IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Swan v. Nickel 28 Capital Corp.,* 2023 BCSC 1262

Date: 20230724
Docket: S233752
Registry: Vancouver

Between:

Maurice Swan, in his capacity as chair of Nickel 28 Capital Corp.'s 2023 annual general and special meeting of shareholders

Petitioner

And

Nickel 28 Capital Corp. and Pelham Investments Partners LP

Respondents

\- and -

Docket: S233883
Registry: Vancouver

Between:

Pelham Investments Partners LP

Petitioner

And

Nickel 28 Capital Corp.

Respondent

Before: The Honourable Justice Fitzpatrick

Reasons for Judgment

Counsel for the Petitioner, Maurice Swan:	J. McEwan, K.C. E. Kirkpatrick
Counsel for the Respondent, Nickel 28 Capital Corp.:	R. Staley D. Luca N. Shaheen D. Yegendorf

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Counsel for the Respondent/Petitioner, Pelham Investment Partners LP:	O. Pasparakis K. Smiley
Place and Date of Hearing:	Vancouver, B.C. May 31, 2023
Place and Date of Judgment with Written Reasons to Follow:	Vancouver, B.C. June 5, 2023
Place and Date of Written Reasons:	Vancouver, B.C. July 24, 2023

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INTRODUCTION

[1] These competing petition proceedings are intended to resolve the issue as to who will be put forward for election as directors of the respondent, Nickel 28 Capital Corp. ("Nickel 28"), at its next annual general meeting (AGM) on June 12, 2023. The petitioner, Maurice Swan, a director of Nickel 28, has been appointed as the Independent Chair of the AGM (the "Chair").

[2] Nickel 28's board of directors (the "Board") has proposed a slate of directors to be considered by the shareholders at the AGM. The petitioner/respondent, Pelham Investment Partners LP ("Pelham") is a shareholder of Nickel 28 and also wishes to put forward a competing slate of directors at the AGM.

[3] The difficulty is that Pelham failed to abide by Nickel 28's Articles in terms of the requirement to deliver the required notice of its intention to propose changes to the composition of the Board at the AGM. As a result, Mr. Swan, as Chair, concluded that Pelham's notice was deficient and that the Articles dictated that Pelham could not put its slate forward. The Board agreed with Mr. Swan's conclusion and it chose not to exercise its discretion to waive the requirements under the Articles, as it could have done.

[4] Pelham now seeks the intervention of the Court to essentially overturn the Board's decision so as to allow its slate of directors to be considered at the AGM, notwithstanding the defects in its notice. In addition, Pelham seeks the appointment of an independent chair for the AGM in place of Mr. Swan. Both Nickel 28 and Mr. Swan oppose that relief.

[5] At the time of the hearing, the parties indicated that there was urgency in obtaining a decision from the Court, given that the AGM was scheduled to be held within days. Accordingly, on June 5, 2023, I advised the parties of my decision to grant the relief sought by Mr. Swan in his petition and dismiss the relief sought by Pelham in its petition. Below are the reasons for those orders.

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BACKGROUND FACTS

[6] The following are my findings of fact. While many of the events took place prior to the central facts in May 2023, which are particularly relevant to these proceedings, Pelham asserts that those prior events provide significant context to those central facts. Nickel 28 agrees, although it characterizes those earlier events much differently.

The Parties

[7] Nickel 28 is a public company headquartered in Toronto, Ontario but incorporated in BC. It was incorporated in 2019 and began operations in 2021.

[8] Nickel 28 is in the business of producing nickel and cobalt at various mines around the world. Nickel 28's shares trade on the TSX Venture Exchange and approximately 91.7 million common shares are outstanding.

[9] Pelham is a private investment limited partnership with a registered office in the U.S. The general partner of Pelham is Part V Capital Management, LLC, led by its founder and managing member, Edward (Ned) Collery. Mr. Collery has sworn an affidavit that is in evidence at this hearing.

[10] Since 2021, Pelham has held common shares of Nickel 28.

[11] Mr. Swan is an independent director of Nickel 28 who, as above, has been appointed as Chair for the AGM. Mr. Swan was a partner of a national law firm, having practiced corporate law for over 22 years prior to his retirement in 2019.

Summer 2022–February 2023

[12] Mr. Collery states that, from the time of its initial investment, Pelham had growing concerns regarding the management and direction of Nickel 28.

[13] In summer 2022, Pelham began expressing concerns to the Board about Nickel 28's direction, its performance, management compensation and various governance issues. In 2022/early 2023, the Board consisted of Justin Cochrane

(President), Anthony Milewski (Executive Chairman), Philip Williams and Mr. Swan (Directors).

[14] One of Pelham's complaints was that there had been non-compliance with the Board's mandate that required Nickel 28 to have at least three independent directors (the "Mandate"). In 2022/early 2023, Nickel 28's public disclosures indicated that Mr. Swan and Mr. Williams were independent; however, it is now acknowledged—and later publicly disclosed—that, as of May 2021, Mr. Williams was not independent as defined by the Mandate.

[15] By early 2023, Pelham concluded that a refreshing of the Board was necessary to provide the independent stewardship that it sought with respect to Nickel 28 and its business.

[16] On February 6, 2023, Pelham sent a letter to the Board indicating its view that a "board renewal" was necessary. Pelham complained about the fact that only two independent directors had been appointed and also called into question their true independence, particularly regarding Mr. Williams who was said to have close ties to Mr. Milewski. In its letter, Pelham also advanced an unsolicited proposal to make a US $15 million private placement, said to be at a 15% "premium" to the share market price. In return for that investment, Pelham demanded two seats on the Board who would also be appointed to the compensation committee. Pelham demanded an immediate response by February 8, 2023.

[17] Nickel 28's Board responded to Pelham's proposal almost immediately, but not as Pelham had wished.

[18] On February 7, 2023, Lance Frericks was appointed to the Board as another independent director.

[19] On February 8, 2023, Nickel 28 issued a press release indicating that the Board had considered and ultimately rejected Pelham's proposal. The Board considered that Pelham was attempting to gain control of Nickel 28 without paying any premium for such control. In coming to this conclusion, the Board had solicited

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input from several larger shareholders who supported the Board's decision. As detailed in Nickel 28's press release issued on February 8, 2023:

> Following review, the Board has unanimously determined that the unsolicited proposal is not value enhancing for the Company or its shareholders, other than for the shareholder making the proposal. The Board is of the view that the value of the Company's assets is far in excess of the value implied by the proposed financing, such that the private placement would be value destructive and economically dilutive for all other shareholders. Management and the Board who collectively hold approximately 25% of the Company's issued and outstanding common shares calculated on a fully-diluted basis are strongly opposed to this opportunistic and coercive proposal and remain fully aligned with the interests of minority shareholders.

[20] Pelham was disappointed but not deterred. Pelham then decided that it would take steps to increase its shareholdings in Nickel 28 toward effecting the changes it sought.

[21] The Board correctly predicted Pelham's response to the rejection of its offer. In its February 8, 2023 news release, the Board referred to a potential for a solicitation of proxies in the future. The Board also hired further financial advisors, including a strategic advisory and communications firm.

Pelham's Tender Offer

[22] On March 21, 2023, Pelham announced an offer to acquire up to 10 million common shares of Nickel 28 at $1.20 per share, which Pelham described as a "premium" price of approximately 22% of the closing price on March 20, 2023 (the "Tender Offer"). The Tender Offer was comprised of an Offer Letter and Letter of Transmittal. The Tender Offer was open for acceptance until 5:00 p.m. (Eastern Time) on April 25, 2023.

[23] The Tender Offer provided that, in the event that prior to Pelham's acquisition of securities pursuant to the Tender Offer, Nickel 28 sets a record date for a meeting at which those securities can be voted, Pelham would become the nominee and obtain proxies in respect of all such securities. The Tender Offer stated:

> In accordance with the terms of the Letter of Transmittal if, prior to the date that the transfer of Deposited Common Shares that are taken up and paid for

> by Pelham LP has been completed, Nickel 28 sets a record date for the determination of Shareholders entitled to receive notice of, and/or to vote at, a meeting of holders of relevant securities of Nickel 28 (whether annual, special or otherwise, or any adjournment or postponement thereof, collectively referred to as a "Meeting"), a Shareholder that validly deposits Common Shares pursuant to the Tender Offer (each, a "Deposited Common Share"), will appoint representatives of Pelham LP as its nominees and proxy in respect of all Deposited Common Shares that are taken up and purchased under the Tender Offer for any such Meeting. …

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[24] In accordance with the Tender Offer, each shareholder accepting the Tender Offer shall have or be deemed to have:

> 2. … (v) agreed: (a) not to vote any of the Deposited Common Shares taken up and paid for under the Tender Offer at any meeting or meetings of holders of relevant securities of Nickel 28 and not to exercise any other rights or privileges attached to such Deposited Common Shares, or otherwise act with respect thereto, (b) <u>to execute and deliver to the Offeror, at any time, and from time to time, as and when requested by, and at the expense of, the Offeror, any and all instruments of proxy, authorizations or consents, in form and on terms satisfactory to the Offeror, in respect of any such Deposited Common Shares</u>, and (c) to designate in any such instruments of proxy, the person or persons specified by the Offeror as the proxyholder of the Shareholder accepting the Tender Offer in respect of all or any such Deposited Common Shares;
>
> …
>
> (x) <u>in respect of any Meeting for which a record date for the determination of Shareholders entitled to receive notice of, and/or to vote at such Meeting has been fixed prior to the date that the transfer of Purchased Securities by Pelham LP has been completed, irrevocably appointed as its proxy and attorney-in-fact, Ned Collery of Pelham LP</u> and any individual who shall hereafter succeed any such person, and any other person designated in writing by Pelham LP, each of them individually, with full power of substitution and re-substitution, to vote or execute written consents with respect to the Purchased Common Shares of the Shareholder at any Meeting;
>
> [Emphasis added.]

