Citation: Aurora Cannabis Inc. (Re), 2018 ONSEC 10
Date: 2018-03-15
File Nos. 2017-71, 2017-73 and 2017-74

**SIMULTANEOUS HEARINGS OF
THE FINANCIAL AND CONSUMER AFFAIRS
AUTHORITY OF SASKATCHEWAN (FCAAS) AND
THE ONTARIO SECURITIES COMMISSION (OSC)**

**IN THE MATTER OF
AURORA CANNABIS INC.**

– and –

**IN THE MATTER OF
CANNIMED THERAPEUTICS INC.**

– and –

**IN THE MATTER OF
THE SPECIAL COMMITTEE OF THE BOARD OF
DIRECTORS OF CANNIMED THERAPEUTICS INC.**

REASONS FOR DECISION
**(Sections 101 and 134 of *The Securities Act, 1988*, SS 1988-89, c S-42.2)
(Sections 104 and 127 of the *Securities Act*, RSO 1990, c S.5)**

Hearing:	December 20 and 21, 2017	
Decision:	March 15, 2018	
FCAAS Panel:	Peter Carton	Member and Chair of the FCAAS Panel
	Howard Crofts	Member of the FCAAS Panel
	Honourable Eugene Scheibel	Member of the FCAAS Panel
OSC Panel:	D. Grant Vingoe	Vice-Chair and Chair of the OSC Panel
	Timothy Moseley	Vice-Chair
	Frances Kordyback	Commissioner

Appearances:	Geoff Moysa Paul Davis Stephen Brown-Okruhlik Leila Rafi Brett Harrison	For Aurora Cannabis Inc.
	James D.G. Douglas Caitlin R. Sainsbury Graham Splawski Ashley Thomassen	For CanniMed Therapeutics Inc.
	Peter F.C. Howard Samaneh Hosseini Sinziana Hennig Zev Smith	For the Special Committee of the Board of Directors of CanniMed Therapeutics Inc.
	Kate McGrann Naizam Kanji Jason Koskela David Mendicino	For Staff of the OSC
	Sonne Udemgba Dean Murrison Nathanial D. Day	For Staff of the FCAAS

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REASONS FOR DECISION

I. OVERVIEW

[1] This decision relates to three separate applications for regulatory relief, all arising out of a contested take-over between cannabis companies.

[2] Aurora Cannabis Inc. ("**Aurora**") made an offer to acquire its competitor, CanniMed Therapeutics Inc. ("**CanniMed**"). Aurora entered into lock-up agreements with four of CanniMed's largest shareholders, and then submitted a proposal to the CanniMed Board of Directors, offering to purchase all of CanniMed's common shares for consideration in the form of Aurora shares. When the CanniMed Board did not respond favourably by the deadline, Aurora launched a formal take-over bid.

[3] Meanwhile, CanniMed moved forward with its own proposed acquisition, which had been under consideration since well before Aurora expressed interest in CanniMed. Between the time of Aurora's initial proposal and its formal offer, CanniMed entered into an arrangement agreement with Newstrike Resources Ltd. ("**Newstrike**"), the result of months of exclusive negotiations.

[4] The two potential transactions presented competing visions for CanniMed's future. Aurora's offer was conditional on the cancellation of CanniMed's proposed Newstrike arrangement. In order to defend against the Aurora offer and protect the Newstrike transaction, CanniMed adopted a shareholder rights plan. That plan prevented Aurora from acquiring, without CanniMed's approval, any CanniMed shares other than those tendered to its bid and from entering into any further lock-up agreements with CanniMed shareholders.

[5] Aurora was first to seek regulatory relief, filing applications with the Ontario Securities Commission (the "**Commission**") and the Financial and Consumer Affairs Authority of Saskatchewan (the "**FCAAS**"). It sought an order for exemptive relief from the requirements in section 2.28.1 of National Instrument 62-104 *Take-Over Bids and Issuer Bids* ("**NI 62-104**"), which requires take-over bid offerors to allow securities to be deposited for an initial deposit period of at least 105 days from the date of the bid. Aurora sought to shorten the initial deposit period to 35 days, expiring in advance of the various scheduled shareholders' meetings for approval of the Newstrike transaction. Aurora also sought an order to cease trade CanniMed's rights plan.

[6] The Special Committee of CanniMed's Board of Directors then filed its own application, seeking an order characterizing Aurora's offer as an "insider bid" for the purposes of Multilateral Instrument 61-101 *Protection of Minority Shareholders* ("**MI 61-101**"). Such an order would require Aurora to obtain a formal valuation in connection with its offer, among other requirements. The Special Committee also asserted that Aurora and the locked-up shareholders should be deemed "joint actors", as defined in MI 61-101, and that the shares of the locked-up shareholders should be excluded from the 50% minimum tender condition in NI 62-104.

[7] Finally, CanniMed filed what it characterized as a "cross-application". It requested an order that the 5% exemption to the restrictions on an offeror's purchases during a take-over bid (found in subsection 2.2(3) of NI 62-104) not apply to Aurora until 105 days after the delivery of a compliant take-over bid

circular to CanniMed's shareholders. CanniMed sought to prevent Aurora from purchasing any CanniMed shares prior to the expiry of the Aurora offer, arguing that such purchases could put Aurora in a blocking position, enabling it to preclude any superior offers.

[8] The relief sought in the various applications raised the following main issues:

a. Should Aurora's offer be exempted from the 105-day minimum deposit period for take-over bids?

b. Should Aurora be prohibited from acquiring up to 5% of CanniMed's common shares during the take-over bid period?

c. Were Aurora and the locked-up shareholders acting jointly or in concert?

d. Was Aurora's disclosure concerning the background of the offer in its news releases and take-over bid circular sufficient?

e. Should CanniMed's shareholder rights plan be cease-traded?

[9] In December 2017, the Commission and the FCAAS heard all three applications together in a joint hearing (the "**Hearing**"), on an urgent basis, and issued separate parallel Orders with Reasons to follow. In conclusion:

a. Aurora was denied the exemptive relief that would shorten the time required for Aurora's offer to remain open;

b. Aurora was not prohibited from acquiring up to 5% of CanniMed's common shares during the take-over bid period;

c. Insufficient evidence was advanced to establish that the locked-up shareholders were acting jointly or in concert with Aurora;

d. Aurora was ordered to issue amended news releases and an amended take-over bid circular to include information that would reasonably be expected to affect CanniMed's shareholders' decision to accept or reject Aurora's offer; and

e. CanniMed's shareholders rights plan was cease-traded.

[10] These are the collective reasons for the decisions of both the Commission and the FCAAS. Copies of our respective Orders are attached as Schedules 'A' and 'B'.

II. BACKGROUND

A. Parties

[11] The three applicants in these various proceedings are Aurora, CanniMed and CanniMed's Special Committee. Aurora is the sole respondent in the applications brought by the other two applicants. CanniMed is the sole respondent in Aurora's application.

[12] Aurora is a producer and distributor of medical marijuana. It is governed by the *Business Corporations Act* (British Columbia), SBC 2002, c 57 and is a reporting issuer in each province of Canada, with common shares listed on the Toronto Stock Exchange. Through wholly-owned subsidiaries, it has licences to produce cannabis pursuant to Canada's *Access to Cannabis for Medical Purposes Regulations*, SOR/2016-230.

[13] CanniMed is a publicly-traded biopharmaceutical company that cultivates and sells cannabis products to Canadians registered under the *Access to Cannabis for Medical Purposes Regulations*. Its subsidiaries are licensed producers and were the sole producers of cannabis for the Government of Canada for more than 13 years. CanniMed is a reporting issuer in each Canadian province other than Québec. CanniMed is incorporated under the laws of Canada, with its head office in Saskatoon, Saskatchewan.

[14] CanniMed's Special Committee was formed on November 13, 2017, and then reconstituted on November 17, 2017. It is composed of all the independent directors of the Board, with a mandate that included the consideration of Aurora's take-over bid (the "**Special Committee**").

B. CanniMed and Newstrike Begin Negotiations

[15] In April 2017, the Government of Canada announced that it would legalize marijuana for recreational use by July 2018. In June 2017, the Chief Executive Officers ("**CEOs**") of CanniMed and Newstrike were introduced to each other. Newstrike, through its subsidiaries, is a licensed producer of medical cannabis that plans to participate in the recreational market. The two CEOs discussed the possibility of collaborative ventures for the supply and storage of cannabis, and the potential for a future collaboration that would provide CanniMed with access to the recreational market. By the end of June 2017, CanniMed and Newstrike had entered into a mutual non-disclosure agreement ("**NDA**"). In July 2017, they expanded the scope of the NDA to include a covenant to negotiate exclusively with each other until the end of August 2017.

[16] During August 2017, CanniMed and Newstrike continued to discuss the terms of a possible storage arrangement (whereby CanniMed would provide storage for Newstrike's products), a supply arrangement (whereby Newstrike would supply products to CanniMed for distribution) and the possibility of future commercial agreements. They also discussed a possible investment by CanniMed in Newstrike.

[17] On September 7, 2017, CanniMed's CEO sent the CanniMed Board a slide deck prepared by CanniMed's financial advisor, AltaCorp Capital Inc. ("**AltaCorp**"), who recommended that CanniMed pursue a merger with Newstrike to strategically enter the recreational cannabis market. The CanniMed Board met to discuss a potential transaction with Newstrike. There was also an opportunity for CanniMed to subscribe for a convertible debenture of Newstrike, which could assist with the potential acquisition strategy. The Board directed management to engage a financial advisor and legal counsel in connection with the potential transactions.

[18] CanniMed retained AltaCorp as its financial advisor in connection with a potential acquisition of Newstrike. AltaCorp met with CanniMed management and some members of the Board to outline the Newstrike opportunity. Newstrike's financial advisor in respect of the transaction was Canaccord Genuity Corp. ("**Canaccord**").

[19] On September 20, 2017, the CanniMed Board resolved to create a special committee to review potential strategies and opportunities for merger and acquisition activities by CanniMed, and to make recommendations to the Board (the "**Initial Special Committee**"). At the same Board meeting, the Board also

approved the terms of a convertible debenture financing with Newstrike, with a view to ensuring the continued exclusivity of discussions with Newstrike beyond September 2017. Ultimately, the covenant between CanniMed and Newstrike to negotiate exclusively with each other was extended until the end of October 2017.

C. Negotiations Proceed Over Objections of Some CanniMed Board Members and Shareholders

[20] As negotiations progressed, some CanniMed Board members and some shareholders raised concerns about CanniMed's corporate strategy. At a CanniMed Board meeting on September 27, 2017, Robert Duguid expressed concern that CanniMed's focus on the recreational cannabis market was not broad enough. Mr. Duguid was then a member of the Initial Special Committee and also the CanniMed nominee director for two of CanniMed's largest shareholders: SaskWorks Venture Fund Inc. ("**SaskWorks**") and Apex Investment Limited Partnership ("**Apex**"), which held approximately 8% and 3% of CanniMed's common shares, respectively. Mr. Duguid commented that CanniMed should entertain a strategic sale to a player in the recreational cannabis space. He suggested that the purpose of the Initial Special Committee should be broadened to: (i) determine the potential outcomes if another company proposed acquiring CanniMed, and (ii) investigate moving into the recreational market. The majority of the Board disagreed and resolved that the Initial Special Committee's mandate did not extend to CanniMed's initiation of a strategic sale process, including potential change of control transactions.

