British Columbia Securities Commission

Reply to:
Douglas B. Muir
Director, Enforcement
T: (604) 899-6800 / F: (604) 899-6633
Email: dbmuir@bcsc.bc.ca

By Regular Mail

October 1, 2018

Dear Mr. Mawji:

Aly Babu Husein Mawji
Reciprocal Order Application

This letter notifies you and the British Columbia Securities Commission (the Commission) that the Executive Director of the Commission is applying for orders against you under sections 161(6) (a) and 161(1) of the *Securities Act*, RSBC 1996, c. 418 (the Act). The Executive Director is not seeking a financial penalty.

The Executive Director is making this application based on your conviction for securities misconduct in Germany.

ORDER FROM GERMANY

1. On October 12, 2012, the District Court Stuttgart, Germany (the District Court) convicted you of illegal market manipulation and sentenced you to three years and two months in prison.

   Decision of the German Federal Court of Justice, (Decision of the GFCJ), p. 3-4, paras. 1 and 4

2. In finding you guilty of illegal market manipulation, the District Court determined the following:

   (a) In early 2006, you, along with others held shares of a company (Company D).

   (b) Together with an individual named G, you decided to increase the price of the share stock in Company D by recommending the purchase of the stock in the media.

(c) You transferred half of your share stock to G on the understanding that G was engaging journalists to implement the marketing of the share stock in the media.

Decision of the GFCJ, p. 4, para. 4

(d) Between May 15, 2006 and June 15, 2006, purchase of the share stock in Company D was actively promoted and recommended in the media.

(e) The share stock of Company D was marketed as a lucrative investment in the media, despite Company D not running an operative business.

(f) There was no disclosure of your ownership of the share stock in any publications. Furthermore, information of your ownership was not included in disclaimers and/or warnings, nor was this information disclosed online.

Decision of the GFCJ, p. 5, paras. 5 and 6

(g) Between May 15, 2006 and June 15, 2006, the stock exchange price of the share stock of Company D increased from EUR 2.10 to EUR 18.10.

(h) You used the rate increases of the share stock for the advantageous sale of the shares. Overall, you made EUR 25,660,856.02 from the sale of the shares.

(i) The share price fell following the conclusion of the marketing campaign, closing at EUR 2.92 on June 30, 2006. Over the course of 2006 and 2007, the share price tended towards zero.

Decision of the GFCJ, p. 6, para.7

3. You appealed the decision of the District Court to the GFCJ. A decision of the GFCJ issued on December 4, 2013.

4. The GFCJ denied your appeal from the judgment of the District Court, except for the findings as per Section 111i paragraph 2 Code of Criminal Procedure. Section 111i paragraph 2 came into effect on January 1, 2007 and the court found that the offence of market manipulation was completed prior to the introduction of Section 111i paragraph 2.

Decision of the GFCJ, p. 3, paras. 1-3, pp. 22-24, paras. 48-53

5. The GFCJ affirmed the conviction for illegal market manipulation and upheld the sentence of the District Court.

Decision of the GFCJ, p. 9, para. 18, p. 22, para. 47

THIS PROCEEDING

6. The Executive Director of the Commission has brought this proceeding under section 161 of the Act.

7. In making orders under section 161 of the Act, the Commission must consider what is in the public interest in the context of its mandate to regulate trading in securities.

8. Orders under section 161(1) of the Act are protective, preventive and intended to be exercised to prevent future harm.

Committee for the Equal Treatment of Asbestos Minority Shareholders v. Ontario (Securities Commission), [2001] 2 SCR 132, paras. 36, 39, and 56

9. In *Re Eron Mortgage Corporation,* [2000] 7 BCSC Weekly Summary 22, and in subsequent decisions, the Commission identified factors to consider when determining orders under section 161(1).

10. The following factors from *Re Eron* are relevant in this proceeding:

(a) the seriousness of the respondent's conduct,
(b) the harm suffered by investors as a result of the respondent's conduct,
(c) the extent to which the respondent was enriched,
(d) the risk to investors and the capital markets posed by the respondent's continued participation in the capital markets of British Columbia,
(e) the respondent's fitness to be a registrant or to bear the responsibilities associated with being a director, officer or adviser to issuers, and
(f) orders made by the Commission in similar circumstances in the past.

Re Eron Mortgage Corporation, [2000] 7 BCSC Weekly Summary 22

Application of the Factors

Seriousness of the Conduct

11. A conviction for illegal market manipulation is very serious and is analogous to section 57(a) of the Act.

12. Market manipulation harms both investors and the integrity of the capital markets. In *Siddiqi (Re),* 2005 BCSECCOM 575, the Commission at paragraph 12 said that section 57(a) of the Act is "fundamental to investor protection because [it] prohibit[s] conduct that strikes at the heart of market integrity - a market in which investors trade on disclosed information, and a market untainted by misleading prices or volumes".

13. Your manipulation of the market in Germany was a sophisticated, concerted scheme, involving numerous other complicit individuals. It resulted in damage to the integrity of capital markets and harmed investors.

Harm to investors

14. You intentionally decided to manipulate the market share price of Company D, leading to massive increases and decreases of the share stock.

15. Because of your misconduct, investors were harmed.

Enrichment

16. You were enriched by your misconduct. Overall, you profited in the amount of EUR 25,660,856.02 from the sale of the shares.

Risk to investors and the capital markets

17. Market manipulation compromises the integrity of the entire market. Its impact extends beyond the victims who lost money to the investing public as a whole.

18. Market manipulation is one of the most serious misconduct contemplated by the Act.

Re Lim, 2017 BCSECCOM 319.

19. Your past misconduct of market manipulation demonstrated that you pose a significant ongoing risk to both investors and the capital markets of British Columbia.

Fitness to be a registrant or to bear the responsibilities associated with being a director, officer or adviser to issuers

20. Participation in our capital markets is a privilege not a right. Those who engage in market manipulation represent serious risks to our capital markets. Those who engage in market manipulation intend to deceive and harm the investing public.

Re Lim, *supra*, paras. 26, 27.

21. Your perpetration of market manipulation shows that you are clearly unfit to be a registrant or to bear the responsibilities associated with being a director, officer or adviser to issuers.

Previous Orders

22. The following Commission decisions are reflective of the penalties imposed in similar proceedings:

    (a) *Poonian (Re),* 2015 BCSECCOM 96
    The respondents engaged in market manipulation resulting in an enrichment of $7,177,305.

    (b) *Re Lim,* 2017 BCSECCOM 319
    The panel found the respondents had engaged in market manipulation resulting in a benefit of US$4.8 million.

23. In both decisions, the panel imposed permanent orders under 161(1)(b)(c) and (d)(i)-(v).

24. The profit from your misconduct was in excess of the enrichment found in *Poonian* and *Lim*. Your misconduct warrants permanent and expansive orders under 161.

RECIPROCAL ORDERS SOUGHT

1. Under section 161 (6)(a) the Commission or Executive Director may, after providing you with an opportunity to be heard, make orders under section 161 (1) as you have been convicted of an offence under the laws of Germany respecting trading in securities.

2. Based on the misconduct described in paragraph 2, the Executive Director seeks the following orders against you:

    (a) under section 161(1)(d)(i), you resign any position you hold as a director or officer of an issuer or registrant;

    (b) you are permanently prohibited:

        (i) under section 161(1)(b)(ii), from trading in or purchasing any securities or exchange contracts;

        (ii) under section 161(1)(c), from relying on any of the exemptions set out in this Act, the regulations or a decision;

(iii) under section 161(1)(d)(ii), from becoming or acting as a director or officer of any issuer or registrant;

(iv) under section 161(1)(d)(iii), from becoming or acting as a registrant or promoter;

(v) under section 161(1)(d)(iv), from acting in a management or consultative capacity in connection with activities in the securities market; and

(vi) under section 161(1)(d)(v), from engaging in investor relations activities.

SUPPORTING MATERIALS

3. In making this application, the Executive Director relies on the following attached material:

(a) Decision of the GFSC dated December 4, 2013;
(b) *Committee for the Equal Treatment of Asbestos Minority Shareholders v. Ontario (Securities Commission)*, [2001] 2 SRC 132, 2001 SCC 37;
(c) *Re Eron Mortgage Corporation*, [2000] 7 BCSC Weekly Summary 22;
(d) *Siddiqi (Re)*, 2005 BCSECCOM 575;
(e) *Re Lim*, 2017 BCSECCOM 319; and
(f) *Poonian (Re)*, 2015 BCSECCOM 96.

29. We also enclose a copy of section 161 of the *Act*.

You are entitled to respond to this application. To do so, you must deliver any response in writing, together with any supporting materials including any submissions and/or evidence, to the Secretary to the Commission by **Tuesday, November 6, 2018.**

The contact information for the Secretary to the Commission is:

Ann Gander
Secretary to the Commission
British Columbia Securities Commission
12th Floor, 701 West Georgia Street
Vancouver, BC V7Y 1L2
E-mail: commsec@bcsc.bc.ca
Telephone: 604-899-6534

If you do not respond within the time set out above, the Commission will decide this application and may make orders against you without further notice to you.

The Commission will send you a copy of its decision.

Yours truly,

Douglas B. Muir
Director, Enforcement

DWF/crc
Enclosures

cc: Ann Gander (by email to commsec@bcsc.bc.ca)
Secretary to the Commission

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TRANSLATOR'S DECLARATION

I, **Aurelia Sedlmair**, certified German/English translator, accredited member in good standing of the Society of Translators and Interpreters of B.C. (S.T.I.B.C.), hereby certify that I have translated the attached documents:

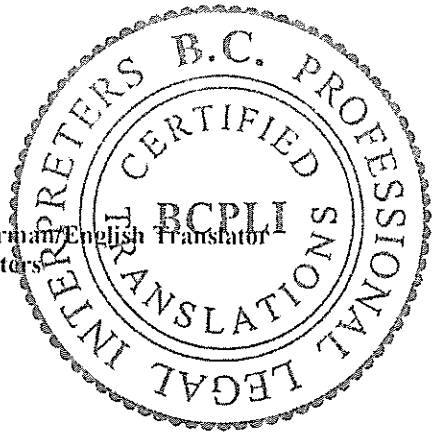
Re: Your file # 43537

- Federal Court of Justice Decision dated Dec. 4, 2013

Total: 24 pages of translation from 24 scanned copies

and that they are, to the best of my knowledge and ability, a true and accurate rendition into the English language from the original documents written in German.

Dated at Coquitlam, British Columbia, this 29th day of June, 2018



Aurelia Sedlmair – Certified German/English Translator
B.C. Professional Legal Interpreters

FEDERAL COURT OF JUSTICE

DECISION

1 Criminal Law Ref. no. (StR) 106/13

dated

December 4, 2013

Law Reports of the Federal Court of Justice in Criminal Matters (BGHSt): yes
Law Reports of the Federal Court of Justice Court Rulings (BGHR): yes
Reference: yes
Publication: yes

Securities Trading Act (WpHG) Section 38 paragraph 2 in conjunction with Section 39 paragraph 1 no. 2, Section 20a paragraph 1 sentence 1 no. 3
Market Manipulation Definition Regulation (MaKonV) Section 4 paragraph 3 no. 2
Criminal Code Section 25 paragraph 2

1. A statutory offense per Section 38 paragraph 2 in conjunction with Section 39 paragraph 1 no. 2, Section 20a paragraph 1 sentence 1 no. 3, Section 4 paragraph 3 no. 2 Market Manipulation Definition Regulation is a crime that can be committed by anyone, the general precepts for perpetration and participation apply.

2. Culpability as per these regulations does not require that the perpetrator owns more than five percent of the shares in the company concerned.

Federal Court of Justice, decision dated December 4, 2013 - 1 Criminal Law Ref. no. 106/13 - District Court Stuttgart

in the Criminal Matter
against

1.

2.

3.

for illegal market manipulation

On December 4, 2013, the 1. Criminal Division of the Federal Court of Justice decided:

1. Following the revisions (appeals on issues of law) of the accused, the judgment of the District Court Stuttgart dated October 12, 2012 was reversed in regards to the findings as per Section 111i paragraph 2 Code of Criminal Procedure (StPO) (clause II of the operative provision); these findings are inapplicable (Section 349 Paragraph 4 Code of Criminal Procedure).
2. The further revisions of the accused against the decision above are being overruled (Section 349 Paragraph 2 Code of Criminal Procedure).
3. Each appellant shall bear the costs for his legal remedy.

Reasons:

1 The District Court has convicted the accused for illegal market manipulation and sentenced the accused M. to three years and two months in prison as well as the accused E. and the accused O. respectively, to one year and nine months and one year and ten months in prison, with a suspended sentence. In addition, it found that the only reason it did not find for forfeiture of the value of the amount of EUR 25,660,856.02 for the accused M. , the amount of EUR 549,294.01 for the accused E. as well as the amount of EUR 3,540,491.06 for the accused O. , was that claims of injured parties posed an obstacle.

2 The accused are appealing this decision with their respective revisions based on the infringement of formal and material rights. The legal remedies are only successful within the evident scope of the operative part of the order (Beschlussformel); they are otherwise unfounded.

I.

3 1. The District Court has determined the following:

4 At the beginning of 2006, the accused M. gained almost complete possession of the freely traded shares of D. Inc. (hereafter referred to as: D.), a company for the discovery and mining of raw materials. Together with the separately prosecuted G. , the accused M. decided to increase the stock exchange price of the stock in D. through massive recommendations - while concealing his own stock of shares and the conflict of interest therein, in order to sell his own shares at a profit. The accused M. transferred approximately half of the share stock to G. , who was supposed to take on the marketing of the stock. The separately prosecuted G. "was to access his network of putative stock exchange journalists and direct them in terms of their detailed coordinated joint course of action". For this reason the accused M. at least tacitly accepted that G. employed additional individuals in order to implement the plan.

5 In the period between May 15, 2006 to June 15, 2006, the accused M. and the separately prosecuted G. had the stock strongly recommended for purchase in numerous communication media, whereby the capital investment was, among other things, presented as a lucrative investment based on the involvement of a well-known geologist as well as an exploration project proposed by the same. Recommendations were regularly made using concrete purchase price limits. The company did not run an operative business.

6 In agreement with G. and with the knowledge of his recommendations, the accused E. and O. also participated in the marketing campaign. In May 2006, E. received 100,000 D. shares from G. and in return published a recommendation for the stock in the news magazine FOCUS on May 15, 2006 as "Primer" as well as additional recommendations in the market letters "Blue Sky Level" and "Commodity Stock Investor", which he published in the period following. In April 2006, O. received more than one million D. shares off-market - brokered by G. at a purchase price that was clearly below the stock market price. In return, from May 22, 2006 on, he published recommendations in his market letter "Rohstoffraketen" (Raw Material Rockets) and promoted the stock within the scope of an investment seminar. The recommendations were sometimes closely coordinated with the separately prosecuted G. , who recommended the stock in his market letter "bullvestor", enlisted further writers of market letters for recommendations for consideration and organized advertisements in supra-regional print media. The stock holdings of the accused were not disclosed in any of the publications; there were no disclaimers and/or warnings in the market letters sent out by email, and the respective home pages merely contained general notices that publisher and associates may hold positions in the stock discussed in the publications.

7 After the D. stock remained virtually inactive following its initial listing on the stock exchange on February 24, 2006, the stock exchange price of the D. stock increased based on the publications from EUR 2.10 at the time of the initial publication on May 15, 2006 to EUR 18.10 on June 15, 2006. The share price fell again following the conclusion of the marketing campaign; on June 30, 2006 it was still at EUR 2.92. Over the course of 2006 and 2007, the sales volume and the share price continually decreased until the D. stock was once again without any trade volume worth mentioning and the share price tended towards zero. The accused used the rate increases for the advantageous sale of the shares. Overall, the accused M. made EUR 25,660,856.02, the accused E. made EUR 549,294.01, and the accused O. made EUR 3,540,491.06 from the sale of the shares, whereby the sales were sometimes only made after the marketing campaign was concluded.

8 2. The District Court assessed the events as having been illegal market manipulation in the form of the so-called "scalping" as per Section 38 paragraph 2 Securities Trading Act (WpHG) in conjunction with Section 39 paragraph 1 no. 2, Section 20a paragraph 1 clause 1 no. 3 Securities Trading Act, Section 4 paragraph 3 no. 2 Market Manipulation Definition Regulation (MaKonV), in their respective versions valid at the time of the offence, perpetrated jointly by the accused (Section 25 paragraph 2 Criminal Code (StGB)).

II.

9 Sentencing of the accused is not in conflict with any procedural impediment.

10 1. Prosecution of the illegal market manipulation with which the accused are charged has not fallen under the statute of limitations. The six-month media law period of limitations per Section 24 paragraph 1 no. 1 Media Law (PresseG) Baden Württemberg (BW) (for determination of the applicable federal state law cf. Federal Court of Justice (BGH), decision dated November 29, 1994 - 3 StR 221/94, NJW 1995, 893) does not apply. The regulation refers to the criminal prosecution of offences and crimes committed by the publication or dissemination of printed materials with criminal content (cf. Federal Court of Justice (BGH), decision May 27, 2004 - 1 StR 187/04, wistra 2004, 339; Federal Court of Justice, decision dated December 21, 1994 - 2 StR 628/94, Federal Court of Justice St 40, 385). Contrary to the opinion of the revision such a media content offense is not the case here. The further deceptive actions in the sense of Section 20a paragraph 1 sentence 1 no. 3 Securities Trading Act (WpHG) did occur at least in part with the publication of recommendations in printed media in terms of Section 7 Media Law Baden Württemberg. The publications by themselves however do not fulfill all criteria of the statutory offense. Beyond the further act of deception, influencing of the domestic stock exchange or the market price of a financial instrument (Section 38 paragraph 2 Securities Trading Act) is required.

11 2. The rule of specialty does not conflict with the criminal prosecution of the accused M. for illegal market manipulation.

12 a) The revision asserts that the extradition of the accused M. from Austria at any rate also included the charge of fraud. A conviction exclusively for illegal market manipulation appears contradictory to the rule of specialty. According to Austrian law this criminal act is merely an administrative offense, which on its own could not support an extradition due to a lack of culpability on both sides.

13

b) The rule of specialty is not violated. The accused M. was not convicted for "another offense" than the one on which the extradition was based (Section 83h paragraph 1 no. 1 Law on International Legal Aid in Criminal Matters (IRG)).

14 The concept of the offense, which forms the base of the rule of specialty, encompasses the entire reported facts of the matter within which the prosecuted has allegedly committed one or more statutory offenses (established practice of the courts; cf. Federal Court of Justice (BGH), decision dated November 2, 2010 - 1 StR 544/09, Law Reports of the Federal Court of Justice Court Rulings (BGHR) Law on International Legal Aid in Criminal Matters, Section 83h paragraph 1 no. 1 Rule of Specialty 2 mwN). The term the "other offense", in terms of Section 83h paragraph 1 no. 1 Law on International Legal Aid in Criminal Matters, refers only to the description of the criminal offense in the extradition authorization, which in turn refers to the European arrest warrant. "Another offense" does not exist if the information in the European arrest warrant and those in the later judgment correspond adequately (Federal Court of Justice, decision date November 2, 2010 - 1 StR 544/09, Law Reports of the Federal Court of Justice Court Rulings, Law on International Legal Aid in Criminal Matters Section 83h paragraph 1 no. 1 Rule of Specialty 2; ECJ, decision dated December 1, 2008 - Legal Matter C-388/08, NStZ (Criminal Law Journal) 2010, 35). This is the case here.

15 The facts on which the conviction is based correspond to the facts of the matter, which were reported to the requested country in the European arrest warrant dated February 16, 2011, which was only based on the alleged illegal market manipulation. The decisions from the District Court Korneuburg in the decision dated June 9, 2011 ("There are no reservations against the facts and allegations described in the European arrest warrant referred to, so that it can be proceeded from.") as well as the appeal proceedings of the Higher Regional Court Vienna (Oberlandesgericht Wien) in the decision dated July 26, 2011 ("According to the European arrest warrant, M. is suspected of, ..."; "The statement of facts given in the European arrest warrant must be accepted...") are based on these facts.

16 The fact that the petitioned state acknowledged the offense that the accused M. allegedly committed, while taking into consideration the allegation which the prosecution communicated in the letter dated May 12, 2011 - corresponding to the state of the investigation at the time, as "serious commercial fraud according to Section 146, Section 147 paragraph 3, 148 second case Criminal Code (StGB)", does not affect the identity of the offense. Austria did not avail itself of the possibility to make the extradition subject to a condition (cf. Section 72 Law on International Legal Aid in Criminal Matters (IRG)). From the reference to the validity of the rule of specialty alone it does not follow that the extradition shall only be authorized on the condition that a conviction of the accused M. for fraud will occur. Accordingly it can rest on whether the findings for a conviction may not also provide adequate indications to find for fraud.

III.

17 The procedural objections raised by the accused do not uncover errors of law that endanger the judgment. They remain unsuccessful for the accurately described reasons in the petitions of the Attorney General (Generalbundesanwalt).

IV.

18 The review of the disputed judgment carried out as a result of the error assignment concerning substantive law did not find an error of law to the detriment of the accused in regards to the judgment. The findings prove an illegal market manipulation as per Section 38 paragraph 2 Securities Trading Act in conjunction with Section 39 paragraph 1 no. 2,

Section 20a paragraph 1 sentence 1 no. 3 Securities Trading Act, Section 4 paragraph 3 no. 2 Market Manipulation Definition Regulation in the version effective at the time of the offense for which, since then, illegal continuity (Unrechtskontinuität) applies.

19 Despite the doubts articulated at times in the literature (Altenhain in Cologne Commentary Securities Trading Act, 2. edition, Section 38 margin number 23, 24; Kutzner, WM 2005, 1401; Moosmayer, wistra 2002, 161; Sorgenfrei in Park - Capital Market Criminal Law, 3. edition, part 3 ch. 4 margin number 61 ff., 214; Schömann, The Culpability of Market Manipulation as per Section 38 paragraph 2 Securities Trading Act pg. 132 f.), the Senate considers the provisions on which culpability is based as constitutional (also Fleischer in Fuchs, Securities Trading Act, Section 20a margin number 72; Vogel in Assmann/Schneider, Securities Trading Act, 6. edition, before Section 20a margin number 26 ff., 30; Mock in Cologne Commentary - Securities Trading Act, 2. edition, Section 20a margin number 94 ff.). As with the previous provision of Section 20a paragraph 1 sentence 1 no. 2 Securities Trading Act aF (cf. to Federal Court of Justice, decision dated November 6, 2003 - 1 StR 24/03, Law Reports of the Federal Court of Justice in Criminal Matters (BGHSt) 48, 373, 383 f.), which corresponds to the effective Section 20a paragraph 1 sentence 1 no. 3 Securities Trading Act with exception of the intent to manipulate, there is no reason to doubt the constitutionality.

20 Beyond that, only the following aspects require further discussion:

21 1. The publication of the purchase recommendations for the D. stock by the accused E. and O. as well as the separately prosecuted G. in the news magazine FOCUS, in the market letters as well as in various supra-regional print media represent further acts of deception, which were suitable for affecting the national stock exchange price of a financial instrument (Section 20a paragraph 1 sentence 1 no. 3 Securities Trading Act).

22 According to Section 4 paragraph 3 no. 2 of the Market Manipulation Definition Regulation), which was based on Section 20a paragraph 5 sentence 1 no. 3 Securities Trading Act,

further acts of deception in this sense also including "the use of occasional or regular access to traditional or electronic media by issuing an opinion or a rumour regarding a financial instrument or its issuer, after positions over this financial instrument have been entered into without revealing this conflict of interest simultaneously with the announcement in an appropriate and effective manner". This provision transforms Section 1 no. 2 letter c. 3. em-dash of the guideline 2003/6/EG of the European Parliament and the Council dated January 28, 2003 on insider transactions and market manipulation - Market Abuse Guideline - (ABl. L 96 dated April 12, 2003 pg. 16) into German law (cf. Bundesrat Printed Matter 18/05 pg. 17).

23 a) The three accused and the separately prosecuted G. acquired D. stock in considerable quantity prior to the publication of the purchase recommendations. Thereafter they respectively published opinions on D. without indicating the conflict of interest, which was caused by their ownership of D. shares.

24 aa) The accused O. and the accused E. as well as the separately prosecuted G. did not adequately and effectively disclose the conflicts of interest that resulted out of this together with the purchase recommendations they published.

25 bb) Based on the principles of complicity (Section 25 paragraph 2 Criminal Code), the purchase recommendations that were published can be ascribed to the accused M. , who did not himself issue any purchase recommendations for the D. stock.

26 The Senate does not share the opinion of the accused M. 's revision that the illegal market manipulation as per Section 38 paragraph 2 Securities Trading Act in conjunction with Section 39

Paragraph 1 no. 2, Section 20a paragraph 1 sentence 1 no. 3 Securities Trading Act, Section 4 paragraph 3 no. 2 Market Manipulation Definition Regulation is a special statutory offense where the qualified perpetrator can only be someone who is in a conflict of interest based on their own positions in the financial instrument being recommended at the time the recommendation is announced. Instead it is a crime that can be committed by anyone, for which the general rules of perpetration and participation apply. Constraint of the group of potential offenders does not correspond to the wording nor to the protective purpose of the norm.