[25] Consistent with the Tender Offer, the Letter of Transmittal at para. 10 similarly provided that shareholders accepting the offer appointed Mr. Collery as their proxy to vote with respect to the tendered shares if a meeting was called prior to the closing of the Tender Offer.

[26] Significantly, from Nickel 28's point of view, para. 10 of the Letter of Transmittal also provided that:

> … Pelham LP may terminate this proxy with respect to the Shareholder at any time at its sole election by written notice provided to the Shareholder.

[27] On March 22, 2023, Nickel 28 issued a press release commenting negatively on the Tender Offer and recommending that the shareholders reject it.

[28] On March 23, 2023, the Board formed a Special Committee, comprised of the independent directors, being Mr. Williams, Mr. Swan and Mr. Frericks.

[29] On March 29, 2023, Nickel 28 reiterated its response to the Tender Offer in another press release, indicating that the Board and the Special Committee had received advice from their legal and financial advisors and, in turn, determined that the Tender Offer was not in the best interests of Nickel 28 or its stakeholders. Again, the Board and Special Committee communicated their view that Pelham was attempting to gain control of Nickel 28, without paying an appropriate premium for such control.

[30] By this time, Nickel 28's management and the Board members had also slightly increased the amount of their collective shareholdings to 26.5%.

April 2023

[31] The battle over Nickel 28 intensified in the ensuing months.

[32] On April 3, 2023, Pelham issued a press release refuting the Board and Special Committee's conclusions and reminding shareholders of the deadline for the Tender Offer (April 25).

[33] On April 12, 2023, Nickel 28 announced the adoption of a shareholder rights plan, described as a "poison pill", which required ratification by the shareholders at the next meeting. The rights plan was said to reduce the likelihood of any person gaining control of Nickel 28 through a "creeping bid" without paying all shareholders an "appropriate control premium".

[34] On April 19, 2023, Nickel 28 announced a repurchase of up to approximately 7.2 million common shares, or 7.9% of the shares.

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[35] On April 21, 2023, Nickel 28 issued another press release criticizing Pelham's Tender Offer. Consistent with its earlier language, the press release described the Tender Offer as a "coercive vote-buying ploy". By this time the share price was $1.18 per share, which the Board pointed out hardly gave rise to the "significant" or 22% premium advertised in the Tender Offer.

[36] Finally, on April 24, 2023, Nickel 28 filed its notice of meeting to hold the AGM on June 12, 2023. In addition, the meeting materials set the record date for that same date, namely April 24, 2023 (the "Record Date"). The Record Date was one day before the expiry of the Tender Offer on April 25, 2023.

[37] On April 26, 2023, Pelham announced the expiry of the Tender Offer. Pelham also advised that, as a result, it had acquired beneficial ownership and control over a further 3,663,478 shares. At that time, and as of the Record Date, Pelham held approximately 5,972,300 million shares. Accordingly, Pelham advised that on closing, it would own and control a total of 9,635,778, or about 10.5% of the total and outstanding issued shares.

The Proxy Contest Begins

[38] Under Section 11.8 of the Articles, the Chair of the Board is entitled to preside at meetings of shareholders. If the chair is absent or unwilling to act, Nickel 28's president may preside as the Chair of a meeting. In addition, Section 11.9 allows the directors to choose another director to serve as Chair of a meeting if the Chair of the Board and President decline to act as Chair.

[39] On May 1, 2023, Pelham's counsel wrote to Nickel 28's counsel about the AGM. Counsel indicated that Pelham has "sought" voting rights for the shares that it had purchased and that it had no confidence that the AGM would be conducted fairly. Counsel demanded that an independent chair be appointed, rather than either Mr. Milewski or Mr. Cochrane.

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[40] On May 4, 2023, Nickel 28's counsel wrote back and stated that, on the recommendation of the Special Committee, the Board had determined that an independent director of Nickel 28 would serve as the Chair of the AGM.

The Advance Notice Requirements

[41] Pursuant to Nickel 28's Articles, any shareholder who wishes to bring nomination of directors to the Board for consideration at any AGM or special general meeting (SGM) is required to comply with Article 10.12. Article 10.12 has been in force since June 25, 2019.

[42] In accordance with Article 10.12(2), compliance with Article 10.12, including the giving of notice—the "Advance Notice"—is "the exclusive means for any person to bring nominations for election to the board before any annual or special meeting of shareholders of the Company".

[43] Article 10.12(1)(c) permits any person who is a direct or beneficial shareholder of Nickel 28 as at the record date of an AGM or SGM of Nickel 28's shareholders to nominate one or more directors, but only if that person "has given timely notice in proper written form as set forth in this Section 10.12."

[44] Article 10.12(4) sets out the numerous requirements that must be met in order for the nomination contained in the Advance Notice to be in "proper written form".

[45] Article 10.12(4)(a) sets out the information regarding the person who is being put forward for nomination. The relevant portion states:

> (a) as to each person whom the Nominating Shareholder proposes to nominate for election as a director ("Proposed Nominee")":
>
> > …
> > (v) any other information that would be required to be disclosed in a dissident proxy circular or other filings required to be made in connection with the solicitation of proxies for election of directors pursuant to the BCA [*Business Corporations Act*] or applicable securities law; …

[46] The parties agree that Article 10.12(4)(a) requires disclosure if the Proposed Nominee is subject to a cease trade order for a period of more than 30 consecutive

days: *Continuous Disclosure Obligations*, BCSC NI 51-102, (10 February 2021); *Information Circular*, BCSC Form 51-102F5, (30 June 105), Sections 7.2 and 7.2.3 regarding contents of dissident proxy circulars.

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[47] In addition, Article 10.12(4)(b) requires the Advance Notice to make disclosure if there is any substantial information regarding the Nominating Shareholder's securities, as well as any means of control or voting rights (including proxies) held by the Nominating Shareholder. The relevant portion states:

> (b) as to each Nominating Shareholder giving the notice, and each beneficial owner, if any, on whose behalf the nomination is made:
>
> …
>
>> (v) full particulars of any proxy, contract, relationship arrangement, agreement or understanding pursuant to which such person, or any of its affiliates or associates, or any person acting jointly or in concert with such person, has any interests, rights or obligations relating to the voting of any securities of the Company or the nomination of directors to the board;

[48] Since the coming into force of the Articles in 2019, all directors of Nickel 28's board have been nominated and elected in accordance with Article 10.12.

Pelham's Advance Notice

[49] Pelham was very aware of the requirement under the Articles to deliver an Advance Notice, in the context of the proxy battle that it intended to mount in respect of the AGM. The deadline to deliver the Advance Notice was May 4, 2023.

[50] On May 4, 2023, Pelham delivered its Advance Notice to Nickel 28, nominating five persons as directors, including Mr. Collery.

[51] Pelham's Advance Notice stated that it held 5,972,300 common shares of Nickel 28 as of the Record Date (April 24) and that, as of May 4, 2023, it held 9,947,878 common shares of Nickel 28.

[52] In response to Section 10.12(4)(b)(v) of the Articles (which requires disclosure of proxies, contracts or agreements relating to the voting securities of Nickel 28), Pelham's Advance Notice said:

> 7. There are <u>no proxies</u>, contracts, relationship arrangements, agreements or understandings pursuant to which the Nominating Shareholder, or any of its affiliates or associates, or any person acting jointly or in concert with the Nominating Shareholder, has any interests, rights or obligations relating to the voting of any securities of the Company or the nomination of directors to the board, other than the right of the Nominating Shareholder under the Advance Notice Provisions to nominate the Proposed Nominees pursuant to this Notice.
> [Emphasis added.]

[53] In response to Section 10.12(4)(a) of the Articles (which requires disclosure of cease trade orders against any of Pelham's Proposed Nominees), Pelham's Advance Notice said:

> 11. No Proposed Nominee is, as at the date of this Notice, or has been, within 10 years before the date of this Notice, a director, chief executive officer or chief financial officer of any company (including the Company) that, (i) was subject to an order that was issued while the Proposed Nominee was acting in the capacity as director, chief executive officer or chief financial officer; or (ii) was subject to an order that was issued after the proposed director ceased to be a director, chief executive officer or chief financial officer and which resulted from an event that occurred while that person was acting in the capacity as director, chief executive officer or chief financial officer and, for the purposes hereof, the word "order" means (a) a cease trade order…

[54] Shortly after delivering the Advance Notice, Pelham also delivered a "with prejudice" settlement offer to Nickel 28, to avoid a proxy battle. In addition to other terms, Pelham offered to withdraw its Advance Notice provided that three members of Nickel 28's Board resigned, to be replaced by Mr. Collery and two other unidentified nominees of Pelham. Again, the Board rejected Pelham's offer, citing that it was not in the best interests of Nickel 28 or its stakeholders, including its shareholders, and that, again, Pelham was attempting to gain control of Nickel 28, without paying any premium (or anything at all) for such control.

