2002 BCSECCOM 597

COR#02/078

Reasons for Decision

Mercury Partners & Company Inc.

and

Canadian Venture Exchange Inc. and VisuaLABS Inc.

Section 28 of the *Securities Act*, RSBC 1996, c. 418

Hearing and Review

Panel	Adrienne Salvail-Lopez	Commissioner
	Joan L. Brockman	Commissioner
	Roy Wares	Commissioner
Date of Hearing	April 2 and 17, 2002	
Date of Reasons	July 2, 2002	

Appearing

David R. Haigh, Q.C. Michael J. Donaldson Stewart L. Muglich Mark Maxwell	For Mercury Partners & Company Inc.
Anthony L. Friend, Q.C. Nick P. Fader Scott Bower	For VisuaLABS Inc.
Susan A. Griffin Sean K. Boyle N. Casey French Maryn Sigurdson	For Canadian Venture Exchange Inc.
J.A. (Sasha) Angus Kristine Mactaggart	For Commission Staff

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Introduction

¶ 1 On April 2 and 17, 2002, we heard an application by Mercury Partners & Company Inc. for orders under sections 27, 28 and 161 of the *Securities Act*, RSBC 1996, c. 418. Mercury's application related to a settlement agreement between VisuaLABS Inc. and Sheldon and Joy Zelitt, former directors of VisuaLABS, that Mercury said had been the subject of a decision by the Canadian Venture Exchange Inc. (since April 8, 2002, the TSX Venture Exchange).

¶ 2 On April 19, 2002, we issued a decision dismissing Mercury's application. These are the reasons for our decision.

Background

¶ 3 VisuaLABS was continued under the *Business Corporations Act*, RSA 2000, c.B-9 and listed on the Exchange. VisuaLABS' operations are described in the company's financial statements for the nine months ended September 30, 2001, as "the research, development, licensing and provision of advanced imaging technologies for application in all forms of electronic image displays."

¶ 4 VisuaLABS focused on the development of two technologies. The first was a 3D visualization technology that would allow viewers to see 3D images without using glasses or headgear. The second was a "grout free" technology that would allow several liquid crystal display panels to be put together to build one large, high resolution screen.

¶ 5 VisuaLABS presented what it claimed was the first working prototype of its grout free technology at the company's annual and special meeting on July 3, 2001. However, VisuaLABS concluded later that month that, in fact, the "prototype" was a standard 42 inch television purchased at a Calgary consumer electronics retailer and slightly modified. VisuaLABS claimed that this deception had been carried out by Sheldon Zelitt, a director and past president of VisuaLABS.

¶ 6 VisuaLABS' president and director, John Kendall, learned of the deception and called a board meeting for July 20, 2001. On July 26, 2001, VisuaLABS issued a news release disclosing the deception. The news release stated that, after reviewing the situation, a special committee of the board had concluded that neither the grout free nor the 3D technology was as advanced as the company had previously represented. The news release noted that Zelitt and his wife had received their shares in the company as consideration for the 3D technology and stated that VisuaLABS expected "to take steps to have the shares held by Mr. and Mrs. Zelitt cancelled without consideration and to pursue other available claims and remedies." The news release also stated that VisuaLABS had terminated the

employment of the Zelitts and would ask them to tender their resignations as directors. The Zelitts held 7,674,624 of the 17,024,444 outstanding shares of VisuaLABS. They held these shares directly or through The Downsview Investment Group Limited, a company incorporated by the Zelitts for estate and tax planning purposes.

¶ 7 The Zelitts refused to resign as directors but ceased to participate in meetings of VisuaLABS' board.

¶ 8 In August 2001, VisuaLABS retained counsel to evaluate claims the company might have against the Zelitts. VisuaLABS' counsel, in turn, retained Deloitte & Touche LLP to do a forensic audit of the company's financial transactions and technologies.

¶ 9 In a letter to the shareholders dated August 28, 2001, Kendall said that the special committee had reported to the board on July 24 and 25 that "it had found no evidence supporting the existence of either the GroutFree technology or the hardware dependent 3-D technology held out by the Corporation." Kendall also said that the board was evaluating the feasibility of a business plan that would enable the company to move forward as a going concern, as well as considering other alternatives, such as winding up the company. According to the company's latest financial statements, for the six months ended June 30, 2001, the company's principal asset was $8,370,671 in cash and short-term deposits.