27 (1) The statutory offense of Section 38 paragraph 2 in conjunction with Section 39 paragraph 1 no. 2 Securities Trading Act is worded as a general and/or crime that can be committed by anyone ("who..., will be punished") and is not limited to a certain group of offenders. The same holds true for the prohibitory norm of Section 20a paragraph 1 sentence 1 no. 3 Securities Trading Act, which is also directed to everybody and not to a certain group of individuals. The wording of Section 4 paragraph 3 no. 2 Market Manipulation Definition Regulation ("Announcement ... after positions ... have been entered without revealing this conflict of interest..."), which - without the effect of justifying culpability (for Provision to reify the prohibition of stock exchange and market price manipulation (KuMaKV) cf. Federal Court of Justice, decision dated November 6, 2003 - 1 StR 24/03, BGH St 48, 373, 383) substantiates the classes of the offense of "further deceptive actions", does not include any restrictions regarding which person must be in the conflict of interest (Higher Regional Court Munich, decision dated March 3, 2011 - 2 Ws 87/11, NJW 2011, 3664).

28 (2) The prohibition of market manipulation as per Section 20a Securities Trading Act, which prohibits any deception that can be used to affect the national stock exchange price of a financial instrument, constitutes a duty to disclose a conflict of interest based on positions entered into (cf. Stoll in Cologne Commentary - Securities Trading Act, 2. edition Section 20a appendix I - Section 4 Market Manipulation Definition Regulation margin number 36) where a conflict of interest exists in the recommended financial instrument, which existed at the time purchase suggestions were issued.

A conflict of interest suitable to affect the stock market price exists equally, beyond the recommending person holding themselves positions in the recommended financial instrument (Stoll in Cologne Commentary Securities Trading Act, 2. edition, Section 20a appendix I - Section 4 Market Manipulation Definition Regulation margin number 36; Bundesrat Printed Matter 18/05 pg. 17), when several individuals - holder of positions on the one hand, recommending individual on the other - collaborate conjointly (cf. Higher Regional Court Munich, decision dated March 3, 2011 - 2 Ws 87/11, NJW 2011, 3664). If the group of potential offenders is limited to individuals who themselves hold positions of the relevant financial instrument when the recommendation is made, neither the reliability nor the truth of the price formation and thereby the functionality of the regulated capital markets nor the assets of the investors would be sufficiently protected, consequently the protective purpose of the norm would be empty of meaning (On the protective purpose of Section 20a Securities Trading Act cf. overview on current opinion by Vogel in Assmann/Schneider, Securities Trading Act, 6. edition, Section 20a margin number 26 ff.; Altenhain in Cologne Commentary Securities Trading Act, 2. edition, Section 38 margin number 2 ff.) because the prohibition of Section 20a paragraph 1 sentence 1 no. 3 Securities Trading Act in conjunction with Section 4 paragraph 3 no. 2 Market Manipulation Definition Regulation could then be circumvented by proceeding in a specialized manner ('division of labour') (Higher Regional Court Munich, decision dated March 3, 2011 - 2 Ws 87/11, NJW 2011, 3664).

29 (3) For this reason the general regulations for perpetration and participation apply (Altenhain in Cologne Commentary- Securities Trading Act, 2. edition, Section 38 margin number 151; Waßmer in Fuchs, Securities Trading Act, Section 38 margin number 67; cf. also Vogel in Assmann/Schneider, Securities Trading Act, 6. edition, Section 20a margin number 54). In case several individuals - as in this case - act conjointly, it is therefore sufficient for one of them to hold positions in the financial instruments and another to release and/or express an opinion or a rumour regarding this financial instrument by using media access, without at the same time disclosing the existing conflict of interest in a proper and effective manner. That the District Court viewed the accused M.

as an accessory as per Section 25 paragraph 2 Criminal Code is, in view of his significant participation in planning, creating and controlling the requirements to implement this plan, namely to bring almost all free trade shares into his possession and then transferring approximately half of them to G. for manipulative marketing purposes as well as his considerable self-interest given his still-held share stock, does not constitute a reversible error.

30 b) The duty to disclose the positions in D. stock entered into, which is subject to penalty as per Section 38 paragraph 2 Securities Trading Act in conjunction with Section 39 paragraph 1 no. 2, Section 20a paragraph 1 sentence 1 no. 3 Securities Trading Act does not become inapplicable in view of the assessment of Section 34b paragraph 1 sentence 2 no. 2 Securities Trading Act in conjunction with Section 5 paragraph 3 sentence 1 no. 1, sentence 2, Financial Analysis Ordinance (FinAnV) based on Section 34b paragraph 8 Securities Trading Act.

31 Accordingly, a financial analysis may only be passed on or publicly disseminated when, among other things, circumstances and relationships, which may constitute conflicts of interest for the creators, the legal persons responsible for the creation or the companies connected to them, are disclosed together with the financial analysis. Mandatory disclosure of information about conflicts of interest exists in particular when substantial ownership positions exist between the above-mentioned individuals and companies and/or the individuals and companies that work for and contribute to the creation of the financial analysis and the issuers, who are themselves, or whose financial instruments are the subject of the financial analysis. An ownership position of more than five percent of the capital stock of a stock corporation is considered material according to Section 5 paragraph 3 sentence 2 Financial Analysis Ordinance. These provisions turn Section 6 paragraph 1 letter a of Guideline 2003/125/EG of the commission

dated December 22, 2003 to implement Guideline 2003/6/EG of the European Parliaments and the Council in reference to the proper presentation of investment recommendations and the disclosure of conflicts of interest (ABl. L 339 dated December 24, 2003 pg. 73) into German law.

32 aa) The appeals (on issues of law) assert that the provision Section 34b paragraph 1 sentence 2 no. 2 Securities Trading Act in conjunction with Section 5 paragraph 3 sentence 1 no. 1, sentence 2 Financial Analysis Ordinance as lex specialis applies regarding the question whether participation in the financial instrument in question presents a conflict of interest that must be disclosed by financial analysts - and that is what the accused E. and the accused O. are reported to be. (It is asserted that,) since the accused E. and O. individually did not hold more than five percent of the capital stock in D. at any point in time, they were not obliged to disclose their own holdings when the stock was recommended.

33 bb) The Senate does not follow this. It may remain open whether the purchase recommendations published by the accused O. and the accused E. are financial analyses in the sense of Section 34b paragraph 1 sentence 1 Securities Trading Act. The same holds true for the question whether in case of conjoined actions of several individuals the shareholdings of the accessories should be added together to determine the shareholding quota, which, in view of spirit and purpose of the regulation of Section 38 paragraph 2 Securities Trading Act in conjunction with Section 39 paragraph 1 no. 2, Section 20a paragraph 1 no. 3 Securities Trading Act and the principles of joint commission (of the offense), of course suggests itself. However, this is not relevant since such a shareholding quota is not required.

34 In any case, no privilege results for financial analysts out of Section 34b paragraph 1 sentence 2 no. 2 Securities Trading Act in regards to criminal liability for illegal market manipulation. Contrary to an opinion expressed in the literature, although without more detailed reasoning, (cf. Sorgenfrei in Park, Capital Market Criminal Code,

3. edition part 3 ch. 4 margin number 213; Fleischer in Fuchs, Securities Trading Act, Section 20a margin number 67; Stoll in Cologne Commentary Securities Trading Act, 2. edition, Section 20a appendix I - Section 4 Market Manipulation Definition Regulation margin number 38; Vogel in Assmann/Schneider, Securities Trading Act, 6. edition, Section 20a margin number 234), culpability, including for financial analysts, as per Section 38 paragraph 2 Securities Trading Act in conjunction with Section 39 paragraph 1 no. 2, Section 20a paragraph 1 sentence 1 no. 3 Securities Trading Act is not restricted by the five-percent participation quota tied to the disclosure standard per Section 34b paragraph 1 sentence 2 no. 2 Securities Trading Act in conjunction with Section 5 Financial Analysis Ordinance. Because the provisions concerning culpability per Section 38 paragraph 2 Securities Trading Act in conjunction with Section 39 paragraph 1 no. 2, Section 20a paragraph 1 sentence 1 no. 3 Securities Trading Act include special and, towards those regarding the presumption of a regulatory offense as per Section 39 paragraph 1 no. 4 (today no. 5), Section 34b paragraph 1 sentence 2 no. 2 Securities Trading Act in conjunction with Section 5 Financial Analysis Ordinance, independently assessed requirements.

35 (1) According to the wording of Section 20a paragraph 1 sentence 1 no. 3 Securities Trading Act and Section 4 paragraph 3 no. 2 Market Manipulation Definition Regulation, which substantiates the situation (Tatbestandsvariante) of the further deceptive action in the sense of the punitive norm of Section 38 paragraph 2 Securities Trading Act in conjunction with Section 39 paragraph 1 no. 2 Securities Trading Act, in case of omitted disclosure regarding positions entered in the financial instrument, at the same time the statement is published in a proper and effective manner - regardless of the volume of positions - is always a further deceptive act. From the material it is also not evident that the legislator and/or regulator considered the possibility of an exception in case the statement is a financial analysis (cf. only Bundestag Printed Matter 14/8017, Bundestag Printed Matter 14/8601, Bundestag Printed Matter 15/3174, Bundestag Printed Matter 16/4028 for Section 34b Securities Trading Act; Federal Ministry of Finance draft with reasoning, printed in ZBB 2004, 422 for Section 5 Financial Analysis Ordinance; Bundestag Printed Matter 14/8017, Bundestag Printed Matter 15/3174 for Section 20a Securities Trading Act; Bundestag Printed Matter 18/05 for Market Manipulation Definition Regulation).

36 (2) Other reasons that might speak for such an exception in the sense of privileging the financial analyst as the typical norm addressee of the punitive norm of Section 38 paragraph 2 Securities Trading Act are not apparent. They would also run counter to the concerns of reliability and veracity of price formation and thereby the functionality of regulated capital markets as well as the protection of the investors' assets and therefore the protective purpose of Section 38 paragraph 2 Securities Trading Act in conjunction with Section 20a Securities Trading Act (overview of the current opinion by Vogel in Assmann/Schneider, Securities Trading Act, 6. edition, Section 20a margin number 26 ff.; Altenhain in Cologne Commentary Securities Trading Act, 2. edition, Section 38 margin number 2 ff.). The legally protected goods at any rate would be no less endangered by the deceptive recommendation of a financial analyst in contrast to one who does not act in that manner.

37 (3) In contrast, Section 34b Securities Trading Act is meant to protect the trust of investors into the diligence, neutrality and integrity of those who prepare financial analyses (Bundestag Printed Matter 14/8017, pg. 92). A deliberate violation against the duty to disclose resulting from Section 34b paragraph 1 sentence 2 in conjunction with the Financial Analysis Ordinance represents a regulatory offense as per Section 39 paragraph 1 no. 5 (at the time no. 4) Securities Trading Act. The definition of a regulatory offense is based on the behaviour of the financial analyst, which is assessed as generally dangerous for the legally protected goods by the legislator. By reaching a five-percent participation quota it is irrefutably assumed that due to the typically concomitant self-interest of the analysts, insufficient confidence in the diligence, neutrality and integrity of the analysis can be guaranteed for the financial analysis. The behaviour that compromises the legally protected goods on which the regulatory offense is based, is constituted solely by the dissemination or publication of the analysis despite reaching the participation quota.

38 (4) There is no room for recourse to this legally specified irrefutable assumption in order to limit the culpability as per Section 38 paragraph 2 Securities Trading Act. In as much as culpability for illegal market manipulation as per Section 38 paragraph 2 Securities Trading Act in conjunction with Section 39 paragraph 1 no. 2, Section 20a paragraph 1 sentence 1 no. 3 Securities Trading Act presumes, besides the further deceptive action - in this case the non-disclosure of the conflict of interest based on positions that were entered into with the financial instrument - the effect on the stock exchange price and thereby proof of a substantial and, regarding Section 34b, Section 39 paragraph 1 no. 4 (now no. 5) Securities Trading Act, different interference. This qualified degree of impact on the legally protected goods of Section 38 Securities Trading Act required for culpability - independent of the volume of the positions entered into - conclusively describes the occurred offense according to the legislative concept. In addition it qualifies the act as a criminal offense as opposed to the lower regulatory offense according to Section 39 paragraph 1 no. 2 Securities Trading Act in conjunction with Section 20a paragraph 1 sentence 1 no. 3 Securities Trading Act, for which merely the eligibility for affecting the price is sufficient. Recourse to a legally defined and by ordinance substantiated assumption of adopting behaviour generally imperiling faith in the financial system is not occasioned due to the reference to legally protected goods elsewhere as in Section 38 paragraph 2 Securities Trading Act.

39 (5) The threshold for presumption of behaviour considered generally imperiling legally protected goods as per Section 34b Securities Trading Act, which the regulator considers exceeded as of a participation quota of five percent of the basic capital, is also not in any relation to the criminal act of Section 38 paragraph 2 Securities Trading Act. Section 34b paragraph 1 sentence 2 no. 2, Section 39 paragraph 1 no. 4 (now no. 5) Securities Trading Act on one hand and Section 38 paragraph 2 Securities Trading Act on the other are different types of offenses, which are not connected to each other beyond the described wrong. If the stock market price has actually been influenced in the sense of

Section 38 paragraph 2, Section 20a paragraph 1 sentence 1 no. 3 Securities Trading Act, the actual result of the offense has occurred. It is not material whether circumstances exist that may generally have been suitable to also influence the faith of the investor in the diligence, neutrality and integrity of those who prepare the financial analyses to justifying the actual success of the regulatory offense as per Section 34b paragraph 1 sentence 2 no. 2, Section 39 paragraph 1 no. 4 (now no. 5) Securities Trading Act.

40 c) The accused did not fulfill the duty to disclose the conflict of interest in a proper and effective manner at the same with the publication of the purchase recommendations in disclaimers and/or risk disclosure statements that were placed in the market letters sent by email or on the Internet homepages. It may remain to be seen whether merely the type of positions entered into (Stoll in Cologne Commentary Securities Trading Act, 2. edition, Section 20a appendix I - Section 4 Market Manipulation Definition Regulation margin numbers 38, 39; Vogel in Assmann/ Schneider, Securities Trading Act, 6. edition, Section 20a margin number 234) must be disclosed or also the intention to quickly dissolve the positions again (Schröder, Manual Criminal Law governing Capital Markets, margin number 559, 560). In any case, blanket statements - as is the case here - according to which publisher and associates may potentially hold positions in the securities treated in the publications, without detailing the specific existing conflict of interest are not sufficient (Higher Regional Court Munich, decision dated March 3, 2011- 2 Ws 87/11, NJW 2011, 3664; Stoll in Cologne Commentary Securities Trading Act, 2. edition, Section 20a appendix I - Section 4 Market Manipulation Definition Regulation margin number 39).

41 2. The District Court, on a sound basis, has established the influence on the stock market price of the D. shares required to fulfill the requirements of a statutory offense per Section 38 Paragraph 2 Securities Trading Act - in addition to the requirements of Section 39 paragraph 1 no. 2 Securities Trading Act.

42 a) No inflated standards should be applied to assess the question whether the stock market price was actually affected by the market manipulating activity, in view of the multitude - beside the commission of the act - of factors that normally contribute to price formation. Comparisons of the current stock price performance and revenue as well as price and revenue development of the relevant security can adequately substantiate an influence on the stock price; a questioning of the market participants is not occasioned (Federal Court of Justice (BGH), decision dated November 6, 2003 - 1 StR 24/03, BGH St 48, 373 on Section 20a paragraph 1 no. 2 Securities Trading Act aF; Federal Court of Justice, decision dated January 27, 2010 - 5 StR 224/09, NStZ 2010, 339).

43 The price development determined by the District Court soundly attests to an influence of the recommendations on the stock market price. The upturn of the D. stock, which, prior to the first recommendation in the news magazine FOCUS on May 15, 2006, remained either dormant or had only few buyers, from EUR 2.10 to EUR 18.10 in immediate chronological connection to the purchase recommendations published in the period between May 15, 2006 until June 15, 2006, mirrors the effects of the purchase recommendations. In this it is unobjectionable that the expertly advised District Court did not undertake an isolated examination of the impact of every single publication in the case of recommendations published in the time period from May 23, 2006 until June 15, 2006 - other than in the case of the publications on May 15, 2006 and/or May 22, 2006 - due to the publications being chronologically close,

but instead examined the publications in the relevant time period in their totality. Because the publications were dovetailed to each other and part of a coordinated marketing campaign, an overall view of the impact of the publications, which the District Court assessed as single act, justifies the assumption of an influence on the stock market price.

44 b) Contrary to the opinion of the revisions, the District Court did not have to examine whether the stock price performance would have been different if the stockholdings of the accused had been properly disclosed together with the publications.

45 The issue of the purchase recommendations by the accused is an implied deception by an act of commission (aktives Tun) in the sense of Section 20a paragraph 1 sentence 1 no. 3 Securities Trading Act. The purchase recommendations include the tacit assertion that they were not brokered with the inappropriate goal of influencing the stock market price for self-serving purposes (Federal Court of Justice, decision dated September 6, 2003 - 1 StR 24/03, Law Reports of the Federal Court of Justice in Criminal Matters (BGHSt) 48, 373). Under these circumstances - deception through an act of commission (active doing) - the determination of a "connection to a violation of duty" and/or the stock price performance in case of "legitimate alternative behaviour" is, contrary to the opinion of the revisions, not required. Nothing else results from the decision of the 3. Criminal Division dated July 20, 2011 (3 StR 506/10, wistra 2011, 467) regarding market manipulation through misleading statements in a press release. The wording used "The declaration (...) that there would not have been an increase in the stock price without the misleading information in (...) does not show an error of law" merely describes the requirement of causality between commission of the act and influence on the stock market price.

46 c) The concerns expressed on various occasions in the literature, that the purchase recommendations are lacking the suitability to affect the price and/or the causality to influence the price without disclosure of positions that were entered into, since the disclosure would at best strengthen the effect of the recommendation and therefore the withholding of such positions would not be very meaningful to the investor (Schönhöft, The Criminal Liability of Market Manipulation as per Section 20a Securities Trading Act, pg. 141; Schröder, Manual on Criminal Law Governing Capital Markets, margin number 559), fall short. Only disclosure can guarantee an autonomous decision of the investor - including the consideration of a conflict of interest of one of the recommenders. If the conflict of interest is disclosed, the investor is also able to include in his purchase decision that the recommender holds his own shares with the possibility of sale in case of appreciation of value.

47 3. Sentencing also holds up under the revision court's examination. Under the aspect of the effect of the offense, it is not objectionable that the District Court assessed the high return from the transactions with the D. stock as penalty enhancing - even in so far as this only took place after the conclusion of the marketing campaign on June 15, 2006.

V.

48 However, the District Court's findings as per Section 111i paragraph 2 Code of Criminal Procedure (StPO) do not hold up to the review of the revision court.

49 The provision of Section 111i paragraph 2 Code of Criminal Procedure was only created by the law to strengthen the enforcement for claims of damages (Rückgewinnungshilfe) and asset forfeiture (Vermögensabschöpfung) in case of criminal offenses dated October 24, 2006 (BGBl. I 2350) and came into effect on January 1, 2007. Section 2 paragraph 5 in conjunction with paragraph 3 Code of Criminal Procedure prevents application of the provision for offenses concluded prior to this point in time, whereby the milder old law applies to the extent according to which this conditional forfeiture order (Verfallsanordnung) was not possible (cf. Federal Court of Justice, decisions dated April 10, 2013 - 1 StR 22/13, NStZ-RR 2013, 254 mwN; and dated October 23, 2008 - 1 StR 535/08, NStZ-RR 2009, 56).

50 In any case, according to the findings of the District Court, the offense as per Section 38 paragraph 2 Securities Trading Act in conjunction with Section 39 paragraph 1 no. 2, Section 20a paragraph 1 sentence 1 no. 3 Securities Trading Act was already completed prior to January 1, 2007 by precipitating the factual success (cf. Altenhain in Cologne Commentary Securities Trading Act, 2. edition, Section 38 margin number 157; Waßmer in Fuchs, Securities Trading Act, Section 38 margin number 89, Vogel in Assmann/Schneider, Securities Trading Act, 6. edition, Section 38 margin number 86). There was no influence on the stock market price in 2007, thus no action pertaining to the elements of the offense. In contrast, on the question of completion of the offense, it is immaterial that the stock market price in 2007 may still have been affected by actions committed in 2006 (Altenhain in Cologne Commentary Securities Trading Act, 2. edition, Section 38 margin number 157). This also applies insofar as the accused were still profiting from the increased stock market price after 2006.

51 Accordingly, there is no space for findings as per Section 111i paragraph 2 Code of Criminal Procedure. The Senate is therefore reversing the judgment in this respect without the underlying findings; the findings as per Section 111i paragraph 2 Code of Criminal Procedure are inapplicable (pursuant to Section 354 paragraph 1 Code of Criminal Procedure).

52

It is therefore not relevant whether the decision made by the Criminal Division without any reasoning might have legal validity in other circumstances. Remanding (the case) for a renewed review of a forfeiture order according to Section 73 paragraph 1 sentence 1, Section 73a Criminal Code is out of the question due to the prohibition to deteriorate (Section 358 paragraph 2 Code of Criminal Procedure).

VI.

53 The small partial success of the revisions does not justify indemnifying the accused from the costs that arose from their legal remedy and the necessary expenses.

Federal Court of Justice Judge (RiBGH)
Dr. Wahl is not present
as he is on vacation and
therefore prevented from
administering his signature

Jäger Jäger Cirener

Radtke Mosbacher

Committee for the Equal Treatment of Asbestos Minority Shareholders *Appellant*

v.

Her Majesty in Right of Quebec, Ontario Securities Commission and Société nationale de l'amiante *Respondents*

INDEXED AS: COMMITTEE FOR THE EQUAL TREATMENT OF ASBESTOS MINORITY SHAREHOLDERS *v.* ONTARIO (SECURITIES COMMISSION)

Neutral citation: 2001 SCC 37.

File No.: 27252.

2000: December 15; 2001: June 7.

Present: McLachlin C.J. and L'Heureux-Dubé, Gonthier, Iacobucci, Major, Bastarache and Arbour JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Securities — Ontario Securities Commission — Public interest jurisdiction — Nature and scope of Commission's public interest jurisdiction to intervene in activities related to Ontario capital markets — Whether Commission's decision not to exercise its public interest jurisdiction in this case reasonable — Securities Act, R.S.O. 1990, c. S.5, s. 127(1), para. 3.

Administrative law — Judicial review — Securities commissions — Standard of review — Standard of review for Ontario Securities Commission's decisions involving application of its public interest jurisdiction.

In 1977, the Quebec Government decided to take control of Asbestos Corp., a leading asbestos producer in the province. The common shares of Asbestos traded on the Toronto Stock Exchange and the Montreal Stock Exchange. Approximately 30 percent of the Asbestos common shares were held by minority shareholders resident in Ontario while GD Canada, a subsidiary of an American company, held the controlling interest. As a vehicle to take control of Asbestos, Quebec incorporated the Société nationale de l'amiante (SNA), a Crown

Comité pour le traitement égal des actionnaires minoritaires de la Société Asbestos Ltée *Appelant*

c.

Sa Majesté du chef du Québec, la Commission des valeurs mobilières de l'Ontario et la Société nationale de l'amiante *Intimées*

RÉPERTORIÉ : COMITÉ POUR LE TRAITEMENT ÉGAL DES ACTIONNAIRES MINORITAIRES DE LA SOCIÉTÉ ASBESTOS LTÉE *c.* ONTARIO (COMMISSION DES VALEURS MOBILIÈRES)

Référence neutre : 2001 CSC 37.

N° du greffe : 27252.

2000 : 15 décembre; 2001 : 7 juin.

Présents : Le juge en chef McLachlin et les juges L'Heureux-Dubé, Gonthier, Iacobucci, Major, Bastarache et Arbour.

EN APPEL DE LA COUR D'APPEL DE L'ONTARIO

Valeurs mobilières — Commission des valeurs mobilières de l'Ontario — Compétence relative à l'intérêt public — Nature et portée de la compétence de la Commission pour intervenir en matière d'intérêt public dans les activités liées aux marchés financiers en Ontario — La décision de la Commission de ne pas exercer en l'espèce sa compétence relative à l'intérêt public était-elle raisonnable? — Loi sur les valeurs mobilières, L.R.O. 1990, ch. S.5, art. 127(1), disposition 3.

Droit administratif — Contrôle judiciaire — Commissions des valeurs mobilières — Norme de contrôle — Norme de contrôle applicable aux décisions de la Commission des valeurs mobilières de l'Ontario portant sur l'exercice de sa compétence relative à l'intérêt public.

En 1977, le gouvernement du Québec a décidé de prendre le contrôle d'Asbestos, un chef de file de la production d'amiante dans la province. Les actions ordinaires d'Asbestos étaient négociées à la Bourse de Toronto et à la Bourse de Montréal. Environ 30 pour 100 des actions ordinaires d'Asbestos étaient détenues par des actionnaires minoritaires résidant en Ontario, alors que le contrôle appartenait à GD Canada, filiale d'une société américaine. Le Québec a constitué la Société nationale de l'amiante (« SNA »), société d'État

corporation wholly owned by the province. In 1981, Quebec reached an agreement with the American company pursuant to which SNA would acquire voting control of GD Canada and, therefore, indirect control of Asbestos. Despite statements made in previous years by the Quebec Minister of Finance suggesting the prospect of a follow-up offer to the minority shareholders of Asbestos, Quebec announced that it did not intend to make such an offer. In response to that announcement, the shares of Asbestos fell to a four-year low. Five years later, SNA purchased the remaining common shares of GD Canada. The appellant sought redress pursuant to s. 127 of the Ontario *Securities Act* (then s. 124), specifically for an order removing Quebec's and SNA's trading exemptions. The OSC determined that the transaction was not a take-over bid and this finding was not appealed. Even though the OSC found that the actions of the Quebec Government and SNA were abusive of the minority shareholders of Asbestos and were manifestly unfair to them, the OSC declined to exercise its public interest jurisdiction under s. 127(1), para. 3, and take away Quebec's trading exemption in the Ontario capital markets. The Divisional Court set aside the decision, holding that the OSC had erred by imposing two jurisdictional prerequisites to its s. 127(1), para. 3 jurisdiction: a "transactional connection" with Ontario and a conscious motive to avoid the takeover laws in Ontario. The Court of Appeal reinstated the OSC's decision.