[21] CanniMed and Newstrike continued to confidentially negotiate an agreement for CanniMed's acquisition of Newstrike pursuant to a plan of arrangement. On October 2, 2017, Newstrike issued a press release announcing its issuance of a convertible debenture to a "strategic arm's length lender", without naming CanniMed as the lender.

[22] Then another CanniMed director, Doug Banzet, voiced concerns. Mr. Banzet was a nominee director for another of CanniMed's largest shareholders, Golden Opportunities Fund Inc. ("**Golden Opportunities**"), an investment fund holding about 17% of CanniMed's common shares. On October 4, 2017, Mr. Banzet told CanniMed's CEO that neither he nor Golden Opportunities supported the Newstrike transaction.

[23] The next day, October 5, 2017, CanniMed received a letter from another large shareholder, Vantage Asset Management ("**Vantage**"). Vantage is an institutional investment manager holding approximately 9% of CanniMed's common shares for Vantage's underlying clients. Vantage's letter outlined several specific challenges it perceived involving CanniMed and concluded that "the best path forward for all CanniMed shareholders is for [CanniMed] to pursue a strategic sale process". Vantage stated that it had identified "logical strategic acquirors" and anticipated discussing its strategic analysis with the CanniMed Board. Vantage believed that acquiring smaller licensed producers or late-stage applicants would introduce unnecessary risks for CanniMed shareholders.

[24] CanniMed's CEO provided the Board with management's written response to the Vantage letter. Management disagreed with Vantage, believing that it was premature to engage in a change of control transaction. AltaCorp, as

CanniMed's advisor, also disagreed with the views expressed in the Vantage letter. On October 12, 2017, AltaCorp presented its views to the Initial Special Committee and advised against putting CanniMed up for sale. AltaCorp asserted that CanniMed's acquisition of a recreationally-focused licensed producer would create the most long-term value.

[25] There were continued differences of opinion. After the AltaCorp presentation, Mr. Banzet emailed the CanniMed Board, expressing unhappiness with the process and with the mandate of the Initial Special Committee. Vantage was also dissatisfied, writing a second letter to the CanniMed Board, in which it repeated the substance of the first letter and insisted that the Board should seek to sell CanniMed.

[26] At the CanniMed Board meeting that followed on October 27, 2017, the Initial Special Committee informed the Board that it could not reach a consensus about whether or not to begin discussions with Vantage. Both AltaCorp and Newstrike gave presentations and CanniMed finalized its 2018 business plan. The plan recommended a strategic acquisition of Newstrike. The Board meeting was adjourned, to reconvene several days later.

[27] Before the meeting reconvened, several more objections were voiced. Mr. Banzet again emailed the CanniMed Board, expressing frustration with the prior Board meeting and raising concerns about the availability of liquidity for Golden Opportunities. Mr. Duguid also sent the Board an analysis opposing the Newstrike transaction. In addition, minutes before the Board meeting convened, Vantage's counsel emailed the Board, citing serious concerns with CanniMed's proposed strategic direction and threatening legal action against CanniMed's directors. It appeared to us that Mr. Duguid's and Vantage's counsel's communications were coordinated for maximum effect immediately before the CanniMed Board meeting.

[28] When the Board meeting reconvened on October 30, 2017, the CanniMed Board decided it was not in CanniMed's best interests to initiate a change of control transaction process. The majority of the Board authorized management to enter into formal negotiations with Newstrike for a potential acquisition of Newstrike. However, the Board also directed CanniMed's Chair and AltaCorp to meet with Vantage representatives to discuss the matters raised in Vantage's letters.

[29] On November 1, 2017, two members of the Initial Special Committee had a conference call with Vantage's Managing Partner and one of his colleagues in which Vantage expressed the view that "a merger with a smaller licensed producer would not be a good route for the Company." Vantage followed up the next day with a letter that stated in part:

> [I]f CanniMed's Board does in fact elect to move forward with an acquisition without evaluating all the benefits (and potential premium) associated with a sale process, we will be forced to escalate the current process.

[30] CanniMed proceeded to obtain an independent fairness opinion about the Newstrike arrangement and extended the covenant to negotiate exclusively with Newstrike until November 17, 2017. Meanwhile, CanniMed's Chair and AltaCorp held a number of conference calls with Vantage's representatives, allowing Vantage to elaborate on its views. Vantage wrote yet another letter to the

CanniMed Board, dated November 2, 2017, insisting that the Board should seek to sell CanniMed and stating that CanniMed should not enter into any transaction in which it would be the acquiror.

[31] A further Board meeting was scheduled for the purpose of presenting the Newstrike arrangement to the CanniMed Board for approval. Management's due diligence report and a draft of the Board's authorizing resolution for the Newstrike transaction were circulated. Finally, on November 12, 2017, CanniMed and Newstrike agreed, in principle, on an exchange ratio for the purposes of the share exchange consideration.

[32] On November 13, 2017, Aurora sent its take-over proposal to CanniMed, approximately one hour before the CanniMed Board meeting at which the Newstrike transaction was scheduled to be put to a vote.

D. CanniMed Shareholder Contacts Aurora and Lock-Up Agreements are Negotiated

[33] While the Newstrike transaction was being finalized, Vantage remained dissatisfied with the responses to its several letters to the CanniMed Board and it began directly contacting potential acquirors. On November 6, 2017, Vantage contacted Aurora and suggested a business combination between Aurora and CanniMed. This led to internal discussions at Aurora, which were then followed by a call between Aurora, Vantage and the portfolio manager of both Apex and SaskWorks. In that call, on November 8, 2017, Aurora learned that CanniMed was looking to acquire an unnamed business in the cannabis market and that Vantage did not agree with the strategy. Aurora was informed of the need to act quickly if it wished to make a bid. Aurora was also informed that there would be other large shareholders interested in selling to Aurora if Aurora pursued a take-over of CanniMed. Through these communications, Aurora learned two facts material to its potential bid, namely that CanniMed was pursuing an acquisition that may well have an impact on the ability to make a bid and that such action was imminent.

[34] The following day, November 9, 2017, Aurora decided to pursue the CanniMed take-over bid and began conducting internal modelling. Aurora prepared a draft of its proposal and negotiated the purchase price of the proposed bid with the interested shareholders, in an effort to entice them to sign "hard" lock-up agreements (*i.e.*, agreements by which the shareholder would promise to tender all of its shares into Aurora's bid, even if a higher bid materialized).

[35] Aurora also engaged a financial advisor in connection with the potential acquisition of CanniMed. Canaccord was Aurora's long time financial advisor, but was engaged at the time as Newstrike's financial advisor in respect of the Newstrike transaction. On November 10, 2017, Canaccord withdrew from the representation of Newstrike and began to advise Aurora in respect of the potential CanniMed bid. Unbeknownst to Newstrike or CanniMed, Canaccord had a contractual first right of refusal on any Aurora engagement once Canaccord cleared conflicts. Therefore, Canaccord could accept Aurora's engagement in connection with the potential acquisition of CanniMed if Canaccord could extricate itself from its Newstrike role.

[36] On November 12, 2017, Aurora entered into separate lock-up agreements with each of Golden Opportunities, Vantage, SaskWorks, and Apex (the "**Locked-up**

Shareholders"). The Locked-up Shareholders agreed to tender their CanniMed common shares to any take-over bid by Aurora, should the bid meet certain price criteria. Specifically, the Locked-up Shareholders could back out if either (i) the Consideration Value (defined in part as "an implied price of C$21 per CanniMed common share…") per CanniMed share fell to below $16 per share at any time within 10 business days prior to the expiry of the offer or (ii) within that time period the 20-day volume-weighted average of the consideration was less than $18 per share. Additionally, if the consideration exceeded $24 per share based on the 20-day volume-weighted average, Aurora was authorized to reduce the consideration such that the consideration "is not more than C$24 per share". The Locked-up Shareholders also agreed to exercise the voting rights attached to their CanniMed common shares to oppose any CanniMed share issuance or acquisition.

E. Aurora's Proposal to Acquire CanniMed

[37] On November 13, 2017, approximately one hour prior to the scheduled CanniMed Board meeting to vote on the Newstrike transaction, Aurora submitted a proposal to the CanniMed Board to purchase all of the issued and outstanding common shares of CanniMed (the "**Aurora Proposal**"). The Aurora Proposal indicated that Aurora had entered into lock-up agreements in support of its proposal with the Locked-up Shareholders, representing approximately 38% of CanniMed's then-outstanding common shares.

[38] At the CanniMed Board meeting, the proposed arrangement agreement between CanniMed and Newstrike was presented to the Board. AltaCorp provided its fairness opinion in respect of the proposed arrangement agreement, concluding that the consideration proposed to be paid by CanniMed to Newstrike shareholders was fair, from a financial point of view, to CanniMed.

[39] In light of the Aurora Proposal, the CanniMed Board also decided to form a second special committee that comprised all the independent directors of the Board to review the Aurora Proposal and report to the Board at a subsequent meeting on November 17, 2017. As later reconstituted, this is the Special Committee that is a party in these Applications.

[40] The day after the CanniMed Board meeting, on November 14, 2017, Aurora issued a press release announcing the Aurora Proposal and Aurora's intention to commence a formal take-over bid for CanniMed if CanniMed failed to respond to the proposal by November 17, 2017. On November 15, 2017, CanniMed issued a responding press release, advising its shareholders that the CanniMed Board was reviewing the terms of the Aurora Proposal. The press release also announced that CanniMed was in exclusive negotiations with Newstrike regarding the proposed arrangement agreement.

[41] As planned, the CanniMed Board reconvened on November 17, 2017. At that meeting:

a. Mr. Banzet (the nominee director for Golden Opportunities) recused himself from discussions relating to the Aurora Proposal and Mr. Duguid (the nominee director for SaskWorks and Apex) resigned from the CanniMed Board;

b. AltaCorp presented its views on the Aurora Proposal;

c. The Special Committee recommended that CanniMed should not engage in discussions with Aurora;

d. The Board approved the execution and delivery of the agreement for the Newstrike arrangement; and

e. The Board reconstituted the Special Committee to consist of all independent members of the CanniMed Board.