¶ 10 On August 28, 2001, VisuaLABS commenced an action against the Zelitts in the Court of Queen's Bench of Alberta seeking various orders. One of these was an order rescinding the issuance of the Zelitts' shares on the basis that they had been obtained by fraud and without consideration, as the technology in exchange for which they had been issued never existed.

¶ 11 Also on August 28, VisuaLABS obtained an interim order under which the Zelitts were "restrained, enjoined and prohibited from transferring, exercising rights, including but not limited to voting rights, or otherwise dealing with any shares in VisuaLABS Inc. which they directly or indirectly own or in which they have a legal or beneficial interest". The order also required the Zelitts to deliver to the Court all of their share certificates, which "shall not be dealt with in any manner whatsoever until further order" of the Court. The Zelitts could bring a motion to amend, vary or set aside the order on two clear days written notice.

¶ 12 VisuaLABS advised that the Zelitts denied any wrongdoing and repeatedly threatened to bring a multi-million dollar counterclaim against VisuaLABS. VisuaLABS also advised that it began settlement negotiations with the Zelitts in early November 2001.

¶ 13 In September 2001, VisuaLABS was approached by Quest Ventures Ltd. Quest is a merchant bank based in Vancouver. All of the shares of Quest are held by A. Murray Sinclair and Brian Bayley. Sinclair and Bayley each sit on the boards of over a dozen public companies. However, neither had any prior connection with VisuaLABS or its management.

¶ 14 Negotiations ensued. On November 28, 2001, the Exchange conditionally approved an issuance of VisuaLABS' shares by VisuaLABS to Quest. That evening, VisuaLABS issued a news release announcing:

1. the issuance of 4,000,000 shares to Quest, for total proceeds of $1,000,000;

2. the appointment of Sinclair, Bayley, John Kendall (VisuaLABS' president) and Glenn McCowan (VisuaLABS' chief financial officer) to VisuaLABS' board; and

3. a proposed change of VisuaLABS' business to an investment corporation.

The news release also announced that VisuaLABS had received the final report from Deloitte & Touche Inc. as to the results of its forensic audit. The news release stated that "based on the findings in the Deloitte & Touche report, it is clear that the Corporation's 3-D and Grout-Free technologies will not have any meaningful value in the hands of the Corporation going forward."

¶ 15 On November 29, 2001, counsel for Mercury wrote to the Exchange expressing concerns about the Quest transaction and suggesting that it contravened various Exchange policies and the continuous disclosure requirements of the Act. Counsel for Mercury requested that the Exchange, among other things, require shareholder approval of the private placement to Quest and the change in directors.

¶ 16 Mercury had been purchasing VisuaLABS shares on the Exchange since July 2001. Mercury describes itself on its website as follows: Mercury is "a financial services company engaging in merchant banking and private equity in Canada and the United States. Mercury's investment objective to acquire influential ownership in companies and through direct involvement bring about the change required to realize the strategic value of the companies it invests in."

¶ 17 On December 13, 2001, the Exchange sent a letter to Mercury's counsel confirming the Exchange's decision of November 28 to conditionally approve the private placement. On December 14, Mercury applied under section 28 of the Act for a hearing and review of the Exchange's decision.

¶ 18 On December 30, 2001, VisuaLABS entered into a settlement agreement with the Zelitts. The principal terms of that agreement are as follows:

- VisuaLABS and the Zelitts will discontinue their actions against each other.
- The Zelitts will resign as directors of VisuaLABS.
- The Zelitts will surrender for cancellation all but one million of the Zelitt shares. The remaining one million shares will be voted by a third person "in a manner that such third person considers to be in the best interests of the shareholders of the Company generally".
- The Zelitts acknowledge a debt to VisuaLABS of $1,575,333.
- The Zelitts will secure the debt by a promissory note and a first mortgage on their property in the Czech Republic. The Zelitts will pay the debt from proceeds of the sale of the remaining one million Zelitt shares; the shares will be sold in the market in an orderly fashion before January 1, 2004, and the proceeds paid to VisuaLABS. Should the debt be paid from sales of fewer than one million shares, the balance of the shares will be transferred to VisuaLABS. Should the debt not be paid from sales of all one million shares, the Zelitts will pay the outstanding balance, plus interest commencing January 1, 2004, in monthly payments beginning February 1, 2004.
- VisuaLABS will forgive another debt owed by the Zelitts of $250,000. The money was used by the Zelitts to purchase some of the Zelitt shares.
- VisuaLABS will pay Joy Zelitt severance of 18 months in lieu of notice, a vacation entitlement and a foreign living allowance and will reimburse her for payments she made on VisuaLABS' behalf. (In its material change report dated March 4, 2002, VisuaLABS disclosed that the payments to Joy Zelitt totalled approximately $270,000.)
- The Zelitts will incorporate a company in which the Zelitts will hold 7,674,624 voting shares and VisuaLABS will hold 9,500,000 non-voting shares. VisuaLABS will transfer the 3-D technology to the company. In turn, the company will grant VisuaLABS a licensing agreement that permits VisuaLABS to use the technology.

¶ 19 On January 2, 2002, VisuaLABS issued a news release announcing that it had reached an agreement in principle with the Zelitts and describing the principal terms of the agreement. The news release observed that completion of the transactions contemplated under the agreement was subject to "all necessary regulatory and other third party approvals" and that there was no assurance that VisuaLABS would be able to implement the agreement.

¶ 20 On January 9, 2002, counsel for Mercury wrote to the Exchange, and to the British Columbia, Alberta and Ontario securities commissions, expressing concerns about VisuaLABS' agreement with the Zelitts and submitting that it was

a related party transaction under Exchange Policy 5.9. That policy requires a company undertaking a related party transaction to obtain a valuation and approval of its minority shareholders unless an exemption from these requirements is available. Counsel for Mercury sent follow-up letters to the Exchange on January 15, February 4, and March 6 and 12, 2002.

¶ 21 On February 1 and 4, 2002, VisuaLABS and the Zelitts made minor amendments to the agreement and executed various documents required to conclude the settlement.

¶ 22 On February 4, 2002, VisuaLABS issued a news release announcing the execution of the documents but noting that the documents would not be effective unless VisuaLABS obtained all necessary regulatory and other approvals. The news release also announced that Sheldon Zelitt had resigned as a director and that two new directors – Richard Clark and Lukas Lundin – had been appointed.

¶ 23 On February 5 and 6, 2002, the Commission held the hearing and review of the Exchange's decision of November 28, 2001. The Commission reserved its decision but informed the parties that it would endeavor to issue the decision by the end of February.

¶ 24 On February 19, 2002, VisuaLABS and the Zelitts obtained from the Alberta Court of Queen's Bench a consent order cancelling all but one million of the Zelitt shares. Sheldon Zelitt retained one share and Joy Zelitt retained 999,999 shares. The court also vacated its order of August 28, 2001, respecting the Zelitt shares. Both the Alberta Securities Commission and the Exchange had been given notice of the application for the order. The Alberta Securities Commission took no position with respect to the application. The Exchange asked for time to consider the matter and VisuaLABS undertook not to enter the order until it had heard from the Exchange.

¶ 25 On February 20, 2002, VisuaLABS' representatives met with Gerald Romanzin, Acting President of the Exchange, to discuss the settlement agreement and the application for cancellation of the Zelitt shares. On February 21, Romanzin sent a letter to VisuaLABS' counsel confirming the following representations and submissions made by VisuaLABS at that meeting:

> Settlement Agreement
>
> 1. The board of directors of the Company has reviewed the Cancellation and the Settlement Agreement and determined that they are in best interests of the Company;

2. any delay in entering the Order may prejudice the Company's ability to conclude the Settlement Agreement;

3. the implementation of the Settlement Agreement is, to the best of the Company's knowledge, in compliance with Exchange Requirements;

4. the Company has specifically addressed its mind to CDNX Policy 5.9 and concluded that CDNX Policy 5.9 does not apply in the circumstances. Alternatively, should CDNX Policy 5.9 apply, the Company has determined that it is exempt from the minority approval and valuation provisions of CDNX Policy 5.9 and acknowledges that it will otherwise comply with any other applicable provisions of CDNX Policy 5.9;

5. the Company has specifically addressed its mind to any other CDNX policies relating to a "Change of Control" and concluded that the Cancellation does not require shareholder approval; and

6. the Company does not require Exchange approval in connection with the implementation of the Settlement Agreement or the Cancellation.