Held: The appeal should be dismissed.

Pursuant to s. 127(1) of the *Securities Act*, the OSC has the jurisdiction and a broad discretion to intervene in Ontario capital markets if it is in the public interest to do so. The permissive language of s. 127(1) expresses an intent to leave it to the OSC to determine whether and how to intervene in a particular case. However, the discretion to act in the public interest is not unlimited. In exercising its discretion, the OSC should consider the protection of investors and the efficiency of, and public confidence in, capital markets generally. In addition, s. 127(1) is a regulatory provision. The sanctions under the section are preventive in nature and prospective in orientation. Therefore, s. 127 cannot be used in response

possédée en propriété exclusive par Sa Majesté du chef du Québec, comme moyen de prendre le contrôle d'Asbestos. En 1981, le Québec et la société américaine ont conclu une entente prévoyant l'acquisition par la SNA du contrôle des voix de GD Canada et, par conséquent, du contrôle indirect d'Asbestos. Malgré les propos tenus par le ministre des Finances du Québec au cours des années précédentes au sujet de la présentation éventuelle d'une offre complémentaire aux actionnaires minoritaires d'Asbestos, le Québec a annoncé qu'il n'entendait pas faire une telle offre. Par suite de cette déclaration, les titres d'Asbestos sont tombés à leur niveau le plus bas en quatre ans. Cinq ans plus tard, la SNA a acheté les actions ordinaires restantes de GD Canada. L'appelant a demandé réparation sous le régime de l'art. 127 de la *Loi sur les valeurs mobilières* de l'Ontario (alors l'art. 124), particulièrement une ordonnance retirant au Québec et à la SNA les dispenses relatives aux opérations sur valeurs mobilières. La CVMO a conclu que l'opération ne constituait pas une offre d'achat visant à la mainmise, conclusion qui n'a pas été contestée en appel. Certes, la CVMO a conclu que les actes du gouvernement du Québec et de la SNA étaient abusifs envers les actionnaires minoritaires d'Asbestos et étaient manifestement injustes à leur égard, mais elle s'est abstenue d'exercer la compétence relative à l'intérêt public que lui confère la disposition 3 du par. 127(1) et de retirer au Québec les dispenses relatives aux opérations sur valeurs mobilières dont il bénéficie sur les marchés financiers de l'Ontario. La Cour divisionnaire a infirmé la décision, concluant que la CVMO avait commis une erreur en imposant deux conditions préalables à l'exercice de sa compétence sous le régime de la disposition 3 du par. 127(1) : un « lien transactionnel » avec l'Ontario et une motivation consciente consistant à contourner le droit ontarien relatif aux offres d'achat visant à la mainmise. La Cour d'appel de l'Ontario a rétabli la décision de la CVMO.

Arrêt : Le pourvoi est rejeté.

Sous le régime du par. 127(1) de la *Loi sur les valeurs mobilières*, la CVMO a la compétence et un large pouvoir discrétionnaire pour intervenir dans les marchés financiers en Ontario lorsqu'il est dans l'intérêt public qu'elle le fasse. Le libellé facultatif du par. 127(1) exprime l'intention de laisser à la CVMO le soin d'apprécier l'opportunité et la manière d'intervenir dans une affaire particulière. Le pouvoir d'agir dans l'intérêt public n'est toutefois pas illimité. Lorsqu'elle est appelée à exercer son pouvoir discrétionnaire, la CVMO doit prendre en considération la protection des investisseurs et l'efficacité des marchés financiers ainsi que la confiance du public en ceux-ci en général. De plus, le

to *Securities Act* misconduct alleged to have caused harm or damages to private parties or individuals.

The standard of review applicable in this case is one of reasonableness. The OSC is a specialized tribunal with a wide discretion to intervene in the public interest and the protection of the public interest is a matter falling within the core of the OSC's expertise. Therefore, although there is no privative clause shielding the decisions of the OSC from review by the courts, taking into consideration that body's relative expertise in the regulation of the capital markets, the purpose of the Act as a whole and s. 127(1) in particular, and the nature of the problem before the OSC, those factors all militate in favour of a high degree of curial deference. However, as there is a statutory right of appeal from the decision of the OSC to the courts, when this factor is considered with all the other factors, an intermediate standard of review is indicated.

The OSC did not commit a reviewable error. First, the OSC did exercise the discretion that is incidental to its public interest jurisdiction. The OSC did not consider a transactional connection with Ontario and an intention to avoid Ontario law to be jurisdictional barriers or preconditions to an order under s. 127(1), para. 3 of the Act. The OSC properly rejected the argument that its public interest jurisdiction was subject to an implicit precondition. In analyzing the appellant's application for a remedy under s. 127(1), para. 3, the OSC identified and considered several factors relevant to the exercise of its discretion under that provision. The transactional connection with Ontario and the motive behind the structure of the transaction were two of several factors considered.

Second, the OSC's decision not to grant a remedy to the aggrieved minority shareholders through the exercise of its jurisdiction to act in the public interest was reasonable. The OSC's decision was informed by the legitimate and relevant considerations inherent in s.127(1) and in the OSC's previous jurisprudence on public interest jurisdiction. These considerations include: (i) the seriousness and severity of the sanction

par. 127(1) est une disposition de nature réglementaire. Les sanctions qui y sont prévues sont de nature préventive et axées sur l'avenir. L'article 127 ne peut donc être invoqué par une partie privée ou un particulier pour une transgression de la *Loi sur les valeurs mobilières* qui lui aurait causé un préjudice ou des dommages.

La norme de contrôle appropriée en l'espèce est celle du caractère raisonnable. La CVMO est un tribunal spécialisé ayant un vaste pouvoir discrétionnaire d'intervention dans l'intérêt public et la protection de l'intérêt public est une matière qui se situe dans le domaine d'expertise fondamental du tribunal. Par conséquent, même en l'absence d'une clause privative mettant les décisions de la CVMO à l'abri du contrôle judiciaire, l'expertise relative de cet organisme dans la réglementation des marchés financiers, l'objet de la Loi dans son ensemble et du par. 127(1) en particulier, et la nature du problème soumis à la CVMO penchent pour un degré de retenue judiciaire élevé. Il faut toutefois tenir compte d'un autre facteur, à savoir le fait que la Loi prévoit le droit d'interjeter appel de la décision de la CVMO devant les tribunaux; lorsque ce facteur est pris en considération avec tous les autres facteurs, c'est une norme de contrôle intermédiaire qui semble indiquée.

La CVMO n'a pas commis d'erreur donnant ouverture au contrôle judiciaire. Premièrement, elle a exercé le pouvoir discrétionnaire accessoire à sa compétence relative à l'intérêt public. Elle n'a pas considéré le lien transactionnel avec l'Ontario et l'intention d'échapper au droit de l'Ontario comme des entraves ou des conditions préalables juridictionnelles à la délivrance d'une ordonnance en vertu de la disposition 3 du par. 127(1) de la Loi. Elle a, à bon droit, rejeté l'argument selon lequel sa compétence relative à l'intérêt public était assujettie à une condition préalable implicite. Dans son analyse de la demande de réparation présentée par l'appelant sous le régime de la disposition 3 du par. 127(1), la CVMO a identifié et examiné plusieurs facteurs pertinents relativement à l'exercice du pouvoir discrétionnaire que lui confère cette disposition. Le lien transactionnel avec l'Ontario et la motivation sous-tendant la structuration de l'opération constituaient deux des nombreux facteurs examinés.

Deuxièmement, le refus de la CVMO d'accorder réparation aux actionnaires minoritaires lésés en exerçant sa compétence pour agir dans l'intérêt public était raisonnable. Les motifs de la CVMO étaient inspirés par les considérations légitimes inhérentes au par. 127(1) et à la jurisprudence de la CVMO portant sur la compétence relative à l'intérêt public. Parmi ces considérations on compte : (i) la gravité et la rigueur de la sanction

applied for; (ii) the effect of imposing such a sanction on the efficiency of, and public confidence in, Ontario capital markets; (iii) a reluctance to use the open-ended nature of the public interest jurisdiction to police out-of-province activities; and (iv) a recognition that s. 127 powers are preventive in nature, not remedial. The OSC's findings of fact that the transaction in this case was not intentionally structured to avoid Ontario law and that the capital markets in general, and the minority shareholders of Asbestos in particular, were not materially misled by the statements of Quebec's Minister of Finance respecting the prospect of a follow-up offer were reasonable and supported by the evidence.

demandée, (ii) l'effet qu'aurait l'application d'une telle sanction sur l'efficacité des marchés financiers en Ontario ainsi que sur la confiance du public en ceux-ci, (iii) une réticence à invoquer la nature indéterminée de la compétence relative à l'intérêt public pour réglementer des activités qui se déroulent hors de la province et (iv) la reconnaissance du fait que les pouvoirs conférés par l'art. 127 sont de nature préventive et non réparatrice. Les conclusions de fait tirées par la CVMO, à savoir que l'opération en cause n'avait pas été structurée intentionnellement de façon à contourner le droit ontarien et que les marchés financiers en général et les actionnaires minoritaires d'Asbestos en particulier n'avaient pas été sensiblement induits en erreur par les déclarations du ministre des Finances du Québec au sujet de la présentation éventuelle d'une offre complémentaire, étaient raisonnables et étayées par la preuve.

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Referred to: *Re Canadian Tire Corp.* (1987), 10 O.S.C.B. 857, aff'd (1987), 59 O.R. (2d) 79, leave to appeal to C.A. denied (1987), 35 B.L.R. xx; *Re H.E.R.O. Industries Ltd.* (1990), 13 O.S.C.B. 3775; *Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557; *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748; *R. v. Wholesale Travel Group Inc.*, [1991] 3 S.C.R. 154; *Re Albino* (1991), 14 O.S.C.B. 365; *Re Mithras Management Ltd.* (1990), 13 O.S.C.B. 1600; *U.E.S., Local 298 v. Bibeault*, [1988] 2 S.C.R. 1048; *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982; *Trinity Western University v. British Columbia College of Teachers*, [2001] 1 S.C.R. 772, 2001 SCC 31; *Re Atco Ltd.* (1980), 15 O.S.C.B. 412; *Re Electra Investments (Canada) Ltd.* (1983), 6 O.S.C.B. 417; *Re Turbo Resources Ltd.* (1982), 4 O.S.C.B. 403C; *Re Genstar Corp.* (1982), 4 O.S.C.B. 326C; *Global Securities Corp. v. British Columbia (Securities Commission)*, [2000] 1 S.C.R. 494, 2000 SCC 21.

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Securities Act, R.S.O. 1980, c. 466, s. 124(1).

Securities Act, R.S.O. 1990, c. S.5, ss. 1.1 [ad. 1994, c. 33, s. 2], 2.1, para. 5 [*idem*], 122 [rep. & sub. 1994, c. 11, s. 373], 127 [*idem*, s. 375], 128 [*idem*], Part XXIII.

Lois et règlements cités

Loi sur les valeurs mobilières, L.R.O. 1990, ch. S.5, art. 1.1 [aj. 1994, ch. 33, art. 2], 2.1, par. 5 [*idem*], 122 [abr. & rempl. 1994, ch. 11, art. 373], 127 [*idem*, art. 375], 128 [*idem*], partie XXIII.

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APPEAL from a judgment of the Ontario Court of Appeal (1999), 43 O.R. (3d) 257, 169 D.L.R. (4th) 612, 117 O.A.C. 224, [1999] O.J. No. 388 (QL), setting aside a decision of the Divisional Court (1997), 33 O.R. (3d) 651, 146 D.L.R. (4th) 721, 100 O.A.C. 46, 46 Admin. L.R. (2d) 128, 34 B.L.R. (2d) 103, 13 C.C.L.S. 50, [1997] O.J. No. 1872 (QL). Appeal dismissed.

David W. Scott, Q.C., Barry H. Bresner and *Ira Nishisato*, for the appellant.

Sheila R. Block, James C. Tory, Michel Jolin and *Claude G. Rioux*, for the respondent Her Majesty in Right of Quebec.

Tim Moseley, for the respondent Ontario Securities Commission.

Glenn F. Leslie and *Matthew J. Halpin*, for the respondent Société nationale de l'amiante.

The judgment of the Court was delivered by

1 IACOBUCCI J. — This appeal arises out of a series of transactions in the course of which Société nationale de l'amiante ("SNA"), a crown corporation wholly owned by Her Majesty in right of Quebec (the "Quebec Government" or "Quebec"), acquired effective control of the federally incorporated, Asbestos Corporation Limited ("Asbestos"). The acquisition of control of Asbestos by SNA was achieved without a follow-up offer to the minority shareholders of Asbestos. Subsequent to SNA taking control, the market value of Asbestos shares fell. A group of the minority shareholders of Asbestos formed an unincorporated association to represent the interests of all the minority shareholders. That association, called the Committee for the Equal Treatment of Asbestos Minority Shareholders, sought redress pursuant to s. 127 of the Ontario *Securities Act*, R.S.O. 1990, c. S.5 (the "Act") (formerly R.S.O.

Doctrine citée

Johnston, David, and Kathleen Doyle Rockwell. *Canadian Securities Regulation*, 2nd ed. Markham, Ont. : Butterworths, 1998.

POURVOI contre un arrêt de la Cour d'appel de l'Ontario (1999), 43 O.R. (3d) 257, 169 D.L.R. (4th) 612, 117 O.A.C. 224, [1999] O.J. No. 388 (QL), qui a infirmé un jugement de la Cour divisionnaire (1997), 33 O.R. (3d) 651, 146 D.L.R. (4th) 721, 100 O.A.C. 46, 46 Admin. L.R. (2d) 128, 34 B.L.R. (2d) 103, 13 C.C.L.S. 50, [1997] O.J. No. 1872 (QL). Pourvoi rejeté.

David W. Scott, c.r., Barry H. Bresner et *Ira Nishisato*, pour l'appelant.

Sheila R. Block, James C. Tory, Michel Jolin et *Claude G. Rioux*, pour l'intimée Sa Majesté du chef du Québec.

Tim Moseley, pour l'intimée la Commission des valeurs mobilières de l'Ontario.

Glenn F. Leslie et *Matthew J. Halpin*, pour l'intimée la Société nationale de l'amiante.

Version française du jugement de la Cour rendu par

LE JUGE IACOBUCCI — Le présent pourvoi découle d'une série d'opérations au cours desquelles la Société nationale de l'amiante (« SNA »), société d'État possédée en propriété exclusive par Sa Majesté du chef du Québec (le « gouvernement du Québec » ou le « Québec »), a acquis le contrôle effectif d'Asbestos Corporation Limited (« Asbestos »), société constituée en vertu d'une loi fédérale. L'acquisition du contrôle d'Asbestos par la SNA s'est faite sans la présentation d'une offre complémentaire aux actionnaires minoritaires d'Asbestos. Après la prise de contrôle par la SNA, la valeur des titres d'Asbestos a chuté. Un groupe d'actionnaires minoritaires d'Asbestos s'est formé en association non constituée en personne morale pour représenter les intérêts de tous les actionnaires minoritaires. Cette association, appelée le Comité pour le traitement égal des actionnaires minoritaires de la Société Asbestos

1980, c. 466, s. 124). Specifically, the association sought an order under s. 127(1), para. 3, removing the trading exemptions of SNA and/or the province of Quebec.

The basic question raised by this appeal is whether the Court should intervene in the refusal of the Ontario Securities Commission ("OSC") to grant a remedy to the aggrieved minority shareholders through the exercise of its jurisdiction to act in the public interest under s. 127(1) of the Act.

I. Facts

There do not appear to be any substantive factual issues in dispute on this appeal. A comprehensive review of the background to this case, the agreed upon facts, the details of the transactions at issue, and the other evidence before the OSC is available in the reasons of the Commission in *Re Asbestos Corp.* (1994), 17 O.S.C.B. 3537. The following is intended to be a synopsis only of the salient factual matters in this appeal.

In the fall of 1977, the province of Quebec was the largest asbestos producer in the Western world, accounting for perhaps 29 percent of annual world asbestos production. However, it had virtually no secondary asbestos industry in that approximately 95 percent of the raw product was shipped elsewhere for manufacture.

During that same time period, Quebec's newly elected Parti québécois Government pursued a policy of creating an asbestos manufacturing industry in Quebec to complement the asbestos mining industry. To accomplish its objective, the Quebec Government decided to take control of Asbestos, a leading asbestos producer in the province.

Ltée, a demandé réparation sous le régime de l'art. 127 de la *Loi sur les valeurs mobilières* de l'Ontario, L.R.O. 1990, ch. S.5 (la « Loi ») (auparavant R.S.O. 1980, ch. 466, art. 124). Plus particulièrement, l'association a demandé que soit rendue, sous le régime de la disposition 3 du par. 127(1), une ordonnance retirant à la SNA et/ou au Québec les dispenses relatives aux opérations sur valeurs mobilières.

2 La question fondamentale soulevée dans le pourvoi est celle de savoir si la Cour devrait intervenir à l'égard du refus de la Commission des valeurs mobilières de l'Ontario (« CVMO ») d'accorder réparation aux actionnaires minoritaires lésés en exerçant sa compétence pour agir dans l'intérêt public en vertu du par. 127(1) de la Loi.

I. Les faits

3 Il ne semble y avoir aucune question de fait substantielle en litige dans le pourvoi. Un examen complet du contexte de la présente espèce, des faits convenus par les parties, des détails des opérations en cause et des autres éléments de preuve produits devant la CVMO figure dans les motifs de la CVMO dans *Re Asbestos Corp.* (1994), 17 O.S.C.B. 3537. Les paragraphes qui suivent visent à présenter seulement un bref exposé des faits saillants du pourvoi.

4 À l'automne de 1977, la province de Québec était le plus gros producteur d'amiante en occident, fournissant près de 29 pour 100 de la production mondiale annuelle d'amiante. Elle ne possédait toutefois pratiquement pas d'industrie secondaire de l'amiante, environ 95 pour 100 du produit brut étant exporté ailleurs pour y être transformé.

5 À l'époque, le gouvernement du Québec, composé du Parti québécois nouvellement élu, menait une politique de création d'un secteur industriel de l'amiante au Québec, qui serait complémentaire au secteur d'extraction de l'amiante. À cette fin, le gouvernement du Québec a décidé de prendre le contrôle d'Asbestos, un chef de file de la production d'amiante dans la province.

6 The common shares of Asbestos traded on the Toronto Stock Exchange and the Montreal Stock Exchange. Approximately 30 percent of the Asbestos common shares were held by minority shareholders resident in Ontario. General Dynamics Corporation (Canada) Limited ("GD Canada") held the controlling interest of 54.6 percent of the common shares of Asbestos. However, ultimate control of Asbestos resided in GD Canada's parent company, General Dynamics Corporation ("GD U.S."), a Delaware corporation with its head office in Missouri. GD Canada was a wholly owned subsidiary of GD U.S.

Les actions ordinaires d'Asbestos étaient négociées à la Bourse de Toronto et à la Bourse de Montréal. Environ 30 pour 100 des actions ordinaires d'Asbestos étaient détenues par des actionnaires minoritaires résidant en Ontario. General Dynamics Corporation (Canada) Limited (« GD Canada ») détenait une participation majoritaire de 54,6 pour 100 des actions ordinaires d'Asbestos. Toutefois, le contrôle d'Asbestos appartenait en bout de ligne à la société mère de GD Canada, General Dynamics Corporation (« GD U.S. »), une société du Delaware ayant son siège social au Missouri. GD Canada était une filiale en propriété exclusive de GD U.S.

7 On October 22, 1977, Premier Lévesque announced the Quebec Government's intention to take control of Asbestos. He was quoted in the press as saying that other shareholders would be "uncomfortable" if they were minority shareholders while the Government held control as the Quebec Government must take positions and achieve objectives that are not always those of ordinary shareholders. At the same time, the press quoted Quebec's Finance Minister, Mr. Parizeau, as saying, "we will in any case make a bid for all public shares" and that a public offer for Asbestos Corp. shares would be at "an equivalent price" to that paid for the General Dynamics block.

Le 22 octobre 1977, le premier ministre Lévesque a annoncé l'intention du gouvernement du Québec de prendre le contrôle d'Asbestos. Selon ses propos rapportés dans la presse, les autres actionnaires ne seraient [TRADUCTION] « pas à l'aise » s'ils étaient des actionnaires minoritaires, alors que le gouvernement détiendrait le contrôle, car le gouvernement du Québec doit prendre des positions et atteindre des objectifs qui ne correspondent pas toujours à ceux des actionnaires ordinaires. À la même époque, le ministre des Finances du Québec, M. Parizeau, a tenu les propos suivants, rapportés par les médias : [TRADUCTION] « nous allons de toute façon présenter une offre visant toutes les actions publiques » et une offre publique d'achat des actions d'Asbestos Corp. serait à [TRADUCTION] « un prix équivalant » à celui qui sera payé pour le bloc de General Dynamics.

8 In May 1978, Quebec incorporated the SNA as a vehicle to take control of Asbestos. All of SNA's shares were allotted to Quebec's Minister of Finance.

En mai 1978, le Québec a constitué la SNA comme moyen de prendre le contrôle d'Asbestos. Toutes les actions de la SNA ont été attribuées au ministre des Finances du Québec.

9 In September 1979, SNA made its first bid to acquire control of Asbestos. SNA offered to purchase all of GD Canada's shares in Asbestos for $42 per share. The offer stated that, once it acquired the shares held by GD Canada, the Quebec Government would offer to purchase the remaining Asbestos shares at the same price. This offer was rejected by GD U.S., as parent of GD Canada. Their valuation came in at $99 per share.

En septembre 1979, la SNA a présenté sa première offre en vue d'acquérir le contrôle d'Asbestos. La SNA a offert d'acheter toutes les actions d'Asbestos détenues par GD Canada au prix de 42 $ l'action. L'offre précisait que, dès qu'il aurait acquis les actions détenues par GD Canada, le gouvernement du Québec offrirait d'acheter le reste des actions d'Asbestos au même prix. Cette offre a été rejetée par GD U.S. en sa

The difference in share price arose from the parties' projections for the future asbestos market.

In June 1979, SNA's incorporating statute was amended to permit Quebec to expropriate the assets of Asbestos. However, in the debates concerning this amendment, both Premier Lévesque and Finance Minister Parizeau emphasized their preference to acquire control of Asbestos by agreement with GD U.S. and their intention to expropriate only if negotiations failed.

Negotiations ceased while Asbestos challenged the constitutionality of the legislation permitting Quebec to expropriate its assets. In the spring of 1981, the Quebec Court of Appeal rejected the constitutional challenge ([1981] C.A. 43, aff'g [1980] C.S. 331) and this Court denied leave to appeal, [1981] 1 S.C.R. v. Quebec then imposed a November 30, 1981 deadline for a negotiated agreement with GD U.S., failing which it would expropriate.

On November 9, 1981, Quebec and GD U.S. reached an agreement pursuant to which SNA would acquire voting control of GD Canada and, therefore, indirect control of Asbestos. Under that agreement, SNA acquired control over GD Canada; however, SNA's payment for GD Canada was deferred through the operation of a "put and call" agreement. This form of the transaction was designed to benefit the tax position of GD U.S., and to provide GD U.S. with a means to acquire the benefits of any subsequent improvement in the asbestos market.

The 1981 transaction differed materially from the offer rejected by GD U.S. in 1979. Under the 1981 transaction, SNA purchased GD Canada shares rather than Asbestos shares as it would have under the 1979 offer. Furthermore, the 1981 transaction was not accompanied by an undertaking to the minority shareholders of Asbestos to purchase their shares. On November 11, 1981, two days

qualité de société mère de GD Canada. Son évaluation s'élevait à 99 $ l'action, la différence de prix s'expliquant par les projections respectives des parties quant à l'avenir du marché de l'amiante.

10 En juin 1979, la loi constitutive de la SNA a été modifiée afin de permettre au Québec d'exproprier les biens d'Asbestos. Toutefois, dans les débats portant sur cette modification, le premier ministre Lévesque et le ministre des Finances Parizeau ont tous deux souligné leur préférence pour l'acquisition du contrôle d'Asbestos de gré à gré avec GD U.S. et leur intention de procéder à l'expropriation uniquement en cas d'échec des négociations.

11 Les négociations ont été suspendues pendant les procédures engagées par Asbestos pour contester la constitutionnalité de la Loi permettant à Québec de l'exproprier. Au printemps de 1981, la Cour d'appel du Québec a rejeté l'attaque constitutionnelle ([1981] C.A. 43, conf. [1980] C.S. 331) et notre Cour a refusé l'autorisation de pourvoi ([1981] 1 R.C.S. v). Le Québec a alors imposé la date limite du 30 novembre 1981 pour la conclusion d'une entente négociée avec GD U.S., faute de quoi il procéderait à l'expropriation.

12 Le 9 novembre 1981, le Québec et GD U.S. ont conclu une entente prévoyant l'acquisition par la SNA du contrôle des voix de GD Canada et, par conséquent, du contrôle indirect d'Asbestos. En vertu de cette entente, la SNA a acquis le contrôle de GD Canada, mais le paiement de la SNA pour GD Canada a été reporté au moyen d'une entente d'achat-vente. Cette forme d'opération visait à avantager GD U.S. sur le plan fiscal et à lui donner un moyen de tirer profit de toute amélioration subséquente du marché de l'amiante.