[42] That afternoon, CanniMed entered into the Newstrike arrangement agreement (the "**Arrangement Agreement**"), pursuant to which CanniMed agreed to purchase all of the issued and outstanding shares of Newstrike in exchange for common shares. The Arrangement Agreement provided that each Newstrike shareholder would receive 0.033 common shares of CanniMed in exchange for each share of Newstrike held and that Newstrike would become a wholly-owned subsidiary of CanniMed. Upon closing of the Arrangement Agreement, CanniMed and Newstrike shareholders would own in aggregate approximately 65% and 35%, respectively, of the newly combined CanniMed. CanniMed subsequently issued a press release announcing the terms of the Arrangement Agreement.

[43] The following week, CanniMed set January 23, 2018, as the date for a special meeting of its shareholders, to seek approval of the issuance of common shares as contemplated by the Arrangement Agreement, with a record date of November 30, 2017.

[44] On November 20, 2017, Aurora issued a press release announcing its intention to make a formal offer to purchase all of the issued and outstanding common shares of CanniMed (the "**Aurora Offer**").

[45] On November 22, 2017, in anticipation of the Aurora Offer, CanniMed issued a press release announcing that it had formed the Special Committee and advising its shareholders "to take no action on any proposal from Aurora until they have received further communication through the Director's Circular."

[46] On the same day, Aurora filed an exemptive relief application with the FCAAS and the Commission seeking to abbreviate the bid deposit period prescribed by section 2.28.1 of NI 62-104.

F. Aurora's Formal Offer

[47] On November 24, 2017, Aurora formally launched the Aurora Offer and issued a press release outlining its terms. The Aurora Offer contemplated that CanniMed shareholders would receive approximately 4.5 common shares of Aurora for each common share of CanniMed, subject to a maximum of $24.00 in common shares of Aurora. The Aurora Offer was set to remain open for acceptance until the earlier of March 9, 2018, or the abbreviated minimum deposit period sought by Aurora in its exemptive relief application.

[48] On the same day, Aurora scheduled a shareholders' meeting for January 15, 2018, with a record date of November 30, 2017, for the purpose of seeking shareholder approval of the issuance of shares in connection with the Aurora Offer.

[49] In response to the formal launch of the Aurora Offer, CanniMed issued a press release, also on November 24, 2017, urging its shareholders "to take NO action in response to" the Aurora Offer and stating that "shareholders have an

attractive and accretive transaction available to them now as CanniMed and Newstrike are extremely well positioned to deliver significant shareholder value going forward."

G. Events After the Aurora Offer

[50] On November 28, 2017, pursuant to the recommendation of the Special Committee, CanniMed adopted a shareholder rights plan (the "**Rights Plan**"), stated to be designed "to ensure that all shareholders are fairly treated, well informed and not subject to coercive bids." As indicated in CanniMed's press release in relation to the Rights Plan, issued the same day, the Rights Plan prevents Aurora from acquiring any CanniMed shares other than those tendered to its bid or from entering into any additional lock-up agreements in respect of the bid.

[51] On the same day, Newstrike scheduled a shareholders' meeting for January 17, 2018, with a record date of November 28, 2017, for the purpose of seeking shareholder approval of the Arrangement Agreement.

[52] Aurora filed its Application on December 4, 2017, with both the FCAAS and the Commission, seeking an expedited joint hearing for exemptive relief under NI 62-104 and for an Order to cease trade the Rights Plan.

[53] On December 8, 2017, both the CanniMed Board and the Special Committee met with their financial and legal advisors to consider the Aurora Offer. After receiving the Special Committee's recommendation, the CanniMed Board rejected the bid, determining that the proposed consideration under the Aurora Offer was inadequate and that the bid was not in the best interests of CanniMed or its shareholders. The Board outlined its reasons as to why the bid was inadequate in the Directors' Circular dated December 8, 2017, which was subsequently mailed to CanniMed shareholders.

[54] CanniMed and the Special Committee filed their own respective Applications, again before both regulators, on December 11, 2017. Before issuing the related Notices of Hearing, the Commission's Registrar wrote to the parties at the direction of the Commission and noted that the relief sought in CanniMed's and in the Special Committee's respective Applications referred to entities that were not named as respondents (*i.e.*, the entities defined as the Locked-up Shareholders in these Reasons). The parties were asked to provide submissions regarding whether the Locked-up Shareholders ought to be respondents in the relevant Applications before Notices of Hearing would be issued. In response, CanniMed and the Special Committee filed Amended Notices of Application, amending their relief sought. Among other things, the Special Committee sought to have Aurora and the Locked-up Shareholders deemed as joint actors and CanniMed sought to have Aurora prohibited from acquiring up to 5% of CanniMed's common shares during the take-over bid period.

III. PRELIMINARY ISSUES

A. Standing of Aurora, CanniMed and the Special Committee

[55] We found that Aurora, as a bidder with a live take-over bid seeking to cease trade a shareholder rights plan alleged to be used for improper defensive purposes under National Policy 62-202 – *Take-Over Bids – Defensive Tactics* ("**NP 62-202**"), had standing to bring an application under sections 104 and 127

of the *Securities Act*, RSO 1990, c S.5 (the **"Ontario Act**") and sections 101 and 134 of *The Securities Act, 1988*, SS 1988-89, c S-42.2 (the "**Saskatchewan Act**"). As a related matter, we found that Aurora had standing to seek an exemption from the minimum deposit period under subsection 6.1(1) of NI 62-104.

[56] Further, we found that CanniMed, as the target of Aurora's take-over bid, had standing pursuant to section 127 of the Ontario Act and section 134 of the Saskatchewan Act to seek to deny Aurora the exemptions permitting purchases during a take-over bid otherwise permitted pursuant to subsection 2.2(1) of NI 62-104.

[57] Because the Special Committee was the governing body that was charged with evaluating the Aurora Offer, we determined that it had standing under sections 104 and 127 of the Ontario Act and sections 101 and 134 of the Saskatchewan Act to bring its application seeking:

a. to establish that the Aurora Offer was deficient since it did not reflect the alleged fact that Aurora was acting jointly or in concert with the Locked-up Shareholders for purposes of MI 61-101 and for purposes of the Aurora Offer; and

b. to enforce the consequences of such joint actor status under the take-over bid rules and for disclosure purposes.

B. Joint Hearing by Two Regulators

[58] The Commission and the FCAAS Panels determined to hold a joint hearing on the basis that this approach promoted efficiency in the administration of the take-over regime in Canada in respect of a pending bid. Although Saskatchewan has not adopted MI 61-101, we decided that both the Commission and the FCAAS would hear all the evidence in light of the possibility that issues presented under that instrument may also arise under the public interest authority vested in the FCAAS. This approach was also taken most recently in *Hecla Mining Company (Re)* (2016), 39 OSCB 8926, 2016 ONSEC 31, which involved a joint hearing of the Commission with the British Columbia Securities Commission. A joint hearing was also appropriate because this was the first opportunity following the February 2016 adoption of the take-over bid amendments to assess a shareholder rights plan adopted by a target company in response to a launched bid, and because a joint hearing would promote common approaches to the issues in these circumstances.

C. Motion for Intervenor Status

[59] After receiving written submissions from the parties, we granted full intervenor status to the Special Committee, including the right to adduce evidence and make submissions, in respect of Aurora's Application and CanniMed's Application. We made this determination pursuant to Rule 1.7.1 of Saskatchewan Policy Statement 12-602, *Procedure for Hearings and Reviews* (the "**Saskatchewan Rules**") and Rule 21(4) of the Commission's *Rules of Procedure and Forms* (2017), 40 OSCB 8988 (the "**Ontario Rules**"), which provide that a panel has discretion to grant leave to intervene or refuse the request on any terms and conditions that it deems appropriate.

[60] CanniMed and the Special Committee agreed not to duplicate their submissions. In managing the Hearing, we allocated approximately equal amounts of time for oral submissions to Aurora, on the one hand, and CanniMed and the Special Committee on a combined basis, on the other hand. We proceeded in this fashion given the expedited nature of the Hearing with a live bid underway and in the interest of efficiency in the conduct of the Hearing. Since the Special Committee was itself an applicant on grounds distinct from those relied on by CanniMed, we found that it would be most efficient to grant the Special Committee such intervenor status in respect of the Aurora application, provided that the time allocations were appropriately managed during the Hearing. This should not be viewed as a precedent for the full intervention of a special committee in an application in which the company itself is the respondent.

D. Confidentiality Order

[61] CanniMed and the Special Committee asked that certain exhibits from the materials filed in respect of the Applications be kept confidential, pursuant to Rule 6.2 of the Saskatchewan Rules and Rule 22 of the Ontario Rules. At the Hearing, CanniMed and the Special Committee provided a revised and narrowed list of documents for which they were seeking a confidentiality order.

[62] CanniMed and the Special Committee submitted that the documents for which confidentiality was sought were commercially sensitive and that their release would be prejudicial to CanniMed. Aurora had no objection to the documents being treated as confidential.

[63] Subsection 9(1) of the *Statutory Powers Procedure Act*, RSO 1990, c S.22, provides that a hearing shall be open to the public except where the tribunal is of the opinion that, among other grounds:

> [I]ntimate financial or personal matters or other matters may be disclosed at the hearing of such a nature, having regard to the circumstances, that the desirability of avoiding disclosure thereof in the interests of any person affected or in the public interest outweighs the desirability of adhering to the principle that hearings be open to the public, in which case the tribunal may hold the hearing in the absence of the public.

[64] Rule 6.2 of the Saskatchewan Rules and Rule 22 of the Ontario Rules set out substantially similar tests.

[65] Accordingly, we heard the parties' submissions on this issue *in camera*. We agreed that certain documents included in the application materials contained financial information for which the desirability of avoiding disclosure outweighed the desirability of adhering to the principle of open hearings. We granted CanniMed's and the Special Committee's requests that such information be confidential and we specified the documents to be kept confidential in our Orders dated December 22, 2017.

E. Expert Evidence

[66] Aurora sought to introduce expert evidence through an affidavit of a Mergers and Acquisitions ("**M&A**") legal practitioner in Toronto regarding whether the following elements of the transaction documents were "off-market": (i) the

bilateral break fees and non-solicitation provisions in the Arrangement Agreement, (ii) the fact that the lock-up agreements were identical or in substantially similar form, and (iii) the scope of the restrictions in the Rights Plan on Aurora entering into new lock-up agreements.

[67] Since this evidence had no statistical basis, but was based on one person's experience, we considered that it had limited utility. Whether certain features are "off-market" also has limited relevance to the issues we are considering. In M&A practice, every scenario has unique elements and it is not a useful exercise to pick and choose certain elements without looking at all the principal features of the transactions in question. The role of considering the transactions as a whole is one for the Commission itself as a specialized tribunal, without borrowing the anecdotal experience of one practitioner with regard to selected elements of the transactions involved offered as expert evidence. Such evidence is not necessary or helpful to our analysis.

[68] For these reasons, we declined to admit the purported expert report into the record.