Issuer Bid

7. The Company has discussed the applicability of issuer bid provisions contained in the *Securities Act* (Alberta) with staff of the Alberta Securities Commission (the "ASC") and has been advised that staff of the ASC neither approves nor opposes the Order. The Company has concluded that Cancellation does not invoke the issuer bid provisions under either the Alberta or Ontario securities acts, being the only Canadian jurisdictions in which the holders of the cancelled shares reside.

ABCA

8. The implementation of the Settlement Agreement does not constitute a sale of all or substantially all of the assets of the Company or otherwise result in a fundamental change within the meaning of the *Business Corporations Act* (Alberta) ("ABCA") and does not, therefore, require shareholder approval.

The letter continued:

Based on the foregoing representations, CDNX advises that it accepts the Company's submissions that:

1. CDNX Policy 5.9 does not apply in the circumstances of the Cancellation and the Settlement Agreement; or alternatively, that if CDNX Policy 5.9 does apply, the Company has an exemption from CDNX Policy 5.9 minority approval and valuation requirements;

2. the implementation of the Settlement Agreement does not invoke any requirement for approval by CDNX that might otherwise arise in the context of a Change of Control; and

3. the Cancellation and the Settlement Agreement does not invoke a requirement for shareholder approval under the ABCA.

We confirm the Company's undertaking that it will provide a summary of the submissions and representations made during the course of the Discussions to CDNX by February 28, 2002.

¶ 26 VisuaLABS entered the order of the Alberta Court of Queen's Bench on February 21, 2002.

¶ 27 On February 22, 2002, VisuaLABS issued a news release announcing the cancellation of all but one million of the Zelitt shares and the resignation of Joy Zelitt as a director. The news release also described the principal terms of the settlement agreement and confirmed that, after the cancellation, VisuaLABS had 14,349,820 shares outstanding.

¶ 28 On February 25, 2002, the Exchange wrote to Mercury, acknowledging Mercury's letters and advising that it was not the Exchange's practice to involve shareholders in discussions respecting companies listed on the Exchange. It advised Mercury to direct any inquiries to VisuaLABS.

¶ 29 On February 27, 2002, the Commission issued its decision in respect of the hearing and review held on February 5 and 6. The Commission ordered, among other things, that VisuaLABS hold a meeting of its shareholders on or before May 30, 2002, at which meeting the shareholders would vote whether to:

1. ratify VisuaLABS' issuance of 4,000,000 shares to Quest or direct the board of VisuaLABS to take all necessary steps to reverse the issuance;

2. ratify the appointments to VisuaLABS' board of McCowan, Sinclair, Bayley, Fleming, Clark and Lundin; and

3. approve a change in VisuaLABS' business to that of an investment company.

¶ 30 On February 28, 2002, Kendall sent an 11 page letter to Romanzin summarizing the discussions at their meeting of February 20. The three page section of the letter dealing with Exchange Policy 5.9 began as follows:

> During the course of our meeting, you asked us to address CDNX Policy 5.9 ("Policy 5.9") and, in particular, the Related Party Transaction provisions incorporated into that policy through Ontario Securities Commission Rule 61-501 ("Rule 61-501"). At a big picture level, we indicated to you that the policy concerns addressed by the related party transaction restrictions are not engaged in the current circumstances. Those restrictions exist to prohibit persons in a position to exercise control or influence over an issuer from utilizing that control or influence to procure benefits from the issuer that would not be available in an arms-length context. As indicated, there can be no suggestion in the current circumstances that the Zelitts were able to utilize their position as significant shareholders to extract benefits from the Corporation, The Zelitts have not attended board meetings since July, 2001 and the nature of the relationship between the Zelitts and the remaining directors of the Corporation has been arms-length, to say the least. Having exposed a number of the directors to the possibility of significant lawsuits, the Zelitts were not in a position to extract any favors from the board. As we indicated to you, negotiations were at times extremely acrimonious (Mr. Zelitt would not speak with Mr. Kendall or Mr. McCowan) and were nothing if not arms-length.