13 L'opération de 1981 différait sensiblement de l'offre rejetée par GD U.S. en 1979. Aux termes de l'opération de 1981, la SNA se portait acquéreur des actions de GD Canada plutôt que des actions d'Asbestos comme le prévoyait l'offre de 1979. De plus, l'opération de 1981 n'était pas accompagnée d'un engagement à acquérir les actions des actionnaires minoritaires d'Asbestos. Le 11 novembre

after the agreement was reached, Quebec announced that it did not intend to make a follow-up offer to the minority shareholders. Instead, the Finance Minister said in a press release, [TRANSLATION] "it will be up to GD Canada to evaluate over the course of the years the advantage of increasing eventually its interest in [Asbestos Corp.]." In response to that statement, the shares of Asbestos fell to a four-year low. Six days later the Finance Minister was quoted by the press as saying: "[b]ut at the present time, I'm not buying the shares of General Dynamics . . . but if I force them out . . . then obviously I should do something with the minority shareholders".

1981, deux jours après la conclusion de l'entente, le Québec a annoncé qu'il n'entendait pas faire d'offre complémentaire aux actionnaires minoritaires. Le ministre des Finances a plutôt déclaré dans un communiqué qu'« il reviendra à G.D. Canada d'évaluer au cours des années l'avantage de majorer éventuellement sa participation dans la [Société Asbestos Limitée] ». Par suite de cette déclaration, les titres d'Asbestos sont tombés à leur niveau le plus bas en quatre ans. Six jours plus tard, les journaux rapportaient les propos suivants du ministre des Finances : [TRADUCTION] « [m]ais en ce moment, je ne me porte pas acquéreur des actions de General Dynamics . . . mais si je les force à se retirer . . . alors, évidemment, je devrais faire quelque chose à l'égard des actionnaires minoritaires ».

14 On February 12, 1982, the agreement among Quebec, SNA, and GD U.S. was formalized. GD Canada's name was changed to Mines SNA Inc. and its registered office was moved from Ottawa, Ontario, to Thetford Mines, Quebec. In November 1986, GD U.S. exercised its put option and, on December 9, 1986, SNA purchased the remaining common shares of GD Canada held by GD U.S. No follow-up offer was ever made to the minority shareholders of Asbestos.

Le 12 février 1982, l'entente entre Québec, la SNA et GD U.S. a été officialisée. Le nom de GD Canada a été remplacé par la dénomination Mines SNA Inc. et son siège social a été transporté d'Ottawa (Ontario) à Thetford Mines (Québec). En novembre 1986, GD U.S. a levé son option de vente et, le 9 décembre 1986, la SNA a acheté les actions ordinaires restantes de GD Canada détenues par GD U.S. Aucune offre complémentaire n'a été faite aux actionnaires minoritaires d'Asbestos à quelque moment que ce soit.

15 In April 1988, the OSC issued a notice of hearing to determine two questions: (i) whether the transaction amounted to a take-over bid in Ontario, requiring SNA to make a follow-up offer to the minority shareholders of Asbestos, and (ii) whether the OSC should exercise its public interest jurisdiction under s. 124(1) (now s. 127(1), para. 3) of the *Securities Act* and take away Quebec's trading exemptions in the Ontario capital markets.

En avril 1988, la CVMO a notifié la tenue d'une audience visant à trancher deux questions, à savoir : (i) si l'opération équivalait à une offre d'achat visant à la mainmise en Ontario, ce qui obligerait la SNA à présenter une offre complémentaire aux actionnaires minoritaires d'Asbestos, et (ii) si la CVMO devait exercer la compétence relative à l'intérêt public que lui confère le par. 124(1) (maintenant la disposition 3 du par. 127(1)) de la *Loi sur les valeurs mobilières*, et retirer au Québec les dispenses relatives aux opérations sur valeurs mobilières dont il bénéficie sur les marchés financiers de l'Ontario.

16 In addition to the details of the negotiations and transaction, the evidence before the OSC included press reports of the statements made by members of the Quebec Government, noted above, as well as other articles quoting analysts as recommending

Outre des renseignements détaillés sur les négociations et l'opération, les éléments de preuve produits devant la CVMO comprenaient des reportages sur les déclarations susmentionnées des membres du gouvernement du Québec, de même

caution and warning against the speculative nature of an investment in Asbestos. The OSC also examined the market performance of Asbestos shares during the relevant period in light of all of the information about Asbestos and the change of control transaction that was available to the market during the material times. The OSC also considered the testimony of witnesses called by the appellant. The OSC concluded that the statements made by members of the Quebec Government did not constitute a promise to make a follow-up offer, that the minority shareholders and market analysts were aware of the speculative nature of an investment in Asbestos, and that the market was not materially misled by Quebec or SNA.

II. Decisions Below

1. *The 1988 Jurisdictional Proceedings*

Immediately after the OSC issued the notice of hearing in this case, Quebec challenged the jurisdiction of the OSC to inquire into the transaction. In a decision dated August 15, 1988, a majority of the OSC held that it had jurisdiction to decide the issues raised in the notice of hearing: (1988), 11 O.S.C.B. 3419. A combined appeal and judicial review application brought by Quebec was dismissed by the Divisional Court. A further appeal was dismissed by the Court of Appeal: (1992), 10 O.R. (3d) 577, with leave to appeal to this Court denied, [1993] 2 S.C.R. x.

At the Court of Appeal, McKinlay J.A., writing for the court, held that the provisions of the Act raised in the notice of hearing were within the province's legislative competence and that it was neither fair nor reasonable to suggest only Ontario residents are subject to Ontario regulatory rules when operating in Ontario capital markets. She wrote, at p. 595:

que d'autres articles citant les recommandations d'analystes qui incitaient à la prudence et mettaient en garde contre la nature spéculative d'un investissement dans la société Asbestos. La CVMO a aussi examiné le rendement des actions d'Asbestos sur le marché au cours de la période visée, d'après toute l'information sur Asbestos et l'opération de changement de contrôle qui était disponible sur le marché à l'époque des faits. Elle a également noté les dépositions des témoins produits par l'appelant. Elle a conclu que les déclarations des membres du gouvernement du Québec ne constituaient pas une promesse de présenter une offre complémentaire, que les actionnaires minoritaires et les analystes étaient conscients de la nature spéculative d'un investissement dans la société Asbestos et que le Québec ou la SNA n'ont pas substantiellement induit le marché en erreur.

II. Les décisions des tribunaux d'instance inférieure

1. *Les procédures de 1988 sur la question de la compétence*

17 Dès la notification par la CVMO de la tenue d'une audience au sujet de l'affaire, le Québec a contesté la compétence de la CVMO pour examiner l'opération. Dans une décision datée du 15 août 1988, la CVMO a conclu à la majorité qu'elle avait compétence pour trancher les questions soulevées dans l'avis d'audience : (1988), 11 O.S.C.B. 3419. Un recours en appel et en contrôle judiciaire engagé par le Québec a été rejeté par la Cour divisionnaire. La Cour d'appel a rejeté un nouvel appel : (1992), 10 O.R. (3d) 577, et notre Cour a rejeté la demande d'autorisation de pourvoi, [1993] 2 R.C.S. x.

18 Dans les motifs prononcés au nom de la Cour d'appel, Madame le juge McKinlay a conclu que les dispositions de la Loi invoquées dans l'avis d'audience demeuraient dans les limites des pouvoirs législatifs de la province et qu'on ne pouvait équitablement ni raisonnablement prétendre que seuls les résidents de l'Ontario sont assujettis aux dispositions réglementaires de l'Ontario lorsqu'ils procèdent à des opérations sur les marchés financiers en Ontario. Elle a écrit, à la p. 595 :

. . . I am of the view that territorial jurisdiction of the OSC under s. 124 does not depend solely upon the province or country in which relevant transactions may have taken place, but rather upon whether or not persons availing themselves of the benefits of trading in the Ontario capital markets act in a manner consistent with the provisions of the Act.

19 McKinlay J.A. also held the OSC's public interest jurisdiction was not "subject to an implicit precondition" (p. 592) that the conduct in question "must have a 'sufficient Ontario connection'" (p. 593). She wrote at pp. 592-93:

I have difficulty understanding the argument of the appellant that s. 124(1) must be interpreted as being subject to an implicit precondition that the conduct relied upon by the OSC as the basis for the exercise of its discretion must have a "sufficient Ontario connection". The Ontario connection required by the section is "the public interest". I construe "the public interest" in that provision as being not only the interest of residents of Ontario, but the interest of all persons making use of Ontario capital markets. The discretion being contemplated by the OSC is a discretion to withdraw special privileges given, in this case, to the government of another province. I see nothing in the Act, nor do I see any constitutional or policy reason why any limited interpretation should be placed on the clear wording of the section.

20 Following the Court of Appeal's decision, the OSC resumed its hearing into whether the transaction amounted to a take-over bid, or whether it should exercise its public interest jurisdiction to remove Quebec's trading exemptions.

2. *Ontario Securities Commission (Vice Chair Geller, Commissioners Kitts and Carscallen concurring)* (1994), 4 C.C.L.S. 233

21 The OSC considered two questions: (i) whether the transaction amounted to a take-over bid in Ontario, requiring SNA to make a follow-up offer

[TRADUCTION] . . . j'estime que la compétence territoriale de la CVMO sous le régime de l'art. 124 ne dépend pas uniquement de la province ou du pays où les opérations pertinentes peuvent avoir eu lieu, mais plutôt de la question de savoir si des personnes tirant profit d'opérations sur les marchés financiers en Ontario agissent ou non d'une façon qui est conforme aux dispositions de la Loi.

Le juge McKinlay a aussi conclu que la compétence relative à l'intérêt public de la CVMO n'était pas [TRADUCTION] « assujettie à une condition préalable implicite » (p. 592) en vertu de laquelle la conduite en cause [TRADUCTION] « doit avoir un "lien suffisant avec l'Ontario" » (p. 593). Elle a écrit, aux p. 592-593 :

[TRADUCTION] J'ai de la difficulté à comprendre l'argument de l'appelante selon lequel le par. 124(1) doit être interprété comme assujetti à une condition préalable implicite en vertu de laquelle la conduite sur laquelle se fonde la CVMO pour exercer son pouvoir discrétionnaire doit avoir un « lien suffisant avec l'Ontario ». Le lien avec l'Ontario prescrit par cet article est « l'intérêt public ». Mon interprétation de « l'intérêt public » dans cette disposition ne se limite pas au seul intérêt des résidents de l'Ontario, mais comprend aussi l'intérêt de toutes les personnes qui utilisent les marchés financiers en Ontario. Le pouvoir discrétionnaire sur lequel s'est prononcée la CVMO est celui de retirer des privilèges spéciaux consentis, en l'espèce, au gouvernement d'une autre province. Je ne vois aucune disposition dans la Loi ni aucune raison constitutionnelle ou politique qui commanderait une interprétation restrictive du libellé clair de cet article.

À la suite de l'arrêt de la Cour d'appel, la CVMO a repris son audience sur la question de savoir si l'opération constituait une offre d'achat visant à la mainmise, ou si la CVMO devait exercer sa compétence relative à l'intérêt public pour retirer au Québec les dispenses relatives aux opérations sur valeurs mobilières dont il bénéficie.

2. *La Commission des valeurs mobilières de l'Ontario (Vice-président Geller, avec l'appui des membres Kitts et Carscallen)* (1994), 4 C.C.L.S. 233

La CVMO s'est penchée sur deux questions, à savoir : (i) si l'opération équivalait à une offre d'achat visant à la mainmise en Ontario, ce qui

to the minority shareholders of Asbestos; and (ii) whether the OSC should exercise its public interest jurisdiction under s. 124(1) (now s. 127(1), para. 3) of the *Securities Act* and take away Quebec's trading exemptions in the Ontario capital markets.

obligerait la SNA à présenter une offre complémentaire aux actionnaires minoritaires d'Asbestos, et (ii) si la CVMO devrait exercer la compétence relative à l'intérêt public que lui confère le par. 124(1) (maintenant la disposition 3 du par. 127(1)) de la *Loi sur les valeurs mobilières* et retirer les dispenses du Québec sur les marchés financiers de l'Ontario.

First, the OSC panel held that the transaction was not a take-over bid, nor a deemed take-over bid, under the Act. Thus, the transaction was not a breach of the Act and no follow-up offer was required under its express provisions or the regulations thereunder. This finding has not been appealed.

22 La CVMO a d'abord conclu que l'opération n'était pas une offre d'achat visant à la mainmise, ni une opération réputée constituer une telle offre au sens de la Loi. L'opération ne contrevenait donc pas à la Loi et aucune offre complémentaire n'était exigée par quelque disposition expresse de la Loi ou de ses règlements d'application. Cette conclusion n'a pas été portée en appel.

Next, the panel considered whether it should exercise its public interest jurisdiction. In doing so, the panel relied on its previous jurisprudence in *Re Canadian Tire Corp.* (1987), 10 O.S.C.B. 857, and *Re H.E.R.O. Industries Ltd.* (1990), 13 O.S.C.B. 3775. The panel noted that it does not need to find a breach of the Act or of the regulations thereunder in order to exercise its s. 127 jurisdiction. It emphasized, however, that it should be cautious in exercising its s. 127 jurisdiction, and should not use its open-ended nature to correct perceived abuses regardless of a connection with Ontario. Then, the panel went on to consider the following four factors: (i) whether the transaction had been designed to avoid the animating principles behind the legislation and the rules respecting take-over bids, (ii) whether the transaction was manifestly unfair to public minority shareholders, (iii) whether there was a sufficient nexus with Ontario to warrant the OSC's intervention, or whether the transaction was structured to make an Ontario transaction appear to be a non-Ontario one, and (iv) whether the transaction was abusive of the integrity of the capital markets in the province.

23 La CVMO s'est ensuite penchée sur la question de savoir si elle devait exercer sa compétence relative à l'intérêt public. Elle s'est fondée à cet égard sur sa jurisprudence dans les affaires *Re Canadian Tire Corp.* (1987), 10 O.S.C.B. 857, et *Re H.E.R.O. Industries Ltd.* (1990), 13 O.S.C.B. 3775. La CVMO a noté qu'il n'était pas nécessaire qu'elle conclue à l'existence d'une contravention à la Loi ou à ses règlements d'application pour pouvoir exercer sa compétence en vertu de l'art. 127. Toutefois, elle a souligné la nécessité d'user de circonspection dans l'exercice de sa compétence en vertu de l'art. 127 et de s'abstenir d'invoquer sa nature indéterminée pour corriger des abus perçus sans égard à l'existence d'un lien avec l'Ontario. La CVMO a ensuite examiné les quatre facteurs suivants : (i) si l'opération avait été conçue dans le but de contourner les principes directeurs qui sous-tendent la Loi et les règles régissant les offres d'achat visant à la mainmise, (ii) si l'opération était manifestement injuste envers les actionnaires minoritaires publics, (iii) s'il existait un lien suffisant avec l'Ontario pour justifier l'intervention de la CVMO, ou si l'opération était structurée de façon à donner à une opération ontarienne l'apparence d'une opération étrangère, et (iv) si l'opération portait atteinte à l'intégrité des marchés financiers de la province.

24 With regard to the first two factors, the panel held that both Quebec and GD U.S. had a moral obligation to the minority shareholders and that

> the actions of the Quebec Government and SNA failed to comply with the spirit underlying the take-over bid rules of the Act, were abusive of the minority shareholders of Asbestos and were manifestly unfair . . . (para. 71)

25 However, with respect to the third factor, the panel held that a sufficient Ontario nexus had not been established, and that the principal and, so far as the evidence went, the sole purpose for structuring the transaction in its final form was the minimization of taxes on the profit received by GD Canada and GD U.S.

26 Furthermore, the panel found that, although it would have been fairer if the Quebec Government had not equivocated about its plans regarding a follow-up offer, its equivocation did not result in the market being materially misled or investors purchasing shares on the "promise" that there would be a follow-up offer.

27 The OSC concluded that, although the minority shareholders of Asbestos were unfairly and badly dealt with by the Quebec Government, they are unable to look to the Act for a remedy (para. 90).

3. *Ontario Divisional Court (Crane J., O'Driscoll J. concurring; Steele J. dissenting in part)* (1997), 33 O.R. (3d) 651

28 The Divisional Court was unanimous in reversing the decision of the OSC. The court held that the OSC had erred by imposing two jurisdictional prerequisites to its s. 127(1), para. 3 jurisdiction: a "transactional connection" with Ontario, and a conscious motive to avoid the takeover laws in Ontario and abuse minority shareholders. On the first jurisdictional error, the court further held that the OSC had erred in concluding that a sufficient

En ce qui a trait aux deux premiers facteurs, la CVMO a conclu que le Québec et GD U.S. avaient tous deux une obligation morale envers les actionnaires minoritaires et que

> [TRADUCTION] les actes du gouvernement du Québec et de la SNA n'ont pas respecté l'esprit qui sous-tend les règles relatives aux offres d'achat visant à la mainmise édictées dans la Loi, étaient abusifs envers les actionnaires minoritaires d'Asbestos et étaient manifestement injustes . . . (par. 71)

En ce qui a trait au troisième facteur, toutefois, la CVMO a conclu qu'un lien suffisant avec l'Ontario n'avait pas été établi et que le motif principal, voire l'unique motif démontré par la preuve, de la structuration de l'opération dans sa forme finale était la réduction des impôts sur le profit réalisé par GD Canada et GD U.S.

La CVMO a en outre conclu, après avoir constaté que la situation aurait été plus juste si le gouvernement du Québec n'avait pas tergiversé quant à son intention de présenter une offre complémentaire, que ses tergiversations n'avaient néanmoins pas eu pour effet de tromper sensiblement le marché ni d'inciter des investisseurs à acheter des actions sur la foi d'une « promesse » de présentation d'une offre complémentaire.

La CVMO a conclu que les actionnaires minoritaires d'Asbestos, en dépit de la façon injuste et incorrecte dont ils ont été traités par le gouvernement du Québec, ne pouvaient invoquer la Loi pour obtenir réparation (par. 90).

3. *Cour divisionnaire de l'Ontario (le juge Crane, avec l'appui du juge O'Driscoll; le juge Steele étant dissident en partie)* (1997), 33 O.R. (3d) 651

La Cour divisionnaire a infirmé à l'unanimité la décision de la CVMO. Elle a conclu que la CVMO avait commis une erreur en imposant deux conditions préalables à l'exercice de sa compétence sous le régime de la disposition 3 du par. 127(1) : un « lien transactionnel » avec l'Ontario et une motivation consciente consistant à contourner le droit ontarien relatif aux offres d'achat visant à la mainmise et à abuser les actionnaires minoritaires. Au

Ontario nexus had not been established. On the second jurisdictional error, the court held that the OSC must look at the effect of the transaction, not the motivation of the parties.

sujet de la première erreur juridictionnelle, la cour a en outre statué que la CVMO avait commis une erreur en concluant qu'un rapport suffisant avec l'Ontario n'avait pas été établi. Quant à la deuxième erreur juridictionnelle, la cour a conclu que la CVMO doit tenir compte de l'effet de l'opération et non de la motivation des parties.

Based on these findings, a majority of the Divisional Court directed the OSC to order the Quebec Government to make a follow-up offer to the minority shareholders within 90 days, failing which the OSC was to deny the Quebec Government all of the exemptions that allowed it to participate in the Ontario capital market. The OSC was also directed to order the Quebec Government to pay the appellant's costs of the 1994 proceedings before the OSC, as well as present costs at the Divisional Court and the future costs of appearances before the OSC on this matter, if any. Steele J. concurred with the majority's reasons but would have granted a different order. The substance of Steele J.'s order was the same as that of the majority; however Steele J. would have left the "mechanics and details" to be determined by the OSC. In other words, Steele J. would have remitted the matter to the OSC for a determination of the prescribed time period for the follow-up offer to be made, the exemptions to be disallowed, the interest rate to be applied, and the liability for future costs.

29 À partir de ces conclusions, la Cour divisionnaire a, à la majorité, prescrit à la CVMO d'ordonner au gouvernement du Québec de présenter une offre complémentaire aux actionnaires minoritaires dans un délai de 90 jours, faute de quoi la CVMO retirerait au gouvernement du Québec toutes les dispenses qu'elle lui avait accordées pour lui permettre de faire des opérations sur le marché financier en Ontario. La CVMO a aussi reçu la directive d'ordonner au gouvernement du Québec de payer à l'appelant ses dépens de la procédure de 1994 devant la CVMO, ceux de l'appel devant la Cour divisionnaire et ceux qui étaient susceptibles de découler de la comparution devant la CVMO sur cette question, le cas échéant. Tout en partageant les motifs des juges majoritaires, le juge Steele aurait rendu une ordonnance différente, qui s'apparentait à celle de la majorité quant au fond, mais qui aurait laissé à la CVMO le soin de régler les [TRADUCTION] « questions d'application concrète et de détail ». En d'autres termes, le juge Steele aurait renvoyé l'affaire devant la CVMO pour qu'elle détermine le délai de présentation d'une offre complémentaire, les dispenses à retirer, le taux d'intérêt à appliquer et la charge des dépens à venir.

4. *Court of Appeal for Ontario (Laskin J.A., Doherty and Rosenberg JJ.A. concurring)* (1999), 43 O.R. (3d) 257

4. *Cour d'appel de l'Ontario (le juge Laskin, avec l'appui des juges Doherty et Rosenberg)* (1999), 43 O.R. (3d) 257

In comprehensive and lucid reasons written by Laskin J.A., the Court of Appeal for Ontario unanimously allowed the appeal and reinstated the OSC's decision. The Court of Appeal concluded that the Divisional Court made four main errors in that it:

30 Dans des motifs approfondis et lucides écrits par le juge Laskin, la Cour d'appel de l'Ontario a, à l'unanimité, accueilli l'appel et rétabli la décision de la CVMO. La Cour d'appel a conclu que la Cour divisionnaire avait commis quatre erreurs principales, à savoir :

(1) applied the wrong standard of review,

(1) elle a appliqué la mauvaise norme de contrôle,

(2) mischaracterized what the OSC did,

(2) elle a mal qualifié ce que la CVMO avait fait,

(3) failed to appreciate that whether the acquisition of control of Asbestos had a sufficient "transactional connection" with Ontario, whether Quebec intended to avoid Ontario law and whether Quebec's public statements misled investors into believing a follow-up offer would be made, were relevant factors for the OSC to consider in exercising its discretion under s. 127(1), para. 3, and

(4) misconceived the purpose of the OSC's public interest jurisdiction by treating it as remedial.

(3) elle a omis de considérer que les questions de savoir si l'acquisition du contrôle d'Asbestos avait un « lien transactionnel » suffisant avec l'Ontario, si le Québec a cherché à éviter la loi de l'Ontario et si les déclarations publiques du Québec ont induit des investisseurs à croire qu'une offre complémentaire serait présentée, constituaient des facteurs pertinents dont la CVMO devait tenir compte dans l'exercice de son pouvoir discrétionnaire sous le régime de la disposition 3 du par. 127(1); et

(4) elle a mal interprété l'objet visé par la compétence relative à l'intérêt public de la CVMO en la traitant comme si elle avait un caractère réparateur.

31 With respect to the first error noted above, the Court of Appeal was of the opinion that the Divisional Court had applied a standard of correctness without first addressing the necessary issue of appropriate standard of review. The Court of Appeal then applied *Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557, and *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748, and concluded that the appropriate standard of review in this case was "reasonableness".

En ce qui a trait à la première erreur susmentionnée, la Cour d'appel a estimé que la Cour divisionnaire avait appliqué la norme de la décision correcte sans s'être penchée au préalable sur l'incontournable question de la norme de contrôle appropriée. La Cour d'appel a ensuite appliqué les arrêts *Pezim c. Colombie-Britannique (Superintendent of Brokers)*, [1994] 2 R.C.S. 557, et *Canada (Directeur des enquêtes et recherches) c. Southam Inc.*, [1997] 1 R.C.S. 748, et elle a conclu que la norme de contrôle appropriée en l'espèce était celle de la décision « raisonnable ».

32 With respect to the second and third errors, in interpreting the reasons of the OSC in this case, Laskin J.A. was of the view that the OSC did not decide it could not make an order under s. 127; rather it decided it would not do so. In his view, the OSC treated the transactional connection to Ontario and the intention to avoid Ontario law as factors relevant to the exercise of its discretion, not as conditions precedent (at p. 273):

. . . the Commission did not set up any jurisdictional preconditions to the exercise of its discretion. Instead, it took into account and indeed gave prominence to factors that were relevant to the exercise of its discretion. It weighed those factors and made findings of fact on them that were reasonably supported by the evidence. Finally, it properly considered whether the abusive and

En ce qui a trait à la deuxième et à la troisième erreur, dans son interprétation des motifs de la CVMO, le juge Laskin était d'avis que la CVMO n'avait pas conclu qu'elle ne pouvait pas rendre une ordonnance sous le régime de l'art. 127, mais plutôt qu'elle ne rendrait pas une telle ordonnance. À son avis, la CVMO a traité le lien transactionnel avec l'Ontario et l'intention de contourner la loi de l'Ontario comme des facteurs pertinents relativement à l'exercice de son pouvoir discrétionnaire, et non comme des conditions préalables (à la p. 273) :

[TRADUCTION] . . . la Commission n'a établi aucune condition juridictionnelle préalable à l'exercice de son pouvoir discrétionnaire. Elle a plutôt pris en considération, voire souligné, des facteurs qui étaient pertinents relativement à l'exercice de son pouvoir discrétionnaire. Elle a apprécié ces facteurs et tiré à leur égard des conclusions de fait qui étaient raisonnablement étayées par la

unfair conduct that it found to have been established warranted an order under s. 127(1)3 of the Act, removing Québec's trading exemptions. In refusing to make such an order, I am not persuaded that the Commission exercised its discretion unreasonably or, to use the familiar language of review of discretionary orders, committed an error in principle, or acted capriciously, arbitrarily or unjustly.

preuve. Enfin, elle s'est penchée adéquatement sur la question de savoir si la conduite abusive et injuste qu'elle a constatée justifiait la délivrance, sous le régime de la disposition 3 du par. 127(1) de la Loi, d'une ordonnance retirant les dispenses du Québec. Je ne suis pas convaincu qu'en refusant de rendre une telle ordonnance, la Commission ait exercé son pouvoir discrétionnaire de façon déraisonnable ou, pour reprendre les termes usuels du contrôle des ordonnances discrétionnaires, qu'elle ait commis une erreur de principe, ou ait agi de façon capricieuse, arbitraire ou injuste.