Chair's Consideration of Pelham's Advance Notice

[55] On May 11, 2023, Nickel 28's counsel advised Pelham that it had chosen Mr. Swan to be the Chair at the AGM. In addition, Pelham was advised that Mr. Swan was in the process of retaining independent counsel in respect of that role.

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[56] Later provisions found in Article 10.12 allow for determinations as to compliance with its provisions. Article 10.12(7) provides that determinations as to whether any Advance Notice provided by a Nominating Shareholder complies with Article 10.12 is to be made by the chair of the relevant AGM/SGM:

> (7) Defective Nomination Determination
>
> The chair of any meeting of shareholders of the Company shall have the power to determine whether any proposed nomination is made in accordance with the provisions of this Section 10.12, and if any proposed nomination is not in compliance with such provisions, must as soon as practicable following receipt of such nomination and prior to the meeting declare that such defective nomination shall not be considered at any meeting of shareholders.

[57] Accordingly, if the Chair determines that a proposed nomination is not in compliance with Section 10.12 of the Articles, the Chair "must" declare that the defective nomination shall not be considered at any meeting of shareholders.

[58] Following his appointment as Chair, Mr. Swan, assisted by his independent legal counsel, identified two apparent concerns with Pelham's Advance Notice. On May 15, 2023, Mr. Swan described his concerns in a letter from his independent counsel to Pelham.

[59] The first of Mr. Swan's concerns related to whether or not, despite the express statement in Pelham's Advance Notice to the contrary, Pelham held proxies in respect of the 3,663,478 common shares that he understood had been taken up through the Tender Offer. Mr. Swan pointed out that no documents publicly filed or otherwise available to Nickel 28 or Mr. Swan addressed whether Pelham held corresponding proxies, or addressed whether Pelham had terminated the proxies as it was entitled to do under the express provisions of the Letter of Transmittal.

[60] Mr. Swan noted that Pelham's Advance Notice, while acknowledging its acquisition of 3,663,478 common shares, expressly and without qualification stated that Pelham had "no proxies" and no similar contracts or arrangements pursuant to which it had any right to shares held by others as of the record date of the AGM. Mr. Swan says that this plain language statement in the Advance Notice was

consistent with Pelham having terminated any proxies obtained as a result of its Tender Offer.

[61] In these circumstances, Mr. Swan's counsel requested of Pelham:

> Please confirm that, prior to Pelham's delivery of the Notice of May 4, 2023, Pelham had provided written notice to each shareholder that had delivered a Letter of Transmittal terminating the proxy of such shareholder as contemplated by the last sentence of paragraph 10 of the Letter of Transmittal. …

[62] The second of Mr. Swan's concerns related to the background of one of Pelham's proposed nominees, Daniel Burns, and whether a company at which Mr. Burns serves as director and formerly, chief financial officer, had been the subject of a management cease trade order. Despite the Advance Notice expressly stating that no such cease trade order was in place, Mr. Swan's counsel pointed out that a cease trade order had been issued against Mr. Burns on April 3, 2023.

[63] On May 16, 2023, Pelham's counsel responded to Mr. Swan's stated concerns. Counsel stated that:

a) Nickel 28 and Mr. Swan had received "full disclosure" through the public disclosure as to the Tender Offer, including that Pelham had acquired rights to vote the shares acquired. Counsel then confirmed that it held proxies for the 3,663,478 common shares it had acquired under the Tender Offer and that there were no "other" proxies that would require disclosure under Article 10.12(4)(b);

b) Pelham's Advance Notice should have disclosed a management cease trade order to which Mr. Burns was subject. They had not done so because the 30-day period for reporting, as required under the *Information Circular*, had not yet lapsed. Counsel contended that this was nothing more than "inadvertence";

c) The errors were "immaterial" and "inadvertent"; and

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d) Updated disclosure would be included in Pelham's proxy circular.

[64] On May 17, 2023, Nickel 28 filed its meeting materials for the AGM, including its management information circular. The materials clearly refer to Pelham's attempts to secure control of Nickel 28 and include statements by the Board that they expect the election of directors at the AGM to be contested.

[65] On May 18, 2023, Mr. Swan's counsel advised Pelham that Mr. Swan had determined that the Advance Notice did not comply with the Articles. Thus, in accordance with the mandatory language of Section 10.12(7) of the Articles, Mr. Swan declared that Pelham's management slate would not be considered at the AGM.

[66] In making the determination, Mr. Swan considered the language and purpose of the Advance Notice provisions, the Articles as a whole, the language of the *Business Corporations Act,* S.B.C. 2002, c. 57 [*BCA*] and the continuous disclosure obligations under securities law. Mr. Swan concluded that Pelham's failure to disclose the proxies it held over 3,663,478 common shares that it had acquired pursuant to the Tender Offer was a "material omission" going to the "heart of the purpose of the advance notice provisions in [Nickel 28]'s articles".

[67] In that same letter of May 18, 2023, Mr. Swan's independent counsel advised Pelham's counsel of Mr. Swan's intention to seek a declaration from this Court confirming his decision, given Pelham's stated if not continuing questioning of his independence.

[68] Pelham swiftly responded on May 19, 2023, indicating that it would be commencing its own petition proceeding, seeking this Court's confirmation that the Advance Notice was valid and a direction that a "truly" independent chair be appointed for the AGM.

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Board's Consideration of Pelham's Advance Notice

[69] On May 19, 2023, Mr. Swan's counsel filed and served the petition and Mr. Swan's affidavit in Action No. S233752 on Pelham.

[70] Mr. Collery states in his affidavit that he understood from his review of the Articles that Article 10.12(9) provided that the Board had the discretion to waive any requirement in Section 10.12, although it is unclear from his evidence as to when he came to that realization.

[71] In any event, the first mention of that potential step took place on May 20, 2023, when Pelham's counsel sent a letter asking Nickel 28 if the Board had considered waiving the Advance Notice requirements.

[72] At this time, Nickel 28's Board had not considered waiving Pelham's admitted failure to provide a proper Advance Notice, intending that Mr. Swan would independently exercise, with advice from his own legal counsel, the powers reserved to the Chair in connection with the AGM.

[73] On May 20, 2023, Pelham's counsel indicated to the Board that Pelham expected the Board to waive the deficiencies in the Advance Notice "as a matter of course". In support, Pelham again contended that the voting arrangements had been publicly disclosed and were known to Nickel 28 and that the omission as to the cease trade order was inadvertent. Again, Pelham undertook to make corrective disclosure, while noting that the shareholders had already been advised that the election of directors at the AGM would be contested.

[74] On May 22, 2023, Nickel 28's Board and Special Committee met to consider whether to waive the requirements of the Advance Notice provisions. Firstly, the Special Committee met with Mr. Frericks, who chaired the meeting. They were joined at the start of the meeting by Nickel 28's management directors, Mr. Milewski and Mr. Cochrane, along with Nickel 28's counsel and Mr. Swan's independent counsel.

[75] At the meeting of the Special Committee, Mr. Swan, in his capacity as Chair of the AGM, delivered a report regarding his determination under Article 10.12(7). Mr. Swan noted that the Advance Notice would have been accurate if Pelham had terminated the proxies obtained in its Tender Offer before delivering the Advance Notice, as it was permitted to do under the Letter of Transmittal. Instead, Pelham specifically and categorically stated that it had no proxies. Mr. Swan also explained, consistent with his counsel's May 18, 2023 letter to Pelham's counsel, that he viewed the disclosure of a nominating shareholder's ownership of shares and voting rights and arrangements as going to the heart of the purpose of the Advance Notice provisions, and that such disclosure was not merely technical in nature, as contended by Pelham.

[76] A discussion followed, during the course of which Board members sought advice from counsel and considered, among other things, Pelham's counsel's May 20, 2023 letter. Mr. Milewski and Mr. Cochrane then withdrew from the meeting and further discussion followed. Mr. Swan and his independent counsel then also withdrew from the meeting.

[77] Further discussions between Mr. Frericks, Mr. Williams and Nickel 28's legal counsel ensued. Mr. Frericks and Mr. Williams, as the Special Committee, ultimately decided to recommend to the Board that Nickel 28 not waive Pelham's non-compliance with the Advance Notice provisions. Mr. Swan then rejoined the Special Committee meeting, following which the Special Committee voted unanimously to make the same recommendation to the Board.

