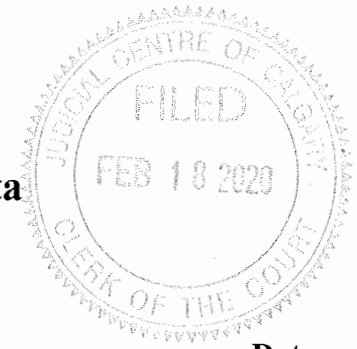

Court of Queen's Bench of Alberta

Citation: Karnalyte Resources Inc v Phinney, 2020 ABQB 119

Date:
Docket: 1801 07487
Registry: Calgary

Between:

Karnalyte Resources Inc.

Applicant

- and -

Robin Phinney, Dave Van Dam, and Dan Brown

Respondents

Reasons for Judgment
of the
Honourable Madam Justice B.E. Romaine

I. Introduction

[1] Karnalyte Resources Inc. brings this application against three shareholders for a declaration that they improperly solicited proxies in relation to the Karnalyte 2018 Annual General Meeting in violation of applicable corporate and securities law. It also applies for approval of the company's decision to decline to accept shareholder proposals from Robin Phinney and Dave Van Dam in relation to the 2018 meeting, and for an order declaring certain votes cast at the meeting null and void.

[2] This is an unusual application, prompted by a long history of acrimony among the current and former management of Karnalyte, and by shareholder dissatisfaction expressed in an internet chatroom. Even if illegal proxy solicitation occurred, and I find that it did not other than one posting on that chatroom, such solicitation was unsuccessful to prevent the election of the management slate of directors at the meeting.

[3] Karnalyte complained to the Alberta Securities Commission alleging improper proxy solicitation by Mr. Phinney and Mr. Van Dam prior to the meeting. The Commission asked Mr. Phinney and Mr. Van Dam for an explanation, and took no action on the complaint, instead granting the exemption order sought by Mr. Phinney.

[4] While there are many allegations and accusations exchanged among Karnalyte management and the three shareholders who are the subject of this application, Karnalyte is not entitled to most of the remedies it seeks.

II. Relevant Facts

[5] Karnalyte is a publicly traded corporation. The Respondents were at the time of the events at issue, and may still be, shareholders of Karnalyte.

[6] The Respondent Robin Phinney founded Karnalyte in November, 2007, and served as its CEO, President and a director until May 13, 2014.

[7] In December, 2014, the Respondent Dan Brown became part of a group known as the "Concerned Shareholders Group", established to address the direction being taken by the then Karnalyte board of directors. This group of shareholders included Todd Rowan, Mark Zachanowich and Peter Matson, who are part of the Karnalyte management group that brings this application.

[8] As noted in a press release dated December 10, 2014, the Concerned Shareholders Group acted in concert with Mr. Phinney, who then held about 15 percent of Karnalyte's shares, in "working to preserve and enhance shareholder value".

[9] The Concerned Shareholder Group engaged in a heated battle against the re-election of the existing board of directors. The directors and management of Karnalyte were strongly criticized in very personal terms by, among others, Mr. Zachanowich, Mr. Rowan and Mr. Matson, who Mr. Brown says in uncontradicted evidence posted comments under pseudonyms about the individuals on the board in an internet chatroom. After a formal proxy contest that included the filing of an early warning report and the preparation and distribution of a dissident proxy circular that disclosed that Mr. Phinney was acting jointly and in concert with 23 other shareholders, including Mr. Brown, Mr. Phinney was elected to Karnalyte's board and reappointed as President and a new board was installed. In April 2015, the Concerned Shareholders Group was disbanded.

[10] In March, 2016, Mr. Brown started a group of shareholders called the "Friends of Karnalyte Resources", formed to act as a unofficial communication medium between Karnalyte and its shareholders. At the time, Mr. Brown, Mr. Rowan, Mr. Zachanowich and Mr. Matson held the majority of the shares represented by the Friends of Karnalyte.

[11] Mr. Brown participates in a website called "Stockhouse", which allows its members to post messages on public forums, each of which is dedicated to a particular company. For many years he has posted messages relating to the management and affairs of Karnalyte on the Stockhouse forum under the name "mdjbrown". Mr. Brown says that the board and management of Karnalyte were well aware that he was the person posting under this name. The Friends of Karnalyte would sometimes submit questions to Karnalyte management arising from Stockhouse postings. The company's responses would then be posted on Stockhouse. Mr. Brown was appointed by 42 shareholders as their proxy at Karnalyte's 2016 Annual General Meeting and he has a high profile on the Stockhouse forum dedicated to Karnalyte as a known intermediary with company management.

[12] Mr. Phinney served as a Karnalyte director from May 21, 2015 and as its chairman from July, 2015 until May 5, 2017, at which point he was not re-elected as a director. His employment

as Karnalyte's president was terminated on June 28, 2017 by the board of directors elected at the 2017 Annual General Meeting.

[13] Mr. Brown did not support Mr. Phinney for re-election in 2017. In March, 2017, Mr. Brown, on behalf of Friends of Karnalyte, put forward a shareholder proposal for a slate of nominees to stand for election as directors of Karnalyte, which Karnalyte included in the 2017 proxy. The Friends of Karnalyte represented approximately 2 million shares at the time.

[14] Mr. Zachanowich, Mr. Rowan, Mr. Matson and Greg Szabo together with two nominees of Gujarat State Fertilizers & Chemicals Limited (GSFC), Karnalyte's largest shareholder and a strategic partner in financing, were elected as directors. Mr. Zachanowich is the chairman of the board and Mr. Rowan was made interim CEO.

[15] Karnalyte says that between June of 2017 and early 2018, Mr. Brown engaged in discussions with Karnalyte regarding his engagement as a consultant. These discussions were terminated without agreement. Karnalyte submits that Mr. Brown presented himself as having a great deal of influence on the voting preferences of a large number of Karnalyte shareholders.

[16] Mr. Brown says that he was often asked by the Karnalyte directors to assist with various tasks involving the corporation and for his input on confidential corporate documents, including in early 2018. He says that he was advised about a number of management issues, and the board's future plans. He agrees that he discussed details of a consulting contract with the Karnalyte directors, including details of compensation.

[17] Mr. Van Dam is 80 years old and a well-known businessman residing in Kenora, Ontario. Mr. Van Dam has been a shareholder of Karnalyte since 2010. He is a friend of Mr. Phinney's brother, and he knows Mr. Phinney, who used to live in Kenora. He states that, due to his roots in the Kenora business community, his profile as a business leader and his long history as shareholder of Karnalyte, it was common for his friends and family to discuss the affairs of Karnalyte with him. In March 2017, Mr. Van Dam submitted a shareholder proposal to Karnalyte, nominating two individuals to stand for election as directors at Karnalyte's 2017 Annual General Meeting. In connection with this proposal, he asserted that he was in possession of pledges representing more than five percent of shares. These nominees, whom Mr. Van Dam says are respected members of the business community in Kenora, were added to the slate but not elected at the 2017 Annual General Meeting.

[18] Mr. Van Dam says in uncontradicted evidence that in 2018, some Kenora shareholders who knew of his interest in the company and his support for the two individuals who had been unsuccessful in their bid to be elected directors in 2017 contacted him to ask if these two nominees would run again, and if so, whether they could pledge their shares to him to support a shareholder proposal to that effect. Mr. Van Dam denies ever soliciting pledges or proxies, but he agreed to accept certain pledges and to make the shareholder proposal nominating the two individuals. Mr. Van Dam states that he didn't speak to every shareholder who pledged their shares to him for this purpose.

[19] On January 19, 2018, Mr. Van Dam nominated the same two people he had nominated in 2017 for seats on the Karnalyte board. Mr. Van Dam says that, in this proposal to Karnalyte, he mistakenly stated that he represented more than 20 percent of the shareholders of Karnalyte. He says that this was a typographical error.

[20] On January 29, 2018, Mr. Van Dam wrote to the Chairman of the Karnalyte board nominating himself and the two same nominees as candidates for election to the board. In this letter, he states that he represented more than five percent of the Karnalyte shares.