Further, Laskin J.A. held that the Divisional Court erred in considering only the effect of the transaction. He stated that this was relevant and was considered by the panel, but it acted reasonably in considering other factors as well. Laskin J.A. was also of the view that it was relevant to consider the motivation of the Quebec Government, and that the panel's findings in this regard were reasonable.

33 Le juge Laskin a conclu que la Cour divisionnaire avait commis une erreur en ne considérant que l'effet de l'opération. Il a déclaré que ce facteur était pertinent et qu'il avait été pris en considération par la CVMO, mais que la CVMO avait agi de façon raisonnable en tenant aussi compte d'autres facteurs. Le juge Laskin estimait aussi qu'il était pertinent de tenir compte de la motivation du gouvernement du Québec et que les conclusions de la CVMO à cet égard étaient raisonnables.

Laskin J.A. held that the panel's finding that there was not a sufficient Ontario connection was reasonably supported by the evidence and therefore not reviewable. Laskin J.A. rejected the appellant's alternative argument that the panel had erred in giving the connection to Ontario and the intention to avoid Ontario law too much weight. According to Laskin J.A., the panel acted reasonably in emphasizing these factors.

34 Le juge Laskin a estimé que la conclusion de la CVMO portant qu'il n'y avait pas de lien suffisant avec l'Ontario était raisonnablement étayée par la preuve et, partant, qu'elle ne donnait pas ouverture au contrôle judiciaire. Le juge Laskin a rejeté l'argument subsidiaire de l'appelant selon lequel la CVMO avait commis une erreur en accordant trop de poids au lien avec l'Ontario et à l'intention de contourner la loi ontarienne. Selon le juge Laskin, la CVMO avait agi raisonnablement en soulignant ces facteurs.

Laskin J.A. also held that the panel's conclusions that the public was not misled and could not have reasonably relied on the statements of Quebec's Minister of Finance were reasonably supported by the record and therefore not reviewable. Furthermore, Laskin J.A. held that the panel had to consider the potential for future harm to the integrity of Ontario's capital markets and the likelihood that Quebec's unfair treatment of investors would be repeated.

35 Le juge Laskin a aussi statué que les conclusions de la CVMO selon lesquelles le public n'avait pas été induit en erreur et ne pouvait raisonnablement pas agir sur la foi des déclarations du ministre des Finances du Québec étaient raisonnablement étayées par la preuve au dossier et ne donnaient donc pas ouverture au contrôle judiciaire. Il a ajouté que la CVMO devait apprécier la possibilité d'une atteinte future à l'intégrité des marchés financiers de l'Ontario et la probabilité qu'un traitement injuste des investisseurs de la part du Québec se répète.

36 With respect to the fourth error noted by the Court of Appeal, Laskin J.A. held that the Divisional Court erred by focussing only on investor abuse and viewing s. 127(1), para. 3 as remedial. It was the opinion of the court that s. 127(1), para. 3 is not remedial (at p. 272):

> The purpose of the Commission's public interest jurisdiction is neither remedial nor punitive; it is protective and preventive, intended to be exercised to prevent likely future harm to Ontario's capital markets. The past conduct of offending market participants is relevant but only to assessing whether their future conduct is likely to harm the integrity of the capital markets.

37 Finally, Laskin J.A. commented on the Divisional Court order. He held that the Divisional Court had no jurisdiction to make the order in respect of future costs. However, he was of the view that the court did have the jurisdiction to include the other aspects of the order, but held that it ought not to have. Rather, it should have remitted the matter back to the OSC to determine what order should be made.

III. Issues on Appeal

38 There are three main issues in this appeal:

1. What is the nature and scope of s. 127 jurisdiction to intervene in the public interest?
2. What is the appropriate standard of review?
3. Did the OSC make a reviewable error?

IV. Analysis

1. *What Is the Nature and Scope of Section 127 Jurisdiction to Intervene in the Public Interest?*

39 Section 127(1) of the Act provides the OSC with the jurisdiction to intervene in activities related to the Ontario capital markets when it is in the public

Quant à la quatrième erreur relevée par la Cour d'appel, le juge Laskin a conclu que la Cour divisionnaire avait commis une erreur en se concentrant uniquement sur l'abus envers les investisseurs et en considérant la disposition 3 du par. 127(1) comme si elle avait un caractère réparateur. La Cour d'appel était d'avis que la disposition 3 du par. 127(1) n'a pas un caractère réparateur (à la p. 272) :

> [TRADUCTION] La fin visée par la compétence relative à l'intérêt public de la Commission n'est ni réparatrice, ni punitive; elle est de nature protectrice et préventive et elle est destinée à être exercée pour prévenir le risque d'un éventuel préjudice aux marchés financiers en Ontario. La conduite passée d'intervenants fautifs dans le marché n'est pertinente qu'en ce qui a trait à l'évaluation de la probabilité que leur conduite future soit préjudiciable à l'intégrité des marchés financiers.

Le juge Laskin a en dernier lieu commenté l'ordonnance de la Cour divisionnaire. Il a conclu que la Cour divisionnaire n'avait pas compétence pour rendre une ordonnance visant les dépens à venir. Il était toutefois d'avis que la cour avait compétence pour inclure les autres aspects de l'ordonnance, mais qu'elle aurait dû s'en abstenir. Elle aurait plutôt dû renvoyer l'affaire devant la CVMO pour que celle-ci détermine quelle ordonnance devrait être rendue.

III. Les questions soulevées par le pourvoi

Le pourvoi soulève trois questions principales :

1. Quelle est la nature et la portée de la compétence pour intervenir en matière d'intérêt public conférée par l'art. 127?
2. Quelle est la norme de contrôle appropriée?
3. La CVMO a-t-elle commis une erreur donnant ouverture au contrôle judiciaire?

IV. Analyse

1. *Quelle est la nature et la portée de la compétence pour intervenir en matière d'intérêt public conférée par l'art. 127?*

Le paragraphe 127(1) de la Loi confère à la CVMO la compétence pour intervenir dans les activités liées aux marchés financiers en Ontario

interest to do so. The legislature clearly intended that the OSC have a very wide discretion in such matters. The permissive language of s. 127(1) expresses an intent to leave it for the OSC to determine whether and how to intervene in a particular case:

127. (1) The Commission may make one or more of the following orders if in its opinion it is in the public interest to make the order or orders .... [Emphasis added.]

The breadth of the OSC's discretion to act in the public interest is also evident in the range and potential seriousness of the sanctions it can impose under s. 127(1). Furthermore, pursuant to s. 127(2), the OSC has an unrestricted discretion to attach terms and conditions to any order made under s. 127(1):

(2) An order under this section may be subject to such terms and conditions as the Commission may impose.

However, the public interest jurisdiction of the OSC is not unlimited. Its precise nature and scope should be assessed by considering s. 127 in context. Two aspects of the public interest jurisdiction are of particular importance in this regard. First, it is important to keep in mind that the OSC's public interest jurisdiction is animated in part by both of the purposes of the Act described in s. 1.1, namely "to provide protection to investors from unfair, improper or fraudulent practices" and "to foster fair and efficient capital markets and confidence in capital markets". Therefore, in considering an order in the public interest, it is an error to focus only on the fair treatment of investors. The effect of an intervention in the public interest on capital market efficiencies and public confidence in the capital markets should also be considered.

lorsqu'il est dans l'intérêt public qu'elle le fasse. Le législateur a clairement voulu que la CVMO ait un très vaste pouvoir discrétionnaire en cette matière. Le libellé facultatif du par. 127(1) exprime l'intention de laisser à la CVMO le soin d'apprécier l'opportunité et la manière d'intervenir dans une affaire particulière :

127. (1) La Commission peut, si elle est d'avis qu'il est dans l'intérêt public de le faire, rendre une ou plusieurs des ordonnances suivantes ... [Je souligne.]

40 La portée du pouvoir discrétionnaire de la CVMO d'agir dans l'intérêt public ressort aussi de façon évidente de la gamme et de la gravité potentielle des sanctions qu'elle est habilitée à imposer en vertu du par. 127(1). De plus, en vertu du par. 127(2), la CVMO dispose sans restriction du pouvoir discrétionnaire d'adjoindre des conditions à toute ordonnance rendue en vertu du par. 127(1) :

(2) L'ordonnance rendue en vertu du présent article peut être assortie des conditions qu'impose la Commission.

41 La compétence relative à l'intérêt public de la CVMO n'est toutefois pas illimitée. Sa nature et sa portée précises doivent être appréciées par une analyse de l'art. 127 dans son contexte. Deux aspects de la compétence relative à l'intérêt public revêtent une importance particulière à cet égard. En premier lieu, il importe de se rappeler que la compétence relative à l'intérêt public de la CVMO est fondée en partie sur les deux objets de la Loi, décrits à l'art. 1.1, à savoir « protéger les investisseurs contre les pratiques déloyales, irrégulières ou frauduleuses » et « favoriser des marchés financiers justes et efficaces et la confiance en ceux-ci ». Par conséquent, lorsqu'il s'agit d'examiner une ordonnance rendue dans l'intérêt public, c'est commettre une erreur que de ne se concentrer que sur le traitement équitable des investisseurs. Il faut aussi prendre en considération l'incidence d'une intervention dans l'intérêt public sur l'efficacité des marchés financiers et sur la confiance du public en ces marchés financiers.

42 Second, it is important to recognize that s. 127 is a regulatory provision. In this regard, I agree with Laskin J.A. that "[t]he purpose of the Commission's public interest jurisdiction is neither remedial nor punitive; it is protective and preventive, intended to be exercised to prevent likely future harm to Ontario's capital markets" (p. 272). This interpretation of s. 127 powers is consistent with the previous jurisprudence of the OSC in cases such as *Canadian Tire*, *supra*, aff'd (1987), 59 O.R. (2d) 79 (Div. Ct.); leave to appeal to C.A. denied (1987), 35 B.L.R. xx, in which it was held that no breach of the Act is required to trigger s. 127. It is also consistent with the objective of regulatory legislation in general. The focus of regulatory law is on the protection of societal interests, not punishment of an individual's moral faults: see *R. v. Wholesale Travel Group Inc.*, [1991] 3 S.C.R. 154, at p. 219.

En deuxième lieu, il importe de reconnaître que l'art. 127 est une disposition de nature réglementaire. À cet égard, j'abonde dans le sens du juge Laskin lorsqu'il dit que [TRADUCTION] « [l]a fin visée par la compétence relative à l'intérêt public de la CVMO n'est ni réparatrice, ni punitive; elle est de nature protectrice et préventive et elle est destinée à être exercée pour prévenir le risque d'un éventuel préjudice aux marchés financiers en Ontario » (p. 272). Cette interprétation des pouvoirs conférés par l'art. 127 s'harmonise avec la jurisprudence de la CVMO dans des affaires comme *Canadian Tire*, précitée, conf. par (1987), 59 O.R. (2d) 79 (C. div.), autorisation d'interjeter appel à la C.A. refusée (1987), 35 B.L.R. xx, où les tribunaux ont reconnu qu'il n'est pas nécessaire qu'il y ait violation de la Loi pour que l'art. 127 s'applique. Elle s'accorde aussi à l'objet des lois de nature réglementaire en général. La visée d'une loi de nature réglementaire est la protection des intérêts de la société, et non la sanction des fautes morales d'une personne : voir l'arrêt *R. c. Wholesale Travel Group Inc.*, [1991] 3 R.C.S. 154, p. 219.

43 Furthermore, the above interpretation is consistent with the scheme of enforcement in the Act. The enforcement techniques in the Act span a broad spectrum from purely regulatory or administrative sanctions to serious criminal penalties. The administrative sanctions are the most frequently used sanctions and are grouped together in s. 127 as "Orders in the public interest". Such orders are not punitive: *Re Albino* (1991), 14 O.S.C.B. 365. Rather, the purpose of an order under s. 127 is to restrain future conduct that is likely to be prejudicial to the public interest in fair and efficient capital markets. The role of the OSC under s. 127 is to protect the public interest by removing from the capital markets those whose past conduct is so abusive as to warrant apprehension of future conduct detrimental to the integrity of the capital markets: *Re Mithras Management Ltd.* (1990), 13 O.S.C.B. 1600. In contradistinction, it is for the courts to punish or remedy past conduct under ss. 122 and 128 of the Act respectively: see

De plus, cette interprétation est compatible avec les moyens retenus pour l'application de la Loi. Les techniques d'application de la Loi embrassent un large éventail allant des sanctions purement réglementaires ou administratives aux sanctions pénales graves. Les sanctions administratives sont celles qui servent le plus fréquemment et elles sont regroupées à l'art. 127 sous l'intertitre « Ordonnances rendues dans l'intérêt public ». Ces ordonnances ne sont pas de nature punitive : *Re Albino* (1991), 14 O.S.C.B. 365. L'objet d'une ordonnance rendue en vertu de l'art. 127 est plutôt de limiter la conduite future qui risque de porter atteinte à l'intérêt public dans le maintien de marchés financiers justes et efficaces. Le rôle de la CVMO en vertu de l'art. 127 consiste à protéger l'intérêt public en retirant des marchés financiers les personnes dont la conduite antérieure est à ce point abusive qu'elle justifie la crainte d'une conduite ultérieure susceptible de nuire à l'intégrité des marchés financiers : *Re Mithras Management Ltd.* (1990), 13 O.S.C.B. 1600. Par contraste, c'est aux cours de justice qu'il appartient de punir ou de

D. Johnston and K. Doyle Rockwell, *Canadian Securities Regulation* (2nd ed. 1998), at pp. 209-11.

corriger une conduite antérieure, en vertu respectivement des art. 122 et 128 de la Loi : voir D. Johnston et K. Doyle Rockwell, *Canadian Securities Regulation* (2e éd. 1998), p. 209-211.

More specifically, s. 122 makes it an offence to contravene the Act and, though the OSC's consent is required before a proceeding under s. 122 can commence, the provision authorizes the courts to impose fines and terms of imprisonment. Under s. 128, the OSC may apply to the Ontario Court (General Division) for a declaratory order. In making such an order, the courts may resort to a wide range of remedial powers detailed in that section, including an order for compensation or restitution which would be aimed at providing a remedy for harm suffered by private parties or individuals. In addition, further remedial powers are available under Part XXIII of the Act which deals with civil liability for misrepresentation and tipping and creates rights of action for rescission and damages.

44 Plus précisément, l'art. 122 sanctionne par une infraction le fait de contrevenir à la Loi et, bien que le consentement de la CVMO soit nécessaire pour que des poursuites puissent être engagées en vertu de l'art. 122, autorise les tribunaux à imposer des amendes et des peines d'emprisonnement. L'article 128 permet à la CVMO de demander à la Cour de l'Ontario (Division générale) de rendre une ordonnance déclaratoire. Lorsqu'ils sont appelés à rendre une telle ordonnance, les tribunaux peuvent exercer une vaste gamme de pouvoirs réparateurs détaillés dans cet article, y compris prononcer une ordonnance d'indemnisation ou de restitution visant à dédommager des parties privées ou des particuliers pour les préjudices qu'ils ont subis. D'autres pouvoirs correctifs sont aussi prévus à la Partie XXIII de la Loi, laquelle porte sur la responsabilité civile découlant de la présentation inexacte de faits et de la communication de renseignements sur le marché et prévoit des recours en annulation et en dommages-intérêts.

In summary, pursuant to s. 127(1), the OSC has the jurisdiction and a broad discretion to intervene in Ontario capital markets if it is in the public interest to do so. However, the discretion to act in the public interest is not unlimited. In exercising its discretion, the OSC should consider the protection of investors and the efficiency of, and public confidence in, capital markets generally. In addition, s. 127(1) is a regulatory provision. The sanctions under the section are preventive in nature and prospective in orientation. Therefore, s. 127 cannot be used merely to remedy *Securities Act* misconduct alleged to have caused harm or damages to private parties or individuals.

45 En résumé, sous le régime du par. 127(1), la CVMO a la compétence et un large pouvoir discrétionnaire pour intervenir dans les marchés financiers en Ontario lorsqu'il est dans l'intérêt public qu'elle le fasse. Le pouvoir d'agir dans l'intérêt public n'est toutefois pas illimité. Lorsqu'elle est appelée à exercer son pouvoir discrétionnaire, la CVMO doit prendre en considération la protection des investisseurs et l'efficacité des marchés financiers ainsi que la confiance du public en ceux-ci en général. De plus, le par. 127(1) est une disposition de nature réglementaire. Les sanctions qui y sont prévues sont de nature préventive et axées sur l'avenir. L'article 127 ne peut donc être invoqué par une partie privée ou un particulier simplement pour réparer une transgression de la *Loi sur les valeurs mobilières* qui lui aurait causé un préjudice ou des dommages.

2. What Is the Appropriate Standard of Review?

46 A determination of the appropriate standard of review calls for the application of the "pragmatic and functional" approach first adopted by this Court in *U.E.S., Local 298 v. Bibeault*, [1988] 2 S.C.R. 1048. That approach was further developed by this Court in cases such as *Pezim*, *supra*, and *Southam*, *supra*.

47 The recent jurisprudence of this Court on standards of review was summarized by Bastarache J. in *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982. The focus of the inquiry is on the particular provision being interpreted by the tribunal, and the central question is: was the question that the provision raises one that was intended by the legislators to be left to the exclusive decision of the administrative tribunal? There are four factors that are used to determine the appropriate degree of curial deference: (i) privative clauses; (ii) relative expertise of the tribunal; (iii) the purpose of the Act as a whole and the provision in particular; and (iv) the nature of the problem: a question of law or fact? None of the four factors is alone dispositive. Each factor indicates a point falling on a spectrum of the proper level of deference to be shown to the decision in question.

48 Most recently, in *Trinity Western University v. British Columbia College of Teachers*, [2001] 1 S.C.R. 772, 2001 SCC 31, at para. 17, it was emphasized that *Pushpanathan* did not modify the decisions of this Court in *Pezim* and *Southam* noted above. In fact, in my view, this Court's decision in *Pezim* is particularly applicable to the present appeal, since both cases concern the exercise of a provincial securities commission's discretion to determine what is in the public interest.

49 In this case, as in *Pezim*, it cannot be contested that the OSC is a specialized tribunal with a wide discretion to intervene in the public interest and that the protection of the public interest is a matter falling within the core of the OSC's expertise. Therefore, although there is no privative clause

2. Quelle est la norme de contrôle appropriée?

La détermination de la norme de contrôle appropriée nécessite l'application de l'analyse « pragmatique et fonctionnelle » adoptée pour la première fois par notre Cour dans l'arrêt *U.E.S., Local 298 c. Bibeault*, [1988] 2 R.C.S. 1048. Cette méthode a été reprise par notre Cour dans des arrêts comme *Pezim* et *Southam*, précités.

Le juge Bastarache a résumé la jurisprudence récente de notre Cour portant sur les normes de contrôle dans l'arrêt *Pushpanathan c. Canada (Ministre de la Citoyenneté et de l'Immigration)*, [1998] 1 R.C.S. 982. L'examen effectué met l'accent sur la disposition particulière interprétée par le tribunal et la question centrale est la suivante : la question soulevée par la disposition est-elle une question que le législateur voulait assujettir au pouvoir décisionnel exclusif du tribunal administratif? Quatre facteurs servent à déterminer le degré de retenue judiciaire approprié : (i) les clauses privatives; (ii) l'expertise relative du tribunal; (iii) l'objet de la loi dans son ensemble et de la disposition en cause; et (iv) la nature du problème : question de droit ou de fait? Aucun de ces facteurs n'est décisif. Chaque facteur fournit une indication s'inscrivant sur le continuum du degré de retenue judiciaire approprié pour la décision en cause.

Plus récemment, dans l'arrêt *Université Trinity Western c. British Columbia College of Teachers*, [2001] 1 R.C.S. 772, 2001 CSC 31, par. 17, on a souligné que l'arrêt *Pushpanathan* n'a pas modifié les décisions de notre Cour dans les affaires *Pezim* et *Southam* susmentionnées. En fait, à mon avis, la décision de notre Cour dans l'affaire *Pezim* est particulièrement applicable au présent pourvoi puisqu'il s'agit dans les deux cas de l'exercice du pouvoir discrétionnaire d'une commission des valeurs mobilières appelée à déterminer ce qui est dans l'intérêt public.

En l'espèce, comme dans l'affaire *Pezim*, il est incontestable que la CVMO est un tribunal spécialisé ayant un vaste pouvoir discrétionnaire d'intervention dans l'intérêt public et que la protection de l'intérêt public est une matière qui se situe dans le domaine d'expertise fondamental du tribunal. Par

shielding the decisions of the OSC from review by the courts, that body's relative expertise in the regulation of the capital markets, the purpose of the Act as a whole and s. 127(1) in particular, and the nature of the problem before the OSC, all militate in favour of a high degree of curial deference. However, as there is a statutory right of appeal from the decision of the OSC to the courts, when this factor is considered with all the other factors, an intermediate standard of review is indicated. Accordingly, the standard of review in this case is one of reasonableness.

3. *Did the OSC Make a Reviewable Error?*

(a) The Interpretation of the OSC Decision

The parties to this appeal offer two different interpretations of the OSC reasons for judgment. The proper interpretation depends on how one views the OSC's treatment of the issue of the transactional connection with Ontario and the motive for structuring the transaction as it was done in this case. The appellant argues that the OSC "adopted a transactional nexus as a jurisdictional precondition" and "imposed an alternative prerequisite" by requiring "proof of a conscious motive to evade regulation as a precondition to the exercise of its public interest jurisdiction". The appellant argues that by failing to consider other factors affecting an assessment of the public interest the OSC "failed or refused to carry out the mandate vested in it by the Legislature". In contrast, the respondents argue that the OSC considered the transactional connection as one of many factors relevant to the exercise of its discretion, and that it was appropriate for the OSC to consider motive as a factor in deciding whether it would exercise its public interest jurisdiction in this case.

conséquent, même en l'absence d'une clause privative mettant les décisions de la CVMO à l'abri du contrôle judiciaire, l'expertise relative de cet organisme dans la réglementation des marchés financiers, l'objet de la Loi dans son ensemble et du par. 127(1) en particulier, et la nature du problème soumis à la CVMO penchent pour un degré de retenue judiciaire élevé. Il faut toutefois tenir compte d'un autre facteur, à savoir le fait que la Loi prévoit un droit d'interjeter appel de la décision de la CVMO devant les tribunaux; lorsque ce facteur est pris en considération avec tous les autres facteurs, c'est une norme de contrôle intermédiaire qui semble indiquée. En l'espèce, la norme de contrôle est donc celle du caractère raisonnable.

3. *La CVMO a-t-elle commis une erreur donnant ouverture au contrôle judiciaire?*

(a) L'interprétation de la décision de la CVMO

Les parties au pourvoi font valoir deux interprétations différentes des motifs de la décision de la CVMO. L'interprétation juste dépend de notre perception de la façon dont la CVMO a traité la question du lien transactionnel avec l'Ontario et la motivation à l'origine du choix de la structure de l'opération en l'espèce. L'appelant prétend que la CVMO [TRADUCTION] « a adopté un rapport transactionnel comme condition préalable à l'exercice de sa compétence » et « imposé un prérequis subsidiaire » en exigeant « la preuve d'une motivation consciente consistant à contourner la réglementation comme condition préalable à l'exercice de sa compétence relative à l'intérêt public ». L'appelant prétend qu'en omettant d'examiner d'autres facteurs ayant une incidence sur la détermination de ce qui était dans l'intérêt public, la CVMO a [TRADUCTION] « omis ou refusé de s'acquitter de la mission que lui a confiée le législateur ». À l'opposé, les intimées prétendent que la CVMO a examiné le lien transactionnel comme l'un des nombreux facteurs pertinents à l'exercice de son pouvoir discrétionnaire, et que la CVMO était fondée à se pencher sur la motivation comme facteur pour décider s'il y avait lieu d'exercer sa compétence relative à l'intérêt public en l'espèce.

50

51 I agree with Laskin J.A. that "the Commission did not set up any jurisdictional preconditions to the exercise of its discretion" (p. 273). In my view, the erection of such a jurisdictional barrier by the OSC is inconsistent with its having fought in the earlier proceedings for the recognition of its jurisdiction to hear this matter. Furthermore, in its reasons in the present case, the OSC clearly rejected the idea that the transactional connection factor could act as a jurisdictional barrier to the exercise of its public interest discretion. At para. 63, the OSC quoted the decision of McKinlay J.A. in the earlier proceedings rejecting a transactional connection with Ontario as an implied precondition to the exercise of its s. 127 jurisdiction. The OSC then continued, at para. 64:

> . . . we regard this statement as a refusal to impose a "sufficient Ontario connection" as a jurisdictional requirement which must be satisfied in any clause 127(1)3 proceedings before the Commission's discretion arises, thus leaving it to the Commission to make the necessary discretionary determination unencumbered by any a priori requirement imposed by the court as a matter of interpretation of the statutory provision.