[78] After the Special Committee meeting concluded, the Board met with all directors present and Nickel 28's legal counsel. Mr. Frericks and Mr. Swan reported on the deliberations and recommendation of the Special Committee to the Board. The Board considered, among other things, Mr. Swan's determination in his capacity as Chair under Article 10.12(7) with respect to Pelham's Advance Notice, including the reasons underlying that determination, Pelham's counsel's letter of May 20, 2023 and the recommendation of the Special Committee. With Mr. Milewski and

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Mr. Cochrane abstaining, the remaining directors voted unanimously not to exercise the Board's discretion to waive Pelham's failure to provide a proper Advance Notice under Article 10.12.

[79] On May 22, 2023, following the meeting, Nickel 28 responded to Pelham, indicating that the Board agreed with Mr. Swan's conclusion that Pelham's failure to make proper and timely disclosure of proxies held in respect of 3,663,478 common shares was a "material omission" in Pelham's Advance Notice that went to the "heart of the purpose of the advance notice provisions in the Articles". Nickel 28 also advised that, given its conclusion, it was not necessary to address Pelham's other failure to disclose the cease trade order in relation to Mr. Burns.

Pelham's Corrective Disclosure

[80] On May 24, 2023, Pelham filed its dissident circular dated May 21, 2023. In that circular, Pelham disclosed the cease trade order against Mr. Burns and that it had been revoked on May 4, 2023. In addition, Schedule "A" to the circular included the provisions in the Tender Offer and Letter of Transmittal regarding Pelham obtaining proxies from those shareholders who took up the offer and who remained entitled to vote given the earlier Record Date.

[81] In his affidavit, Mr. Collery states that it is his view that the Board is attempting to disenfranchise Pelham by its decision. He believes that Pelham would have broad support for its nominees at the AGM. He contends that it would be manifestly unfair if Pelham's slate of directors is not considered at the AGM.

[82] On May 25, 2023, Pelham filed its own petition proceeding in Action No. S233883.

[83] On May 29, 2023, Nickel 28 filed a supplement to its management information circular. At that time, Nickel 28 confirmed Mr. Swan and the Board's decisions regarding Pelham's Advance Notice and that Pelham's slate of directors would not be put forward at the AGM. Nickel 28 also disclosed the ongoing proceedings to determine the issues, as set out in these Actions. Despite these statements, Nickel

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28 also continued to provide shareholders with its stated reasons as to why they should not vote in favour of Pelham's director nominees at the AGM.

RELIEF SOUGHT

[84] There are two petitions before the Court:

a) Mr. Swan, as Chair of the AGM, seeks a declaration confirming his determination under Article 10.12 that the Advance Notice did not comply with that Article and that, as a result, Pelham's nominees need not be considered at the AGM. During its counsel's submissions, Pelham acknowledged that the Advance Notice was deficient and did not comply with the Articles. Further, Pelham conceded that Mr. Swan had no discretion but to disallow the Pelham's slate of directors from being considered at the AGM, given the mandatory provisions in Article 10.12(7); and

b) Pelham seeks: (a) an order that its director nominees listed in the Advance Notice be tabled at the AGM and voted on by the shareholders; and (b) a direction that the Board waive any non-compliance in the Advance Notice in order to allow Pelham's nominees to be considered at the AGM. Further, Pelham seeks a declaration that an independent chair be appointed to conduct the AGM and an order that Nickel 28 appoint one of two specifically proposed persons to that task.

[85] Pelham's counsel confirmed that, if the Court concluded that it was not appropriate to overturn the Board's decision, there was no need to appoint an independent chair for the AGM since the Board's slate of directors would be the only persons put forward for election and no issues arose in that respect as to the conduct of the meeting.

[86] As mentioned above, there is considerable urgency to decide the issues so that the AGM can proceed on a proper basis. All parties remain concerned, as is the

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Court, that the continuing and conflicting public disclosure as to whether Pelham's slate of directors will be considered at the AGM is likely causing considerable confusion in the minds of the shareholders, particularly given that proxy forms were being distributed and discussed on both sides as this dispute evolved.

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ISSUES AND LEGAL CONTEXT

[87] Nickel 28 concedes that the rejection of Pelham's Advance Notice largely arose from the failure to disclose the proxies that it held as of May 4, 2023 under the Tender Offer. In doing so, Nickel 28 acknowledges that Pelham's failure to mention the cease trade order in relation to Mr. Burns in the Advance Notice is of little consequence, as confirmed in its May 22, 2023 letter to Pelham, since the order was revoked that same day.

[88] Therefore, the focus of these proceedings is whether there is any basis for this Court to interfere with the exercise of the Board's discretion under Article 10.12(9) in relation to Pelham's non-disclosure in the Advance Notice of the proxies that it held arising from the Tender Offer.

[89] In seeking that relief, Pelham relies on two legal bases: s. 186 of the *BCA*; and alternatively, the oppression relief provisions found in s. 227 of the *BCA*.

[90] Section 186 of the *BCA* provides:

> (1) The court may, on … the application of a shareholder entitled to vote at the meeting,
>
> (a) order that a meeting of shareholders be called, held and conducted in the manner the court considers appropriate, and
>
> (b) give directions it considers necessary as to the call, holding and conduct of the meeting.
>
> (2) The court may make an order under subsection (1)
>
> (a) if it is impracticable for any reason for the company to call or conduct a meeting of shareholders in the manner required under this Act, the memorandum or the articles,
>
> (b) if the company fails to hold a meeting of shareholders in accordance with this Act or the regulations or its memorandum or articles, or
>
> (c) for any other reason the court considers appropriate.

…

[91] Section 227(2) of the *BCA* provides that a shareholder may apply to this Court for a remedy where (a) "the powers of the directors are being or have been exercised, in a manner oppressive to one or more of the shareholders" or (b) where "some act of the company has been done or is threatened … that is unfairly prejudicial to one or more shareholders."

[92] Under s. 227(2) of the *BCA*, Pelham asserts that the Board's decision not to waive the deficiencies in the Advance Notice was unfairly prejudicial to it and other shareholders.

CONDUCT OF THE MEETING UNDER THE *BCA*, s. 186

[93] A consideration of the issues is properly made in the context of the well-known parameters governing the conduct of a company's affairs:

a) The Articles represent a contract in law between the company and the shareholders: *BCA*, s. 19; *Rogers v. Rogers Communications Inc.*, 2021 BCSC 2184 at para. 81;

b) The election or appointment of directors must be made in accordance with the *BCA* and the Articles: *BCA*, s. 122;

c) The calling, holding and conducting of meetings of shareholders, including an AGM, are governed by both the *BCA* and the Articles: *BCA*, ss. 181–182;

d) A director must act honestly and in good faith with a view to the best interests of the company: *BCA*, s. 142(1)(a); and

e) Subject to (d) above, a director must act in accordance with the *BCA* and the Articles: *BCA*, ss. 142(1)(c) and (d).

[94] In addition, a shareholder's right to vote is both a necessary and fundamental right in corporate democracy: *Gupta v. East Asia Minerals Corporation*, 2018 BCSC

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214 at para. 55, citing *Echo Energy Canada Inc. v. Challenge Gas Holding AB* (2008), 94 O.R. (3d) 254 (Ont. S.C.J.) at para. 88.

[95] As I stated in *Gupta* at paras. 54 and 61, the composition of a board of directors represents an important aspect of "corporate democracy".

[96] Subsection 186(1) of the *BCA* provides this Court with broad discretion to grant orders or give directions regarding the holding or conduct of a meeting toward ensuring that the best interests of the company are obtained. However, there must be an appropriate reason to so and the person seeking the court's intervention—here, Pelham—bears the onus of justifying that intervention.

[97] In *Kingsway Financial Services Inc. v. Kobex Capital Corp.*, 2015 BCSC 2155 at para. 22, Justice G.C. Weatherill stated that:

> … the court should not involve itself in the internal affairs of the company unless there is sufficient evidence to justify such intervention.

[98] One particular example of this approach, cited by Mr. Swan, is found in *Brio Industries Inc. v. Clearly Canadian Beverage Corp.*, [1995] B.C.J. No. 1441 (S.C.). In that case, the facts were similar to those here, in that the dissenting shareholder who wished to put its slate of directors forward had not met the requirement of the articles in order to do so. However, unlike Pelham, the shareholder did not seek to have the Court override the provisions of the Articles; rather, it sought to delay the AGM to allow it to meet the deadlines.