¶ 31 The letter also identifies the third party who will be voting the remaining one million Zelitt shares.

¶ 32 On March 4, 2002, VisuaLABS issued a material change report describing the current status of the settlement arrangements. The report disclosed that the third party who will be voting the remaining shares "is a resident of Calgary, Alberta, who is arms length to both the Zelitts and VisuaLABS" and that there "has been no direction from VisuaLABS (or others, so far as the Corporation is aware) as to the manner in which the Retained Shares are to be voted."

¶ 33 On March 15, 2002, VisuaLABS issued a news release announcing the resignation of Clark and Lundin from the board of directors. On March 22, 2002, VisuaLABS issued a news release announcing the termination of the lease on its head office and facilities and the termination of its technical staff. The news release stated that:

> The Corporation is also arranging for the disposition of all of its equipment and furnishings. With the termination of the technical staff, the Corporation will have three remaining employees, who will be tasked with responsibility for completing the disposition of the Corporation's remaining property, discharging the Corporation's ongoing disclosure and other obligations under securities laws and stock exchange policies and preparing for the annual and special meeting of the shareholders, which is scheduled to be held on May 23, 2002.

¶ 34 On April 2 and 17, 2002, we heard Mercury's application for orders under sections 27, 28 and 161 of the Act in respect of the settlement agreement between VisuaLABS and the Zelitts. We also heard an application by VisuaLABS for an order under section 171 of the Act varying our orders of February 27.

¶ 35 On April 19, 2002, we issued a decision dismissing Mercury's application and an order under section 171 of the Act varying the February 27 orders so that they order that:

4. on May 23, 2002, VisuaLABS hold the annual and special meeting of its shareholders at which the shareholders will elect the board of directors of VisuaLABS;

5. at the meeting, before the election of the board, the shareholders vote whether to ratify VisuaLABs' issuance of 4,000,000 shares to Quest on November 28, 2001, or to direct the board to take all necessary steps to reverse the issuance of the Quest shares;

6. the ratification of the issuance of the Quest shares be by way of resolution passed by a majority of the votes cast at the meeting, other than votes attaching to shares owned, directly or indirectly, by

   (a) Quest, the officers or directors of Quest, the officers or directors of VisuaLABS, or the associates of any of them, or
   (b) Sheldon Zelitt, Joy Zelitt or Downsview;

7. the information circular provided to the shareholders in connection with the meeting disclose all material facts relating to the issuance of the Quest shares;

8. if the shareholders do not ratify the issuance of the Quest shares

   (a) the Quest shares cannot be voted in respect of the election of the board at the meeting; and

(b) the boards of VisuaLABS and Quest take all necessary steps to reverse the issuance of the Quest shares; and

9. if any issues arise in connection with our order, any of the parties may apply to the Commission for further direction.

Analysis

¶ 36 Mercury applied for orders under sections 27, 28 and 161 of the Act. We will deal first with the application under section 28.

Section 28

¶ 37 Section 28(1) of the Act provides as follows:

> 28.(1) The executive director or a person directly affected by a direction, decision, order or ruling made under a bylaw, rule or other regulatory instrument or policy of a self regulatory body or of an exchange may apply by notice to the commission for a hearing and review of the matter under Part 19, and section 165(3) to (5) applies.

A decision is defined in section 1(1) of the Act as "a direction, decision, order, ruling or requirement made under a power or right conferred by this Act or the regulations".

¶ 38 Mercury is entitled to a hearing and review under section 28 only if there was "a direction, decision, order or ruling made under a bylaw, rule or other regulatory instrument or policy" of the Exchange relating to the settlement agreement between VisuaLABS and the Zelitts.

¶ 39 The only applicable instrument or policy is Exchange Policy 5.9 Insider Bids, Issuer Bids, Going Private Transactions and Related Party Transactions. The policy incorporates Ontario Securities Commission Rule 61-501, which bears the same title. Policy 5.9 requires a company undertaking a related party transaction to provide certain disclosure and to obtain a formal valuation and minority approval. The policy also provides exemptions from these requirements in prescribed circumstances. However, Policy 5.9 does not require a company to obtain the approval of the Exchange before undertaking a related party transaction or relying on an exemption provided in the policy.