52 Moreover, at para. 68 of its reasons, rather than raising "transactional connection" as a jurisdictional barrier, the OSC identified the transactional connection with Ontario as one of several relevant factors to be considered in determining whether to exercise its public interest discretion, including, *inter alia*, the motive behind the structure of the transaction at issue:

> Were the transactions before us "clearly abusive of investors and of the capital markets," to quote *Canadian Tire*? Were they "clearly designed to avoid the animating principles behind [the take-over bid] legislation and rules," to quote the same decision? Were they "clearly abusive of the integrity of the capital markets, which have every right to expect that market participants . . .

Je partage l'avis du juge Laskin selon lequel [TRADUCTION] « la Commission n'a établi aucune condition juridictionnelle préalable à l'exercice de son pouvoir discrétionnaire » (p. 273). Selon moi, l'établissement d'une telle barrière à l'exercice de sa compétence serait en contradiction avec la fermeté avec laquelle la CVMO a lutté, au cours des procédures antérieures, afin de faire reconnaître sa compétence pour connaître de cette matière. De plus, dans ses motifs en l'espèce, la CVMO a clairement rejeté l'idée selon laquelle le facteur du lien transactionnel pouvait agir comme une entrave juridictionnelle à l'exercice de son pouvoir discrétionnaire relatif à l'intérêt public. Au paragraphe 63, la CVMO cite la décision rendue par le juge McKinlay de la Cour d'appel, dans les procédures antérieures, rejetant l'hypothèse selon laquelle un lien transactionnel avec l'Ontario serait une condition préalable implicite à l'exercice de sa compétence en vertu de l'art. 127. Et la CVMO de poursuivre en ces termes, au par. 64 :

> [TRADUCTION] . . . nous voyons dans cette déclaration un refus d'imposer un « lien suffisant avec l'Ontario » comme exigence relative à la compétence à laquelle il faut satisfaire dans toute poursuite fondée sur la disposition 3 du par. 127(1) pour que le pouvoir discrétionnaire de la Commission soit applicable, de sorte qu'il appartient à la Commission de décider d'exercer son pouvoir discrétionnaire lorsque cela est nécessaire, sans être entravée par une exigence préliminaire que lui imposerait un tribunal par suite de son interprétation de cette disposition législative.

De plus, au par. 68 de ses motifs, plutôt que de soulever le « lien transactionnel » avec l'Ontario comme une entrave juridictionnelle, la CVMO l'a identifié comme un facteur parmi plusieurs facteurs pertinents sur lesquels elle doit se pencher lorsqu'elle est appelée à déterminer s'il y a lieu d'exercer son pouvoir discrétionnaire relatif à l'intérêt public, y compris la motivation qui sous-tend la structuration de l'opération en cause :

> [TRADUCTION] Les opérations dénoncées étaient-elles « clairement abusives envers les investisseurs et les marchés financiers », pour reprendre les termes de la décision *Canadian Tire*? Étaient-elles « clairement conçues de façon à contourner les principes directeurs qui sous-tendent la Loi et les règles [régissant les offres d'achat visant à la mainmise] », pour citer la même

will adhere to both the letter and the spirit of the rules that are intended to guarantee equal treatment of offerees in the course of a take-over bid, no matter by whom the bid is made" and is the result "manifestly unfair to the public minority shareholders . . . who lose the opportunity to tender their shares . . . at a substantial premium" to quote *H.E.R.O.*? And finally, does "the transaction in question [have] a sufficient Ontario connection or 'nexus' to warrant intervention to protect the integrity of the capital markets in the province", to quote that decision?

décision? Portaient-elles « clairement atteinte à l'intégrité des marchés financiers, qui ont absolument le droit de s'attendre à ce que les personnes qui participent aux marchés . . . respectent l'esprit tout autant que la lettre des règles cherchant à garantir un traitement égal aux sollicités dans le cadre d'une offre d'achat visant à la mainmise, quelle que soit la personne qui présente l'offre », et le résultat est-il « manifestement injuste envers les actionnaires minoritaires publics . . . qui perdent l'occasion d'offrir leurs actions . . . à un prix substantiel », pour reprendre la décision *H.E.R.O.*? Enfin, « l'opération en cause a-t-elle un lien ou un "rapport" suffisant avec l'Ontario pour justifier une intervention visant à protéger l'intégrité des marchés financiers dans la province », pour citer cette décision?

Although in its reasoning, the OSC placed significant weight on the transactional connection factor, it did not, as alleged by the appellant, stop the inquiry upon finding there was an insufficient transactional connection with Ontario. Furthermore, in this respect, it was appropriate for the OSC to consider, as a factor relevant to the determination of whether to exercise its public interest jurisdiction in this case, the presence or absence of a motivation to structure the transaction so as to make what was essentially an Ontario transaction appear to be a non-Ontario transaction. In effect, the OSC found that what could otherwise appear to be the absence of an Ontario connection might be overcome by a finding that a transaction was improperly and deliberately structured so as to give such an appearance.

53 Même si, dans son raisonnement, la CVMO a accordé un poids significatif au facteur du lien transactionnel, elle n'a pas, ainsi que le prétend l'appelant, mis fin au processus d'examen immédiatement après avoir conclu au caractère insuffisant du lien transactionnel avec l'Ontario. De plus, à cet égard, la CVMO était fondée à considérer, comme facteur pertinent pour décider s'il y a lieu d'exercer sa compétence relative à l'intérêt public en l'espèce, l'existence ou l'absence d'une volonté de structurer l'opération de façon à donner à une opération essentiellement ontarienne l'apparence d'une opération étrangère. En fait, la CVMO a conclu qu'il est possible de réfuter ce qui pourrait autrement paraître une absence de lien avec l'Ontario par une conclusion portant qu'une opération a été structurée de façon irrégulière et intentionnelle pour créer une telle apparence.

The Court of Appeal correctly confirmed that it was appropriate for the OSC to consider motive as a factor in deciding whether it would exercise its public interest jurisdiction (at p. 277):

54 La Cour d'appel a confirmé à bon droit que la CVMO était fondée à considérer la motivation comme un facteur pour décider s'il y avait lieu d'exercer sa compétence relative à l'intérêt public (à la p. 277) :

The Commission also reasonably considered whether Québec and SNA intended to avoid Ontario law as relevant to the exercise of its discretion under s. 127(1)3. As I have already said, the purpose of an order under that section is to protect the Ontario capital markets by removing a participant who, based on past misconduct, represents a continuing or future threat to the integrity of these markets. Therefore, the Commission could not focus only on the effect of the transaction. This transaction was lawful. The Commission had to consider

[TRADUCTION] La Commission a aussi raisonnablement considéré la question de savoir si le Québec et la SNA cherchaient intentionnellement à éviter le droit de l'Ontario comme un facteur pertinent à l'exercice de son pouvoir discrétionnaire en vertu de la disposition 3 du par. 127(1). Ainsi qu'il a été mentionné plus haut, l'objet visé par une ordonnance rendue en vertu de cet article est de protéger les marchés financiers en Ontario en retirant tout participant qui, par son inconduite passée, présente une menace continue ou future pour l'intégrité

whether the Québec Government deliberately attempted to avoid the requirements of the Act . . . .

de ces marchés. Par conséquent, la Commission ne peut limiter son examen au seul effet de l'opération. Cette opération était légale. La Commission était tenue d'examiner la question de savoir si le gouvernement du Québec a tenté délibérément d'échapper aux exigences de la Loi . . .

Therefore, Québec's intention was relevant.

L'intention du Québec était donc pertinente.

55 The OSC did not identify motive as a precondition to the exercise of its public interest jurisdiction. On the contrary, the OSC held that it could consider motive as a factor in deciding whether to exercise the jurisdiction that it clearly had. Indeed, the OSC saw motive as a factor that might prompt it to make an order that it may not otherwise have made. Rather than a limitation on jurisdiction, the OSC considered motive as enlarging the circumstances under which the public interest would warrant intervention.

La CVMO n'a pas considéré la motivation comme une condition préalable à l'exercice de sa compétence relative à l'intérêt public. Au contraire, la CVMO a statué qu'elle pouvait considérer la motivation comme un facteur lui permettant de décider s'il y avait lieu d'exercer la compétence qu'elle avait clairement. En fait, la CVMO a perçu la motivation comme un facteur qui pourrait la convaincre de rendre une ordonnance qu'autrement elle n'aurait peut-être pas rendue. Plutôt qu'une entrave à sa compétence, la CVMO a considéré la motivation comme un moyen d'étendre la gamme des circonstances dans lesquelles l'intérêt public pourrait justifier son intervention.

56 In summary, I agree with Laskin J.A. that "[the OSC] did not consider a transactional connection and an intention to avoid Ontario law to be, as the Divisional Court contended, jurisdictional barriers or preconditions to an order under s. 127(1)3 of the Act" (pp. 277-78). The OSC clearly and properly rejected the argument that its public interest jurisdiction was subject to an implicit precondition. In analyzing the appellant's application for a remedy under s. 127(1), para. 3, the OSC proceeded by identifying and considering several factors relevant to the exercise of its discretion under that provision. The transactional connection with Ontario and the motive behind the structure of the transaction were two of several factors considered. I also agree with Laskin J.A. that the OSC "took into account and indeed gave prominence to factors that were relevant to the exercise of its discretion. It weighed those factors and made findings of fact on them . . . " (p. 273). Therefore, properly interpreted, the OSC decision did not adopt any jurisdictional preconditions, but instead exercised the

En résumé, je partage l'avis du juge Laskin selon lequel [TRADUCTION] « [la CVMO] n'a pas considéré un lien transactionnel et une intention d'échapper au droit de l'Ontario, ainsi que l'a prétendu la Cour divisionnaire, comme des entraves ou des conditions préalables juridictionnelles à la délivrance d'une ordonnance en vertu de la disposition 3 du par. 127(1) de la Loi » (p. 277-278). La CVMO a clairement et à bon droit rejeté l'argument selon lequel sa compétence relative à l'intérêt public était assujettie à une condition préalable implicite. Dans son analyse de la demande de réparation présentée par l'appelant sous le régime de la disposition 3 du par. 127(1), la CVMO a identifié et examiné plusieurs facteurs pertinents relativement à l'exercice du pouvoir discrétionnaire que lui confère cette disposition. Le lien transactionnel avec l'Ontario et la motivation sous-tendant la structuration de l'opération constituaient deux des nombreux facteurs examinés. Je partage aussi l'avis du juge Laskin selon lequel la CVMO a [TRADUCTION] « pris en considération, voire souligné, des facteurs qui étaient pertinents relativement à l'exercice de son pouvoir discrétionnaire. Elle a apprécié ces facteurs et tiré à leur égard des

discretion that is incidental to its public interest jurisdiction.

(b) Was the OSC Decision Reasonable?

The OSC was cautious in the application of its public interest jurisdiction in this case. This approach was informed by the OSC's previous jurisprudence and by four legitimate considerations inherent in s. 127 itself: (i) the seriousness and severity of the sanction applied for, (ii) the effect of imposing such a sanction on the efficiency of, and public confidence in Ontario capital markets, (iii) a reluctance to use the open-ended nature of the public interest jurisdiction to police out-of-province activities, and (iv) a recognition that s. 127 powers are preventive in nature, not remedial.

As noted above, in reaching its decision in this case, the OSC relied on its previous jurisprudence in *Canadian Tire*, *supra*, and *H.E.R.O.*, *supra*, to identify the relevant factors to be considered. The OSC found that "the actions of the Quebec Government and SNA failed to comply with the spirit underlying the take-over bid rules of the Act . . . " (para. 71). However, the OSC did not, on the evidence, conclude that the transaction in this case was intentionally structured to avoid Ontario law (at para. 73):

> We were not presented with any evidence that the transaction which finally occurred was structured so as to make an Ontario transaction appear to be a non-Ontario one. This is not the case, like *Canadian Tire*, of "transactions that are clearly designed to avoid the animating principles behind" Ontario's take-over bid legislation and rules. The evidence was clear that the principal (and so far as the evidence went, the sole) purpose for structuring the transaction in its final form was the

conclusions de fait . . . » (p. 273). Par conséquent, une interprétation juste de sa décision révèle que la CVMO n'a pas adopté de conditions préalables juridictionnelles, mais a plutôt exercé le pouvoir discrétionnaire accessoire à sa compétence relative à l'intérêt public.

(b) La décision de la CVMO était-elle raisonnable?

57 La CVMO a fait preuve de circonspection dans l'application de sa compétence relative à l'intérêt public en l'espèce. Cette méthode s'inspirait de la jurisprudence de la CVMO ainsi que de quatre considérations légitimes inhérentes à l'art. 127 lui-même : (i) la gravité et la rigueur de la sanction demandée, (ii) l'effet qu'aurait l'application d'une telle sanction sur l'efficacité des marchés financiers en Ontario ainsi que sur la confiance du public en ceux-ci, (iii) une réticence à invoquer la nature indéterminée de la compétence relative à l'intérêt public pour réglementer des activités qui se déroulent hors de la province, et (iv) la reconnaissance du fait que les pouvoirs conférés par l'art. 127 sont de nature préventive et non réparatrice.

58 Ainsi qu'il a été mentionné plus haut, pour trancher la présente espèce, la CVMO s'est fondée sur sa jurisprudence dans les affaires *Canadian Tire* et *H.E.R.O.*, précitées, pour identifier les facteurs pertinents à examiner. Elle a conclu que [TRADUCTION] « les actes du gouvernement du Québec et de la SNA n'ont pas respecté l'esprit qui sous-tend les règles relatives aux offres d'achat visant à la mainmise édictées dans la Loi . . . » (par. 71). La CVMO n'a toutefois pas conclu, à la lumière de la preuve, que l'opération en cause avait été structurée intentionnellement de façon à contourner le droit ontarien (au par. 73) :

> [TRADUCTION] On ne nous a présenté aucune preuve établissant que l'opération qui a finalement eu lieu était structurée de façon à donner à une opération ontarienne l'apparence d'une opération étrangère. Il ne s'agit pas, comme c'était le cas dans l'affaire *Canadian Tire*, « d'opérations qui sont clairement conçues de façon à éviter les principes directeurs qui sous-tendent » la législation et les règles de l'Ontario régissant les offres d'achat visant à la mainmise. La preuve a établi claire-

minimisation of taxes on the profit received by GD Canada and GD U.S. In our view, the structuring of the transaction was not abusive of the integrity of the capital markets of this province, and cannot be relied on to provide the required nexus.

ment que le motif principal (voire l'unique motif démontré par la preuve) de la structuration de l'opération dans sa forme finale était la réduction des impôts sur le profit réalisé par GD Canada et GD U.S. À notre avis, la structuration de l'opération n'a pas porté atteinte à l'intégrité des marchés financiers de cette province, et elle ne peut être invoquée pour établir le rapport nécessaire.

This finding of fact is reasonable and supported by the evidence.

Cette conclusion de fait est raisonnable et elle est étayée par la preuve.

59 Granted, the OSC did find that "the actions of the Quebec Government and SNA . . . were abusive of the minority shareholders of Asbestos and were manifestly unfair to them" (para. 71). However, whether a s. 127(1) sanction is warranted depends on a consideration of all of the relevant factors together. In this case, the OSC also found that the capital markets in general, and the minority shareholders of Asbestos in particular, were not materially misled by the statements of Quebec's Minister of Finance respecting the prospect of a follow-up offer. This finding is supported by the evidence, including the several published reports that recommended caution and characterized an investment in Asbestos as speculative. In this case, such a finding can and did properly inform the OSC's discretion under s. 127.

La CVMO a, il est vrai, conclu que [TRADUCTION] « les actes du gouvernement du Québec et de la SNA . . . étaient abusifs envers les actionnaires minoritaires d'Asbestos et étaient manifestement injustes à leur égard » (par. 71). Toutefois, la question de savoir s'il y a lieu d'appliquer une sanction sous le régime du par. 127(1) exige un examen de tous les facteurs pertinents ensemble. Dans la présente espèce, la CVMO a aussi conclu que les marchés financiers en général et les actionnaires minoritaires d'Asbestos en particulier n'avaient pas été sensiblement induits en erreur par les déclarations du ministre des Finances du Québec au sujet de la présentation éventuelle d'une offre complémentaire. Cette conclusion est étayée par la preuve, y compris plusieurs rapports publiés recommandant la prudence et caractérisant un investissement dans la société Asbestos comme de nature spéculative. En l'espèce, une telle conclusion pouvait orienter et a effectivement orienté, à bon droit, l'exercice du pouvoir discrétionnaire dont la CVMO est investie par l'art. 127.

60 In addition, consistent with the two purposes of the Act described in s. 1.1 and because s. 127(1) sanctions are preventive in nature, it was open to the OSC to give weight to the fact that there has been no abuse of investors or other misconduct by the province of Quebec or SNA in the 13 years since the transaction at issue in this appeal. The OSC was also entitled to give weight to the fact that the removal of the province's exemptions is a very serious response that could have negative repercussions on other investors and the Ontario capital markets in general.

De plus, conformément aux deux objets de la Loi décrits à l'art. 1.1 et en raison de la nature préventive des sanctions visées au par. 127(1), il était loisible à la CVMO d'accorder du poids au fait que les 13 ans qui ont suivi l'opération en cause n'ont donné lieu à aucune conduite abusive à l'endroit des investisseurs ni à quelque autre conduite incorrecte de la part de la province de Québec ou de la SNA. La CVMO pouvait aussi accorder du poids au fait que le retrait des dispenses de la province est une mesure très grave qui pourrait avoir des incidences négatives sur d'autres investisseurs et sur les marchés financiers en Ontario en général.

Furthermore, the OSC did not find that there was no transactional connection with Ontario in this case, but that the transactional connection was insufficient to justify its intervening in the public interest. As noted by Chairman Beck in his dissenting opinion in *Re Asbestos Corp.* (1988), 11 O.S.C.B. 3419, a review of the OSC decisions on s. 124 (now s. 127) indicates that there has been careful use of the public interest jurisdiction and that in each case there was a clear and direct transactional connection with Ontario, contrary to the facts here: see *H.E.R.O.*, *supra*; *Re Atco Ltd.* (1980), 15 O.S.C.B. 412; *Re Electra Investments (Canada) Ltd.* (1983), 6 O.S.C.B. 417; *Re Turbo Resources Ltd.* (1982), 4 O.S.C.B. 403C; *Re Genstar Corp.* (1982), 4 O.S.C.B. 326C.

61 Par ailleurs, la CVMO n'a pas conclu qu'il n'existait aucun lien transactionnel avec l'Ontario en l'espèce, mais plutôt que le lien transactionnel n'était pas suffisant pour justifier qu'elle intervienne dans l'intérêt public. Ainsi que l'a mentionné le président Beck dans ses motifs de dissidence dans la décision *Re Asbestos Corp.* (1988), 11 O.S.C.B. 3419, il ressort d'une revue des décisions de la CVMO relatives à l'art. 124 (maintenant l'art. 127) que la CVMO a appliqué judicieusement sa compétence relative à l'intérêt public et que, dans chaque affaire, il y avait un lien transactionnel clair et direct avec l'Ontario, ce qui n'est pas le cas en l'espèce : voir *H.E.R.O.*, précité; *Re Atco Ltd.* (1980), 15 O.S.C.B. 412; *Re Electra Investments (Canada) Ltd.* (1983), 6 O.S.C.B. 417; *Re Turbo Resources Ltd.* (1982), 4 O.S.C.B. 403C; *Re Genstar Corp.* (1982), 4 O.S.C.B. 326C.

It is true that the OSC placed significant emphasis on the transactional connection factor. However, it was entitled to do so in order to avoid using the open-ended nature of s. 127 powers as a means to police too broadly out-of-province transactions. Capital markets and securities transactions are becoming increasingly international: see *Global Securities Corp. v. British Columbia (Securities Commission)*, [2000] 1 S.C.R. 494, 2000 SCC 21, at paras. 27-28. There are a myriad of overlapping regulatory jurisdictions governing securities transactions. Under s. 2.1, para. 5 of the Act, one of the fundamental principles that the OSC has to consider is that "[t]he integration of capital markets is supported and promoted by the sound and responsible harmonization and co-ordination of securities regulation regimes". A transaction that is contrary to the policy of the Ontario *Securities Act* may be acceptable under another regulatory regime. Thus, the OSC's insistence on a more clear and direct connection with Ontario in this case reflects a sound and responsible approach to long-arm regulation and the potential for con-

62 Il est vrai que la CVMO a particulièrement mis l'accent sur le facteur du lien transactionnel. Il lui était toutefois loisible de le faire afin d'éviter de se servir de la nature indéterminée des pouvoirs conférés par l'art. 127 comme moyen de réglementer, démesurément, des opérations qui ont lieu à l'extérieur de la province. Les marchés financiers et les opérations boursières deviennent de plus en plus internationaux : voir l'arrêt *Global Securities Corp. c. Colombie-Britannique (Securities Commission)*, [2000] 1 R.C.S. 494, 2000 CSC 21, par. 27-28. Il existe une myriade de compétences concurrentes en matière de réglementation des opérations sur valeurs mobilières. Aux termes de la disposition 5 de l'art. 2.1 de la Loi, l'un des principes fondamentaux dont la CVMO doit tenir compte est que « [l]'harmonisation et la coordination saines et responsables des régimes de réglementation des valeurs mobilières favorisent l'intégration des marchés financiers ». Une opération qui est contraire à la politique de la *Loi sur les valeurs mobilières* de l'Ontario peut être acceptable dans un autre régime de réglementation. Par conséquent, l'insistance de la CVMO pour qu'il y ait un lien plus clair et direct avec l'Ontario reflète une approche juste et responsable à l'égard de la réglementation à longue portée et des possibilités de conflits entre les différents régimes de régle-

flict amongst the different regulatory regimes that govern the capital markets in the global economy.

63 In summary, the reasons of the OSC in this case were informed by the legitimate and relevant considerations inherent in s. 127(1) and in the OSC's previous jurisprudence on public interest jurisdiction. The findings of fact made by the OSC were reasonable and supported by the evidence. I conclude that the decision of the OSC in this case was reasonable and therefore should not be disturbed.

64 For the foregoing reasons, I would dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitors for the appellant: Borden Ladner Gervais, Ottawa.

Solicitors for the respondent Her Majesty in Right of Quebec: Torys, Toronto.

Solicitor for the respondent Ontario Securities Commission: The Ontario Securities Commission, Toronto.

Solicitors for the respondent Société nationale de l'amiante: Blake, Cassels & Graydon, Toronto.

mentation régissant les marchés financiers dans l'économie mondiale.

En résumé, les motifs de la CVMO dans la présente espèce étaient inspirés par les considérations légitimes et pertinentes inhérentes au par. 127(1) et à la jurisprudence de la CVMO portant sur la compétence relative à l'intérêt public. Les conclusions de fait tirées par la CVMO étaient raisonnables et étayées par la preuve. Je conclus que la décision de la CVMO en l'espèce était raisonnable et qu'elle ne devrait donc pas être réformée.

Pour les motifs qui précèdent, je rejetterais le pourvoi avec dépens.

Pourvoi rejeté avec dépens.

Procureurs de l'appelant : Borden Ladner Gervais, Ottawa.

Procureurs de l'intimée Sa Majesté du chef du Québec : Torys, Toronto.

Procureur de l'intimée la Commission des valeurs mobilières de l'Ontario : La Commission des valeurs mobilières de l'Ontario, Toronto.

Procureurs de l'intimée la Société nationale de l'amiante : Blake, Cassels & Graydon, Toronto.

Decisions

ERON MORTGAGE CORPORATION, et. al. [Decision]

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IN THE MATTER OF THE SECURITIES ACT
R.S.B.C. 1996, c. 418

AND

IN THE MATTER OF ERON MORTGAGE CORPORATION, ERON INVESTMENT CORPORATION, ERON FINANCIAL SERV SLOBOGIAN AND FRANK BILLER

PANEL: JOYCE C. MAYKUT, Q.C. VICE CHAIR
BRENT W. AITKEN MEMBER
JOHN K. GRAF MEMBER

SUBMISSIONS JAMES A. (SASHA) ANGUS FOR COMMISSION STAFF
RECEIVED FROM: GEORGE B. COLEMAN

MARK L. SKWAROK FOR THE RESPONDENT
FRANK BILLER

DECISION OF THE COMMISSION

We made our Findings in this matter on November 26, 1999. *See In the Matter of Eron Mortgage Corporation et al*, [1999] 48 BCSC sanctions and costs were received from the Executive Director and from Frank Biller. No submissions were received from any other oral submissions. This decision should be read in conjunction with our Findings.

The respondents in this matter are Eron Mortgage Corporation (Eron Mortgage), Eron Investment Corporation (EIC), Eron Financial (Capital), Brian Slobogian and Frank Biller. We refer to the corporate group generally as "Eron", as we did in the Findings.

We found that all of the respondents:

- traded and distributed securities without being registered and without filing a prospectus, contrary to sections 34 and 61 of th
- made misrepresentations, contrary to section 50(1)(d) of the Act;
- perpetrated a fraud on persons in British Columbia, contrary to section 57(b) of the Act; and
- acted contrary to the public interest.

This is a case of massive fraud and misplaced trust. Investors were seriously misled about the nature of their investments, the level money was being invested and spent. Eron encouraged investors, many of whom were unsophisticated, to trust Eron and they did s abused by the respondents, who acted dishonestly, contrary to the public interest and contrary to fundamental provisions of the Act. financial losses will exceed $170 million. The loss of the investors' health, their happiness and the security they expected to enjoy in

Slobogian and the Corporate Respondents

We found that Slobogian and the corporate respondents traded promissory notes without being registered, contrary to section 34, ar

These sections of the Act are fundamental to investor protection. The breach of these sections by these respondents was a significa

Eron raised about $47.5 million from investors through notes issued by Maxim, Eron Financial, EIC and Capital, of which a maximun costs are paid, the loss to the investing public will be well over $40 million from the sale of notes through Eron.