[99] In *Brio Industries* at para. 18, Justice Newbury, as she then was, concluded that the dissenting shareholder had not made out a sufficiently "strong case" to justify the Court's intervention. At para. 15, she discussed the potential scenario where corporate machinery might be manipulated, justifying the Court's intervention:

> [15] I certainly accept the principle that where corporate machinery is being "manipulated" for what may be ulterior motives, the court must carefully scrutinize management's actions. The business judgment rule will not preclude a court from stepping in to ensure that fiduciary duties are not breached, and that shareholders' rights are not prejudiced, under the guise of the best interests of the company. It may even be that where it is shown that corporate machinery is being "manipulated", an evidentiary burden shifts to

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> the directors to justify their conduct. (On the question of onus in an oppression action, see *Starcom International Corporation v. MacDonald* (Vancouver Registry No. A934792, dated March 11, 1994), at paras. 31-3.) But the cases cited by Mr. Holmes are quite different from that at bar. In *International Banknote*, the bylaw in question had been enacted by the board, and in clearly suspicious circumstances. Here, in contrast, Article 13.11 was enacted by CCB's <u>shareholders</u>, presumably voting in what they saw as their own interests. Thus it seems to me that Article 13.11 and the other changes to the company's Articles that were adopted in 1989 can hardly be attacked as giving rise to an inference of improper "manipulation" as occurred in *International Banknote*. In fact, almost identical provisions were proposed by Brio's management recently, for adoption by <u>its</u> shareholders.
>
> [16] In *Aprahamian*, the usual rules applicable to general meetings of the company were indeed being manipulated, again in suspicious circumstances, by management. In the case at bar, CCB's board only intends to follow the rules that have been in place for some years. It is the petitioners who seek to enlist the Court's assistance effectively to suspend or override the operation of CCB's Articles. In this circumstance, the onus is on the petitioners to show why the Court's power should be exercised. As stated by Hinkson, J.A. in *Allied Cellular Systems Ltd. v. Bullock* (Vancouver Registry No. CA012649, dated July 5, 1990), "there must be a very strong case indeed to authorize and justify it to interfere with the conduct of an annual meeting of the shareholders of a company.
>
> [Emphasis in original.]

[100] Following *Brio Industries*, in *Proprietary Industries Inc. v. eDispatch.com*, 2001 BCSC 1850, Chief Justice Brenner stated:

> [21] … The section, while it does provide a discretion to the court, must of course be exercised reasonably and in a manner consistent with general corporate law principles and arguably not inconsistent with existing securities regulations. …

[101] As it was in *Brio Industries*, Pelham does not attack the Articles and their requirements in terms of what a shareholder must do to mount an effort to replace board members at a shareholders meeting. Pelham was clearly aware of what was required under Article 10.12 in terms of the Advance Notice. However, inexplicably it did not meet the requirements.

[102] The essence of Pelham’s argument is that the Court should substitute its judgement for that of the Board in terms of relieving Pelham of the clear consequences of its failure to abide by the Articles in respect of the Advance Notice.

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[103] In support, Pelham cites a number of authorities as to the purpose of the Advance Notice requirements under not only the Articles, but other company articles that include such provisions.

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[104] In *Orange Capital, LLC v. Partners Real Estate Investment Trust*, 2014 ONSC 3793 at para. 52, the court stated that advance notice requirements are intended to ensure that management and shareholders have sufficient advance notice of a challenge for control before the vote takes place. These types of provisions permit orderly meetings and election contests and provide fair warning to the company and sufficient time to respond. In doing so, the court at paras. 53–53 followed similar comments in *Openwave Systems Inc. v. Harbinger Capital Partners Master Fund I, Ltd.*, 924 A (2d) 228 at 239 (Del. Ch. 2007) and *Northern Minerals Investment Corp. v. Mundoro Capital Inc.*, 2012 BCSC 1090 at para. 47.

[105] Pelham also refers to the statements found in *Chambers Global Practice Guides, Shareholder Rights & Shareholder Activism*, 2020 by Robert Staley and others (Mr. Staley is Nickel 28's counsel), which described the purpose of advance notice requirements at p. 9:

> … Advance notice by-laws, which are now commonly adopted, require shareholders to provide advance notice to the corporation, including where a dissident slate of directors is proposed. This prevents stealth campaigns to change the board at an annual meeting, where a small number of like-minded shareholders hold a sufficient number of shares to elect a dissident slate. Notice of a dissident campaign gives the corporation an opportunity to run an active campaign to solicit proxies for the management slate;

[106] Nickel 28's Response to Petition acknowledges the above stated purposes of the Advance Notice provisions in the Articles:

> The Advance Notice Provisions are intended to ensure that Nickel 28 and its shareholders are not left in the dark, or simply guessing, in respect of critical issues going to the exercise of shareholder democracy at the Annual Meeting.

[107] Pelham also cites a number of authorities to the effect that Advance Notice requirements should be used to further shareholder democracy and should not be

used by management as a tool of entrenchment: *Orange Capital* at para. 54; *BullRun Capital Inc. v. GrowMax Resources Corp.*, 2019 ABQB 107 at para. 58.

[108] In *Openwave Systems,* the Delaware Court cautioned that courts should not permit boards to use advance notice requirements inequitably or to restrict shareholder voting rights:

> Such bylaws are designed and function to permit orderly meetings and election contests and to provide fair warning to the corporation so that it may have sufficient time to respond to shareholder nominations. Advance notice bylaws are often construed and frequently upheld as valid by Delaware courts. ... However, this court is "vigilant in policing fiduciary misconduct that has the effect of impeding or interfering with the effectiveness of a stockholder vote." "This is particularly the case in matters relating to the election of directors." Thus, when advance notice bylaws unduly restrict the stockholder franchise or are applied inequitably, they will be struck down.
>
> [Emphasis added.]

[109] Neither Nickel 28 nor Mr. Swan dispute the above comments regarding the purpose of advance notice provisions.

[110] Pelham has not put forward any explanation for its failure to disclose the 3,663,478 proxies that it held at the time it delivered its Advance Notice. The only evidence arises from the statements in Pelham's counsel's letter of May 16, 2023 that the errors were "immaterial" and "inadvertent", although those statements appear to have been directed more toward the failure to disclose Mr. Burns' cease trade order. With respect to the proxy issue, counsel's argument was more akin to "you already knew".

[111] Pelham's counsel's statements in its letters alleging advertence are presumptively inadmissible for the truth of the contents, given the final relief that is sought here. Even leaving that aside, in my view, Pelham's explanation is entirely unsatisfactory toward providing a basis for this Court's intervention.

[112] One of the central themes in Pelham's submissions concerned its competing characterization of its non-compliance. As stated in its counsel's letters of May 16 and 20, 2023, Pelham asserts that the deficiency was only technical or inadvertent.

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Its overarching assertion is that the Board and Mr. Swan were well aware of the proxies it held arising from the Tender Offer.

[113] To the contrary, Mr. Swan disagrees that he and the Board were aware of the proxies when the Advance Notice was received. He states that he and the other Board members understood that Pelham had taken up and paid for the proxies under the Tender Offer but that, importantly, the terms were such that Pelham could terminate the proxies received by giving written notice. Mr. Swan was not aware of any publicly filed documents from Pelham that disclosed whether Pelham had retained or terminated those proxies. Given the express representation found in the Advance Notice, Mr. Swan considered that it was consistent with Pelham having exercised its right to terminate the proxies. Pelham's counsel's letter of May 16, 2023 was the first time that he learned that Pelham indeed held those proxies and intended to vote them at the AGM.

[114] I accept Mr. Swan's evidence that he and the members of the Board did not know the true state of affairs as to the proxies. I also accept Mr. Swan's evidence that the non-disclosure of the proxies was material and not mere "technical non-compliance". The number of proxies was significant—over 3.6 million.

[115] Pelham states that the "heart" of the Advance Notice provisions is not the number of shares that can be voted at the meeting, but simply that the shareholder will be nominating another slate of directors. I disagree. If that was case, the significant information required to be set out in the Advance Notice about the extent of voting rights held by the shareholder would be largely irrelevant. To the contrary, Article 10.12(4)(b) sets out a long list of information that *must* be provided in advance, including "full particulars" of any proxies held. To disregard these requirements is to disregard the shareholders' clear intent in adopting these provisions.

[116] In addition, the Board's decision is undeniably an exercise of their business judgment toward what is in the best interests of Nickel 28: *Jaguar Financial*

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Corporation v. Alternative Earth Resources Inc., 2016 BCCA 193 at para. 114 [*Jaguar*].

[117] In *Sandpiper Real Estate Fund 4 Limited Partnership v. First Capital Real Estate Investment Trust*, 2023 ONSC 794 [*Sandpiper*], Justice Kimmel discussed the business judgment rule and the Court's role in relation to any deference to the exercise of management's business judgment:

> [16] Where the business judgment of the Board is at issue, the role of the court is to determine "whether the board applied the appropriate degree of prudence and diligence in coming to its decision on the timing of the special meeting": [*Marks v. Intrinsyc Software International Inc.*, 2013 ONSC 727] at paras. 7, 25.
>
> [17] In determining whether the Board has properly exercised its business judgment, the court can consider the process of the Board's decision making as well as the grounds upon which the decision was made and the factors taken into consideration: see *UPM-Kymmene Corp. v. UPM-Kymmene Miramichi Inc*. (2002), 214 D.L.R. (4th) 496 (Ont. S.C.), at para. 156.
>
> [18] Courts must defer to the business judgment of the Board provided that its decision falls "within a range of reasonableness" and will not interfere with the Board's decision unless the Board is shown to have acted for an improper purpose or unreasonably: see *Paulson & Co. v. Algoma Steel Inc.* (2006), 79 O.R. (3d) 191 (Ont. S.C.), at para. 43; *Marks*, at para. 7.
>
> [19] As described by the Supreme Court of Canada in *BCE Inc. v. 1976 Debentureholders*, 2008 SCC 69 at para. 84, "[e]verything depends on the particular situation faced by the directors and whether, having regard to that situation, they exercised business judgment in a responsible way."

[118] Pelham does not advance any argument that the Board failed to consider appropriate matters or contemplated inappropriate considerations in coming to its business decision not to waive the requirements of Article 10.12.