[21] On February 5, 2018, Karnalyte appointed Frank Wheatley as president.

[22] On February 11, 2018, Mr. Phinney attempted to requisition a special meeting of shareholders for the purposes of nominating three individuals as directors (not the same individuals as nominated by Mr. Van Dam).

[23] Mr. Brown says that in February 2018, he received a call from Mr. Zachanowich asking if he knew a number of named individuals, which included Mr. Van Dam, his nominees for the board, and Mr. Phinney's nominees. Mr. Brown was told that these proposed directors had been nominated by two separate groups. Mr. Brown says that he told Mr. Zachanowich that he recognized two names as having been nominated in 2017 (Mr. Van Dam's nominees), but he did not know the others, other than knowing the background of one of them. Mr. Brown says that he was called the next day by Mr. Matson asking him to look into the background of these nominees. He reported back, recommending one of the nominees.

[24] On February 16, 2018, Karnalyte advised Mr. Van Dam that his proposals did not meet the legal requirements for nominating directors for election.

[25] Mr. Brown says that discussions over his consultation appointment were terminated without notice to him in early March 2018.

[26] On March 2, 2018, Mr. Rowan advised Mr. Phinney that his request did not meet all the legal requirements and that the board would not call a special meeting.

[27] On March 16, 2018, Karnalyte announced that its annual general meeting would be held on June 7, 2018.

[28] On March 27, 2018, Mr. Phinney submitted a new shareholder proposal on the basis that he was the holder of over five percent of the Karnalyte shares, seeking to have the same three individuals nominated for election to the board.

[29] Karnalyte takes the position that Mr. Phinney's proposal did not need to be included in its Management Proxy Circular because it failed to comply with the *Alberta Business Corporations Act* requirements for such a proposal and with Karnalyte's advance notice by-laws. It rejected the proposal on April 6, 2018, in part on the basis that the common shares held by Mr. Phinney comprised less than five percent of Karnalyte shares.

[30] On March 29, 2018, Mr. Van Dam again sent a shareholder proposal to Karnalyte proposing himself and the same two individuals as in his previous proposal as nominees for election to the board of directors. Karnalyte rejected the proposal on the basis that the number of shares held by shareholders named in his application totalled less than the five percent threshold required for a shareholder requisition.

[31] On April 10, 2018, Mr. Van Dam made a further shareholder proposal, including with his request all of the pledge sheets he had received from shareholders, only to be told on May 2, 2018 that the request was out of time. He asked for a comparison of his list of pledges with the company's records, but received no response.

[32] Mr. Van Dam states that he did not learn of Mr. Phinney's efforts to nominate a slate of directors until sometime in April when Mr. Phinney contacted him to discuss making a joint application for an exemption to the Alberta Securities Commission.

[33] Mr. Van Dam agreed to make an application jointly with Mr. Phinney, although he says that he never intended to solicit proxies or to encourage Karnalyte shareholders to vote in a certain manner. Mr. Van Dam states that he thought the intention was to put information out on a website with respect to the issues facing Karnalyte.

[34] Mr. Phinney says he became aware sometime in April or May of 2018 that both his proposed nominees and Mr. Van Dam's proposed nominees had been rejected by the Karnalyte board. Although he can't recall who first contacted the other, he agrees that they discussed the rejection of their nominees and the idea of making a joint application to the Commission.

[35] On May 14, 2018, Karnalyte distributed its Notice of Annual and Special Meeting and a Management Information Circular, which did not include either Mr. Phinney's or Mr. Van Dam's proposed nominees for directors.

[36] Mr. Phinney and Mr. Van Dam filed a joint application to the Alberta Securities Commission for an exemption from the requirements of the ABCA with respect to proxy solicitation on May 23, 2018. They say that the reason that they were both joined in the application is that they and their counsel thought having two applicants strengthened the application.

[37] Although the exemption application states that Mr. Phinney and Mr. Van Dam were acting jointly and in concert with each other under the heading "facts" in the application, and that they may wish to solicit proxies, both Mr. Van Dam and Mr. Phinney say that they did not in fact ever solicit proxies.

[38] Mr. Brown states that, by mid-July 2017, Karnalyte shareholders were starting to voice their disappointment over lack of transparency and communication from the board on the Stockhouse forum. He says that from March 2018, he continued posting messages on Stockhouse as he had done previously, expressing the growing anger and frustration he was hearing from shareholders about this lack of transparency and the Board's inactivity.

[39] Some of the messages on Stockhouse during this period are heated and unrestrained, as messages on this type of website are apt to be. Many who post use pseudonyms. Mr. Brown does not. Karnalyte alleges that some of Mr. Brown's posts are defamatory. Mr. Brown in his posts accused the directors of entrenchment tactics and lack of integrity.

[40] Mr. Wheatley says that he was advised in April, 2018 by a Karnalyte employee related to Mr. Phinney that Mr. Brown "and friends" were posting "extremely negative and angry opinions about the company" and "false statements" about certain employees.

[41] Mr. Brown says that, in the months prior to Karnalyte's 2018 Annual General Meeting, he was subjected to an onslaught of harassing and threatening posts on the Stockhouse forum by parties using pseudonyms. He says he received an anonymous phone message on May 23, 2018 advising him that Mr. Matson, a director of Karnalyte, had hinted that a lawsuit was being filed against him, Mr. Phinney and Mr. Van Dam.

[42] Both Mr. Van Dam and Mr. Brown say that they have never met, nor spoken to each other.

[43] Mr. Brown says that on May 24, 2018, he spoke with Mr. Phinney for the first time since the end of Karnalyte's 2017 Annual General Meeting, asking if he was aware of any pending lawsuits by Karnalyte. Mr. Brown says that Mr. Phinney informed Mr. Brown that he was not aware of any impending lawsuit, but according to Mr. Brown, spent some time telling him "what he thought of me and my decision to support the current Karnalyte board in the last election". Both Mr. Brown and Mr. Phinney agree that they are not friends, and that Mr. Phinney holds harsh feelings about Mr. Brown's failure to support him in 2017.

[44] On the evening of May 25, 2018, Mr. Brown noted a message on the Stockhouse billboard from someone using the alias "Curvature" threatening him with litigation and saying that Mr. Brown would be receiving "legal documents" from Curvature's lawyer demanding an apology within 24 hours.

[45] On May 25, 2018, Mr. Wheatley issued a press release entitled "Karnalyte Resources Inc. Issues Letters to Shareholders Warning of Threats to Value Creation from Self-interested Individuals." In that press release, Mr. Wheatley indicates that he has issued a letter to shareholders containing "important information regarding a serious threat to the value of shareholders' investment in Karnalyte as a result of the reckless actions of a number of self-interested individuals". The press release urges shareholders to vote for management nominees to Karnalyte's board of directors and notes:

> In the letter, Karnalyte shareholders are also provided with the alarming facts regarding the conduct of certain shareholders who are actively seeking to take control of the company and its board of directors, at the expense of other shareholders. Karnalyte has written the letter to shareholders as such shareholders are flagrantly ignoring basic corporate and securities laws, as well as long-established Karnalyte corporate policies.
>
> Evidence of the transgressions of these self-interested individuals is all comprehensively documented in Karnalyte's corporate records.

[46] The May 25, 2018 letter to shareholders states, among other comments, the following about Mr. Brown:

> Dan Brown tried to enrich himself at your expense....twice
>
> But the truth is, Mr. Brown is no friend of the shareholders and has twice tried to enrich himself at the Company's expense and that of its shareholders.
>
> In early 2018, Mr. Brown launched a self-serving attempt to gain control of Karnalyte and put his interests ahead of all of the Company's other shareholders…
>
> This was not his first attempt. In June 2017, Mr. Brown tried to convince your Board of Directors to pay him …
>
> Mr. Brown's proposal lacked credibility, and demonstrated a complete lack of understanding of corporate governance of public mining companies and the mining industry.
>
> To make matters worse, behind the scenes Mr. Brown was attempting to coerce GSFC into supporting his reckless and irresponsible scheme. Mr. Brown's self-interest put a vital strategic partnership with Karnalyte's single largest shareholder at risk - all to enrich himself at the expense of the Company's other shareholders.