IV. MAIN ISSUES

[69] As set out above, the relief sought in the applications raises the following main issues, which we will address in this order:

a. Should the Aurora Offer be exempted from the 105-day minimum deposit period for take-over bids?

b. Should Aurora be prohibited from acquiring up to 5% of CanniMed's common shares during the take-over bid period?

c. Were Aurora and the Locked-up Shareholders acting jointly or in concert?

d. Was Aurora's disclosure concerning the background of the offer in its news releases and take-over bid circular sufficient?

e. Should CanniMed's Rights Plan be cease-traded?

V. ANALYSIS

[70] For the following reasons, we found that:

a. the 105-day minimum deposit period should continue to apply to the Aurora Offer;

b. Aurora should continue to be able to acquire up to 5% of CanniMed's common shares;

c. Insufficient evidence was advanced to establish that Aurora and the Locked-up Shareholders were acting jointly or in concert,

d. Aurora should be required to amend its disclosures regarding the events leading up to its bid; and

e. CanniMed's Rights Plan should be cease traded.

A. Should the Aurora Offer be exempted from the 105-day minimum deposit period for take-over bids?

1. Overview

[71] Section 2.28.1 of NI 62-104 imposes a 105-day minimum initial deposit period for take-over bids. Aurora has applied for exemptive relief from that requirement for the Aurora Offer, such that the minimum deposit period would be shortened to a minimum period of at least 35 days from the date the Aurora Offer was made. If this relief is not granted, the bid would remain open until at least March 9, 2018. If the relief is granted, Aurora could set a deposit period of at least 35 days ending on or prior to the date of the CanniMed Meeting, set for January 23, 2018.

[72] Aurora admits that the two possible exceptions to the minimum deposit period are not applicable in this case. It argues instead that the policy rationale for the exception set out in section 2.28.3 of NI 62-104 (the "**Alternative Transaction Exception**") is present, and that the exemption should be granted to enable CanniMed shareholders to consider the Newstrike proposal and the Aurora Offer within the same time frame. This would enable CanniMed's shareholders to treat these transactions as essentially competing offers and make an election as between them without regard to the timing difference arising from the longer term presently in effect for the Aurora Offer.

2. Law

[73] The amendments to the take-over bid regime that came into force in Ontario on May 9, 2016, and Saskatchewan on June 3, 2016, and that have been adopted by all jurisdictions of Canada, were intended to rebalance that regime to enable target companies to have greater time to respond to bids, potentially enabling them to obtain higher offers to the advantage of their shareholders. Predictability of the regime, and particularly applicable time periods, is an important objective of take-over bid regulation and these reforms. Investors and market participants should be entitled to know with reasonable certainty what rules will govern the bid environment.

[74] The Alternative Transaction Exception permits a bidder to reduce the deposit period applicable to its bid if the target company announces that it intends to effect an alternative transaction, which is defined generally as a corporate action, including a plan of arrangement or amalgamation, as a result of which a target shareholder's interest in the issuer is extinguished, regardless of whether that interest is replaced with another security. This exception has the effect that if a target company subject to a live bid enters into a friendly transaction to be implemented by a plan of arrangement, pursuant to which the target company may be acquired by the friendly party, the original bidder can reduce its deposit period so that the two proposals can be considered closely in time and as alternatives open for the target's shareholders to choose. This exception is consistent with the possibility of multiple bids being advanced for shareholder consideration in addition to the target company board-endorsed alternative.

3. Application of the law

[75] Aurora submitted that CanniMed's rejection of the Aurora Offer and endorsement of the Newstrike transaction, together with the deal protections that CanniMed implemented to avoid interference with the Newstrike transaction, was

tantamount to the Newstrike transaction being an alternative transaction in the spirit of the exception. Aurora made this argument notwithstanding that the shareholdings of CanniMed shareholders would not be extinguished and CanniMed was not undergoing a change of control as a result of the transaction.

[76] We do not believe that the policy rationale for the Alternative Transaction Exception exists in this case. The magnitude of the mutual break fees set out in the Arrangement Agreement is a limited financial deterrent to the Aurora Offer, or to any subsequent transaction. The fees are not a substantial obstacle to such transactions. The non-solicitation provisions in the Arrangement Agreement do not preclude the consideration of unsolicited offers, do not preclude an offer for CanniMed following the acquisition of Newstrike, and include a "fiduciary out" clause, which permits CanniMed's board to accept superior offers.

[77] The principal reason that the Newstrike transaction is, in an informal sense, 'alternative' to the Aurora Offer is that Aurora included a condition in its bid that the Newstrike transaction not be completed. This was a commercial decision by Aurora that could be revisited and the condition dropped by Aurora at any time. Aurora's decision to include this condition set up the narrative of alternative transactions, but does not give the Newstrike transaction legal character of an alternative transaction under NI 62-104.

[78] CanniMed's intention to acquire a recreational cannabis company had been made publicly known by CanniMed well before the Aurora Offer, and negotiations with Newstrike had been underway for some time. The developed strategic rationale for such an acquisition and the history of negotiations and timing of the Newstrike transaction convinced us that the acquisition was not intended as a defensive tactic against the Aurora Offer or that it developed as an alternative to a possible Aurora offer. To the contrary, the evidence showed that Aurora accelerated its bid when it learned that the CanniMed Board was about to meet to approve such an acquisition.

[79] Once the Newstrike transaction was approved by CanniMed's Board, Aurora and the Locked-up Shareholders were free to engage in a proxy solicitation to seek the rejection by CanniMed's shareholders of the Newstrike transaction. They were free, at the same time, to advocate for the Aurora Offer and seek to persuade CanniMed Shareholders to wait it out until the Aurora Offer was completed. In either event, CanniMed shareholders will have their say on both transactions, unless the Aurora Offer is terminated pursuant to the Newstrike condition or otherwise, or CanniMed abandons the Newstrike proposal. Abbreviating the 105-day period is not necessary to facilitate these choices; instead it would only seek to increase the timing advantage enjoyed by Aurora by its early start to its bid described in section V.C.3(b) of these Reasons, beginning at paragraph 109, below. Preserving the 105-day deposit period holds out the possibility of superior offers, which we find not to have been precluded by the Newstrike transaction, even if CanniMed is not currently conducting an auction for the sale of the company.

4. Conclusion on the minimum deposit period

[80] Given the rebalancing that has occurred as a result of the amendments to the Canadian take-over bid regime, we are reluctant to make piecemeal changes to

timing requirements that affect planning by bidders and target companies and that would make bid pricing and secondary market price determinations less predictable. On the facts of this case, our reluctance is not seriously tested by the evidence Aurora presented, because the Newstrike transaction does not extinguish the interests of CanniMed Shareholders, CanniMed is not undergoing a change of control by virtue of the Newstrike transaction, and higher bids for CanniMed are not foreclosed.

B. Should Aurora be prohibited from acquiring up to 5% of CanniMed's common shares during the take-over bid period?

1. Overview

[81] CanniMed applied for an order that the exemption set out in subsection 2.2(3) of NI 62-104 to the restrictions on purchases by a bidder during a take-over bid not be available to Aurora. This 5% exemption provides a limited exception to the prohibition against bidders purchasing target shares outside of the take-over bid. This exemption permits such purchases beginning on the third business day following the date of the bid, provided that the bidder satisfies various conditions, including: (i) the bidder must make its intention to effect such purchases known in its take-over bid circular, or by news release at least one business day prior to making such purchases; and (ii) on each day that purchases are made, the bidder must issue a news release stating the number of securities acquired and price information. This exemption only permits open market transactions not pre-arranged with any seller or agent for a seller. For this reason, any shares purchased pursuant to this exemption cannot affect the vote on the Newstrike proposal since the record date for that vote has already passed, and the Rights Plan has had the effect of prohibiting such purchases pending our Orders.

2. Law

[82] The policy reason for the prohibition on purchases by a bidder alongside its bid is to ensure equal treatment of all shareholders, so that a shareholder cannot receive from the bidder consideration that is not available to all shareholders.

[83] The policy basis for the 5% exemption, as stated in *Falconbridge Ltd (Re)* (2006), 29 OSCB 6783 ("***Falconbridge***") at paragraph 73, is that:

> … the purchases under the 5% Exemption contribute to liquidity in the target company's shares, provide all target shareholders with an equal opportunity to sell their target shares prior to conclusion of the bid, raise the market price of the shares, and encourage bidders to raise their offer prices.

[84] In *Falconbridge*, the Commission utilized its public interest authority under section 127 of the Ontario Act to prohibit Xstrata Canada Inc. ("**Xstrata**") from making purchases pursuant to the exemption until the earlier of (i) a specified date approximately one month after the hearing of the matter to which the decision related and (ii) Xstrata satisfying its (otherwise waivable) "majority of the minority" condition and two-thirds minimum tender condition applicable to its bid. This time period was also utilized for determining when the Falconbridge Ltd. ("**Falconbridge**") shareholder rights plan was considered to have served its purpose and would, thereafter, be cease-traded.

[85] In the unique circumstances of the *Falconbridge* case, in which Xstrata owned 19.8% of Falconbridge's outstanding stock and Xstrata possessed the ability to waive the minimum tender conditions, the Commission intervened to seek to prevent Xstrata from blocking other bids by waiving those conditions, and taking up the shares that had been tendered, which together with its existing holdings could block the outstanding competing offer and prevent the auction for Falconbridge from continuing.

3. Application of the law

[86] The circumstances prevailing in *Falconbridge* are not applicable to the Aurora Offer. To the contrary, Aurora does not hold any stock of CanniMed. As discussed below, we have declined to find that the Locked-up Shareholders are acting jointly or in concert with Aurora, and therefore, their stock holdings cannot be attributed to Aurora. The Canadian take-over bid regime now includes a non-waivable minimum tender condition, so that Aurora cannot obtain a blocking position through a partial bid in which it obtains less than 50% of the shares subject to the bid. Since the minimum tender condition is calculated to exclude shares held by the bidder and persons acting jointly or in concert with the bidder, any shares acquired by Aurora pursuant to the 5% exemption are excluded from the calculation of the minimum tender condition. The concern in *Falconbridge* that a bidder could obtain enough stock through a bid after waiving its minimum conditions, which, in conjunction with its pre-existing holdings, could give it a blocking position of less than 50% cannot arise under the rules now in effect in the absence of any exemption. The risk that shareholders of a target company will be denied the ability to participate in a control premium has been mitigated by these changes in the take-over bid regime.

[87] Although the original rationale for the 5% exemption has been stated to be the promotion of liquidity in target company securities to allow shareholders to sell during the bid, the relative liquidity of the target securities will be relevant only if there are circumstances that otherwise support the removal of the exemption, as there were in *Falconbridge*. The Commission may then wish to weigh the impact of its order prohibiting such transactions on shareholders seeking to sell their securities in the market in relation to the benefits to the take-over process of prohibiting purchases by the bidder. The 5% exemption is an established feature of the Canadian take-over bid regime. Prohibiting the use of the 5% exemption may be appropriate in the public interest if the policies underlying the take-over bid regime are undermined by allowing its use. That is not the case here.