[119] Further, the debate as to what or what is not in Nickel 28 or the shareholders' best interests in terms of the direction of Nickel 28 has been hotly contested between the two camps in the public domain, since Pelham's initial foray to seek more control of Nickel 28 in February 2023. Those debating points are numerous and complex. More importantly, this Court is not in any position to judge the merits or lack thereof. That issue will be decided by the shareholders, and if not at this AGM, then perhaps at the next.

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[120] I see no basis to question the Board's business judgment as to what was in Nickel 28's best interests in terms of their decision to decline any waiver in relation to the Advance Notice.

[121] Pelham complains that the process by which the Board came to its decision was not done by independent directors of Nickel 28, in that the critical meeting took place between Mr. Williams and Mr. Frericks. However, the Board composition, being as it was, had these inherent issues and the Board members, with their legal representation, took appropriate and careful steps to follow a process that accommodated the independence issues as could best be done. In my view, the process, while not perfect, did reflect a "robust, independent and objective process of deliberation" per *Sandpiper* at para. 57.

[122] The fact that the Board's decision under Article 10.12(9) aligns with its approach to rejecting the overtures of Pelham more generally does not inevitably mean that the decision is an act of self-interest or that it was made for an improper purpose, such as to disenfranchise Pelham.

[123] In *Proprietary Industries*, Brenner C.J. stated:

> [27] Ultimately, in the case at bar, what has occurred is that the eDispatch directors, after taking advice from the independent committee that was set up to evaluate the takeover bid, have satisfied themselves that it is in the best interests of the company and all of its shareholders to proceed with the meeting today. There is no evidence or allegations of improper conduct or breach of fiduciary duty. In these circumstances it is my view that it would be an error for this court to substitute its judgment as to what might or might not be in the best interests of the shareholders of the respondent company.

[124] It has been stated many times before that the court will not enter the fray to allow one party to gain an advantage in corporate battles, including proxy fights. In *Brio Industries* at para. 19, Newbury J. stated that the application was more accurately described as an attempt by the petitioners to "gain an advantage in an economic contest". In *Tracey v. Gokturk*, 2017 BCSC 1813 at para. 21, Justice Grauer, as he then was, concluded that there was no reason to justify the Court "entering the fray" between the corporate combatants.

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[125] In this sense then, Pelham's sought-after relief is unusual in that, rather than seeking the Court's assistance to *ensure the Board's compliance* with the Articles, Pelham seeks the intervention of the Court to *relieve it of the requirements of the Articles* by which it was bound.

[126] Such an approach is consistent with that taken by the shareholder and considered in *Openwave Systems* at 29 where the court stated:

> … Harbinger clearly had not one but two reasonable opportunities to submit its nominations and missed those opportunities out of neglect or indecision, or perhaps to gain a tactical advantage by remaining a 13G filer even while it was preparing to wage a proxy contest. Whatever the reason, the facts are clear that Harbinger did not comply with any deadline under any reasonable reading of the bylaws. Harbinger does not seriously dispute this fact. Instead, it argues that its noncompliance with the bylaws should be excused because the bylaws are confusing or because the board had a duty to waive the bylaws under the circumstances.

[127] I agree with the court's conclusion in *Openwave Systems*. As such, I find that the Board is not under any duty to waive the Advance Notice requirements.

[128] Nickel 28's counsel suggests that there may have been good reasons for Pelham to have terminated the proxies under the Tender Offer, given the lack of a dissident proxy circular at the time, which may have affected Pelham's ability to vote the proxies at the meeting. If that was the case, it is possible that the confusion as to whether Pelham still held the proxies as of May 4, 2023 arising from the omission in the Advance Notice was deliberate, and that Pelham was seeking some "tactical advantage" in that respect, as suggested above in *Openwave Systems*.

[129] Pelham exhorts this court to "carefully scrutinize" the actions of the Board, per *Proprietary Industries* at para. 21, citing *Brio Industries* at para. 15.

[130] I have undertaken that careful scrutiny but am unable to discern any evidence that the Board manipulated the situation to its advantage in the context of this hotly contested proxy battle. Pelham does not advance any allegation that the Board failed to abide by the *BCA* or the Articles. Pelham does not allege that the members of the Board have breached their fiduciary duty to Nickel 28 or acted with

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impropriety. Pelham does not allege that the Board has applied the Advance Notice provisions inequitably.

[131] One specific complaint of Pelham is that the Board failed to consider its discretion under Article 10.12(9) until prompted to do so by Pelham on May 20, 2023. Pelham also says that Nickel 28 "rushed" an announcement to the shareholders on May 19, 2023 as to Mr. Swan's decision, the day after Mr. Swan communicated his decision to Pelham, and before the Board undertook its deliberations.

[132] In my view, these arguments about the timing of the Board's deliberations lack any merit. Pelham has not cited any authority to support that the Board had a duty to consider the issue of waiver in the absence of any request that it do so. As Mr. Frericks states, the Board was waiting for Mr. Swan to complete his duties as Chair to consider the Advance Notice, which was undeniably the process that had to first be undertaken. I do not consider that it was irresponsible for Mr. Swan to notify the shareholders of his decision promptly, given the ongoing proxy battle. I disagree with Pelham that the purpose of the announcement was to disrupt Pelham's proxy campaign.

[133] It is also not clear to me why Pelham's counsel did not seek a response from the Board directly in its May 16, 2023 letter as an alternative to simply asking Mr. Swan, as Chair, to confirm that he would not reject Pelham's slate at the AGM. There is a clear inference from that letter that the mandatory results arising from a determination by Mr. Swan as Chair was either unknown or ignored by Pelham in this correspondence. In either case, that may explain why Pelham did not earlier recognize that Mr. Swan had no discretion to waive non-compliance and then seek to implore the Board for the waiver.

[134] In any event, once Pelham did seek the waiver on May 20, 2023, the Board acted quickly in addressing the matter and it responded very quickly on May 22, 2023. I do not see that this short delay resulted in any unfairness to Pelham.

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[135] At bottom, Pelham's disclosure in its Advance Notice under Article 10.12(4) was false and non-compliant with those provisions.

[136] I reject Pelham's narrative that the Board is seeking to disenfranchise Pelham by its decision and also seeking to disenfranchise all Nickel 28 shareholders by depriving them of the ability to consider alternate directors for election to the Board. Pelham remains, even now, fully able to vote its shares at the AGM, including those shares for which it holds proxies.

[137] There is no controversy that Pelham, as a shareholder of Nickel 28, was required to abide by the Articles. Similarly, there is no contest that, as a shareholder, Pelham has the right to seek a change of control at the Board, provided it was done in accordance with the *BCA*, the Articles and securities regulations generally. If Pelham had provided proper and timely notice in the Advance Notice, it would have been permitted to advance its slate of nominees at the AGM, in addition to voting all of its shares. Assuming Mr. Collery is correct in his assessment that Pelham has broad support for its nominees, Pelham could then have come fully armed at the AGM with all of its voting power.

[138] Again, Pelham failed to provide the necessary notice as required by the requirements of Article 10.12(4) that would have allowed it to do so, without any adequate explanation for that clear failure.

[139] In that sense, Mr. Swan and the Board were simply reacting to Pelham's non-compliance, as it was required to do under the Articles. They did not seek to implement procedures to disallow Pelham from bringing forward its slate of directors, or seek to disenfranchise Pelham.

[140] The remaining matter to be considered is that of prejudice.

[141] Pelham asserts that there is no prejudice arising from its defective Advance Notice since its corrective disclosure in late May 2023 has now provided the necessary information that was absent from its Advance Notice. For example, Pelham refers to the ongoing discussion in the various communications to

shareholders about the competing slates of directors. Pelham asserts that no ambush could possibly occur in these circumstances.

[142] A determination of prejudice is less than straightforward. To some degree, the shareholders themselves are prejudiced by either the Board (or this Court) allowing a shareholder to disregard the clear requirements under Article 10.12 in seeking a change at the Board level. Pelham's claim that their "disenfranchisement" at the AGM is unfair is equally met with the statement that it is unfair that Pelham is allowed special dispensation from the requirements under Article 10.12.

[143] Pelham also suggests that Nickel 28 and Mr. Swan, as Chair, bear the onus of disproving prejudice and that they have failed to establish any element of prejudice to Nickel 28 or the shareholders by allowing Pelham's slate to be considered. I am not convinced that either Nickel 28 or Mr. Swan are appropriately allocated such a burden.

[144] What is clearer is the seeming acknowledgement by all parties that there is likely considerable confusion in the minds of the shareholders about the course of the upcoming AGM. I agree that this is a reasonable inference from the materials before me. However, there is also no doubt that this likely confusion arose solely as a result of Pelham's non-compliance with Article 10.12.

[145] It is worth noting that, unlike other cases, Pelham does not seek a remedy to delay the AGM so as to allow it to comply with the Advance Notice provisions. Rather, Pelham seeks to have this Court substitute its judgment for that of the Board.

[146] Having all of the circumstances, I am not satisfied that Pelham has put forward any basis upon which to justify this Court's interference under s. 186 of the *BCA* with respect to the Board's decision not to waive the Advance Notice requirements.