¶ 40 As the Exchange clearly did not give a direction or make an order or ruling in this matter, the only issue is whether the Exchange made a "decision" under Policy 5.9.

¶ 41 The Alberta Securities Commission recently dealt with the issue of what constitutes a “decision” giving a right to an appeal in *Re Ironside*, [2002] A.S.C.D. No. 158. In that case, Ironside made a complaint to the Executive Director of the ASC. ASC staff conducted an investigation and advised Ironside that they would not take enforcement action with respect to his complaint. Ironside sought to appeal the “decision” of the Executive Director to not take enforcement action.

¶ 42 The ASC concluded that it would not hear Ironside’s appeal. In paragraphs 54 to 59 of its decision, the ASC distinguished between the different types of decisions made by the Executive Director:

> The nature of the decision of the Executive Director in this case must be considered in the context of the statutory scheme of the Act.
>
> Mr. Ironside's brief argued that the definition of "decision" in s. 1(n) of the Act is circular, since it defines "decision" in part as a decision, and that it is therefore not particularly helpful in determining whether a decision not to proceed with enforcement action is a "decision" as defined by the Act. In our view, the definition is not circular. It merely indicates that not every decision in the general sense of the word meets the definition of "decision" for the purposes of the Act. It specifies only those that are made "under a power or right conferred by this Act or the regulations".
>
> The Act does not specify who is to decide whether to proceed with enforcement action in any given case. Section 44(1) requires investigators appointed pursuant to s. 41(1) or (2) to provide reports to the Executive Director, but it says nothing about who must decide whether to proceed with enforcement action.
>
> In this case, staff acknowledged that the Executive Director actually made the decision to not proceed with enforcement action, but in our view it is significant that similar decisions are usually made by other staff. The 2001 Annual Report of the Commission indicates that enforcement staff received 5,398 inquiries, 560 complaints and had 145 current investigation files. In the context of staff's enforcement operations, the decision whether to issue a notice of hearing is functionally indistinguishable from a decision whether to interview a certain person, or review certain documents, or a myriad of other choices made during the course of an investigation. Each could be said to involve a decision to either move forward with, or stop, the investigative/enforcement process. It would be unrealistic to expect the Executive Director to make or to delegate all such decisions. During oral submissions, staff confirmed that most such

> decisions are taken by staff other than the Executive Director. If these were "decisions" within the meaning of s. 1(n) only when made by the Executive Director, that would produce the absurd result of permitting appeals from decisions of the Executive Director, but not from similar decisions of other staff.
>
> In our view, the Act permits staff to make most decisions relating to investigations and enforcement actions, including decisions about whether to proceed with enforcement action, without any formal delegation of power from the Executive Director pursuant to s. 17(2) of the Act. It seems obvious that it would be practically impossible for the Executive Director to properly delegate authority for the multitude of administrative decisions made by enforcement staff because those decisions are too numerous and discretionary. Such decisions are part of the general administrative function of staff and the Executive Director under the Act.
>
> Such decisions may be contrasted with decisions made pursuant to a right or power specifically conferred by the Act upon the Executive Director, such as s. 76 (conferring the power to grant or refuse registration), or s. 120 (conferring the power to issue or refuse a receipt for a prospectus). The Act imposes certain procedural requirements in relation to these decisions; the Executive Director cannot refuse registration or refuse a receipt for a prospectus without giving an opportunity to have a hearing. Without a proper delegation, no staff member other than the Executive Director has jurisdiction to make such decisions and, in exercising a delegated power, a staff member is acting as the Executive Director. In that situation, the decision is clearly a "decision" of the Executive Director, made "under a power or right conferred by this Act or the regulations", and subject to appeal or review under s. 35 and s. 36. In our view, the decision to not proceed with enforcement action in this case is not a "decision" as defined by the Act because it is not made "under a power or right conferred by this Act or the regulations".