4. Conclusion on the acquisition allowance

[88] For these reasons, we denied the relief requested in the CanniMed's Application and declined to use our public interest authority to prohibit Aurora from making purchases pursuant to the exemption. The 5% exemption remains available to Aurora, as set out in subsection 2.2(3) of NI 62-104, so that Aurora may acquire up to 5% of CanniMed's common shares during the take-over bid period.

C. Were Aurora and the Locked-up Shareholders acting jointly or in concert?

1. Overview

[89] The CanniMed Special Committee seeks an order that Aurora and the Locked-up Shareholders are "joint actors" under section 1.1 of MI 61-101 and are "acting jointly or in concert" for the purposes of NI 62-104.

[90] The consequences of such a finding would include:

a. The shares held by the Locked-up Shareholders, amounting to approximately 35.66% of CanniMed's outstanding shares (on an undiluted basis), would have to be excluded in determining whether Aurora had satisfied the minimum tender condition;

b. The Aurora Offer would be an "insider bid" requiring additional information to be disclosed in Aurora's take-over bid circular, and, in the absence of an exemption, a formal valuation would have to be prepared;

c. The Aurora Offer may have to be restarted with new time periods running from the date its take-over bid circular is revised and complete; and

d. Aurora would have to issue new press releases and file early warning reports to reflect the ownership attributed to it as a result of the holdings of the Locked-up Shareholders.

Joint actor status would also trigger aspects of the Rights Plan. However, given our determination to cease trade the Rights Plan, we do not address those implications further in this section.

[91] Neither CanniMed, nor the CanniMed Special Committee, made the Locked-up Shareholders parties to these proceedings. Although specific notice was given to the Locked-up Shareholders pursuant to the Panel's direction through Aurora's counsel, none of the Locked-up Shareholders sought standing to intervene in this proceeding and representatives of the Locked-up Shareholders were not called as witnesses.

[92] Not having the Locked-up Shareholders participate in the Hearing necessarily limited the evidentiary record regarding the interactions between Aurora and these shareholders. However, since the focus of this application is on the Aurora Offer, we were in a position to make an order, if appropriate, governing the Aurora Offer, even if such an order had indirect effects on the Locked-up Shareholders.

2. Law

[93] Subsection 1.9(1) of NI 62-104 provides, in relevant part, that it is a question of fact as to whether a person is acting jointly or in concert with an offeror or an acquirer. In addition to affiliates of the offeror, a person is deemed to be acting jointly or in concert with an offeror if, as a result of any agreement, commitment or understanding with the offeror or another person acting jointly or in concert with the offeror, that person acquires or offers to acquire securities of the same class as those subject to the offer. This prong of the test involves parties on the same side of the transaction – those aiming to acquire the securities on a group basis.

[94] A person is also deemed to be acting as part of such a group if they intend to exercise voting power together. On the other hand, a person is specifically not deemed to be a joint actor with an offeror solely because they have committed themselves to tender to an offeror's bid.

[95] The determination of "joint actor" status under MI 61-101 and persons "acting jointly or in concert" for the purposes of NI 62-104 involves identical considerations.

[96] Since it is a question of fact whether a person is acting jointly or in concert with a bidder, the details of each relationship between a person alleged to be acting jointly or in concert with a bidder need to be separately assessed. As set out in the Commission's decision in *Sterling Centrecorp Inc. (Re)* (2007), 30 OSCB 6683, 2007 ONSEC 9 ("***Sterling***"), evidence of a formal agreement between persons is helpful, but not necessary to find this status. The question is whether the parties are acting together "to bring about a planned result".[1]

3. Application of the law

[97] The Special Committee submits that Aurora has acted jointly or in concert with each of the Locked-up Shareholders, for two reasons.

[98] First, that the Locked-up Shareholders led by Vantage, shopped CanniMed to potential buyers and to Aurora in particular, and thereby instigated the Aurora Offer. The Special Committee alleges that in doing so, Vantage shared its analysis as to why Aurora should acquire CanniMed and that Vantage's analysis included confidential, non-public information about CanniMed's production capabilities. The Special Committee alleges that Vantage was a conduit in structuring the Aurora Offer, in recruiting Aurora as the acquiror, and in working with the other Locked-up Shareholders to establish the price for the Aurora Offer and conclude the lock-up agreements. The Special Committee submits that in doing so, each of the Locked-up Shareholders went from being a significant shareholder taking steps only to enhance the liquidity of its investments and to maximize the price that it would receive, to being an active participant in assisting Aurora in planning its bid, including the bid's timing and tactical considerations arising from the Newstrike proposal.

[99] Second, the Special Committee asserts that the terms and conditions of the lock-up agreements and the circumstances leading to their execution support the conclusion that the Locked-up Shareholders acted jointly or in concert with Aurora in making its bid.

(a) The lock-up agreements

[100] We turn first to the lock-up agreements. As provided in subsection 1.9(3) of NI 62-104, an agreement or understanding to tender securities to a bid does not, in and of itself, lead to a determination of acting jointly or in concert.

[101] This provision does not distinguish so-called "hard" lock-up agreements, as were entered into in this case, in which a shareholder is committed to tender to a bid as long as a threshold price is achieved, from "soft" lock-up agreements where the shareholder is permitted to tender to a superior offer.

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[1] *Sterling* at paras 97 and 102, citing *Drilcorp Ltd v Nova Bancorp Investments Ltd*, No 0501-02360, March 24, 2005 (Unreported) (Alta QB) at p 7.

[102] Consistent with the view taken in the *Re Sterling* decision, we conclude that both hard and soft lock-up agreements are covered by subsection 1.9(3). This provision does not allow us to conclude that the Locked-up Shareholders are acting jointly or in concert solely on the basis of the strong commitments to tender set out in the lock-up agreements. The terms of lock-up agreements or the context in which they are used can also raise additional public interest issues, but we did not find the lock-up agreements objectionable in this case.

[103] Entering into such agreements is consistent with the Locked-up Shareholders seeking enhanced liquidity and a higher price for their securities in their own and their investors' interests. Lock-up agreements are an established practice in M&A transactions that allow investors to pursue their financial interests. Such agreements can also help facilitate transactions by providing a degree of deal certainty to a bidder, who might otherwise be deterred from making a bid that is advantageous to all shareholders. This is especially true now that a bid is at risk to be countered during the extended minimum 105-day deposit period and in light of the minimum tender condition, which promotes a tactical drive to have certainty that the condition will be satisfied at the earliest possible time.

[104] Section 1.9 also includes a presumption that a person who enters into an agreement, commitment or understanding to vote jointly or in concert with a bidder will be found to be acting jointly or in concert in relation to the bid.

[105] In this case, the Locked-up Shareholders agreed to vote against the Newstrike transaction and to vote for the Aurora transaction if it were reformulated into a transaction requiring a shareholder vote. The Aurora Offer was conditioned on the Newstrike transaction not proceeding.

[106] Subject to these restrictions, the Locked-up Shareholders did not agree to vote in accordance with Aurora's instructions, and they did not agree to give Aurora their proxies to vote their securities. Aurora did not take steps to transfer voting rights or entitlements to Aurora generally or in respect of all significant matters requiring a vote of shareholders in a manner similar to what would prevail if the shares had already been transferred to Aurora or the Aurora Offer had been successful and the shares taken up by Aurora.

[107] In the absence of the voting provisions included in the lock-up agreements, the effect of the "hard" commitments would be substantially watered down, since the shareholders could otherwise thwart Aurora's plans either by supporting the Newstrike transaction, or by voting against a reformulated Aurora transaction (such as an amalgamation or plan of arrangement) that would have the same ultimate effect as the Aurora Offer.

[108] We conclude that the voting provisions in the lock-up agreements are consistent with the permissible objectives of the tender commitments made by the Locked-up Shareholders to Aurora, and do not result in these shareholders acting jointly or in concert with Aurora. The presumption that an agreement to exercise voting rights leads to joint actor status can be rebutted, where, as here, the voting rights are tailored to be consistent with and to support otherwise permissible commitments to tender securities to a bid.

(b) Circumstances leading to the Aurora Offer

[109] We turn now to the circumstances that led to Aurora making its bid and whether these circumstances lead us to the conclusion that Aurora is acting jointly or in concert with Vantage and the other Locked-up Shareholders.

[110] Aurora's take-over bid circular states in the section entitled, "Background to the Offer":

> On November 6, 2017, a unique opportunity presented itself to Aurora, when a representative of a large institutional shareholder of CanniMed contacted Mr. Joseph del Moral, a director of Aurora, to discuss the state of the cannabis industry and the business of Aurora in general. During the course of that conversation, the shareholder representative suggested to Mr. del Moral that if Aurora were to consider a business combination with CanniMed the shareholder group would be prepared to support the merger of Aurora and CanniMed. Mr. del Moral discussed the conversation internally at Aurora.

[111] The institutional shareholder that approached Aurora was Vantage, one of the Locked-up Shareholders, notably the one Locked-up Shareholder that did not have an associated person on the Board of CanniMed and was not an insider of CanniMed since it held less than 10% of its stock. This contact was made by Mark Tredgett, Managing Partner of Vantage.

[112] In the second affidavit of Terry Booth, Aurora's Chief Executive Officer, he indicates that in this initial approach, Mr. Tredgett stated "that it was important that the offer be made quickly." On November 8, 2017, Mr. Tredgett communicated that the CanniMed Board was looking at the acquisition of "a business in the adult cannabis market and that Vantage did not agree with such growth strategy." It was during this time that Newstrike negotiations were continuing, along with presentations from financial advisors to CanniMed's Board, evaluation of the Aurora Offer and the Newstrike proposal, and culminating in the execution of the Arrangement Agreement on November 17, 2017.

[113] The background section of the take-over bid circular states that after this initial approach, Mr. Booth instructed legal counsel to prepare a draft proposal for submission to CanniMed, as well as lock-up agreements based on discussions with certain institutional investors. Vantage took the lead in respect of the lock-up agreements, with its counsel, Norton Rose Fulbright, preparing identical first drafts and then holding the pen. This ultimately resulted in identical lock-up agreements.

[114] Aurora continued its assessment of a possible bid, in conjunction with its financial advisers, including Canaccord, whose involvement is discussed further below. The lock-up agreements were then executed on November 12, 2017. On November 13, 2017, Aurora sent a letter making a non-binding take-over bid proposal to CanniMed, and also informed CanniMed about the execution of the lock-up agreements. On November 14, 2017, Aurora issued a news release announcing its intention to proceed with a formal offer for CanniMed. Aurora formally commenced its offer on November 24, 2017.

[115] The Locked-up Shareholders, other than Vantage, had representatives on CanniMed's Board of directors: Rob Duguid in respect of SaskWorks and Apex and Doug Banzet in respect of Golden Opportunities. During the course of Board deliberations, these directors had strongly objected to the Newstrike proposal and had advocated for a possible sale of the company. Their views did not prevail with the Board. Mr. Duguid resigned from the Board on November 17, 2017. Mr. Banzet remained on the Board, but recused himself from the discussions relating to the Aurora Proposal.

