

3.3.5.c Bitfarms's strategic review process

[112] Bitfarms submitted that the strategic review process that was underway constituted exceptional circumstances sufficient to justify the survival of the shareholder rights plan's 15% trigger. We disagree.

[113] A strategic review process by a board is not, in and of itself, an extraordinary event. Boards undertake strategic reviews for many different reasons. In cases where the existence of a strategic review process is persuasive, it is the nature and status of the review, and the particular context facing the board, that matter. This and other tribunals have focused on the quality of the evidence concerning whether the process would lead to increased shareholder choice or shareholder value within a reasonable period of time.

[114] In assessing whether Bitfarms met the burden of showing that its strategic review process constituted exceptional circumstances, we rejected Bitfarms's

submission that the decision in *Bison Acquisition* should influence us. That decision was grounded in the use of so-called "swap shares" by the bidder to enhance its control over the target. The Alberta Securities Commission found that this had the potential to "unfairly distort" the outcome of a shareholder vote, and that the best interests of the shareholders of the target (other than the bidder) were served by maintaining the plan in place for a limited time.

[115] As we discuss further below, we were not persuaded that this type of exceptional circumstance exists here. We also note the significant point of difference that the plan in *Bison Acquisition* had a conventional 20% trigger, which had a less intrusive effect on the bidder's ability to accumulate shares than was contemplated by the Bitfarms plan.

[116] Here, one important effect of the Bitfarms plan was to preserve the *status quo* in anticipation of a shareholder vote relating to a possible future transaction with a hypothetical third party requiring a two-thirds majority shareholder vote. The plan might also have had the effect of limiting Riot's voting power at the requisitioned shareholder meeting to elect new directors. The plan was a defence against the ordinary course accumulation of shares, not a defence against a live or pending bid.

[117] The burden on an issuer seeking to justify extending the duration of a shareholder rights plan by showing exceptional circumstances is, in our view, an appropriately heavy one. This is especially true where, as here:

a. there is no live or pending bid;

b. the plan has not been endorsed by shareholders; and

c. the strategic review process on which the issuer relies has been underway for an extended period.

[118] This last point was a compelling factor in our decision. The Bitfarms board first received an expression of interest from a third party in early April 2024. The time period between that expression of interest and the hearing before us was approximately equal to the 105-day minimum deposit period prescribed by the take-over bid regime. We also noted that if a bid were to emerge, Bitfarms would have had at least 105 days to investigate alternatives.

[119] We did not find Bitfarms's evidence of a supposedly ongoing and active auction process persuasive. In an affidavit from a Bitfarms financial advisor, the advisor outlined the extent of discussions with third parties as part of the Bitfarms strategic review process. He stated that:

a. he understood that Bitfarms contacted his firm after it received inquiries from several parties interested in pursuing a transaction, including Riot;

b. the Bitfarms Special Committee asked the firm to canvass a broader group of prospective purchasers to determine interest, and as a result of this outreach, a number of parties reviewed and discussed the opportunity with the firm;

c. by June 1, 2024, some interested parties had executed non-disclosure agreements with Bitfarms and engaged in discussions regarding a potential transaction; and

d. a colleague of his advised him that one of the third parties indicated that it wished Bitfarms to put a shareholder rights plan in place and that it had a draft proposal prepared for when that was done.

[120] Notably, the advisor did not:

a. identify any interested parties, or even given any information about those parties that could help assess the level of interest; or

b. state that any of these parties had tendered offers or draft proposals for a transaction with Bitfarms.

[121] Bitfarms also tendered the affidavit of Edith Hofmeister, Chair of the Special Committee, in which she stated that Bitfarms received two expressions of interest (other than Riot's) in April 2024. Her affidavit contained no further particulars about the identity or number of continuing interested parties and did not state whether any draft proposals or offers emerged.

[122] Bitfarms's evidence lacked sufficient particulars for us to conclude that there was a reasonable possibility that the Bitfarms strategic review process would lead to a transaction within a reasonable time. We accept that there might have been some sensitivity about including identifying information, but Bitfarms made no

effort to adduce redacted information or otherwise seek confidentiality protection.

[123] As a result, we had no basis to believe that allowing the strategic review process to continue longer might have generated a credible offer or value-enhancing transaction. For us, the evidence fell far short of demonstrating exceptional circumstances warranting refusal of the cease trade order sought by Riot.

4. CONCLUSION

[124] We conclude that where an applicant seeks to cease trade a shareholder rights plan, without establishing that the plan contravenes Ontario securities law, the Tribunal will consider whether the applicant has shown that:

a. the plan undermines, in a real and substantial way, one or more clearly discernible animating principles underlying applicable provisions of Ontario securities law; and

b. there is a public dimension to the effect caused by the plan's existence, such that it is in the public interest for the Tribunal to intervene.

[125] The applicant need not prove abuse. However, if the applicant were to do so, that would be at least a relevant, if not determinative, factor for the Tribunal to consider. At the other end of the spectrum, unfairness by itself would not necessarily justify a cease trade order, but if the applicant were to prove unfairness, that would be a relevant factor for the Tribunal to consider.

[126] The Bitfarms plan undermined, in a real and substantial way, the animating principles underlying the take-over bid regime, which principles provide the appropriate benchmark against which to assess the plan. Specifically, the plan's 15% trigger was a significant departure from the bid regime's 20% threshold, and there were no exceptional circumstances sufficient to justify that departure. If the plan were allowed to continue, it would diminish the predictability and

certainty inherent in the regime and would weaken confidence in the capital markets. It was therefore in the public interest to cease trade the Bitfarms plan.

Dated at Toronto this 19th day of November, 2024

"Timothy Moseley"

Timothy Moseley

"Mary Condon"

Mary Condon

"Dale R. Ponder"

Dale R. Ponder