¶ 43 The ASC said that the lack of finality of the Executive Director's decision was also a factor and observed at paragraph 61 that:

> The decision is not final because the Executive Director can change his mind. We take notice of the fact that it is not uncommon for staff to abandon enforcement proceedings after a notice of hearing has been issued and a hearing has been scheduled before the Commission. Whether as a result of new evidence becoming available, or reconsideration of the evidence already available, there is no impediment to staff changing their mind about whether to proceed with enforcement action. This lack of

> finality militates strongly against such a decision being subject to appeal because the decision could be re-appealed each time new evidence became available.

¶ 44 We are of the view that the *Ironside* case is analogous to the matter before us. Mercury's application for a hearing and review is, in essence, an appeal of the Exchange's refusal of Mercury's request that the Exchange take enforcement action against VisuaLABS for failure to comply with Policy 5.9.

¶ 45 Like staff of our Commission and the ASC, staff of the Exchange regularly make decisions whether to commence, move forward or stop their enforcement process. This type of decision must be contrasted with decisions made by the Exchange pursuant to a power that is specifically given to it in a bylaw, rule or other regulatory instrument or policy. An example of this latter type of decision would be a decision of the Exchange pursuant to section 1.13 of Exchange Policy 4.1 Private Placements: pursuant to that section, a company generally may not issue shares in a private placement until the Exchange has issued a conditional acceptance of the transaction. The decision of the Exchange to issue or not issue its conditional acceptance would clearly be a decision subject to review under section 28 of the Act.

¶ 46 Also, the Exchange's refusal to take enforcement action against VisuaLABS is not final. It is still open to the Exchange to commence such action if it later determines that VisuaLABS did fail to comply with Policy 5.9 in respect of its settlement agreement with the Zelitts.

¶ 47 For these reasons, we found that the Exchange did not make "a direction, decision, order or ruling … under a bylaw, rule or other regulatory instrument or policy" of the Exchange in respect of VisuaLABS' settlement agreement with the Zelitts and therefore that Mercury was not entitled to a hearing and review under section 28 of the Act.

Sections 27 and 161

¶ 48 Both sections 27 and 161 of the Act authorize the Commission to issue orders if it "considers it to be in the public interest" to do so. Section 27 authorizes the Commission to make any decision respecting certain matters involving the Exchange while section 161 authorizes the Commission to make prescribed enforcement orders after a hearing.

¶ 49 The public interest concerns that arise in connection with related party transactions are set out in Part 1 of the Companion Policy to OSC Rule 61-501, which provides as follows:

> **1.1 General** - The Commission regards it as essential, in connection with the disclosure, valuation, review and approval processes followed for insider bids, issuer bids, going private transactions and related party transactions, that all securityholders be treated in a manner that is fair and that is perceived to be fair. In the view of the Commission, issuers and others who benefit from access to the capital markets assume an obligation to treat securityholders fairly and the fulfilment of this obligation is essential to the protection of the public interest in maintaining capital markets that operate efficiently, fairly and with integrity.
>
> The Commission does not consider that insider bids, issuer bids, going private transactions and related party transactions are inherently unfair. It recognizes, however, that these transactions are capable of being abusive or unfair, and has made Rule 61-501 (the "Rule") to regulate these transactions.
> …

¶ 50 In regard to these public interest concerns, counsel for VisuaLABS made the following submission:

> The policy behind regulation of related party transactions is not engaged by the circumstances of this case. These restrictions exist to prohibit persons who are in a position to exercise control or influence over an issuer from utilizing that control or influence to procure benefits from the issuer that would not be available in an arms length context. In the present case, the relationship between the Zelitts and VisuaLABS, since the discovery of the fraud in mid-2001, was acrimonious, litigious and at arms length to say the least. There can be no suggestion that the Zelitts were able to use their position as significant shareholders or as directors to extract benefit from VisuaLABS.

¶ 51 We agreed with the above submission in respect of the public interest in this matter and dismissed Mercury's application for orders under sections 27 and 161, as well as section 28, of the Act.

¶ 52 July 2, 2002

¶ 53 **For the Commission**

Adrienne Salvail-Lopez

2002 BCSECCOM 597

Commissioner

Joan L. Brockman
Commissioner

Roy Wares
Commissioner