[116] These events must be viewed against the backdrop of the fact that for a month or so, Vantage had been communicating by letter and otherwise, advocating for a strategic sale process for CanniMed. During the third week of October, Vantage had specifically objected to a possible M&A transaction involving a recreational-focussed target.

[117] In the face of Vantage's objections, and those from Messrs. Duguid and Banzet, CanniMed conducted a further evaluation of the Newstrike transaction as well as potential sale opportunities, including a sale to Aurora. This process resulted in the completion of the negotiation of the Newstrike proposal as the Board's favoured course of action.

[118] The Special Committee submits that the timing of communications to the Board of CanniMed by Vantage permits an inference that one or more of Mr. Duguid and Mr. Banzet shared information with Vantage (as well as the investors with whom they are each associated) concerning at least the timing of Board meetings considering the Newstrike acquisition and the characteristics, if not the identity, of the proposed CanniMed acquisition target.

[119] We agree. Such an inference is supported by the course of communications between Vantage, Mr. Duguid, Mr. Banzet and the CanniMed Board, including Mr. Duguid's communication hours before the October 30, 2017 meeting to consider the Newstrike proposal in which he referred to "our analysis" of why CanniMed should not proceed with the Newstrike transaction. This was followed, minutes before the Board meeting, by a communication from Vantage's counsel to the CanniMed Board that if Vantage were not afforded an opportunity to directly communicate its views to the Board:

> Vantage would be compelled to take such actions as necessary to make its concerns known and to hold each director and officer of the Company personally liable for their actions.

[120] This communication from Vantage strongly suggests that it knew that action by the CanniMed Board to move forward with negotiations for the acquisition was imminent.

[121] On November 1, 2017, two members of the Initial Special Committee had a conference call with Mr. Tredgett and one of his colleagues from Vantage in which Vantage expressed the view that "a merger with a smaller licensed producer would not be a good route for the Company." Vantage followed up the next day with a letter that stated in part:

> …[I]f CanniMed's Board does in fact elect to move forward with an acquisition without evaluating all the benefits (and

> potential premium) associated with a sale process, we will be forced to escalate the current process.

[122] Following a similar pattern of prescient knowledge of CanniMed Board meetings, on November 13, 2017, Aurora sent its take-over proposal to CanniMed, approximately one hour before the CanniMed Board meeting at which the Newstrike transaction was scheduled to be put to a vote.

[123] From the timing of these communications we infer that Vantage had learned the timing and nature of the actions proposed to be taken by CanniMed's Board, and had shared this information with Aurora. To us, knowing the timing of these deliberations and the general characteristics of CanniMed's acquisition target was material non-public information that was extremely valuable to Aurora in formulating its bid. We find that this knowledge impelled Aurora to pursue this bid on an accelerated basis, from a standing start to its news release announcing its bid in eight days, gaining valuable time for its campaign, and allowing it to proceed before the Newstrike Arrangement Agreement was entered into.

[124] Once the bid was made and the Arrangement Agreement was entered into, the receipt of the material non-public information described above was, for Aurora, cleansed by disclosure.

[125] With the Newstrike transaction now public and the Aurora Offer having been made, the timing of these Board deliberations and the characteristics of CanniMed's acquisition target was no longer material non-public information. The market was aware of these material facts. It was then the Rights Plan, and not the fact that Aurora held material non-public information, that prevented market purchases using the 5% exemption.

[126] If the goal on the part of Vantage, or the directors associated with Locked-up Shareholders, was to maximize the liquidity and price received for their investments in CanniMed, it is not obvious that the disclosure of the material non-public information we have outlined means that Aurora is a joint actor with the Locked-up Shareholders. Aurora is still the only buyer, did not make toehold purchases based upon such information, and the Locked-up Shareholders were seeking the most attractive exit possible. That does not mean that the transfer of material non-public information to a bidder could never be a factor in finding joint actor status. If such a transfer was clear and extensive, it could suggest a level of cooperation that would mean that the shareholders are 'under the tent' with the bidder and are participating in the planning of the bid beyond appropriately seeking to maximize the price and liquidity for their shares. The receipt of such non-public information by Aurora in this case does not rise to the level that Aurora can be said to have become a joint actor with the Locked-up Shareholders.

[127] In some cases, the improper transfer of information may also warrant remedies fashioned to level the playing field to avoid the timing advantage a bidder has obtained through the receipt of such information. This would be the case, for example, if the transfer of information was clear and extensive enough that it prevented an auction process from being feasible or otherwise denying the other shareholders a choice of transactions.

[128] Notwithstanding the information received by Aurora in this case, which afforded Aurora a timing advantage, the fact remains that Vantage and the other Locked-

up Shareholders were all sellers and were demonstrably acting in their own financial interests to maximize their returns, while Aurora is the only buyer in this transaction. The Locked-up Shareholders wanted an attractive exit and Aurora was pursuing a long-term business combination. These are not circumstances in which their share positions should be aggregated since Aurora and these shareholders are fundamentally on different sides of the transaction. The disclosure of information to Aurora, while raising other issues, is not inconsistent with the Locked-up Shareholders seeking to have the Aurora Offer succeed based upon their self-interest as sellers.

[129] Evidence of any benefits to the Locked-up Shareholders beyond an increased price and liquidity would potentially have been relevant, but there was no such evidence in this case.

[130] The transmission of such information could independently give rise to concerns properly addressed under corporate and commercial law, in addition to the use of the concept of joint actors in securities regulation.

4. Conclusion on joint actor issue

[131] We have therefore determined that joint actor status has not been established by the Special Committee in respect of Aurora and the Locked-up Shareholders.

D. Was Aurora's disclosure concerning the background of the offer in its news releases and take-over bid circular sufficient?

1. Overview

[132] Although the circumstances we have described relating to the receipt of the information are not sufficient to establish joint actor status by Aurora with Vantage or the other Locked-up Shareholders, the receipt by Aurora of this information raises disclosure concerns related to the Aurora Offer.

2. Law

[133] Item 23 of Form 62-104F1, the form of Take-Over Bid Circular, requires an offeror to disclose, in addition to the other prescribed items:

> Any other matter not disclosed in the take-over bid circular that has not previously been generally disclosed, is known to the offeror, and that would reasonably be expected to affect the decision of the security holders of the offeree issuer to accept or reject the offer.

[134] This requirement is not limited to purely financial effects, and covers conduct by the bidder that can be expected to be important to the decision to tender. Conduct by the bidder is especially relevant where the consideration being offered consists of common shares of the bidder, since the tendering shareholder is deciding whether to invest in the bidder, whether on a short term or longer term basis.

3. Application of the law

(a) Disclosure to Aurora of material non-public information

[135] In deciding whether to accept Aurora's bid, CanniMed shareholders are entitled to consider whether the receipt of material non-public information by Aurora,

which gave it a tactical advantage in launching its bid, will have an impact on their decision whether to tender or not. It may affect their confidence in the board or management of the companies involved. Financial considerations are not the only criteria that shareholders will weigh in making a decision to tender where they are receiving the bidder's shares as consideration, and have the option to continue as shareholders in the enlarged enterprise. Shareholders can reasonably be expected to consider the facts related to the transmission of material non-public information as a potential ethical consideration in deciding whether to tender to a bid. These considerations can have long-term financial effects and are reasonable consideration in and of themselves for a potentially broad segment of shareholders. To the extent that this information might support litigation on corporate law grounds against Aurora or others, the possibility of such litigation and the possible resulting disruption is also a reasonable matter for CanniMed shareholders to consider. If, on the other hand, Aurora discloses the circumstances surrounding such disclosure and an innocent explanation is provided under the strength of the certification required for its take-over bid circular, this can also be appropriately considered by the CanniMed shareholders.

(b) Canaccord's role

[136] CanniMed and the CanniMed Special Committee also raised concerns regarding the role that Canaccord performed for Aurora in implementing its bid. Canaccord had been Newstrike's financial advisor in respect of the Newstrike transaction with CanniMed, a role it continued to perform until November 10, 2017. Canaccord had full access to the data room for the Newstrike transaction, including due diligence materials on both companies. Canaccord withdrew from the representation of Newstrike on November 10, 2017. CanniMed and Newstrike were conducting due diligence on their respective businesses in connection with the Newstrike proposal from the end of October through November 2017.

[137] Canaccord's Managing Director and Co-Head of M&A accessed that data room the morning of the day that Canaccord withdrew from its representation of Newstrike. Mr. Booth indicates that at the time of the engagement, he was not aware of the nature of the conflict, and states that Aurora had already determined to make a bid for CanniMed and had set the price it was willing to pay. Mr. Booth indicates in his affidavit that he had inquired of Canaccord who assured him that no confidential information was used by Canaccord in the course of the Aurora mandate. Mr. Booth also states that he did not receive, and to the best of his knowledge no one else at Aurora received, any confidential information from Canaccord.

[138] We note that while CanniMed and the CanniMed Special Committee raised reasonable concerns regarding the role that Canaccord performed on behalf of Newstrike before terminating this retainer and acting for Aurora in implementing its bid, there was insufficient evidence to conclude that confidential information was transmitted to Aurora through Canaccord's activities. Evidence was provided that Canaccord implemented informational barriers. Through our order requiring additional disclosure concerning the information Aurora received leading to its bid, Aurora bears the onus of verifying that it did not benefit from inappropriate disclosures of material non-public information. Our order requires

Aurora to inquire of its advisers, including Canaccord, and to determine whether any information was inappropriately obtained that assisted it in implementing its bid.

4. Conclusion on disclosure issue

[139] For the above reasons, we ordered that Aurora:

a. with respect to its news releases dated November 14, 2017, and November 20, 2017, relating to the Aurora Offer, and after making inquiries of Aurora's relevant agents, affiliates and advisors, amend those news releases as necessary so that they include the following information:

   i. the circumstances under which, and the means by which, Aurora became aware that the Board of CanniMed would be meeting on November 13, 2017 to, among other things, consider for approval an arrangement agreement entered into between CanniMed and Newstrike Resources Limited, which information the Commission has determined would reasonably be expected to affect the decision of CanniMed's shareholders to accept or reject the Aurora Offer;

   ii. any other information that was:

      1. obtained directly or indirectly by Aurora from any person who is, or was at the relevant time, in a special relationship with CanniMed (by reference to the definitions in subsection 76(5) of the Ontario Act and clause 85(1)(a) of the Saskatchewan Act); and

      2. material to Aurora in structuring, determining the timing of, delivering or implementing the Aurora Offer; and

   iii. any other information within Aurora's knowledge that would reasonably be expected to affect the decision of the security holders of CanniMed to accept or reject the offer made by the Aurora Offer;

b. issue and file the amended news releases;

c. amend the take-over bid circular issued by Aurora on November 24, 2017, in connection with the Aurora Offer, by means of a Notice of Change, and in the same manner as described above in subparagraph (2)(a) for the news releases; and

d. distribute the Notice of Change to every person to whom the Aurora Offer circular was required to be sent, and in the manner required by Ontario securities law applicable to the filing and delivery of take-over bid circulars.