[47] The letter says the following about Mr. Phinney, among other comments:

> Robin Phinney … His track record is one of value destruction, self-dealing and irresponsible leadership … The facts are that those governance matters [previously described] were wholly-caused by Mr. Phinney's recklessness, greed and self-interest …
>
> To be clear: Mr. Phinney single-handedly killed a US$700 million financing … because of his unbridled greed and total disregard for the interests of all other shareholders …

[48] In the week following the letter, from May 24 to May 30, 2019, Mr. Brown and Mr. Phinney had several conversations about the allegations against them contained in the letter and press release and about the threats from Curvature.

[49] On May 25, 2018, Mr. Phinney posted comments on his own website about certain events that occurred during his time with the company, which included the following:

> It is now my intention to obtain an exemption from the Alberta Securities Commission to broadcast further information pertaining to the Management Proxy & Information Circular dated May 14th, 2018, regarding the Annual and Special Meetings of shareholders to be held on June 7th, 2018 in Saskatoon, Sask.
>
> …
>
> I AM VOTING WITHOLD on the resolutions related to election of the Board and audit committee proposed by the management and AGAINST on the resolution proposing Karnalyte's name change. Once you have read all of the information, please vote your own shares.
>
> Please note that the current Board requires a minimum of 2/3 majority vote in order to proceed with the name change and other developments, including the nitrogen project which, I believe, have very little merit and are not in the best interests of Karnalyte and its shareholders.
>
> MORE INFORMATION WILL BE PROVIDED BY ME ONCE THE ASC ORDER IS OBTAINED. AT THAT TIME YOU CAN REACH OUT TO ME IF YOU HAVE QUESTIONS OR CONCERNS AS WELL.

[50] On May 25, 2018, Mr. Brown posted the following on the Stockhouse forum:

> As with any election, the candidates should be judged based on the merits of their last term, and if a 50% slash in your investment here is acceptable, and you are ok with our company going in a completely unproven rabbit hole just because they think it is a good idea, vote for these guys.
>
> If you are starting to see what is really going on here leading into a very important election for the companies future, please vote accordingly.
>
> Robin Phinney's name as the designated proxy box.
>
> WITHHOLD and AGAINST in all the boxes will finally clean this mess up once and for all and breath live back into our company.

[51] On May 28, 2018, Karnalyte filed this application. On the same day, Karnalyte sent a letter to all provincial securities commissions alleging that Mr. Phinney, Mr. Van Dam and Mr. Brown were engaging in the illegal solicitation of dissident proxies. Karnalyte included a copy of this application with its letter.

[52] On May 29, 2018, Mr. Brown received a letter entitled "Cease and Desist" from Karnalyte's counsel, who demanded an apology for the comments Mr. Brown had made on Stockhouse. Mr. Phinney also received a "cease and desist" letter on the same day relating to comments he had made on his website, alleging that they were improper proxy solicitation.

[53] On May 29, 2018, legal counsel for the Alberta Securities Commission emailed counsel for Mr. Phinney and Mr. Van Dam asking about the Karnalyte allegations, specifically whether Mr. Phinney and Mr. Van Dam had been engaging in proxy solicitation, whether they were acting in concert with any other parties and, if so, whether the requirement of an early warning report had been triggered.

[54] Counsel for Mr. Phinney and Mr. Van Dam responded the same day, indicating that they had not been soliciting proxies, and that Mr. Phinney had a website on which he had indicated his voting intentions for the upcoming meeting, which counsel pointed out, was excluded from the definition of "solicit" in subparagraph 1.1(i) of National Instrument 51-102 Continuous Disclosure Obligations (NI 51-102). Counsel copied the Commission with Mr. Phinney's posting.

[55] Counsel also advised the Commission that Mr. Phinney and Mr. Van Dam had not been acting jointly or in concert with any other shareholders, but that they were aware of Mr. Brown's activity expressing his displeasure with Karnalyte's current management. They denied acting jointly or in concern with Mr. Brown.

[56] On May 31, 2018, counsel for the Commission informed counsel for Mr. Phinney and Mr. Van Dam that they were concerned about Mr. Wheatley's allegation that Mr. Van Dam had said that he represented more than 20 percent of the Karnalyte shareholders when he first proposed two nominees to the Karnalyte board. From that, the Commission noted that it appeared that an early warning report would be required.

[57] On Friday, June 1, 2018, counsel for Mr. Phinney and Mr. Van Dam advised the Commission that Mr. Van Dam had authorized counsel to remove him from the application, as it appeared that his involvement was causing issues with the timing of the order, and that the proxy cut-off date for the meeting was imminent. The Commission asked counsel to address its question about Mr. Van Dam's holdings at any rate.

[58] Counsel responded within minutes as follows:

> The idea is that they plan to act together to solicit proxies but have not yet started, hence the reason for the application. I would think that dropping Van Dam's name should address the issue since they would not be acting jointly to solicit proxies. They were definitely acting joint for the purposes of making the application and were hoping to act jointly for the purposes of soliciting proxies, but have agreed that Van Dam can step aside for the purposes of this application and soliciting proxies in order for Mr. Phinney (who has the larger share position in any event) to solicit on his own.

[59] About a half hour later, he advised:

> I've received word from Dave Van Dam that he has not entered into nor is he aware of any agreement or commitment in respect of the ownership, control or voting of securities of Karnalyte. He has also indicated that in his letter from January, 2018 to the company, the number 20% should have in fact been 10% due to a typo. He was also engaging in a bit of "puffery" in that he had not spoken to anyone or acted jointly with anyone in connection with sending that letter but was merely indicating that he felt that he could get 10% of the shareholders over to his way of thinking. As such, he did not have control over 10% of the shareholders and therefore was not required to have filed an early warning report.

[60] Counsel noted that he was preparing a revised application and verification statement from Mr. Phinney dated June 1, 2018, which was emailed to the Commission that day.

[61] That application specified, among other things, that Mr. Phinney was not acting jointly or in concert with anyone, and that he may wish to communicate with shareholders in advance of the Karnalyte meeting to solicit proxies by public broadcast, speech or publication, without filing a dissident's proxy circular.

[62] At 4:14 p.m. on Friday, June 1, 2018, the Commission emailed an exemption order to Mr. Phinney's counsel. Unfortunately, the order referenced Mr. Van Dam in the style of cause, although Mr. Van Dam was not included in the body of the order granting the exemption. On Monday morning, June 4, 2018, without prompting from Mr. Phinney or his counsel, the Commission emailed counsel for Mr. Phinney a revised order that did not include Mr. Van Dam in the style of cause.

[63] The order exempts Mr. Phinney from the requirement of filing a dissident's proxy circular as long as a public solicitation is made by broadcast, speech or publication, includes certain information and is not for the purpose of nominating a director, and a non-public solicitation is made to not more than 15 shareholders.

[64] On June 1, shortly after being informed that he had received the exemption order, Mr. Phinney posted comments on his personal website responding in great detail to the comments about him made by Mr. Wheatley in the May 25, 2018 letter to shareholders, and ending with the following:

> The current Board has mischaracterized events repeatedly to make them sound better for the current Board than they actually are. These repeated mischaracterizations are clearly indicative of the problematic board that is currently in place. The current Board has shown its inability to create value for shareholders. I hope that you use this letter to inform yourself.
>
> I will vote WITHELD with respect to the board of directors proposed by the management.
>
> I will vote AGAINST with respect to the proposed name change and change of business. I hope that Karnalyte can return to a smart business plan and implement the projects for which it has been founded.

[65] Mr. Phinney's comments on his own website were reposted on Stockhouse shortly afterwards by someone using the alias "theend 6543", under the comment "Robin reply to Karnalyte". Mr. Phinney denies that he posted this comment or that he used the alias in question, and says that he has never posted on Stockhouse.