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[147] In coming to my conclusion, I have also considered many other specific arguments advanced by Pelham, which are discussed below in conjunction to Pelham's sought after relief relating to unfair prejudice.

UNFAIR PREJUDICE (*BCA*, s. 227(2)(b))

[148] Section 227(3) of the *BCA* provides the Court with broad discretion to grant any interim or final order that is appropriate to remedy any oppression or unfairly prejudicial acts.

[149] Pelham relies on s. 227(2)(b) of the *BCA* alleging that the Board's refusal to waive its non-compliance with Article 10.12 amounts to it being treated in an unfairly prejudicial manner. In this respect, Pelham repeats the same arguments that I have addressed above.

[150] In *BCE Inc. v. 1976 Debentureholders*, 2008 SCC 69 at para. 61, the Court stated that the reasonable expectations of the affected shareholder are the "cornerstone of the oppression remedy".

[151] Mr. Collery states that Pelham's expectations, which he describes as reasonable, were:

> a) the Company would treat Pelham fairly during the proxy contest and permit Pelham to exercise its statutory right to nominate proposed directors to be considered by shareholders;
>
> b) the Board would operate in a manner consistent with the Board Mandate;
>
> c) the Company would not depart from prior practice in setting a record date to be the same date as the Notice of Meeting and Record Date in an attempt to disenfranchise shareholders;
>
> d) the Board would consider whether to exercise its discretion under Article 10.12(9) prior to determining and announcing to shareholders that the Pelham Nominees would not be considered at the AGM;
>
> e) the Board would exercise its direction under Article 10.12(9) reasonably and not as a tool of entrenchment;
>
> f) the Board would waive any technical non-compliance with the Advance Notice Provisions unless prejudice would result to shareholders that could not be remedied by corrective disclosure; and

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g) the Board would use the Advance Notice Provisions as a shield to protect the Company from ambush and not as a sword to disqualify nominees based on technical non-compliance.

[152] Pelham also submitted that they reasonably expected that the Special Committee would be composed of at least three independent directors.

[153] In *BCE* at paras. 62–63, the Court stated that subjective expectations are not conclusive; rather, the expectations must be reasonable in the objective and contextual sense.

[154] Before turning to Pelham's expectations, a preliminary issue arose as to whether Pelham had standing to advance its arguments under s. 227 of the *BCA*.

[155] Both Nickel 28 and Mr. Swan contended that Pelham has no standing, stating that s. 227(2) requires that "an applicant shareholder must establish harm to his interests as a shareholder": *Walker et al. v. Betts et al.*, 2006 BCSC 128 at para. 81.

[156] Nickel 28 and Mr. Swan cite *Icahn Partners LP v. Lions Gate Entertainment Corp.*, 2010 BCSC 1547; aff'd 2011 BCCA 228. In this Court, Justice Savage was addressing an oppression complaint where the challenged transaction had the effect of deleveraging the company which the shareholder contended was to impede its takeover bid. At para. 179, Savage J. stated:

> … In cases where the complaining shareholder is also bidding for control of a corporation, courts distinguish between a shareholder's complaint *qua* shareholder and a shareholder's complaint *qua* bidder. The oppression remedy protects the former but not the latter …

[157] To similar effect, Nickel 28 and Mr. Swan cite *Gazit (1997) Inc. v. Centrefund Realty Corp.*, [2000] O.J. No. 3070 (S.C.J.) at para. 54, where the court confirmed that the oppression remedy is not available to protect the interests of "bidders", as opposed to shareholders.

[158] With respect, I am not convinced that the principle from *Icahn Partners* is relevant here. Pelham has sought relief as a shareholder who has the right to put forward an alternate slate of directors for consideration by the shareholders. Pelham

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in that respect is not a bidder for the company nor does it seek by those means any more control of Nickel 28.

[159] Nickel 28 and Mr. Swan also argue that Pelham would only have recourse to the oppression remedy only if it "suffered harm that is 'direct and special', 'peculiar', or 'separate and distinct' from the harm suffered generally by all of the shareholders": *Jaguar* at para. 179. They also say that "an indirect impact to all shareholders … does not given rise to an oppression remedy", citing *Wigen v. Wynndel Logging Co. Ltd.*, 2018 BCSC 881 at para. 102.

[160] I do not understand Nickel 28's arguments, that Pelham's unfair prejudice claim only relates to Nickel 28's responses to Pelham's bids to gain control of Nickel 28. Nickel 28 contends that such claims cannot be the foundation of oppression relief. I agree that Pelham asserts that its efforts to replace the Board will benefit all shareholders, including itself and those shareholders who support Pelham, but that simply arises as a consequence of the relief sought by Pelham and is not the reason given for it.

[161] At bottom, Pelham's claim of unfair prejudice relates directly to its ability to put forward its slate of directors under the deficient Advance Notice. Pelham unquestionably had the right to put forward such an Advance Notice under the Articles as a shareholder. I agree with Mr. Swan that the rejection of the Advance Notice does not impact the existence of Pelham's voting rights; however, it does impact Pelham's ability to seek a change of the Board composition and it affects the ability of the shareholders, including Pelham, to cast their vote for the directorships.

[162] Accordingly, I propose to address Pelham's claims of unfair prejudicial treatment on their merits. I will address them in the context of the general categories of Mr. Collery's expectations, as above.

Independent Directors and the Special Committee

[163] Pelham advances various complaints about the composition of the Board and the Special Committee. I agree that Pelham's complaints about the independence of

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various Board members appears to be longstanding. It is clear that Nickel 28 did not purport to comply with the Mandate to have three independent directors until Mr. Frericks' appointment on February 7, 2023, although Mr. Williams was still being incorrectly described at that time as independent when he was not. The Mandate was only amended very late in the day on May 27, 2023 to align with TSX Venture Exchange requirements to have at least two independent directors on the Board.

[164] In addition, I agree that the Special Committee still included Mr. Williams, who was not in fact independent.

[165] However, I agree with Mr. Swan that Pelham's alleged grounds of unfair prejudicial treatment that relate to matters *other* than the Advance Notice are irrelevant in that there is no nexus between those complaints and the relief sought. Section 227(3) provides that the relief that may be granted is done:

> … with a view to remedying or bringing to an end the matters complained of …

[166] As was stated in *Wilson v. Alharayeri*, 2017 SCC 39 at para. 53, any order "should go no further than necessary to rectify the oppression". See also *Ludmer v. Ludmer*, 2023 QCCS 224 at para. 117.

[167] Pelham does not seek any relief that relates to these complaints about the composition of the Board or Special Committee. Nor has Pelham sought to vary or set aside any previous resolution of the Special Committee or Board made while those entities were improperly constituted.

Setting of the Record Date

[168] Pelham also complains about the fact that Nickel 28 set the Record Date for April 24, 2023, the day before the closing of its Tender Offer.

[169] The selection of the Record Date for the AGM is a matter for decision by the Board, again pursuant to the exercise of its discretion and in its business judgment.

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[170] I acknowledge that Pelham states that the Record Date was set differently in prior years, with a date set after the delivery of the notice of the meeting materials. However, those decisions were made in different circumstances. Here, Mr. Frericks confirms that the Record Date was set with Pelham's anticipated proxy challenge in mind and that the Board wished to bring the issue forward as soon as possible to allow the shareholders to consider the competing proposals. There is no basis upon which this Court should question this decision.

[171] In any event, it is manifestly clear that the setting of the Record Date had absolutely no bearing on Pelham's ability to vote its shares, including those acquired under the Tender Offer. The Letter of Transmittal in fact specifically anticipated a Record Date prior to the closing and this was the very reason that Pelham then secured proxy rights to those shares, subject to Pelham possibly terminating those proxy rights.

Process / Timing for Exercise of Board's Discretion

[172] Pelham argues that it "expected" that the Board would, of its own initiative, consider whether to exercise its discretion to waive Pelham's non-compliance prior to notifying shareholders of Mr. Swan's determination.

[173] As with the previous complaints, and as discussed above, this is entirely untethered from the relief sought by Pelham, even assuming this was a breach of Pelham's expectations. The evidence does not support any inference that the outcome of the Board's determination would have been any different had it been raised on its own initiative. In any event, if the Board had agreed to waive the provision, I have no doubt that an announcement would have been made correcting the prior disclosure of Mr. Swan's determination, thus eliminating any prejudice.

[174] Further, and following my earlier comments, I do not agree that Mr. Collery reasonably expected this timing of the decision making. Reasonable expectations must be grounded in the evidence and in the facts, rather than speculation or mere expectations, perhaps only formed *ex post facto*: *Pente Investment Management Ltd. v. Schneider Corp.*, [199] O.J. No. 2036 (S.C.J.) at para. 105, aff'd [1998] O.J.

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No. 4142 (C.A.); *Herber v. Guse*, 2014 BCSC 1908 at para. 72; *Shefsky v. California Gold Mining Inc.*, 2016 ABCA 103 at para. 37; *Slaughter v. Ximen Mining Corp.*, 2018 BCSC 573 at para. 58.