E. Should CanniMed's Rights Plan be cease-traded?

1. Overview

[140] CanniMed adopted and announced the Rights Plan on November 28, 2017, several days after the date of the Aurora Offer and the day before Aurora could make any purchases under the 5% exemption. Since the adoption of the Rights

Plan occurred in response to the Aurora Offer, timing constraints did not permit shareholder approval to be obtained prior to this action being taken.

[141] The purpose of the Rights Plan was described in CanniMed's news release as follows (with defined terms removed):

> The Plan prevents Aurora from acquiring any CanniMed shares other than those tendered to its Hostile Bid or from entering into any lock-up agreements in respect of its Hostile Bid other than those it has already entered into and filed on SEDAR …in order to (i) encourage fair treatment of the shareholders of the Company in connection with any other potential acquisition transaction of the Company, (ii) ensure that CMED shareholders have the opportunity to vote on the previously announced acquisition of Newstrike Resources Ltd. … by the Company, and (iii) ensure that shareholders are not coerced into tendering to the Hostile Bid. The Plan is not intended to deter the Hostile Bid or any other bid, and as described below, the Hostile Bid is deemed to be a "Permitted Bid" under the Plan, and the Current Lock-up Agreements are deemed to be Permitted Lock-up Agreements under the Plan, even though they would not otherwise meet the typical requirements of being a Permitted Lock-up Agreement.

[142] The Rights Plan is stated by CanniMed to achieve these goals through a dilutive rights issue typical of such plans (excluding the bidder and those acting jointly or in concert with them), with the rights being separated and becoming exercisable on the tenth trading day following (i) the acquisition by a person of 20% of CanniMed's outstanding stock, (ii) a non-permitted hostile bid being initiated, or (iii) a permitted bid being modified so it is no longer a permitted bid.

[143] The Rights Plan replicates the 105-day deposit period now present in the revised take-over bid rules, but without reduction in the case of an alternative bid as specified in section 2.28.3 of NI 62-104. The mandatory 10-day extension after the satisfaction of the minimum tender condition arising under the take-over rules is changed to ten business days.

[144] The Rights Plan deems all securities subject to lock-up agreements to be beneficially owned by Aurora. The interaction of this provision and the definition of a 20% acquiror, means that the use of the 5% exemption is denied to Aurora. The CanniMed Board is vested with broad discretion to amend the Rights Plan.

2. Law

[145] NP 62-202 sets out the views of the Commission, the FCAAS and the other Canadian securities regulatory authorities on the use of defensive tactics in relation to take-over bids. Our review of defensive tactics is based on the objectives of the take-over regime as described in subsection 1.1(2) of this Instrument:

> The primary objective of the take-over bid provisions of Canadian securities legislation is the protection of the bona fide interests of the shareholders of the target company. A secondary objective is to provide a regulatory framework within which take-over bids may proceed in an open

> and even-handed environment. The take-over bid provisions should favour neither the offeror nor the management of the target company, and should leave the shareholders of the target company free to make a fully informed decision.

[146] The optimum outcome for target shareholders is described in subsection 1.1(5) of NP 62-202:

> The Canadian securities regulatory authorities consider that unrestricted auctions produce the most desirable results in take-over bids and they are reluctant to intervene in contested bids. However, they will take appropriate action if they become aware of defensive tactics that will likely result in shareholders being deprived of the ability to respond to a take-over bid or to a competing bid.

3. Application of the law

[147] Implementation of the Rights Plan is clearly a defensive tactic subject to NP 62-202, designed by CanniMed to protect the Newstrike proposal in the face of a bid conditional on that transaction being abandoned. The Rights Plan is designed to prevent additional lock-ups that, together with permitted market acquisitions, could lead to Aurora's success. We concluded that it was a secondary motivation to permit potential higher bids for CanniMed that might arise on an unsolicited basis (since CanniMed was prohibited by the Arrangement Agreement from soliciting other transactions) or bids that would engage both CanniMed and Newstrike through a bid for the combined enterprise if the Newstrike transaction was completed. Given these constraints, it was not surprising that CanniMed was not engaged in an auction process for the company since it was committed to the Newstrike transaction.

[148] Since the Rights Plan had primarily a tactical motivation in simultaneously protecting the Newstrike arrangement and resisting the Aurora Offer, its function could not primarily be said to be giving the Board time to conduct an auction or to allow time for higher bids to emerge. Such a function was a possibility as a secondary matter, but there was no evidence that the ability to seek other transactions was being utilized by CanniMed. There was also no evidence of higher bids surfacing in the approximately five weeks that had elapsed between Aurora's announcement of its intention to make its bid and the Hearing. On the contrary, the Rights Plan could operate to deny CanniMed shareholders the potential benefits of the Aurora Offer if Aurora is prohibited from strengthening its position by additional lock-ups and market purchases, leading to its abandonment of its bid. As things stand, shareholder choice is being promoted without the operation of the Rights Plan since CanniMed shareholders will decide on whether the Newstrike transaction will proceed well before the Aurora Offer ends, since we have declined to shorten the 105-day deposit period. Aurora and the Locked-up Shareholders can continue to oppose that transaction and, if they wish, reinforce with CanniMed shareholders that the Bid may be terminated if the Newstrike proposal is not abandoned. Regardless of the outcome of the Newstrike vote, the 105-day period allows additional bids to emerge, whether for CanniMed alone if the Newstrike transaction is not completed, or for the combined enterprise.

[149] The rebalancing of the take-over bid regime by mandating the 105-day deposit period, the minimum tender condition and the mandatory 10-day extension following satisfaction of that condition, provides sufficient protections in this case for shareholder choice to occur while allowing bids to be made and management to respond to such bids in an appropriately predictable and even-handed manner. These amendments make the prior decisions of the Commission regarding shareholder rights plans of limited use in this case since the amendments have introduced features designed to provide sufficient time for other bids to surface without the need for Commission intervention to determine how long before a poison pill must be terminated.[2]

[150] We agree with Staff's submissions that lock-up agreements are a lawful and established feature of the planning for M&A transactions in Canada, and are even more important in a bidder's planning after the adoption of the take-over bid amendments since the risks to the completion of a transaction have been increased by virtue of the lengthening of the period that a bid must remain open and since the minimum tender condition cannot be waived by the bidder. If tactical shareholder rights plans could, as a general matter, operate to prevent lock-ups and permitted market purchases, the take-over regime would be made far less predictable and the planning and implementation of shareholder value-enhancing transactions made more difficult or inappropriately discouraged by such intervention.

[151] As a general matter, tactical plans that reproduce the features of the take-over regime, *e.g.* the 105-day period, the minimum tender condition and the 10-day extension, can be confusing to investors and market participants. Reproducing these features, with variations in how the requirements are to be satisfied, would generate confusion and in this case serve no useful purpose. Similarly, such plans should not generally be utilized to deem a bidder to beneficially own locked-up shares in circumstances where they would not be deemed to be joint actors under the applicable rules.

[152] It will be a rare case in which a tactical plan will be permitted to interfere with established features of the take-over bid regime such as the opportunity for bidders and shareholders to make decisions in their own interests regarding whether to tender to a bid by entering into lock-up agreements of the kind under consideration in this case. In this case, the Rights Plan constitutes an impermissible defensive tactic.

4. Conclusion on the Rights Plan

[153] For the above reasons, we cease-traded the Rights Plan pursuant to our public interest jurisdiction.

VI. CONCLUSION

[154] Given the careful rebalancing of the Canadian take-over bid regime and in the absence of factors requiring our intervention in the public interest, we have preserved the take-over bid requirements as prescribed in our rules. We have cease-traded the tactical Rights Plan since its continuation was unnecessary,

[2] See, for instance, *Canadian Jorex (Re)* (1992), 15 OSCB 257; *Royal Host Real Estate Investment Trust (Re)* (1999), 22 OSCB 7819; *Chapters Inc. (Re)* (2001), 24 OSCB 1657 and *Thirdcoast Ltd. (Re)* (2012), 37 OSCB 7709, 2012 ONSEC 20.

given this rebalancing that operates, in this case, to preserve shareholder choice. We have also sought to counter potential unfairness in the timing advantage enjoyed by Aurora by ordering disclosure of information reasonably expected to affect the decision of CanniMed's shareholders to accept or reject the Aurora Offer.

Dated this 15th day of March, 2018.

FCAAS PANEL

"*Peter Carton*"

Peter Carton

"*Howard Crofts*"

Howard Crofts

"*Eugene Scheibel*"

Honourable Eugene Scheibel

OSC PANEL

"*D. Grant Vingoe*"

D. Grant Vingoe

"*Timothy Moseley*"

Timothy Moseley

"*Frances Kordyback*"

Frances Kordyback

SCHEDULE 'A' – OSC ORDER

Ontario Securities Commission | Commission des valeurs mobilières de l'Ontario | 22nd Floor, 20 Queen Street West, Toronto ON M5H 3S8 | 22e étage, 20, rue queen ouest, Toronto ON M5H 3S8

FILE NOS.: 2017-71
2017-73
2017-74

IN THE MATTER OF
AURORA CANNABIS INC.

– and –

IN THE MATTER OF
CANNIMED THERAPEUTICS INC.

– and –

IN THE MATTER OF
THE SPECIAL COMMITTEE OF THE BOARD OF
DIRECTORS OF CANNIMED THERAPEUTICS INC.