[66] On June 1, 2018, Mr. Brown publicly apologized on Stockhouse for his previously posted comments offending Karnalyte or any of Karnalyte's counsel's clients. Specifically Mr. Brown stated:

> To the management team and the board of directors, I realize that posting messages under intense stress, frustration, and emotion is not going to solve any issues, and I apologize for any remarks, comments, or suggestions that have offended or insulted you in any way in the past. It will never happen again...
>
> I have learned a very valuable lesson in that trying to fix the worlds problems through emotional and often continued heated discussions on these social platforms is not the answer.

[67] Mr. Brown refrained from posting any further negative comments about Karnalyte's management nominees or management.

[68] On June 6, 2018, the day prior to the 2018 Annual General Meeting, Mr. Brown posted a message on the Stockhouse forum requesting that posters not display the names of any Karnalyte directors, management, or any other party involved on the Stockhouse forum in a negative light.

[69] Notwithstanding this, on June 14, 2018, Mr. Breitman sent Mr. Brown a letter giving notice of Karnalyte's intention to sue Mr. Brown for defamation, and subsequently filed a statement of claim ultimately claiming damage of approximately $1.4 million against Mr. Brown. That action is in addition to this application.

[70] At the meeting, the management slate of directors was elected by a majority of 55 percent of the votes, but the proposed name change did not pass. It was an uncontested election with respect to the directors, in the sense that the shareholders of Karnalyte only had the option of voting for the slate of directors, or withholding their vote.

[71] The facts as I have stated them derive from affidavit and questioning evidence of Mr. Phinney, Mr. Van Dam and Mr. Brown and from documents and communications filed in evidence. The evidence of Mr. Phinney, Mr. Van Dam and Mr. Brown was unimpeached by questioning and uncontradicted other than by inferences and speculation, and I accept it as credible.

[72] There were many other allegations put in evidence by the parties relating to past disputes and grievances and commenting on the management or alleged mismanagement of Karnalyte in the years since it was incorporated. It is not necessary that I comment on those allegations for the purpose of my decision.

III. Issues

A. Did Mr. Phinney and Mr. Van Dam solicit proxies without obtaining an exemption order?

B. Were Mr. Phinney, Mr. Van Dam and Mr. Brown acting jointly or in concert such that they were required to file early warning disclosure under securities regulation?

C. Is the requirement of filing early waring disclosure triggered through the holding of proxies?

D. Did Mr. Phinney breach the exemption order such that it is invalidated?

E. Did Mr. Brown solicit proxies on his own?

IV. Analysis

General Principles

[73] A person other than on behalf of management of an Alberta corporation with more than 15 shareholders must not solicitor proxies unless:

a) they have prepared and circulated a dissident's proxy circular; or
b) they have obtained an exemption from the Alberta Securities Commission: Sections 150 and 151 of the *Alberta Business Corporations Act*, RSA 2000, c B-9.

[74] A person who contravenes these sections is guilty of an offence under the *Act*: subsection 150(4).

[75] Section 147 of the *ABCA* defines "solicit" or "solicitation" to include the sending of a form of proxy or other communication to a shareholder under circumstances reasonably calculated to result in the procurement, withholding or revocation of a proxy vote.

[76] A person soliciting proxies may also be required to comply with NI 51-102. In contrast to the other provinces and territories of Canada, the Alberta Securities Commission is not bound to follow NI 52-102 because of the absolute prohibition on soliciting proxies without a dissident's proxy circular in sections 150 and 151 of the *ABCA*. However, the Commission's orders typically reference and apply the requirements of NI 51-102 to bridge the gap between corporate law specific to Alberta and securities laws that apply more broadly. The ASC did so in the exemption order that was obtained by Mr. Phinney.

[77] Under NI 51-102, the term "solicit" includes requesting a proxy, requesting a securityholder to execute or to not execute a form of proxy or to revoke a proxy, and sending a form of proxy or any other communication that to a reasonable person will likely result in the giving, withholding, or revocation of a proxy.

[78] It does not include a public announcement, by a securityholder of how the securityholder intends to vote and the reasons for that decision, if that public announcement is made by

i. a speech in a public forum; or
ii. a press release, an opinion, a statement or an advertisement provided through a broadcast medium or by a telephonic, electronic or other communication facility, or appearing in a newspaper, a magazine or other publication generally available to the public.

[79] NI 51-102 requires an information circular to be provided to securityholder prior to or concurrent with the solicitation of proxies. The requirement for an information circular does not apply to a solicitation if the total number of securityholders whose proxies are solicited is not more than 15.

[80] As noted previously, Mr. Phinney obtained an exemption order from the ASC dated June 1, 2018 that exempts him from the requirement of filing a dissident's proxy circular as long as a public solicitation is made by broadcast, speech or publication, includes certain information and is not for the purpose of nominating a director, and non-public solicitation is made to not more than 15 shareholders.

A. Did Mr. Phinney and Mr. Van Dam solicit proxies without obtaining an exemption order?

[81] Karnalyte submits that Mr. Phinney and Mr. Van Dam solicited proxies by either directly requesting them or by communicating with shareholders in a manner that resulted in them being granted proxies.

[82] Karnalyte has not, however, supported these allegations with evidence other than circumstantial evidence, despite vigorous and repetitive questioning of Mr. Phinney and Mr. Van Dam. While circumstantial evidence, such as family relationship and the granting of proxies to an individual is admissible to support an allegation, that evidence must meet the standard of balance of probabilities. Mere plausibility or suspicion is not sufficient to meet the burden: ***Re Kusamoto***, 2007 ABASC 40 at para 91.

[83] Mr. Phinney denies soliciting any proxies. While he was named as proxy by a number of shareholders with respect to the 2018 meeting, many of these shareholders were family and friends who were aware of his previous relationship with the company, some of whom he had gifted with their shares. He denies knowing some of the shareholders who appointed him as proxy. While Karnalyte suggests that this should give rise to an inference that he must have solicited these proxies, it is equally plausible that he was appointed because of his previous high-profile involvement in Karnalyte's affairs.

[84] Mr. Phinney's posting on his website prior to his receipt of an exemption order is not a proxy solicitation, as noted by his counsel to the securities commission, because it falls within the exclusion set out in subparagraph 1.1(i) of NI 51-102, despite Karnalyte's allegations in its "cease and desist" letter to the contrary.

[85] Mr. Van Dam also denies soliciting proxies. He conceded that he didn't know many of the shareholders who had appointed him as proxy, but indicated that he was well-known in Kenora, and well-known to have an interested in Karnalyte. His credibility was not impeached or undermined through questioning.

B. Were Mr. Phinney, Mr. Van Dam and Mr. Brown acting jointly or in concert such that they were required to file early warning disclosure under securities regulation?

[86] Karnalyte submits that Mr. Phinney, Mr. Van Dam and Mr. Brown were required to comply with the early warning requirements of National Instrument 62-104, as they were acting "jointly or in concert" to succeed in a common goal.

[87] Mr. Phinney concedes that he would have been required to provide early warning disclosure pursuant to NI 62-104 in any case where he acted jointly or in concert with other parties collectively controlling greater than 10 percent of the actual outstanding shares in Karnalyte. However, he denies that he acted "jointly or in concert" with Mr. Van Dam and Mr. Brown or any other third parties.

[88] Pursuant to NI 62-104, early warning obligations are triggered when a person acquires "beneficial ownership of, or control or direction over" voting or equity shares in excess of 10% of the class at issue. Section 5.2(1) of NI 62-104 provides that:

> An acquiror who acquires beneficial ownership of, or control or direction over, voting or equity securities of any class of a reporting issuer, or securities convertible into voting or equity securities of any class of a reporting issuer, that, together with the acquiror's securities of that class, constitute 10% or more of the outstanding securities of that class, must
>
> (a) promptly, and, in any event, no later than the opening of trading on the business day following the acquisition, issue and file a news release containing the information required by section 3.1 of National Instrument 62-103 *The Early Warning System and Related Take-Over Bid and Insider Reporting Issues*, and
>
> (b) promptly, and, in any event, no later than 2 business days from the date of the acquisition, file a report containing the information required by section 3.1 of the National Instrument 62-103 *The Early Warning System and Related Take-Over Bid and Insider Reporting Issues*.
>
> Under this subsection, such an acquiror is required to issue and file a news release and file a report as set out in section 5.2(b). The report must contain the information required under section 3.1 of NI 62-103.