More serious are our findings with respect to misrepresentation and fraud. We found that these respondents knowingly made misrep securities, contrary to section 50(1)(d), and that they acted fraudulently, contrary to section 57(b). In particular, we found that:

- Eron Mortgage, EIC, Capital, Eron Financial and Slobogian knowingly made untrue statements;
- Eron Mortgage, EIC, Capital, Eron Financial and Slobogian promised investors returns that they knew were not sustainable;
- Eron Mortgage, EIC, Capital, Eron Financial and Slobogian promised terms of repayment that they knew were not achievable
- Slobogian and Eron Mortgage knowingly put investors into mortgages with a lower priority than promised without the investor
- Slobogian and Eron Mortgage knowingly put investors into mortgages that were in higher amounts than promised without the
- Slobogian and Eron Mortgage knowingly raised funds from investors with respect to mortgages with face values that exceed
- Eron Mortgage, EIC, Capital, Eron Financial and Slobogian falsely assured investors that their funds would be properly spen ways, without the investors' knowledge or consent; and
- Eron Mortgage, EIC, Capital, Eron Financial and Slobogian used the funds of subsequent investors to make interest or capita of the investors.

We found that the elements of fraud, dishonesty and deprivation, were clearly established with respect to Slobogian and the corpora exceed $170 million. Dishonesty was apparent from Slobogian's conduct and knowledge, described in our Findings as follows (at pa

> The evidence also clearly establishes dishonesty. Slobogian directly solicited investment from investor was making to investors, and that were being made by Biller and other Eron brokers, were misreprese at Eron and with respect to the management of its investments and projects. He insisted on tight contr with the borrowers. He prepared and approved the hot sheets. He increased mortgages and put new c funds among the projects. He was aware of all of the appraisals that showed the properties were wortl problems with the projects, both through direct contact with them and through warnings he received fr

In making orders under sections 161 and 162 of the Act, the Commission must consider what is in the public interest in the context o circumstances of each case are different, so it is not possible to produce an exhaustive list of all of the factors that the Commission c but the following are usually relevant:

- the seriousness of respondent's conduct,
- the harm suffered by investors as a result of the respondent's conduct,
- the damage done to the integrity of the capital markets in British Columbia by the respondent's conduct,
- the extent to which the respondent was enriched,
- factors that mitigate the respondent's conduct,
- the respondent's past conduct,
- the risk to investors and the capital markets posed by the respondent's continued participation in the capital markets of Britis
- the respondent's fitness to be a registrant or to bear the responsibilities associated with being a director, officer or adviser to
- the need to demonstrate the consequences of inappropriate conduct to those who enjoy the benefits of access to the capital
- the need to deter those who participate in the capital markets from engaging in inappropriate conduct, and
- orders made by the Commission in similar circumstances in the past.

Applying these factors to this case, it has been clearly established, and we have found, that the conduct of Slobogian and the corpor devastated investors and has damaged the integrity of the capital markets of British Columbia. Slobogian and the corporate respond found Slobogian's direct income alone from Eron during the relevant period to be $2.7 million. There is no evidence of mitigating con our capital markets. It is important the orders we make fit these circumstances.

In cases of serious fraud, the Commission has in the past issued orders permanently cease trading issuers and permanently removi *Mindoro Corporation et al*, [1997] 7 BCSC Weekly Summary 13 and *In the Matter of Armstrong* [1999] 8 BCSC Weekly Summary 10 Commission in recent memory and similar orders are clearly warranted in these circumstances.

The respondents breached the Act as a result of their fraudulent activities and also committed other serious contraventions of the Ac these contraventions to reflect the following factors:

- the misrepresentations made by the respondents were with respect to the core of the investors' decision to invest, and playe investments,
- the misrepresentations and fraud pervaded Eron's business,
- the respondents not only breached some of the most fundamental sections of the Act, but did so repeatedly, with respect to r
- the respondents' conduct caused significant harm to a large number of investors, and
- the respondents' conduct damaged the integrity of the capital markets of British Columbia.

The orders we make in this case must also demonstrate to the market the consequences of engaging in this sort of conduct, and est

Accordingly, considering it to be in the public interest, we order:

Sections 161 and 162 – Eron Mortgage, EIC, Capital and Eron Financial

1. under section 161(1)(b) of the Act, that all persons cease trading in securities of Eron Mortgage, EIC, Capital and E

2. under section 161(1)(c) of the Act, that all of the exemptions contained in sections 44 to 47, 74, 75, 98 or 99 do not Financial;

3. under section 162 of the Act, that each of Eron Mortgage, EIC, Capital and Eron Financial pay an administrative pe sections 34 and 61;

4. under section 162 of the Act, that each of Eron Mortgage, EIC, Capital and Eron Financial pay an administrative pe section 50(1)(d);

5. under section 162 of the Act, that each of Eron Mortgage, EIC, Capital and Eron Financial pay an administrative pe section 57(b);

Sections 161 and 162 – Slobogian

6. under section 161(1)(c) of the Act, that all of the exemptions contained in sections 44 to 47, 74, 75, 98 or 99 do not

7. under section 161(1)(d)(i) of the Act, that Slobogian resign any position that he holds as a director or officer of any

8. under section 161(1)(d)(ii) of the Act, that Slobogian is prohibited from acting as a director or officer of any issuer fc

9. under section 161(1)(d)(iii) of the Act, that Slobogian is prohibited from engaging in investor relations activities for t

10. under section 162 of the Act, that Slobogian pay an administrative penalty of $100,000 for his contraventions of s

11. under section 162 of the Act, that Slobogian pay an administrative penalty of $100,000 for his contraventions of s

12. under section 162 of the Act, that Slobogian pay an administrative penalty of $100,000 for his contraventions of s

Biller

Biller also contravened section 34 and 61. It was his responsibility to ensure, in the absence of applicable exemptions, that he was r prospectus was filed with respect to the securities he was distributing. However, considering the respective roles of Biller and Slobo Slobogian as having the greater responsibility of the two to ensure that Eron's operations were conducted in accordance with the rec have made.

We found that Biller knowingly made misrepresentations with the intention of effecting trades in securities, contrary to section 50(1)((b). There is a difference, however, made clear in our Findings, in the culpability of Biller from that of Slobogian and the corporate re to some of Biller's conduct, we did not find that Biller had actual knowledge of all of the wrongdoing at Eron. We also found the follov

First, Biller did the following:

- Upon becoming aware of the EIC problem, he questioned Slobogian about the shortfall.
- After the EIC meeting, he tried to organize a comprehensive due diligence effort through the brokers.
- After Slobogian ended that plan, he continued to seek information on projects.
- He refused to fund new loans that he and Lehner believed did not make sense.
- He actively sought information from Pricewaterhouse and Eron's counsel on the situation and asked to be copied on all corre
- When overfunding concerns came to his attention about Arrowhead, STGR, Emerald Estates, Nexus and Shuswap, he stopp of the Reale investment in Shuswap).
- He had extensive discussions with Pricewaterhouse with a view to protecting the interests of the Eron investors.

Second, when trouble surfaced, Biller did not make efforts to see that he and his family and friends were paid out. He did not resign, ensured he was kept informed, especially once he understood the scope of the regulatory concerns, and he worked with Eron's prof problems.

Nevertheless, we also found that Biller failed in discharging his duties to the Eron investors. His failure to do so contributed significar

Our task is to make orders in the public interest that are appropriate in these circumstances, having regard to the factors set forth ab respects dishonest, but there is no question that the seriousness of his conduct was far less than Slobogian's. Nevertheless, Biller's and to the damage to the integrity of the capital markets. In addition, Biller enjoyed substantial enrichment during the relevant period million and $7 million.

Although his conduct demands his removal from the markets for a substantial period of time, we are not convinced that Biller is a pe understood that he had acted wrongly and wishes to take responsibility for his actions. He also said that he has learned from the Erc

indicate that Biller is capable of both taking responsibility and learning from his experience. Biller is a young man and we do not belie deprive him of career opportunities that will bring him into contact with participants in the public markets.

Accordingly, considering it to be in the public interest, we order:

1. under section 161(1)(c) of the Act, that all of the exemptions contained in sections 44 to 47 (except section 45(7)), 10years;

2. under section 161(1)(d)(i) of the Act, that Biller resign any position that he holds as a director or officer of any issue officer of a company, all of the securities of which are owned directly and beneficially by him, his wife or his children;

3. under section 161(1)(d)(ii) of the Act, that Biller is prohibited from acting as a director or officer of any issuer for a p officer of a company, all of the securities of which are owned directly and beneficially by him, his wife or his children;

4. under section 161(1)(d)(iii) of the Act, that Biller is prohibited from engaging in investor relations activities for a peri

5. under section 162 of the Act, that Biller pay an administrative penalty of $100,000 for his contraventions of section

6. under section 162 of the Act, that Biller pay an administrative penalty of $100,000 for his contraventions of section

7. under section 162 of the Act, that Biller pay an administrative penalty of $100,000 for his contraventions of section

Costs

The scope of the respondents' illegal and fraudulent activity gave rise to a complex investigation and a lengthy hearing, complicated of the circumstances, and considering it appropriate and in the public interest to do so, we order under section 174 of the Act that the prescribed fees or charges for the costs of or related to the hearing incurred by, or on behalf of, the Commission and the Executive D prescribed fees and charges shall not exceed 25% of the total.

We direct Commission staff to file an application for costs with the Commission on or before March 3, 2000.

We have included orders under sections 162 and 174 notwithstanding the suggestion of counsel for the Executive Director that all a Commission's responsibility to make orders that are appropriate in the circumstances. We leave collection to the discretion of the Ex

DATED February 16, 2000

FOR THE COMMISSION

Joyce C. Maykut, Q.C. Brent W. Aitken
Vice Chair Member

John K. Graf
Member

2005 BCSECCOM 575

Fatir Hussain Siddiqi

Sections 161 and 162 of the *Securities Act*, RSBC 1996, c. 418

Hearing

Panel	Brent W. Aitken	Vice Chair
	Marc A. Foreman	Commissioner
	Robert J. Milbourne	Commissioner
Submissions Completed	August 12, 2005	
Date of Decision	September 9, 2005	
Submissions Filed By		
H. Roderick Anderson	For Fatir Hussain Siddiqi	
Peter J. Brady	For the Executive Director	

Decision

Introduction

¶ 1 This decision should be read with our Findings in this matter made on June 15, 2005 (see 2005 BCSECCOM 416). In our Findings, we directed the parties to make written submissions on the matter of sanctions and to advise the Secretary to the Commission if they wished to be heard orally. Both parties made submissions; neither sought an oral hearing.

¶ 2 Siddiqi was in the business of assisting public companies in raising capital. In the spring of 1999 Siddiqi was approached by Canop Worldwide Corp. to help it raise capital to fund the exploration of an oil and gas property in Tanzania. Siddiqi was not interested at first but about a year later he began doing research on Canop and the Tanzanian property to see if the deal made sense. By the fall he was negotiating with Canop about ways to fund the deal and ultimately it was agreed that the funding would be done through AIS Resources Ltd. Both Canop and AIS were listed on the Canadian Venture Exchange (CDNX, now the TSX Venture Exchange).

¶ 3 In the September-October 2000 time frame, two related transactions took place. First, Canop and Siddiqi reached an agreement about exploration funding for the

Tanzanian property using AIS as a vehicle. Second, Siddiqi and related parties acquired control of Floral Holdings Ltd. During this period, Siddiqi traded shares of AIS.

¶ 4 On October 13, 2000 the Exchange halted trading in the shares of AIS. The halt remained in place for several weeks and by the end of the year Siddiqi decided it made no sense to proceed with the project. The parties negotiated a settlement and the transactions were unwound.

Findings

¶ 5 We found that Siddiqi:

1. contravened section 86(1) of the Act when he purchased and sold 90,000 shares of AIS in 17 trades while being a person in a special relationship with AIS and having knowledge of material information about AIS that had not been generally disclosed, being the negotiations surrounding the farmout agreement and the acquisition of Floral;

2. contravened section 57(a) when he placed buy and sell orders for, and bought and sold, shares of AIS while knowing that those activities resulted in a misleading appearance of trading in, and an artificial price for, the shares of AIS;

3. contravened section 56(1) when he sold short 56,500 shares of AIS without declaring those sales as short sales;

4. contravened section 61(1) when he distributed 28,000 shares of AIS while being a control person of AIS without having filed a prospectus or having the benefit of an exemption from that section; and

5. contravened section 111(1) when he acquired control of more than 10% of the equity securities of AIS without filing the press release and report required by that section.

¶ 6 The Executive Director acknowledges that Siddiqi's undeclared short sales in contravention of section 56(1) "are relatively technical breaches". In making the finding in subparagraph 4 of paragraph 5 above, we noted that as it happened, the Exchange halted trading in the AIS shares 4 days before the expiry of the 7-day notice period required by the rules, and so the contravention is of little practical significance. In making the finding in subparagraph 5, we noted that the market was otherwise well-informed of the change of control in AIS and so the contravention is of little significance.

Discussion

¶ 7 The Executive Director says we should prohibit Siddiqi's use of the exemptions under the Act, prohibit him from acting as a director or officer, and prohibit him from engaging in investor relations activities, all for 12 years, and impose an administrative penalty of $150,000. The Executive Director also asks that we order him to pay costs of over $106,000, based on the bill of costs filed as part of the Executive Director's submissions.

¶ 8 Siddiqi appears to accept that it would be in the public interest for us to prohibit Siddiqi's use of the exemptions, his acting as a director or officer, and his engaging in investor relations activities, but for a time period of between 6 and 8 years. He also does not object to an administrative penalty, but says that it should be in the range of $40,000 to $60,000. He also says that the bill of costs submitted by the Executive Director is unreasonable and he should pay an amount not exceeding half of that amount.

¶ 9 In *Re Eron Mortgage Corporation* [2000] 7 BCSC Weekly Summary 22, the Commission discussed the factors relevant to sanction as follows (at page 24):

> In making orders under sections 161 and 162 of the Act, the Commission must consider what is in the public interest in the context of its mandate to regulate trading in securities. The circumstances of each case are different, so it is not possible to produce an exhaustive list of all of the factors that the Commission considers in making orders under sections 161 and 162, but the following are usually relevant:
>
> - the seriousness of respondent's conduct,
> - the harm suffered by investors as a result of the respondent's conduct,
> - the damage done to the integrity of the capital markets in British olumbia by the respondent's conduct,
> - the extent to which the respondent was enriched,
> - factors that mitigate the respondent's conduct,
> - the respondent's past conduct,
> - the risk to investors and the capital markets posed by the respondent's continued participation in the capital markets of British Columbia,
> - the respondent's fitness to be a registrant or to bear the responsibilities associated with being a director, officer or adviser to issuers,
> - the need to demonstrate the consequences of inappropriate conduct to those who enjoy the benefits of access to the capital markets,
> - the need to deter those who participate in the capital markets from engaging in inappropriate conduct, and
> - orders made by the Commission in similar circumstances in the past.

¶ 10 We found that Siddiqi traded on inside information, and created a misleading appearance of trading in, and an artificial price for, the shares of AIS. These are both serious contraventions of the Act. Of section 86(1), the Commission said this in *Greenwell*, 1989 BCSC Weekly Summary 125 (at p. 6 Quicklaw edition):

> Section [86(1)] is one of the key provisions of the Act. It is intended to make the market operate more fairly by prohibiting trading in securities by certain persons having possession of certain information that has not been disclosed to the public. We have found there were two breaches . . . . Although [the] trading did not involve large sums of money, the violation of this fundamental prohibition requires that the Commission make appropriate orders to protect the public interest in a fair trading market.

¶ 11 In *Sirianni*, [1991] 40 BCSC Weekly Summary 7, the Commission said this about section 57(a):

> This issue was considered by the United States Securities and Exchange Commission ("SEC") in its decision In the Matter of Thornton and Company, 28 SEC 4 (1948) 208. . . . The SEC observed, at page 218:
>
> > Investors reading reports of stock exchange transactions on ticker tapes and in newspapers ordinarily assume that the reports reflect legitimate transactions. If the transactions instead reflect fictitious activity, such investors are deceived as to the market in the security. They are falsely led to believe that bona fide transactions have occurred at a certain price and they may be induced by the volume or price changes to purchase or sell the securities as the case may be.

¶ 12 Sections 86(1) and 57(a) are both fundamental to investor protection because they prohibit conduct that strikes at the heart of market integrity – a market in which investors trade on disclosed information, and a market untainted by misleading prices or volumes. Siddiqi's conduct damaged the integrity of our markets.

¶ 13 Siddiqi argued that there was no evidence that his conduct actually harmed any investors, or that British Columbia markets were damaged. Certainly if there were such evidence, it would be highly relevant to the issue of sanctions, but the absence of that evidence does not mean that we should ignore those factors. Persons other than Siddiqi who were trading in the shares of AIS at the same time he was could well have suffered some damages, although there is no way to know the quantum.

¶ 14 Siddiqi traded on four days with inside information that had not been generally disclosed. By definition, that means that there was information not available to the persons on the other side of his trades that could reasonably be expected to have a significant effect on the share price. Therefore, their trades with Siddiqi took place at prices that were likely different than they would have been had the inside information been disclosed.

¶ 15 Similarly, Siddiqi's trading activity created a misleading appearance of trading in, and an artificial price for, the shares of AIS. Other persons trading in shares of AIS while its volume and price were being affected by Siddiqi's trading activities were also likely trading at prices different than they would have been had without Siddiqi's activity.

¶ 16 In our findings we noted that Siddiqi's trading in the shares of AIS yielded a gross surplus (before commissions and taxes) of $76,290, which the parties have rounded off to an even $75,000. Siddiqi says that in considering this factor we should offset his costs of covering his short position, which he says amounted to about $42,000. He arrives at this figure by multiplying his short position (56,000 shares) by $0.75, the market price for AIS when he covered the position. If that amount is deducted, then Siddiqi's enrichment falls to about $33,000 before taxes and commissions.

¶ 17 The Executive Director disputes this approach because Siddiqi did not buy shares in the market to cover his short position. Instead, he covered his position out of the 100,000 AIS shares he acquired in the settlement of the civil dispute that arose when the deals fell apart. The Executive Director also says the cost to Siddiqi of the 100,000 shares was nominal.

¶ 18 The evidence is unclear as to the true cost to Siddiqi of the 100,000 shares. But it is true that any shares he used to cover his short position would otherwise have been available to him to sell into the market at $0.75, so in economic terms that is the cost to him of covering his short position. As a result, his actual enrichment is likely some amount less than $33,000, taking into account taxes and commissions.

¶ 19 Siddiqi has no previous disciplinary history with the Commission and cooperated with the investigation. He also made admissions that allowed the hearing to focus on the most serious allegations.

¶ 20 Compared to other cases before the Commission involving contraventions of section 57(a) and 86(1), this case did not involve other overt means of attempting to manipulate the market, such as misrepresentation. Neither did Siddiqi attempt to cover his tracks through a complex network of nominee accounts. His trading was limited to the shares of one company, AIS, and took place in a one-month

period, which limited the harm done to investors and markets compared to other cases the Commission has seen in the past.

¶ 21 The Executive Director says that we should consider the technical and insignificant contraventions as aggravating circumstances. This we have done, to some extent, not on the basis that Siddiqi wilfully contravened these provisions (there was not evidence of that) but because he appears not to have taken the care, and obtained the advice he ought to have, in ensuring that his activities were not in contravention of the Act.

¶ 22 Siddiqi no longer lives in British Columbia and is not acceptable to the TSX Venture Exchange as a director or officer of any company listed on that exchange. He is apparently not active in the market. It is therefore difficult to assess the risk he represents to our markets, but all the same we are of the view that the appropriate sanction ought to include some element of specific deterrence.

¶ 23 Given the fundamental role that the prohibitions against market manipulation and trading on inside information play in our regime of regulation, we think that the sanctions must communicate clearly to market participants the seriousness of a contravention of these sections, and they must also achieve an appropriate level of general deterrence. They must also take into account the mitigation factors and the precedents.

¶ 24 The precedents cited by the Executive Director generally involved conduct more serious than Siddiqi's. In *Sirianni*, debit kiting was a central part of the scheme and the Commission found that the respondents had a strong motivation to manipulate the market because they had a large position in the company, financed by expensive credit. Unlike AIS, the company had no prospects. It was in the process of abandoning the property that supported its public financing and was not making payments on its new property. The Commission found that the "only way for the respondents to profit from their holdings . . . was to induce investor interest." There was no similar evidence in this case. The Commission denied the respondents the use of the exemptions, prohibited them from acting as directors and officers or filling roles similar to what we would now call investor relations activities for 15 years and ordered them to pay costs. (At that time the Commission did not have the power to impose administrative penalties.)

¶ 25 *Atlantic Trust Management Group*, [1995] 14 BCSC Weekly Summary 54 was a massive boiler room operation, and *DiIanni*, 2001 BCSECCOM 918 involved a respondent with a criminal record in the United States who was described by the US Court of Appeals as "a recidivist who – offered any opportunity – will undertake to engage in conduct that is proscribed by federal securities laws". The facts in these cases are far removed from Siddiqi's conduct. In *Atlantic,* the

Commission removed exemptions, imposed director and officer and investor relations activities prohibitions for 25 years, ordered costs and imposed an administrative penalty of $75,000. In *DiIanni*, the Commission removed exemptions and imposed director and officer and investor relations activities prohibitions for life, and ordered costs.

¶ 26 Siddiqi cites *Woo*, 2004 BCSECCOM 610, a settlement in which Woo admitted to market manipulation through 40 trades in numerous companies over a one-month period. He agreed not to trade, not to be an officer or director, and not to engage in investor relations activities, for 10 years. He also agreed to pay the Commission $40,000, of which $3,000 represented the costs of the investigation.

¶ 27 Siddiqi also cites *Hogan*, 2002 BCSECCOM 811. The Commission found that Hogan used the internet to disseminate misrepresentation about five companies and to have conducted "blatant and highly effective" manipulations of their stock. The Commission cease traded him and prohibited him from engaging in investor relations activities for 10 year and imposed an administrative penalty of $25,000. (The Commission also noted that Hogan had agreed to consent to a disgorgement order under section 157(1)(b).)

¶ 28 The parties were unable to direct us to useful precedents for contraventions of section 86(1), although a couple of cases were cited.

Orders

¶ 29 Considering it to be in the public interest, we order:

1. under section 161(1)(c) of the Act, that the exemptions described in sections 44 to 47, 74, 75 , 98 and 99 of the Act do not apply to Siddiqi for six years expiring on September 8, 2011, subject to paragraph 5 of these orders;

2. under section 161(1)(d)(ii) of the Act, that Siddiqi is prohibited from becoming or acting as a director or officer of any issuer for six years expiring on September 8, 2011, subject to paragraph 5 of these orders;

3. under section 161(1)(d)(iii) of the Act, that Siddiqi is prohibited from engaging in investor relations activities for six years expiring on September 8, 2011, subject to paragraph 5 of these orders;

4. under section 162 of the Act, that Siddiqi pay an administrative penalty of $60,000; and

5. paragraphs 1, 2, and 3 of these orders remain in force until Siddiqi pays the amount due under paragraph 4 of these orders, and any amount due under any future costs order we make in this matter.

Costs

¶ 30 Siddiqi disputes the reasonableness of the bill of costs submitted by the Executive Director. First, he says that his counsel spent only 161 hours in this matter, about one-half of the time billed for litigation staff (317 hours). Second, he disputes that the 537 hours of investigation time that was billed was necessary. Third, he argues that hearing days that did not occupy a full day (the set-date hearing for example was only one hour) should not be billed at the full $2,000 per day rate. Finally, he says he should not have to pay $2,967 in paper copying costs as well as the $3,971 for electronic reproduction of disclosure documents.

¶ 31 Siddiqi asks that the Executive Director be required to provide better particularization of the costs with further written submissions to follow, or that that we reduce the bill of costs by "more than half".

¶ 32 The Executive Director says that the bill of costs accurately reflects the time spent and that "a large portion of the Executive Director's time and expense goes into the investigation stage, whereas the respondent primarily participates in the matter once the investigation is complete."

¶ 33 Combining the litigation and investigation costs, Commission staff spent nearly 854 hours preparing this case. At seven hours per day, this represents about 4 person-months of effort. Although this appears to be a great deal of time to prepare for a five-day hearing, we are reluctant to arbitrarily reduce the bill of costs without more information. Conversely, we are reluctant to make an order for costs without knowing the particulars of the time spent by litigation and investigation staff.

¶ 34 Therefore, we direct the Executive Director to provide better particularization of the time spent by litigation and investigation staff.

¶ 35 We agree that it is not reasonable to charge a full hearing day for the set date hearing. In recognition that some other hearing days we did not sit for a full day, we order that the administrative costs portion of the bill of costs be reduced to $10,000.

¶ 36 We also direct the Executive Director to provide further details about the $2,967 disbursement for "Copywork" and a rationale for its inclusion in the bill of costs.

¶ 37 We direct that the Executive Director provide the additional information we have directed to Siddiqi and to the Secretary to the Commission on or before September 30, along with any further written submissions in support of the order for costs. We direct Siddiqi to deliver to the Executive Director and the Secretary to the Commission his further submissions on costs on or before October 24. If a party wishes an oral hearing, that party should make that request when filing its submissions.