D. Grant Vingoe, Vice-Chair and Chair of the Panel
Timothy Moseley, Vice-Chair
Frances Kordyback, Commissioner

December 22, 2017

ORDER
(Sections 104 and 127 of the
Securities Act, RSO 1990, c S.5)

WHEREAS on December 20 and 21, 2017, the Ontario Securities Commission (the "**Commission**") held a hearing in conjunction with the Financial and Consumer Affairs Authority of Saskatchewan (the "**FCAAS**") in the following three Applications:

i) the Application filed by Aurora Cannabis Inc. ("**Aurora**"), dated December 4, 2017, File No. 2017-71 (the "**Aurora Application**"), in respect of a request for (i) an order granting exemptive relief from the requirements set forth in section 2.28.1 of National Instrument 62-104 *Take-Over Bids and Issuer Bids* ("**NI 62-104**"), and (ii) an order to cease trade the shareholder rights plan between CanniMed Therapeutics Inc. ("**CanniMed**") and Computershare Investor Services Inc., dated November 28, 2017 (the "**Shareholder Rights Plan**");

ii) the Amended Application filed by the Special Committee of the Board of Directors of CanniMed (the "**Special Committee**"), dated December 11, 2017, File No. 2017-73 (the "**CanniMed Special Committee Application**"), in respect of a request for an order that, along with related relief, Aurora, SaskWorks Venture Fund Inc., Apex Investments Limited

Partnership, Golden Opportunities Fund Inc., and Vantage Asset Management Inc. are deemed to be joint actors, as defined in Multilateral Instrument 61-101 *Protection of Minority Shareholders in Special Transactions* ("**MI 61-101**"), and are acting jointly or in concert in connection with Aurora's unsolicited take-over bid to acquire all of the issued and outstanding common shares in the capital of CanniMed, pursuant to Aurora's take-over bid circular, dated November 24, 2017 (the "**Aurora Offer**"); and

iii) the Amended Application filed by CanniMed, dated December 11, 2017, File No. 2017-74 (the "**CanniMed Application**"), in respect of a request for an order that the exemption created by section 2.2(3) of NI 62-104 to the restrictions on purchases during a take-over bid found in section 2.2(1) of NI 62-104 shall not apply to Aurora until (i) March 9, 2018, or (ii) if the Commission grants the relief sought in the CanniMed Special Committee Application, then 105 days after the date upon which a take-over bid circular that complies with insider bid rules is delivered to CanniMed's shareholders;

ON HEARING the submissions of the representatives for Aurora, CanniMed, the Special Committee, Staff of the Commission and Staff of the FCAAS and on reading the application materials and written submissions filed by the parties;

With Reasons to follow;

IT IS ORDERED THAT:

1. Pursuant to paragraph 2 of subsection 127(1) of the *Securities Act*, RSO 1990, c S.5 (the "**Act**"), and in accordance with the guidance in National Policy 62-202 – *Take-Over Bids – Defensive Tactics*, all trading shall cease in respect of any securities issued, or that are proposed to be issued, in connection with the Shareholder Rights Plan;

2. pursuant to clause 104(1)(b) and paragraph 5 of subsection 127(1) of the Act, Aurora shall, on or before January 12, 2018:

    a. with respect to its news releases dated November 14, 2017, and November 20, 2017, relating to the Aurora Offer, and after making inquiries of Aurora's relevant agents, affiliates and advisors, amend those news releases as necessary so that they include the following information:

        i. the circumstances under which, and the means by which, Aurora became aware that the board of CanniMed would be meeting on November 13, 2017 to, among other things, consider for approval an arrangement agreement entered into between CanniMed and Newstrike Resources Limited, which information the Commission has determined would reasonably be expected to affect the decision of CanniMed's shareholders to accept or reject the Aurora Offer;

        ii. any other information that was:

            1. obtained directly or indirectly by Aurora from any person who is, or was at the relevant time, in a special relationship with CanniMed (by reference to the definition in subsection 76(5) of the Act); and

            2. material to Aurora in structuring, determining the timing of, delivering or implementing the Aurora Offer; and

        iii. any other information within Aurora's knowledge that would reasonably be expected to affect the decision of the security holders of CanniMed to accept or reject the offer made by the Aurora Offer;

    b. issue and file the amended news releases;

c. amend the take-over bid circular issued by Aurora on November 24, 2017, in connection with the Aurora Offer, by means of a Notice of Change, and in the same manner as described above in subparagraph (2)(a) for the news releases; and

d. distribute the Notice of Change to every person to whom the Aurora Offer circular was required to be sent, and in the manner required by Ontario securities law applicable to the filing and delivery of take-over bid circulars;

3. The exemptive relief sought in the Aurora Application regarding the requirements set forth in section 2.28.1 of NI 62-104 is denied;

4. The relief sought in the CanniMed Special Committee Application is denied;

5. The relief sought in the CanniMed Application is denied; and

6. Pursuant to clause 9(1)(b) of the *Statutory Powers Procedure Act*, RSO 1990, c S.22, and Rule 22(3) of Commission's *Rules of Procedure and Forms* (2017), 40 OSCB 8988, the following filed documents are confidential:

   a. In Exhibit 4, Tabs "10" and "11" of the Affidavit of John Knowles sworn December 15, 2017;

   b. In Exhibit 4, Tab "6" of the Affidavit of Jeffrey Fallows sworn December 15, 2017; and

   c. In Exhibit 5, Tabs "7" and "8" of the Affidavit of Richard Hoyt sworn December 14, 2017.

"*D. Grant Vingoe*"

D. Grant Vingoe

"*Timothy Moseley*"

Timothy Moseley

"*Frances Kordyback*"

Frances Kordyback

SCHEDULE 'B' – FCAAS ORDER

HEARING PURSUANT TO *THE SECURITIES ACT, 1988*, S.S.1988-89, c.S-42.2

IN THE MATTER OF
AURORA CANNABIS INC.

-and-

IN THE MATTER OF
CANNIMED THERAPEUTICS INC.

-and-

IN THE MATTER OF
THE SPECIAL COMMITTEE OF THE BOARD OF
DIRECTORS OF CANNIMED THERAPEUTICS INC.

Peter Carton, Chair of the FCAAS Panel
Howard Crofts
Honourable Eugene Scheibel

December 22, 2017

ORDER

(Sections 101 and 134 of *The Securities Act, 1988,* S.S. 1988-89, c. S-42.2 and
Section 22 of *The Financial and Consumer Affairs Authority of Saskatchewan Act,* SS 2012, c F-13.5)

WHEREAS, pursuant to section 17 of *The Financial and Consumer Affairs Authority of Saskatchewan Act,* S.S. 2012, c F-13.5 (the "FCAAS Act"), the Chairperson of the Financial and Consumer Affairs Authority of Saskatchewan (the "FCAAS") has appointed a panel (the "FCAAS Panel") to hear the above-noted matter;

AND WHEREAS, by virtue of subsection 17(7) of the FCAAS Act, a decision or action of the FCAAS Panel in relation to this matter is a decision of the FCAAS;

AND WHEREAS on December 20 and 21, 2017, the FCAAS Panel held a hearing in conjunction with the Ontario Securities Commission (the "**Commission**") in the following three Applications:

i) the Application filed by Aurora Cannabis Inc. ("**Aurora**"), dated December 4, 2017, (the "**Aurora Application**"), in respect of a request for (i) an order granting exemptive relief from the requirements set forth in section 2.28.1 of National Instrument 62-104 *Take-Over Bids and Issuer Bids* ("**NI 62-104**"), and (ii) an order to cease trade the shareholder rights plan between CanniMed Therapeutics Inc. ("**CanniMed**") and

Computershare Investor Services Inc., dated November 28, 2017 (the "**Shareholder Rights Plan**");

ii) the Amended Application filed by the Special Committee of the Board of Directors of CanniMed (the "**Special Committee**"), dated December 11, 2017, (the "**CanniMed Special Committee Application**"), in respect of a request for an order that, along with related relief, Aurora, SaskWorks Venture Fund Inc., Apex Investments Limited Partnership, Golden Opportunities Fund Inc., and Vantage Asset Management Inc. are deemed to be joint actors, as defined in Multilateral Instrument 61-101 *Protection of Minority Shareholders in Special Transactions* ("**MI 61-101**"), and are acting jointly or in concert in connection with Aurora's unsolicited take-over bid to acquire all of the issued and outstanding common shares in the capital of CanniMed, pursuant to Aurora's take-over bid circular, dated November 24, 2017 (the "**Aurora Offer**"); and

iii) the Amended Application filed by CanniMed, dated December 11, 2017, (the "**CanniMed Application**"), in respect of a request for an order that the exemption created by section 2.2(3) of NI 62-104 to the restrictions on purchases during a take-over bid found in section 2.2(1) of NI 62-104 shall not apply to Aurora until (i) March 9, 2018, or (ii) if the FCAAS Panel grants the relief sought in the CanniMed Special Committee Application, then 105 days after the date upon which a take-over bid circular that complies with insider bid rules is delivered to CanniMed's shareholders;

ON HEARING the submissions of the representatives for Aurora, CanniMed, the Special Committee, Staff of the Commission and Staff of the FCAAS and on reading the application materials and written submissions filed by the parties;

With Reasons to follow:

IT IS ORDERED THAT:

1. Pursuant to clause 134(1)(b) of *The Securities Act*, *1988,* S.S. 1988-89, c.S-42.2 (the "Act"), and in accordance with the guidance in National Policy 62-202 – *Take-Over Bids – Defensive Tactics*, all trading shall cease in respect of any securities issued, or that are proposed to be issued, in connection with the Shareholder Rights Plan;

2. Pursuant to clause 101(b) and subsection 134(1) of the Act, Aurora shall, on or before January 12, 2018:

   a. with respect to its news releases dated November 14, 2017, and November 20, 2017, relating to the Aurora Offer, and after making inquiries of Aurora's relevant agents, affiliates and advisors, amend those news releases as necessary so that they include the following information:

      i. the circumstances under which, and the means by which, Aurora became aware that the board of CanniMed would be meeting on November 13, 2017 to, among other things, consider for approval an arrangement agreement entered into between CanniMed and Newstrike Resources Limited, which information the FCAAS Panel has determined would reasonably be expected to affect the decision of CanniMed's shareholders to accept or reject the Aurora Offer;

ii. any other information that was:

1. obtained directly or indirectly by Aurora from any person who is, or was at the relevant time, in a special relationship with CanniMed (by reference to the definition in clause 85(1)(a) of the Act); and

2. material to Aurora in structuring, determining the timing of, delivering or implementing the Aurora Offer; and

iii. any other information within Aurora's knowledge that would reasonably be expected to affect the decision of the security holders of CanniMed to accept or reject the offer made by the Aurora Offer;

b. issue and file the amended news releases;

c. amend the take-over bid circular issued by Aurora on November 24, 2017, in connection with the Aurora Offer, by means of a Notice of Change, and in the same manner as described above in subparagraph (2)(a) for the news releases; and

d. distribute the Notice of Change to every person to whom the Aurora Bid circular was required to be sent, and in the manner required by Saskatchewan securities law applicable to the filing and delivery of take-over bid circulars;

3. The exemptive relief sought in the Aurora Application regarding the requirements set forth in section 2.28.1 of NI 62-104 is denied;

4. The relief sought in the CanniMed Special Committee Application is denied;

5. The relief sought in the CanniMed Application is denied; and

6. Pursuant to section 6.2 of Saskatchewan Policy Statement 12-602 *Procedures for Hearings and Reviews*, the following filed documents are confidential:

a. In Exhibit 4, Tabs "10" and "11" of the Affidavit of John Knowles sworn December 15, 2017;

b. In Exhibit 4, Tab "6" of the Affidavit of Jeffrey Fallows sworn December 15, 2017; and

c. In Exhibit 5, Tabs "7" and "8" of the Affidavit of Richard Hoyt sworn December 14, 2017.

"*Peter Carton*"

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Peter Carton

"*Howard Crofts*"

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Howard Crofts

"*Eugene Scheibel*"

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Honourable Eugene Scheibel