[89] Section 1.9(1) of NI 62-104 states that, "it is a question of fact as to whether a person is acting jointly or in concert with an offeror or an acquirer", but that such a relationship is presumed when:

> [a] a person that, as a result of any agreement, commitment or understanding with the offeror, the acquiror or with any other person acting jointly or in concert with the offeror or the acquiror, intends to exercise jointly or in concert with the offeror, the acquiror or with any person acting jointly or in concert with the offeror or the acquiror any voting rights to any securities of the offeree issuer. (Emphasis added)

[90] In ***Genesis Land Development Corp. v Smoothwater Capital Corp.*** 2013 ABQB 509 at para 24, this Court noted:

> It is a question of fact as to whether the Respondents, or any of them, were acting jointly or in concert: *Sterling Centrecorp Inc., Re* (2007), 30 O.S.C.B. 6683 (Ont. Securities Comm.) at para 97. The joint acting can be as a result of an agreement, a commitment or an understanding, and need not be by way of a formal or written agreement. The burden was on [the Applicant] to establish that the Respondents were joint actors on the basis of "clear cogent evidence, not ambiguous or speculative evidence; however, reasonable inferences can always properly be drawn from evidence": *Sterling Centrecorp* at para 116.

[91] Karnalyte's evidence to support the allegation that Mr. Phinney, Mr. Van Dam and Mr. Brown were acting jointly or in concert with others is as follows:

a) Mr. Phinney and Mr. Van Dam are family friends: they both attempted to nominate directors for election at Karnalyte's 2018 Annual General Meeting at about the same time;
b) there is evidence from their phone records that Mr. Van Dam and Mr. Phinney spoke by telephone about a dozen times over the course of January to May, 2018;
c) between May 29, 2018 and the day of the meeting, Mr. Phinney and Mr. Van Dam were appointed as proxies by many shareholders;
d) the May 23, 2018 application to the securities commission indicated under "facts" that Mr. Phinney and Mr. Van Dam were acting jointly and in concert; and
e) there is evidence from their phone records that Mr. Brown and Mr. Phinney spoke by telephone from May 24 to May 30, 2018.

[92] Both Mr. Phinney and Mr. Van Dam state that their attempts to nominate directors were undertaken independently, and that they did not discuss them with each other until after they discovered that all their attempts had been rejected, about the time the Karnalyte Management Information Circular was distributed. It is noteworthy that their nominees were not the same. They do not deny that they know each other and sometimes communicated by telephone about Karnalyte matters.

[93] Mr. Van Dam could not recall what he was talking to Mr. Phinney about during phone calls between January and mid-May, 2018. He conceded that he had talked to Mr. Phinney about what he characterized as the "slander" in the Wheatley May 25 letter. Mr. Van Dam states that he did not learn of Mr. Phinney's efforts to nominate a slate of directors until sometime in early April when Mr. Phinney contacted him to discuss making a joint application for an exemption to the Alberta Securities Commission. He says that the idea behind the application was "to put the website out to the shareholders, but not for solicitation". He says that Mr. Phinney "thought it would be beneficial to have two five percent representatives to apply". Mr. Van Dam denied that he solicited proxies, or that there was any strategy to solicit proxies, even in the face of intense questioning.

[94] He conceded that the May 23 application indicated that he and Mr. Phinney were acting jointly or in concert with each other with respect to filing the application, but nevertheless maintained that there was no proxy solicitation.

[95] Mr. Phinney recalled that he and Mr. Van Dam spoke after he became aware that Karnalyte had rejected both of their proposals to nominate directors. He also stated that he and Mr. Van Dam had acted independently in nominating directors. He denied speaking to Mr. Van Dam or anyone else about soliciting proxies.

[96] Mr. Phinney says that he was phoned by a number of interested shareholders after Mr. Wheatley's May 25 letter, and that he was under pressure to tell his side of the story, but that he did not engage in proxy solicitation.

[97] Mr. Phinney says that he started his application for an exemption on May 23 so he could do a "shout-out" to other shareholders about his views of Karnalyte's management, and he was advised by counsel that he should get an exemption to be able to do that. He denies that he intended to solicit proxies, despite the permissive wording of the exemption order, and says that his only plan was to make comments on his website.

[98] As noted previously, Mr. Phinney agreed that he did know the identity of everyone who had made him their proxy. He said that he expected that family members might give him a proxy, although he did not solicit it, but that he was surprised by the number of proxies that were in his name when he discovered the extent of it at the Karnalyte meeting.

[99] Karnalyte relies heavily on the statement in the May 23 application to the Securities Commission that Mr. Phinney and Mr. Van Dam were acting jointly and in concert. That statement, viewed in context, appears to refer to the fact that they initially made a joint application for an exemption. As noted previously, both Mr. Van Dam and Mr. Phinney say that Mr. Van Dam withdrew from the application because his involvement was taking too much time due to his error about how many shares he controlled in his first proposal to nominate directors. Correspondence with the Commission confirms this. The amended application states that Mr. Phinney is not acting jointly or in concert with anyone else.

[100] Karnalyte submits that Mr. Van Dam was dropped from the application to hide the fact that they were acting jointly and in concert, and in response to the "cease and desist" order from Karnalyte's counsel, but Mr. Van Dam's testimony is equally, if not more, plausible, and supported by the communications with the Commission.

[101] It is noteworthy that Mr. Phinney and Mr. Van Dam advised the Commission when the application was being considered that they had not been soliciting proxies, and provided the text of Mr. Phinney's May 25 posting to the Commission to support the fact.

[102] Karnalyte submits that the mere fact that Mr. Phinney and Mr. Van Dam applied for the exemption order together was enough to trigger the early warning disclosure. I reject that submission.

[103] The application discloses that Mr. Phinney and Mr. Van Dam held less than 10 percent of the shares at the time of the application. Both of their shareholder proposals had been rejected by Karnalyte on the basis that the shareholders they purported to represent held less than 5 percent of Karnalyte's shares.

[104] The securities commission was aware of the joint application, and did not raise the question of whether an early warning notice was required because of the application, but only when they were concerned from Karnalyte's complaint that Mr. Van Dam controlled about 20 percent of the shares, a typographical error in his first shareholder proposal that he later corrected and explained to the Commission.

[105] Karnalyte attempted to strengthen its case against Mr. Phinney and Mr. Van Dam by questioning Stan Phinney, Mr. Phinney's brother who lives in Kenora. Stan Phinney denied acting as a go-between Mr. Phinney and Mr. Van Dam and denied helping either Mr. Van Dam or Mr. Phinney to solicit proxies. His testimony supports Mr. Van Dam and Mr. Phinney's evidence that they acted independently of each other in their shareholder requests to nominate directors.

[106] Stan Phinney testified that he was one of a group of Kenora business people who would meet regularly for morning coffee. He stated that some of them were Karnalyte investors who were unhappy about Karnalyte's performance, and who had lost a great deal of money investing in the company. Mr. Van Dam was often present at these coffee meetings. Stan Phinney described Mr. Van Dam as "one of the most high-profile businessmen in Northwest Ontario, Manitoba and Canada". He said that he knew Mr. Van Dam was going to put his name forward

as a director, as Kenora is "a little, tiny town", but that he didn't see Mr. Van Dam's proposal or discuss it with him. In fact, he knew that Mr. Van Dam wanted to avoid having him as part of the proposal, as the Phinney name was controversial, and Mr. Van Dam was acting independently. Karnalyte submits that "the more obvious reasonable inference" would be that including people with Phinney last names "would have alerted Karnalyte that Phinney and Van Dam were acting together to submit shareholder proposals and solicit proxies". Again, this is just suspicion and speculation and contradicted by credible questioning evidence.

[107] The questioning of Stan Phinney failed to establish that he was used to solicit proxy votes for either Mr. Phinney or Mr. Van Dam. There is no evidence from either Mr. Van Dam or Stan Phinney that Mr. Van Dam used the Kenora coffee meetings to solicit proxies, as the references that purport to establish this do not do so.