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[175] Mr. Collery does not refer to any past practice of the Board in this respect which might have informed his expectations. Further, it is difficult to see that there was any requirement on the Board to even consider the matter, given the clearly permissive language in Article 10.12(9), which used the word “may”, the meaning of which Mr. Collery states he understood. I agree with Mr. Swan’s counsel that the content of Pelham’s May 20, 2023 letter would strongly suggest that Mr. Collery only realized this potential solution to Pelham’s problems *after* receiving Mr. Swan’s petition materials and only then realized that Pelham could seek a Board waiver.

[176] Finally, I do not consider it reasonable to expect the Board to initiate a discussion of the issue when Pelham had not even requested that the Board waive the deficiencies and without Pelham having advanced its full argument in support of its claim that the Board do so. Indeed, if the Board had proceeded beforehand, it could have been seen, reasonably, as the Board having prejudged the matter without Pelham’s having been fully heard as to the reasons by which it sought a waiver.

Substance of Exercise of Board’s Discretion

[177] The remainder of Pelham’s allegations of unfair prejudice all devolve to one central proposition: that the Board’s refusal to waive Pelham’s non-compliance with the Advance Notice was “unfair”, “unreasonable”, a “tool of entrenchment”, “technical” and that the Board was improperly using the provisions in Article 10.12 as a “sword” and not a “shield”.

[178] The Court in *BCE* stated at para. 70 that “it may be readily inferred that a shareholder has a reasonable expectation of fair treatment”; however, oppression turns on “particular expectations arising in particular situations”, not generalized assertions of unfairness or that the decision was unreasonable.

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[179] In the context of the proxy battle that was brewing between Pelham and the Board from early 2023, I accept that Pelham reasonably expected that it would be treated fairly in the fight. In *BullRun Capital*, the court stated that:

> [86] I am satisfied that the Applicants have established that they reasonably expected to be treated fairly during the proxy contest and to be allowed to exercise their statutory rights.

[180] To a large extent, Pelham's arguments rest on its purported "reasonable expectation" that the misrepresentation in respect of its proxies in the Advance Notice would not be considered material. I have already discussed that issue above and concluded that Pelham had clearly failed to set out what was plainly required per Article 10.12(4) and did not advance any reasonable explanation for those omissions other than a general reference to "inadvertence". While Pelham argues that the Board's decision is not entitled to deference from the Court, there is no suggestion but that the decision was made in a way that was not in accordance with the Board members' duties of good faith and honest performance.

[181] I agree with Mr. Swan that the omissions in the Advance Notice were material. Further, there is no evidentiary basis to ground Mr. Collery's belief that the omissions would be viewed by the Board as immaterial.

[182] In addition, Pelham's arguments rest on its purported "reasonable expectation" that a defective Advance Notice would be waived by the Board, even if the Board concluded that the omissions were material. Again, any such expectations on the part of Mr. Collery are not grounded in the evidence.

[183] To the contrary, a shareholder's reasonable expectations, in the face of past compliance with Article 10.12, would have been an understanding that the Board would have continuing respect for those requirements in the Articles that were established not by the Board, but by the shareholders.

[184] In *Walker* at para. 81, the Court stated:

> … Moreover, the contractual force of conduct permitted by a company's articles of association cannot be ignored when determining if conduct is oppressive or unfairly prejudicial.

[185] In *Hastman v. St. Elias Mines Ltd.*, 2013 BCSC 1069, Justice Steeves emphasized the role of the Articles in considering expectations of stakeholders. He stated:

> [100] Be that as it may, the issues in this application are legal ones related to whether the proxies were valid in the first place and whether the chair made other appropriate rulings at the AGM on December 27, 2012. Regardless of the democratic support an issue has among shareholders, it must be presented in a way that is consistent with the articles of the respondent company as well as applicable legislation, common law and policy. Those are the general issues in the application in this case.
>
> [101] Therefore, as a preliminary matter, I point out that my role is not to decide which side has the most support among shareholders. Once an issue or proposal has complied with the legal requirements, the shareholders are entitled to exercise their rights and vote on it. I am deciding the legal issues and the shareholders decide the democratic issues that are properly before them.
>
> [Emphasis added.]

[186] In essence, the rules governing the manner in which decisions about the board composition are decided—even in the context of a proxy battle—are set by the Articles and provide the necessary roadmap for all concerned. The shareholders, by adopting the Articles, have themselves set those rules and, in my view, both Mr. Swan and the Board had proper regard for that context (and other considerations) in coming to their respective decisions under Article 10.12. *Chornoby v. Caycuse Acres Ltd.*, 2017 BCSC 456 at para. 27 highlighted that reasonable expectations have arisen from "foundational documents".

[187] When Pelham realized that its earlier approaches to the Board were not well-received—and indeed, attacked—by the Board in the public discourse, Pelham decided to implement a strategy to achieve its goals. That strategy included increasing its shareholder stake through the Tender Offer. This strategy must also have included, or should have included, Pelham and its team of advisors fully understanding the requirements under the Articles in order to take the next steps at the AGM. Most importantly, that strategy should have been undertaken by

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assiduously abiding by those rules to seek a change at the Board to avoid any issues at the meeting.

[188] By all accounts, Pelham failed in its efforts to present its Advance Notice in a manner consistent with the Articles: *Hastman* at para. 135. Pelham is therefore solely to blame for the result. There is no basis upon which Pelham could have reasonably expected that its deficient notice would be waived and that it would be given a “pass” that no other shareholder had ever been afforded in the past.

[189] Given the clear omissions in the Advance Notice, the Board’s conclusion was squarely within the range of reasonable alternatives given all matters considered by it, including the express requirements set out in the Articles. The Board’s business judgment is deserving of this Court’s deference.

[190] I conclude that, in the circumstances, Pelham has not established that the Board’s decision not to waive the errors in the Advance Notice amounts to it being treated unfairly prejudicially.

MR. SWAN AS CHAIR

[191] In its petition, Pelham alleged that it was inappropriate for Mr. Swan to stand as Chair of the AGM as he was not independent.

[192] However, as is clear from the evidence, Mr. Swan’s only action taken in relation to the AGM to date was in his capacity as Chair in determining that Pelham’s Advance Notice failed to comply with the Articles. Pelham now admits that its Advance Notice did not comply with Article 10.12 and also admits that Mr. Swan was required by Article 10.12(7) to declare that Pelham’s defective nomination would not be considered the AGM.

[193] In addition to seeking to overturn the decision of the Board, Pelham sought to have Mr. Swan replaced as Chair based on what was said to be a reasonable apprehension of bias. Pelham alleged that Mr. Swan was biased based on his prior

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participation in and support of the Board's rejection of Pelham efforts from early 2023, to seek to gain control of Nickel 28 and/or the Board.

[194] All parties have referred to a number of case authorities addressing circumstances where the court ordered that an independent chair of the upcoming meeting be appointed. Those authorities confirm that the relevant test is not as asserted by Pelham, but rather whether there is a reasonable apprehension that the meeting will not be conducted properly: *MTC Electronics Co., Re,* [1994] B.C.J. No. 3223 at para. 30; *Proprietary Industries* at paras. 28–29; *Western Wind Energy Corporation v. Savitr Capital, LLC*, 2012 BCSC 1414 at paras. 18–22.

[195] In addition, Mr. Swan's status as a director, if not an independent director, does not disqualify him as Chair for that reason: *MTC* at para. 26. In *Goldstein v. McGrath*, 2017 BCSC 586, Justice Myers stated:

> [29] An apprehension of bias is not sufficient to merit an independent chairperson. Existing directors will always have an interest in the outcome of a meeting in which their election is to be considered: *Blair v. Consolidated Enfield Corp.*, [1995] 4 S.C.R. 5 at para. 49. Rather, the court must be shown evidence of potential impropriety at the meeting: *Kingsway Financial Services Inc. v. Kobex Capital Corp.*, 2015 BCSC 2155 at para. 26.

[196] I accept the arguments of Nickel 28 and Mr. Swan in concluding that the evidence presented by Pelham does not give rise to any apprehension, let alone a reasonable one, that Mr. Swan will not conduct the AGM in an appropriate manner.

[197] In any event, as Pelham's counsel confirmed during his submissions, if Pelham failed in its efforts to overturn the Board's decision toward having its slate of directors presented at the AGM, the further relief sought toward replacing Mr. Swan was essentially moot. As such, there is no need to further address Pelham's arguments in relation to Mr. Swan in any detail.

<u>CONCLUSION</u>

[198] Inexplicably, although conceding that Mr. Swan had no discretion under Article 10.12 to act otherwise as he did, Pelham still opposed the relief sought in Mr. Swan's petition. As far as I can determine, this position was largely driven by

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Pelham's expectation that it would succeed in its petition proceeding, thus essentially rendering Mr. Swan's relief moot.

[199] In summary, I am unconvinced that Pelham has established any basis upon which this Court would intervene and overturn the Board's exercise of its discretion under Article 10.12.

[200] The relief sought by Mr. Swan in Action No. S233752 is granted. Pelham's petition is dismissed. I award costs of both petition proceedings against Pelham in favour of Mr. Swan and Nickel 28 on the usual scale.

"Fitzpatrick J."

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