[108] Stan Phinney also said that his brother was very careful not to talk about Karnalyte matters, not to "share". He says he was aware that his brother was going to propose directors for the board but he was not part of what Mr. Phinney was doing in that regard. Stan Phinney was questioned about his telephone conversations with his brother between January and the Karnalyte meeting. He acknowledged speaking to his brother often, but pointed out that most of those conversations were about their ailing mother, whom Mr. Phinney was supporting financially by buying her meals and helping to pay for homecare, or about their plans for the summer, or about Mr. Phinney's new grandchild.

[109] Stan Phinney stated that he saw his brother's postings after Mr. Phinney had obtained the exemption order, and that he had talked to his daughter about how to vote after she asked his advice, but pointed out that she and his other children and family members were intelligent, independent people, and made their own decisions.

[110] Stan Phinney also agreed that he had saw Mr. Van Dam frequently at the morning coffee group, and that he had spoken to him by telephone after May 23, 2018. He said he knew Mr. Van Dam's proposed nominees had not been accepted by the Karnalyte board and that Mr. Van Dam told him he didn't know why they were denied. He was questioned about calls between him and Mr. Van Dam in early June, and explained that a group of Kenora shareholders had traveled to the meeting in Saskatoon together by car, and the calls were probably about these arrangements. Stan Phinney agreed that he gave his proxy to Mr. Van Dam, together with those of his mother, his daughter and one of his brothers. At the request of a friend who was not going to attend the meeting, he delivered his friend's proxy to Mr. Van Dam, but he denied organizing proxy solicitation on Mr. Van Dam's behalf.

[111] Like Mr. Phinney and Mr. Van Dam, Stan Phinney's evidence on questioning was not contradicted and did nothing to support Karnalyte's allegations against Mr. Phinney and Mr. Van Dam.

[112] Mr. Brown points out that the communications between himself and Mr. Phinney were confined to a single week from May 24 to 31, 2018. His phone records indicate that he was not communicating with any other Karnalyte shareholders during the time at issue.

[113] Mr. Brown says his conversations with Mr. Phinney were always in response to the allegations in Mr. Wheatley's May 25, 2018 letter and the threats of litigation from various sources. That Mr. Brown and Mr. Phinney would communicate after being the subject of such allegations as are set out in the May 25 letter is at least as plausible, if not more, than Karnalyte's

speculations that they were acting jointly or in concert to solicit proxies. I find that there is no evidence other than suspicion to establish that Mr. Brown and Mr. Phinney were acting jointly or in concert to solicit proxies. The uncontradicted evidence from both respondents is to the contrary.

[114] There is certainly no evidence of Mr. Brown and Mr. Van Dam acting jointly or in concert in any way. The uncontradicted and credible evidence of both is that they have never met, and have never communicated with each other.

[115] I find that Karnalyte has not satisfied its burden of addressing cogent evidence that Mr. Phinney and Mr. Van Dam were acting jointly or in concert, or that they were soliciting proxies. Therefore, there was no reason why any of them would have to file early warning disclosure.

[116] There is no persuasive evidence that Mr. Brown and Mr. Phinney were acting jointly or in concert with each other. Karnalyte submits that "it is logical to infer that the communications between Mr. Brown and Mr. Phinney were not mere coincidence". It is equally possible to infer, and more logical and natural in the circumstances, that Mr. Brown's communications with Mr. Phinney, with whom he was not then on speaking terms, were made directly in response to Karnalyte's serious allegations against them both as set out in Karnalyte's press release and letter to shareholders.

[117] A court cannot draw adverse credibility findings on the basis of inferences drawn from circumstantial evidence that are contrary to the sworn and uncontradicted testimony of witnesses, particularly when an alternate explanation is equally or more plausible than the inference.

C. Is the requirement of filing early warning disclosure triggered through the holding of proxies?

[118] Karnalyte submits that the mere fact of holding proxies for more than 10 percent of the shares of a public company gives rise to a requirement to filing early warning disclosure, and that therefore Mr. Phinney and Mr. Van Dam were in breach of this securities regulation.

[119] As of May 14, 2018 (the day of the Information Circular prior to the 2018 Annual General Meeting), there were 28,116,565 total Karnalyte shares outstanding.

[120] Mr. Van Dam held 174,882 common shares. At Karnalyte's 2018 meeting, he also held 25 proxies for 1,591,116 shares on behalf of his family, friends, colleagues and acquaintances. Not including those held for his family members, Mr. Van Dam held proxies for 1,308,434 shares for the 2018 meeting.

[121] As of May 14, 2018, Mr. Phinney held 1,528,577 shares in Karnalyte. At the 2018 meeting, Mr. Phinney held proxies representing 2,413,172 shares, excluding shares owned by his sons.

[122] As of June 28, 2018, Mr. Brown held 100,050 Karnalyte shares, while Stan Phinney estimated his holdings at 98,000 shares as of September 19, 2018.

[123] Karnalyte seeks a declaration that the votes cast through the exercise of proxies held by Mr. Phinney and Mr. Brown are null and void as they were obtained through improper proxy solicitation in violation of applicable corporate and securities law, including the obligations to file an early warning report.

[124] The early warning regime was established to ensure that shareholders are properly notified when other shareholders accumulate significant holdings. In ***Genesis Land Development Corp v Smoothwater Capital Corp***, 2009 ABQB 509 [***Genesis***], this Court discussed the purpose of the early warning system, concluding at paragraph 11:

> The comments in the [Notice of National Instrument 62-103 (4 September 1998) that accompanied then-proposed NI 62-103] make it clear that the early warning regime was not put in place merely to warn of impending take-over bids, but to provide disclosure to the market of accumulations of significant blocks of securities for several reasons, including the possibility of a proxy fight over the constitution of a board of directors.

[125] An "acquiror", as defined in NI 62-104, must comply with the early warning requirements in NI 62-103 in order to ensure that shareholders are informed of significant share accumulations.

[126] Central to interpretation of subsection 5.2(b) of NI 62-104 which requires early warning disclosure is the meaning of "acquiror". "Acquiror" is defined in section 5.1(1) of NI 62-104 as one who:

> ...acquires beneficial ownership of, or control or direction over, voting or equity securities of any class of a reporting issuer, or securities convertible into voting or equity securities of any class of a reporting issuer, that, together with the acquiror's securities of that class, constitute 10% or more of the outstanding securities of that class...

[127] Also important is the definition of "acquiror's securities" as defined in section 1.9(b)(i) of NI 62-104 as:

> ...securities of an issuer beneficially owned, or over which control or discretion is exercised, on the date of the acquisition or disposition, by an acquiror or any person acting jointly or in concert with the acquiror.

[128] The "acquiror", as defined in subsection 5.1(a) of NI 62-104, refers to a person who acquired a security, other than by way of a take-over bid or an issuer bid. Karnalyte says the definition of "acquiror" includes persons acquiring beneficial ownership of, or control or direction over, shares by proxy. As well, Karnalyte argues that in determining whether the 10% threshold is met, shares held by persons acting jointly or in concert with the acquiror are included.

[129] The issue is whether a proxy-holder acquires beneficial ownership of, or control or direction over, the shares held by proxy.

[130] Karnalyte argues that the proxies held by Mr. Van Dam and Mr. Phinney must be considered in determining whether the early warning obligation was triggered. At the 2018 meeting, Mr. Van Dam held approximately 1,591,116 proxies for friends, family, colleagues and acquaintances, while Mr. Phinney held proxies representing 2,413,172 shares, excluding shares owned by his sons. They argue that they never acquired beneficial ownership of the shares for which they were given proxies to vote, and could not exercise control or direction over them. Accordingly, they argue that they had no obligation to file an early warning report.

[131] "Control" is defined in NI 62-104 in section 1.4 in part to include where:

> (a) the first person, directly or indirectly, beneficially owns or exercises control or direction over securities of the second person carrying votes which, if exercised, would entitle the first person to elect a majority of the directors of the second person, unless the first person holds the voting securities only to secure an obligation. ...

[132] That definition is not determinative; it suggests a proxy holder could control Karnalyte if it could exercise its control or direction to elect a majority of directors of Karnalyte.

[133] There are additional definitions of "control". In NI 62-103, "control" in respect of a security is defined in s 1.1(1) as:

> (a) when used in connection with the insider reporting requirements, the take-over bid requirements and related definitions and the early warning requirements, the power to exercise control or direction over the security, or similar term or expression used in securities legislation...

[134] "Control" is defined in the Alberta *Securities Act*, RSA 2000, c S-4 in section 3 as follows:

> A person or company is considered to control another person or company if the person or company, directly or indirectly, has the power to direct the management and policies of the other person or company by virtue of
>
> (a) the ownership or direction of voting securities of the other person or company,
>
> (b) a written agreement or trust instrument,
>
> (c) being the general partner or controlling the general partner of the other person or company, or
>
> (d) being the trustee of the other person or company.

[135] There is no evidence in this matter that Mr. Van Dam or Mr. Phinney had the power to direct the management and policies of the shareholders for whom they held proxies in accordance with (a) through (d) of section 3 of the *Securities Act*.

[136] Further, a proxy holder is not granted control or given beneficial ownership of the shares for which a proxy is given, in the absence of any other agreement. A "proxy" is defined in NI 51-102 at section 1.1(1) as follows:

> ...a completed and executed form of proxy by which a securityholder has appointed a person or company as the securityholder's nominee to attend and act for the securityholder and the securityholder's behalf at the meeting of securityholders.

[137] The relationship between a shareholder and a proxy has been described as one of agency: ***Montreal Trust Co of Canada v Call-Net Enterprises Inc*** (2002) 57 OR (2d) 775 [***Montreal Trust***] at para 22; aff'd (2004), 70 OR (3d) 90 (CA). That decision involved a proxy battle with a dissident shareholder. The court considered whether the fact of a shareholder owning sufficient shares and holding enough proxies to pass a resolution constituted a change in control, which was deemed to occur under a Change of Control Agreement "if any person acquires the right to

control or direct 35% or more of the combined voting power of the corporation in any manner whatsoever": at para 1.

[138] In ***Montreal Trust***, the Court disagreed that a proxy holder has control or direction of shares, stating at paragraphs 22-25:

> [22] The relationship between a proxyholder and a shareholder is one of agency. It is essentially an administrative mechanism to facilitate shareholder participation in the corporate decision-making process. As explained by Professor Crête in her text *The Proxy System in Canadian Corporations: A Critical Analysis:*
>
> > The proxy form represents, as do other proxy materials sent by management prior to a general meeting, a fundamental instrument of shareholder participation in the corporate decision-making process. Not only does it serve as an informative device similar to the notice of meeting and the information circular but it also enables shareholders to exercise their voting rights. Through the proxy form, shareholders may create an agency agreement or mandate by which they appoint a person, namely the proxyholder, to act on their behalf at the meeting.
> >
> > The completion of an adequate proxy form is, therefore, vital to effective shareholder participation since proxyholders will ultimately be required to act according to the authority defined in such a document.
>
> [23] The proxy framework established under the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44 and Ontario's *Securities Act*, R.S.C. 1990, c. S.5 reinforces this. It can be summarized in this way: First, it is the shareholder who gives the proxy and appoints the proxyholder to act in place of the shareholder. Second, the proxyholder must act only to the extent authorized by the proxy. Third, while the proxyholder has a limited discretion to vote on amendments or variations of matters proposed in the notice of meeting of which the proxyholder was unaware when soliciting the proxy, the proxyholder has no discretion to vote contrary to the instructions of the shareholder and may not vote on behalf of the shareholder on significant matters not identified in the notice of meeting or the proxy circular. Fourth, a proxy must identify the meeting at which it is to be used and is valid only at that meeting. Consequently, the proxy terminates at the end of the meeting. Finally, the authority of the proxyholder is limited by the fact that the proxy can be revoked by the shareholder at any time before it is exercised. [Footnote omitted.].
>
> [24] Judicial consideration of the nature of the power conferred by a proxy is to the same effect and underscores that the proxyholder is a mere agent whose authority is transitory:
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> > The law is clear that a person holding a proxy is merely an agent acting for the person giving the proxy and, as such, is subject to the instructions of the giver, who may withdraw his or her authority at

> any time. See Cousins v International Brick Co., [1931] 2 Ch. 90 (C.A.) , at p. 102, where Lawrence L.J. said:
>
> > Every proxy is subject to an implied condition that it should only be used if the shareholder is unable or finds it inconvenient to attend the meeting. The proxy is merely the agent of the shareholder, and as between himself and its principal is not entitled to act contrary to the instructions of the latter.
>
> [25] In summary, proxies are an expression of the shareholders' right to vote, they are revocable until an actual vote is taken and a proxyholder bound to act in accordance with the instructions of the shareholder, irrespective of the interests of the proxyholder. A proxy does not confer any right to control or direct the voting power of the corporation. Therefore, Crescendo never acquired the right to control or direct the voting power of Call-Net. What Crescendo acquired was the authority to vote the shares for which it held proxies in accordance with the instructions given to it by those shareholders who gave their proxy. It is worth noting that at least some of those proxies instructed Crescendo to vote against its own resolution. This belies the assertion that Crescendo acquired any real power over the shares, apart from those it owned.
>
> [Emphasis added.]

[139] Similarly, in this case, Mr. Van Dam, Mr. Phinney and Mr. Brown did not acquire control of the shares for which they held proxies. As proxy nominees, they were obligated to vote as directed by the shareholder (or may have been given authority to decide how to vote in the specific instance of the 2018 meeting). I agree with Mr. Phinney's argument in his brief that, to the extent the nominee exercises the authority granted to it via the form of proxy, the nominee only interacts with the voting right, which is only one of the rights that makes up the bundle of rights constituting property in the security.

[140] Further, a shareholder who nominates someone as his or her proxy does not confer a beneficial interest in the shares for which the proxy is to act. The relationship is not a trust relationship; as stated in ***Montreal Trust***, the relationship is one of agency.

[141] Karnalyte relies on this Court's decision in ***Genesis*** to argue that the early warning regime applies to groups of security holders acting jointly or in concert in an attempt to change the composition of the Board of Directors, and not only to take-over bids, and therefore includes proxy holders. I agree with Mr. Van Dam's submission that this is not the intention of the early warning regime; it is not intended to capture proxy holders, as the shareholder retains control over how the shares are voted. While the accumulation of active control above the limited agency of a proxy may trigger the early warning disclosure requirements, there is no evidence of that in this case.

[142] The law is clear that a proxy does not confer a beneficial interest in the securities or legal control to the proxy holder. As a result, there was no need to file an early warning report.

D. Did Mr. Phinney breach the exemption order such that it is invalidated?

[143] Although Mr. Phinney obtained an exemption order from the Commission, Karnalyte submits that Mr. Phinney's purported reason for seeking the order is not substantiated by the

facts. Karnalyte also alleges that the exemption order was based on misrepresentations of fact that *prima facie* invalidate it. It also alleges that Mr. Phinney breached the terms of the exemption order in several material respects.

[144] However, Karnalyte has not established that there were any misrepresentations in the order.

[145] Karnalyte asks that I find that Mr. Phinney was in breach of applicable corporate and securities laws at the time that he sought the exemption order and therefore obtained the exemption order by misrepresentation.

[146] Most of the alleged misrepresentations relate to Karnalyte's submission that Mr. Phinney and Mr. Van Dam were acting jointly and in concert, which I have found not to be the case. Neither have I found that they had an obligation to file an early warning report. Beyond this, Karnalyte alleges that Mr. Phinney committed "material securities violations" in 2010 and 2011, that Mr. Phinney and Mr. Van Dam failed to issue early warning reports in 2016 and 2017, and that Mr. Phinney failed to file insider trading reports. These are all issues for securities commission to decide after a full hearing and not this Court on the basis of contradictory affidavit evidence.

[147] I note that when the Alberta Securities Commission received a copy of Karnalyte's Amended Originating Application in this matter, Commission counsel contacted counsel for Karnalyte to express that the Commission had jurisdictional concerns about Karnalyte's request that this Court revoke the exemption order by reason of representations made by Mr. Phinney to the Commission to the effect that Mr. Phinney was not in default of securities legislation and that he was not acting jointly and in concert with Mr. Van Dam.

[148] Counsel for the Commission informed counsel for Mr. Phinney that, relying on indications from Karnalyte's counsel that he would be withdrawing this request for relief, the Commission did not plan to participate in the application. However, Karnalyte continues to take the position in its brief that the exemption order is of no force or effect on the basis of misrepresentations of fact "which prima facie invalidate the exemption order in any event" and that the exemption order is founded on Mr. Phinney's "fraudulent misrepresentations and he should be denied the protection afforded by" the exemption order.

[149] This is sophistry: I will not indirectly "invalidate" the exemption order in the face of Karnalyte's representation to the Commission on the relief it would seek.

[150] Karnalyte notes that the exemption order does not on its face indicate that it was granted with retrospective effect, and therefore, submits that any solicitations by Mr. Phinney before June 1, 2018 are not covered by the order. While it is correct that the order does not state that it has retroactive effect, there is no evidence that Mr. Phinney solicited proxies prior to June 1, 2018. As noted previously, a public announcement of how a shareholder intends to vote is not a solicitation, and that is the only evidence other than speculation that Karnalyte has adduced against Mr. Phinney.

[151] Karnalyte submits that Mr. Phinney breached the exemption order by failing to file the content of his post-exemption website posting in advance of its publication. Since the posting merely indicated how he intended to vote, it did not require pre-filing with the Commission, and thus there was no breach.

[152] Karnalyte also suggests that there is evidence to suggest that Mr. Phinney engaged in the non-public solicitation of in excess of 15 shareholders in contravention of the exemption order. There is no such evidence.

E. Did Mr. Brown solicit proxies on his own?

[153] The only evidence against Mr. Brown relating to proxy solicitation generally is his posting on Stockhouse on May 28, 2018. From the evidence, it appears that Mr. Brown made a call to Mr. Phinney shortly before this posting that lasted approximately one minute. Mr. Brown says that he did not reach Mr. Phinney during that call, that he doesn't remember whether he left a voice message for him or just hung up. This is not evidence that Mr. Brown was acting in concert with Mr. Phinney before the posting, and it is noteworthy that it followed Mr. Wheatley's letter to shareholders and the Curvature threats.

[154] In order to determine whether Mr. Brown solicited proxies through the posting on May 28, 2018, it must be established that:

(a) the posting is a solicitation as defined in NI 51-102:
(b) Mr. Brown failed to send a circular to each registered security holder whose proxy was solicited; and
(c) the alleged solicitation does not fall into one of the exemptions found in section 9.2 of the disclosure obligations.

[155] The posting meets all of these requirements. It is a communication to shareholders on a public forum that can be reasonably calculated to result in the withholding of a proxy vote for the election of directors. Even though Mr. Brown purports to extend an option, this is in terms that are not meant to be taken seriously. He failed to sent a dissident circular to the shareholders of Karnalyte, and the solicitation does not fall within an exemption. The fact that there is, and cannot reasonably be, any evidence of how many Stockhouse forum users saw the posting, the onus is on Mr. Brown to establish that this was less than 15, and he cannot do so.

[156] I must find that this posting was an unlawful solicitation of proxies.

[157] However, Karnalyte suffered no damages from this solicitation. The management slate of directors was elected. While the name change may not have passed, that is something that it is clear from its current shareholdings that Karnalyte would be able to remedy at its next meeting, and at any rate, there is no evidence of any adverse impact to Karnalyte arising from a delay in the name change.

[158] Mr. Brown issued a full public apology prior to the meeting, serving to neutralize his posting at least in part. Despite his error in issuing the May 28, 2018 posting, I find that there is no further remedy necessary against Mr. Brown. He was caught up in a vicious battle among old enemies. Any further penalty against Mr. Brown would be a matter for the securities commission.

V. Evidentiary Issues

[159] Karnalyte in its brief makes bold statements that it purports to support through answers obtained on questioning of Mr. Phinney, Mr. Van Dam and Mr. Brown. However, the cross-

references to questioning in the brief fails to support Karnalyte's statement in many instances and instead mischaracterizes the questioning answers. For example:

a) Karnalyte's brief states that "Phinney and Van Dam were conducting an illegal proxy solicitation, without the benefit of an exemption order … in violation of applicable corporate and security laws". The supporting reference is to an answer of Mr. Phinney in questioning that fails to support the statement, and in fact, supports the uncontradicted evidence that Mr. Van Dam and Mr. Phinney were acting independently with respect to their shareholder proposals.

b) Karnalyte's brief states that "Van Dam stated in his cross-examination that Phinney contacted him on May 22, 2018 respecting the two of them working jointly and in concert." The questioning reference instead refers to Mr. Phinney contacting Mr. Van Dam to ask him to put his name on the application for an exemption.

c) Karnalyte states in its brief that "(a) significant number of the proxies that had been signed in paper form by the shareholders that granted Van Dam the authority to vote the 1,308,434 shares at the 2018 AGM were personally delivered by Stan Phinney to Van Dam… Stan Phinney drove Van Dam to the 2018 AGM". The first cross-reference in the brief relating to these statements has nothing to do with the statement. Later cross-references indicate that Stan Phinney had given Mr. Van Dam his proxy, together with that of his mother, his brother and his daughter. While a group of shareholders, including Stan Phinney and Mr. Van Dam drove to Saskatoon together, the questioning does not establish that Stan Phinney drove Mr. Van Dam.

d) Karnalyte states in its brief that Mr. Phinney's posting of June 2, 2018 in which he indicates how he will vote was "purportedly done in furtherance" of the exemption order and that, since it was not filed before publication, it was in contravention of the exemption order. The questioning and undertaking references purporting to support this statement do not do so, but instead establish that Mr. Phinney's statement on that date do not fall within the definition of solicitation.

e) Karnalyte states in its brief that, during cross-examination, Mr. Phinney admitted that he breached the terms of the exemption order by failing to provide the commission with a copy of the content he intended to publish. This is inaccurate and misleading, for the reasons described previously, and the references in the brief purporting to support this statement do not do so.

[160] Karnalyte misstated that the duration of telephone conversations between Mr. Phinney and Mr. Brown, claiming they amounted to an aggregate sum of 761 minutes between May 24-30, 2018. This number was considerably inflated and contradicts numbers presented in Karnalyte's own evidence and later in its own brief.

[161] This kind of mischaracterization required a careful examination of the questioning transcripts, and what they actually established, or failed to establish.

VI. Other Matters

[162] Karnalyte asks that I declare that it properly excluded Mr. Phinney and Mr. Van Dam's shareholder proposals from the 2018 Management Information Circular. Mr. Phinney and Mr. Van Dam do not ask for any declaration to the contrary.

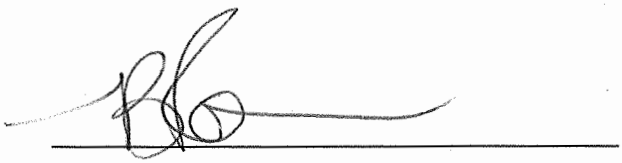
[163] Mr. Phinney and Mr. Van Dam are not pursuing any relief arising from this exclusion. I am not prepared to grant such a declaration and ratify the Karnalyte board's decision in the absence of any live issue relating to the matter.

VII. Conclusion

[164] Karnalyte's application is dismissed, other than for a finding that Mr. Brown published an improper proxy solicitation on May 28, 2018.

[165] If the parties are unable to agree on costs, they may make brief written submissions.

Dated at the City of Calgary, Alberta this 14th day of February, 2020.



B.E. Romaine
J.C.Q.B.A.

Appearances:

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Matthew Epp, Matthew Schneider and Aaron Grach
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Oliver C. Hanson
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William Katz
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