¶ 38 September 9, 2005

¶ 39 **For the Commission**

Brent W. Aitken
Vice Chair

Marc A. Foreman
Commissioner

Robert J. Milbourne
Commissioner

BRITISH COLUMBIA SECURITIES COMMISSION
Securities Act, RSBC 1996, c. 418

Citation: Re Lim, 2017 BCSECCOM 319 Date: 20171023

David Tuan Seng Lim and Michael Mugford[1]

Panel	Nigel P. Cave	Vice Chair
	Audrey T. Ho	Commissioner
	Don Rowlatt	Commissioner
Hearing Date	September 22, 2017	
Submissions Completed	September 22, 2017	
Date of Decision	October 23, 2017	

Appearing

Derek Chapman Joyce Johner	For the Executive Director
Owais Ahmed	For David Tuan Seng Lim
Stephen B. Jackson	For Michael Mugford

Decision

I. Introduction

[1] This is the sanctions portion of a hearing under sections 161(1) and 162 of the *Securities Act*, RSBC 1996, c. 418. The Findings of this panel on liability made on June 5, 2017 (2017 BCSECCOM 196) are part of this decision.

[2] We found that both David Tuan Seng Lim and Michael Mugford contravened section 57(a) of the Act in respect of the common shares of Urban Barns Foods Inc.

[3] The parties provided written and oral submissions with respect to the appropriate sanctions for the respondents' misconduct.

[4] This is our decision with respect to sanctions.

II. Position of the Parties

[5] The executive director sought the following orders:

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[1] The original style of cause in this matter was David Tuan Seng Lim, Michael Mugford and EuroHelvatia Trustco S.A. now known as EHT Corporate Services S.A. In our findings on liability made on June 5, 2017, we found that EHT did not contravene the Act. Therefore, the style of cause has been amended to refer only to the remaining respondents for whom sanctions must be determined.

a) broad, permanent market prohibitions (with limited exceptions) against both Lim and Mugford;
b) an order under section 162 of the Act that Lim pay to the Commission $1.2 million; and
c) an order under section 162 of the Act that Mugford pay to the Commission $700,000.

[6] Lim submitted that the following orders were appropriate in the circumstances:

a) subject to the exceptions noted in subparagraphs b) and c) below, market prohibitions not exceeding six years;
b) that he not be required to resign any position that he currently holds as, nor be prohibited in the future from being, a director or officer of an issuer or a registrant;
c) that he be allowed to trade or purchase securities for his own account and for an RESP account at a registered dealer, provided that he first provide that dealer with a copy of the Commission's decision on sanctions in this matter; and
d) an order under section 162 of the Act that he pay to the Commission $200,000.

[7] Lim provided an alternative suggested order to that set out in paragraph 6b) and c) above. His submission was that he be allowed to act as a director or officer of any issuer in which he and/or his immediate family members own all of the outstanding shares. Further, in oral submissions, counsel for Lim suggested that the exception in subparagraph c) above, should also allow Lim to trade or purchase securities on behalf of any issuer in which he and/or his immediate family members own all of the outstanding shares.

[8] Mugford submitted that the following orders were appropriate in the circumstances:

a) subject to the exception noted in subparagraph b) below, market prohibitions not exceeding eight years;
b) that he be allowed to trade or purchase securities for his own account (including an RRSP account and a TFSA account) and for an RESP account, all in both US and CDN dollars, at a registered dealer, provided that he first provide that dealer with a copy of the Commission's decision on sanctions in this matter; and
c) an order under section 162 of the Act that he pay to the Commission $60,000.

[9] The executive director did not seek any orders under section 161(1)(g) of the Act.

III. Analysis

A. Factors

[10] Orders under sections 161(1) and 162 of the Act are protective and preventative, intended to be exercised to prevent future harm. See *Committee for Equal Treatment of Asbestos Minority Shareholders v. Ontario (Securities Commission)*, 2001 SCC 37.

[11] In *Re Eron Mortgage Corporation*, [2000] 7 BCSC Weekly Summary 22, the Commission identified factors relevant to sanction as follows (at page 24):

> In making orders under sections 161 and 162 of the Act, the Commission must consider what is in the public interest in the context of its mandate to regulate trading in securities. The circumstances of each case are different, so it is not possible to produce an exhaustive list of all of the factors that the Commission considers in making orders under sections 161 and 162, but the following are usually relevant:
>
> - the seriousness of respondent's conduct,
> - the harm suffered by investors as a result of the respondent's conduct,
> - the damage done to the integrity of the capital markets in British Columbia by the respondent's conduct,
> - the extent to which the respondent was enriched,
> - factors that mitigate the respondent's conduct,
> - the respondent's past conduct,
> - the risk to investors and the capital markets posed by the respondent's continued participation in the capital markets of British Columbia,
> - the respondent's fitness to be a registrant or to bear the responsibilities associated with being a director, officer or adviser to issuers,
> - the need to demonstrate the consequences of inappropriate conduct to those who enjoy the benefits of access to the capital markets,
> - the need to deter those who participate in the capital markets from engaging in inappropriate conduct, and
> - orders made by the Commission in similar circumstances in the past.

B. Application of the Factors

Seriousness of the conduct

[12] Contraventions of section 57(a), or market manipulations, share two significant similarities with fraudulent misconduct. Like fraud, a contravention of section 57(a) requires a finding of intent on the part of the respondent and some element of deceit (i.e. creating a misleading appearance of trading activity in, or an artificial price for, a security). As a consequence, a market manipulation is one of the most serious misconduct contemplated by the Act.

[13] In this case, the seriousness of the respondents' misconduct was exacerbated by the extent to which they orchestrated their affairs such that their activities were concealed by the use of offshore accounts and third parties, including trustees and other intermediaries.

[14] However, the evidence also demonstrated that, as between the two respondents, there was a clear differentiation in the seriousness of their misconduct owing to their differing contributions to the market manipulation.

[15] Although we found that both were principals under an agreement that set out the basic structure of the manipulation, we also found that Lim played a far more significant role than Mugford in carrying out the "pump and dump" manipulation of the Urban Barns shares.

[16] Lim was largely responsible for putting in place the offshore funding structure and paying for the "tout sheet" marketing campaign that was at the heart of the manipulation. Lim, as a registrant, was also able to start the initial volume of purchasing activity through accounts of his clients. As set out in our Findings, Mugford's role, while not insignificant, was clearly less than that of Lim. Our sanctions recognize this difference in the seriousness of the misconduct, as between Lim and Mugford.

Enrichment; harm to investors

[17] Although the evidence included trading records and account information that indicated the gross proceeds derived from the sale of shares of Urban Barns in certain accounts connected to the market manipulation, there was no information as to the specific enrichment of either of the respondents derived from those accounts.

[18] The respondents submitted that we also had no evidence of harm to investors arising from the misconduct of the respondents. This submission is correct only in the sense that we do not have evidence of a specific harm to a specific investor. In the general sense, the market manipulation relating to the securities of Urban Barns has caused significant harm to investors. The trading accounts connected to the market manipulation were the beneficiaries of approximately US$4.8 million derived from the sale of Urban Barns shares during the relevant period. The Urban Barns shares that were sold from those accounts were essentially worthless immediately prior to the misconduct and were essentially worthless shortly after the misconduct ceased. This represents significant harm to the investing public.

Mitigating or aggravating factors; past conduct

[19] Neither Lim nor Mugford have a history of securities regulatory misconduct.

[20] However, it is an aggravating factor that Lim was a registrant at the time of his misconduct. In fact, Lim abused his role as a registrant to orchestrate one aspect of the manipulation – by having accounts of his clients create an initial demand for the Urban Barns shares following the commencement of the "tout sheet" marketing campaign. Registrants play a critical role in our capital markets as one of the "gatekeepers". Instead of fulfilling his role as a gatekeeper, Lim abused the privilege of his registration to assist in his misconduct.

[21] The executive director cited this Commission's decision in *Re Sungro*, 2015 BCSECCOM 281 (para. 29) in support of his submission that Mugford's past history as a director and officer of public companies should be viewed as an aggravating factor.

[22] While we agree that a history of being actively engaged in our capital markets can be an aggravating factor, we do not see that Mugford's history is a material aggravating factor in this case. Mugford's misconduct did not arise in the context of his acting as either a director or officer of Urban Barns nor in any other issuer that played a material role in the market manipulation. As will be discussed below, Mugford's conduct raises significant concerns with respect to his fitness to be a director or officer of an issuer; however, that is

different than concluding that his history in the capital markets is an aggravating factor in the circumstances of this case.

[23] Finally, the executive director submitted that it is an aggravating factor that the market manipulation occurred in the junior capital markets.

[24] Market manipulations of the type carried out by the respondents (a "pump and dump") may be easier to carry out in the junior capital markets, but we do not see that a market manipulation in the junior capital markets represents an aggravating factor. Any market manipulation, carried out in respect of an issuer large or small, is one of the most serious misconduct contemplated under the Act.

[25] However, the considerable efforts that the respondents undertook to carry out and hide their misconduct through various market intermediaries is an aggravating factor. It is perhaps axiomatic that market manipulations will often involve significant elements of attempts to disguise or hide that conduct. However, this case is striking in the extent to which Lim, in particular, utilized intermediaries in an attempt to disguise his misconduct. This included using Swiss trustees, a Marshall Islands' trust and various intermediaries to both instruct and pay for the "tout sheet" marketing campaign.

Risk to our capital markets; fitness to be a registrant or a director or officer of an issuer

[26] Participation in our capital markets is a privilege not a right.

[27] Those who engage in market manipulation represent serious risks to our capital markets. Those who engage in market manipulation intend to deceive and harm the investing public.

[28] In this case, Lim also abused, in a most serious way, his registration status to harm the investing public and our capital markets. He also used various intermediaries, including corporations to hide his misconduct. Lim represents a very significant risk to our capital markets. He has demonstrated a lack of fitness to participate in our capital markets, as a registrant or as a director or officer of an issuer.

[29] Similarly, Mugford has experience as a director and/or officer of an issuer. He knew or should have known that the conduct he engaged in was harmful to the investing public and fell far below that expected of those responsible for the actions of a corporation. Mugford has also demonstrated a lack of fitness to participate in our capital markets as either a registrant or as a director or officer of an issuer.

Specific and general deterrence

[30] The sanctions we impose must be sufficient to ensure that the respondents and others will be deterred from engaging in similar misconduct.

Previous orders

[31] The executive director provided two previous decisions of this Commission in support of

his requested sanctions in this case: *Re Sungro*, 2015 BCSECCOM 281 and *Re Poonian*, 2015 BCSECCOM 96.

[32] The respondents submit that this Commission's decision in *Re Siddiqi*, 2005 BCSECCOM 575 is more analogous to the circumstances of this case and say that *Sungro* and *Poonian* are distinguishable.

[33] In *Sungro*, three individual respondents were found to have contravened section 57(a) of the Act and, in addition, one of the three respondents was found to have made false or misleading statements to a Commission investigator. One of the individual respondents also had a significant aggravating factor in that he had a history of securities regulatory misconduct.

[34] The panel imposed broad, permanent market prohibitions against each of the respondents in *Sungro*. There was also specific evidence as to the enrichment of two of the respondents arising from the market manipulation and orders were made against the two respondents under section 161(1)(g) in the amount of their enrichment. Finally, the panel considered each of the three respondents to be equally responsible for the misconduct and ordered administrative penalties (before consideration of the additional misconduct of providing false or misleading information) of $700,000 against each of the respondents.

[35] In *Poonian*, five individual respondents were found to have engaged in a market manipulation. There were no other findings of contraventions against any of the respondents.

[36] The panel imposed broad, permanent market prohibitions against each of the respondents. The respondents were ordered to pay administrative penalties that varied between $10 million (against the mastermind of the scheme) and $1 million. The panel found that there were significant differences in the contributions to and the responsibility for the market manipulation and these differences were reflected in the relative magnitudes of the administrative penalties imposed against each of the five respondents.

[37] In *Siddiqi*, the panel found that the individual respondent had engaged in insider trading and manipulation of the shares of a company. The market manipulation was short-lived, taking place over a one-month period and Siddiqi's enrichment was approximately $33,000. The panel imposed an administrative penalty of $60,000 (approximately twice the amount of Siddiqi's likely enrichment) and prohibited Siddiqi from trading, acting as a director or officer of an issuer and engaging in investor relations for a period of six years.

[38] There is a marked difference in the magnitude of the sanctions imposed on the respondents in each of these three decisions.

[39] The panel in *Sungro* noted that, after the decision in *Siddiqi*, the Act was amended to increase the maximum administrative penalty that could be ordered under section 162 (per contravention) from $250,000 to $1,000,000. The rationale that the panel employed

in *Sungro* to explain the substantially higher administrative penalty was based, in part, on this change in the legislation.

[40] In *Poonian*, the market manipulation was carried out over a much longer time frame, targeted a victim group that was particularly vulnerable and resulted in substantially larger harm to investors (measured by the proceeds derived from the improper trading in the accounts connected to the market manipulation) and damage to our capital markets than in *Siddiqi* or *Sungro*.

[41] In the current case, the market manipulation of the Urban Barns shares was carried out over an extended period and caused significantly more damage to our capital markets than in *Siddiqi* or *Sungro*.

[42] As set out above, market manipulations have much in common with fraud and they represent some of the most serious misconduct contemplated by the Act. The nature of the sanctions in *Siddiqi* are not reflective of the sanctions that are currently ordered in cases where a respondent's misconduct is among the most serious contemplated by the Act. We do not view *Siddiqi* as determinative for an appropriate sanction for the type of misconduct carried out by Lim and Mugford.

C. Appropriate Orders

Market prohibitions

[43] Lim and Mugford represent significant risks to our capital markets. They have acted with intent to harm the investing public and in a manner that is totally inconsistent with conduct acceptable for a registrant or a director or officer of an issuer. Broad, permanent market prohibitions against both of them are necessary and appropriate to protect our capital markets.

[44] Although we are prepared to grant limited exceptions to these prohibitions for both Lim and Mugford, we are not prepared to allow Lim to act as a director or officer of any issuer whose securities are owned by anyone other than his immediate family members. Nor do we agree that he should be allowed to open an account and trade in securities through an issuer. Lim carried out his misconduct through the use of intermediaries, including trusts and corporations. It is appropriate in the matter before us to impose sanctions that include prohibitions that will prevent Lim from doing so again.

[45] Our orders allow both Lim and Mugford to trade and purchase securities in accounts in their own name (including TFSAs, RESPs and RRSPs) through a registrant, so long as they provide a copy of this decision to the registrant. Lim is also allowed to be a director and/or officer of 104877 B.C. Ltd. and Monsoon Holdings Limited, provided that all of the securities of these two companies continue to be owned by Lim and his immediate family members.

Administrative penalties

[46] Lim submits that we do not have the jurisdiction to make an order under section 162 of the Act against him in the amount requested by the executive director. He says that that

section of the Act allows us to impose a maximum penalty of $1 million per contravention of the Act. He submits that our Findings set out only one contravention of section 57(a) against him.

[47] The executive director submits that we need only find that Lim carried out two contraventions of section 57(a) of the Act in order to make the requested order of $1.2 million. He then posited several components of Lim's contribution to the market manipulation as separate contraventions of section 57(a). The executive director relied upon the decision in *Re McCabe*, 2014 BCSECCOM 512 (upheld in *McCabe v. British Columbia (Securities Commission)*, 2015 BCCA 176) in support of the proposition that a panel, at the sanctions stage, might determine that there were multiple contraventions of a single provision of the Act.

[48] We agree with Lim's submissions on this point. The decision in *Re McCabe* is distinguishable. In *McCabe*, the respondent was found to have made misrepresentations. The evidence clearly set out multiple publications of the misrepresentations.

[49] This case is different. The notice of hearing alleges that "...the Respondents engaged or participated in conduct relating to Urban Barns' shares that they knew, or reasonably, should have known, resulted in or contributed to a misleading appearance of trading activity in, or an artificial price for, Urban Barns shares, contrary to section 57(a) of the Act." While somewhat ambiguous, we find that this wording alleges one contravention of the Act.

[50] More importantly, in our Findings we determined that the totality of the conduct of both Lim and Mugford, individually, resulted in their respective contraventions of section 57(a) of the Act. We did not find that one aspect of their conduct (e.g. paying for the "tout sheet" marketing campaign) in and of itself constituted a contravention of section 57(a) of the Act. The case was not argued in this manner, nor did we, as a panel, even turn our minds to the question of whether the separate components of Lim's behavior that the executive director now alleges to be contraventions of section 57(a) of the Act, might, in and of themselves, constitute a distinct contravention of section 57(a). We do not believe it appropriate to carry out that analysis at this stage in the proceedings. To be clear, in reaching this determination we are not making any commentary on whether it would be possible (or not) for there to be multiple contraventions of section 57(a) in respect of the same security, in similar circumstances, if it were alleged and argued in that manner. However, that was not the case before us.

[51] Therefore, in the circumstances of this case, we find the maximum amount that we could order against Lim under section 162 to be $1 million.

[52] As noted above, our sanctions must reflect the differing contributions (as reflected in our findings) that Lim and Mugford made to the market manipulation of the Urban Barns shares.

[53] We also received an affidavit from Mugford which set out that he is currently an undischarged bankrupt. The financial circumstances of a respondent must be considered for the purposes of specific deterrence but have no role with respect to general deterrence.

[54] The circumstances of this case and the nature of the misconduct of Lim are most closely aligned with that of the respondents in *Sungro*. The most significant difference between the two being that the misconduct in *Sungro* was carried on for a shorter duration as the Commission was able to disrupt the market manipulation in its early stages in that case. However, Lim also had the aggravating factor of having been a registrant at the time of his misconduct. His administrative penalty should be larger than that imposed on the respondents in *Sungro*. After considering all of the circumstances and the need for specific and general deterrence, we find that an appropriate administrative penalty in light of Lim's conduct is $800,000.

[55] Mugford's contributions to the market manipulation were less significant than the three individual respondents in *Sungro* and less than that of Lim. As a result, an appropriate administrative penalty should be a lesser amount. After considering all of the circumstances, including Mugford's status as an undischarged bankrupt with limited means, and the need for specific and general deterrence, we find that an appropriate administrative penalty in light of Mugford's conduct is $375,000.

IV. Orders

[56] Considering it to be in the public interest, and pursuant to sections 161 and 162 of the Act, we order that:

Lim

a) Under sections 161(d)(i) and (ii) of the Act, that Lim resign any position that he holds as a director or officer of any issuers or registrant, and is permanently prohibited from becoming or acting as a director or officer of any issuer or registrant, except that he may act as a director or officer of an issuer whose securities are solely owned by him or his immediate family members (being: Lim's spouse, parent, child, sibling, mother or father-in-law, son or daughter-in-law or brother or sister-in-law);

b) under sections 161(1)(b), (c) and (d)(iii) to (v):

   i. that Lim cease trading in, and is permanently prohibited from trading in or purchasing securities, except that he may trade and purchase securities or exchange contracts for his own account (including one RRSP account, one TFSA account and one RESP account) through a registered dealer, if he gives the registered dealer a copy of this decision;
   ii. any and all exemptions set out in the Act, the regulations or a decision permanently do not apply to Lim;
   iii. that Lim is permanently prohibited from becoming or acting as a registrant or promoter;

iv. that Lim is permanently prohibited from acting in a management or consultative capacity in connection with activities in the securities market;
v. that Lim is permanently prohibited from engaging in investor relations.

c) Lim pay to the Commission an administrative penalty of $800,000 under section 162 of the Act;

Mugford

a) Under sections 161(d)(i) and (ii) of the Act, that Mugford resign any position that he holds as a director or officer of any issuer or registrant, and is permanently prohibited from becoming or acting as a director or officer of any issuer or registrant.

b) under sections 161(1)(b), (c) and (d)(iii) to (v):

i. that Mugford cease trading in, and is permanently prohibited from trading in or purchasing securities, except that he may trade and purchase securities or exchange contracts for his own account (including one RRSP account, one TFSA account and one RESP account) through a registered dealer, if he gives the registered dealer a copy of this decision;
ii. any and all exemptions set out in the Act, the regulations or a decision permanently do not apply to Mugford;
iii. that Mugford is permanently prohibited from becoming or acting as a registrant or promoter;
iv. that Mugford is permanently prohibited from acting in a management or consultative capacity in connection with activities in the securities market;
v. that Mugford is permanently prohibited from engaging in investor relations.

c) Mugford pay to the Commission an administrative penalty of $375,000 under section 162 of the Act.

October 23, 2017

For the Commission

Nigel. P. Cave
Vice Chair

Audrey T. Ho
Commissioner

Don Rowlatt
Commissioner

Citation: 2015 BCSECCOM 96

Thalbinder Singh Poonian, Shailu Sharon Poonian,
Robert Joseph Leyk, Manjit Singh Sihota and Perminder Sihota

***Securities Act*, RSBC 1996, c. 418**

Hearing

Panel	Suzanne K. Wiltshire	Commissioner
	George C. Glover, Jr.	Commissioner
	Audrey T. Ho	Commissioner
Submissions completed	February 11, 2015	
Date of Decision	March 13, 2015	

Appearing

Anjalika Rogers	For the Executive Director
Alexandra Luchenko	For Manjit Sihota and Perminder Sihota
Thalbinder Poonian	For himself and Shailu Sharon Poonian

Decision

I Introduction

¶ 1 This is the sanctions portion of a hearing under sections 161(1) and 162 of the *Securities Act*, RSBC 1996, c. 418. The Findings on liability made on August 29, 2014 (2014 BCSECCOM 318) are part of this decision.

¶ 2 This matter concerns the market manipulation of the shares of OSE Corp. (OSE) between September 10, 2007 and March 31, 2009 (the relevant period).

¶ 3 The panel found that each of the respondents breached section 57(a) of the Act by engaging in, or participating in, conduct that they knew, or reasonably should have known, would result in, or contribute to, a misleading appearance of trading activity in, or an artificial price for, shares of OSE.

II Position of the Parties

Executive Director

¶ 4 The executive director seeks orders under sections 161(1) and 162 of the Act:

- permanently prohibiting the respondents from trading in or purchasing securities,

- permanently prohibiting the respondents from becoming, or acting as, a registrant or promoter, acting in a management or consultative capacity in connection with activities in the securities market, engaging in investor relations activities and being or acting as a director or officer of any issuer,
- requiring the respondents to pay, jointly and severally, $7,177,305, being the total amount obtained as a result of their contraventions under the Act, and
- requiring the respondents to pay, jointly and severally, an administrative penalty of $21,530,000.

Poonians

¶ 5 The Poonians made written submissions on sanction and Thal Poonian attended the sanction hearing and made brief oral submissions. The Poonians continue to dispute they did anything wrong.

¶ 6 Sharon Poonian submits the appropriate sanctions to be imposed on her are:

- a suspension in the range of two to three years,
- an exception to any prohibition against being, or acting as, a director or officer of an issuer to permit her to be a director and/or officer of private, non-reporting issuers, whether or not she owns all of the issued and outstanding shares of any such issuer, and
- a fine of $1000 and costs of $100, citing inability to pay any larger amounts, to be payable by the time the suspension expires.

¶ 7 Thal Poonian submits the appropriate sanctions to be imposed on him are:

- a suspension in the range of two to three years,
- that he takes and successfully completes the director and officer course for reporting issuers,
- in the event that the panel imposes a prohibition on acting as a director or officer of any issuer, an exception to permit him to act as a director and/or officer of private, non-reporting issuers, whether or not he owns all of the issued and outstanding shares of any such issuer, and
- a fine of $1000 and costs of $100, citing inability to pay any larger amounts, to be payable by the time the suspension expires.

Sihotas

¶ 8 Manjit Sihota accepts that he should be prohibited from trading in or purchasing securities and that he should be prohibited from becoming, or acting as, a director or officer of any issuer for an appropriate period, with one exception. He asks that he be permitted to continue to act as a director and officer of Richmond Plywood Corporation Limited, an exception previously granted by the Commission on September 26, 2012 (2012 BCSECCOM 376) to the temporary order in this matter.

¶ 9 In his written submissions, Manjit Sihota expresses sorrow for his actions. He states that, while not an excuse for his conduct, everything he did was at the request of other individuals and that he did not profit from his actions.

¶ 10 In her written submissions, Perminder Sihota submits that she has been punished enough, her character has been smeared and she has lost everything. She asks that she not be punished any further.

¶ 11 She states in her written submissions that she does not take the situation lightly. While wishing she had not been so vulnerable and stupid as to be coerced by people she trusted, she states that she is not making any excuses and takes responsibility for her actions.

Leyk

¶ 12 Robert Leyk did not attend the sanctions portion of the hearing or make any written submissions on sanction.

III Analysis

A. Factors

¶ 13 In *Re Eron Mortgage Corporation*, [2000] 7 BCSC Weekly Summary 22, the Commission identified certain factors relevant to sanction as follows (at page 24):

> In making orders under sections 161 and 162 of the Act, the Commission must consider what is in the public interest in the context of its mandate to regulate trading in securities. The circumstances of each case are different, so it is not possible to produce an exhaustive list of all of the factors that the Commission considers in making orders under sections 161 and 162, but the following are usually relevant:
>
> - the seriousness of respondent's conduct,
> - the harm suffered by investors as a result of the respondent's conduct,
> - the damage done to the integrity of the capital markets in British Columbia by the respondent's conduct,
> - the extent to which the respondent was enriched,
> - factors that mitigate the respondent's conduct,
> - the respondent's past conduct,
> - the risk to investors and the capital markets posed by the respondent's continued participation in the capital markets of British Columbia,
> - the respondent's fitness to be a registrant or to bear the responsibilities associated with being a director, officer or adviser to issuers,
> - the need to demonstrate the consequences of inappropriate conduct to those who enjoy the benefits of access to the capital markets,
> - the need to deter those who participate in the capital markets from engaging in inappropriate conduct, and
> - orders made by the Commission in similar circumstances in the past.

B. Application of the Factors

Seriousness of the conduct; damage to integrity of capital markets

¶ 14 In *Siddiqi (Re)*, 2005 BCSECCOM 575, the Commission at paragraph 12 said that section 57(a) of the Act is "fundamental to investor protection because [it] prohibit[s] conduct that strikes at the heart of market integrity - a market untainted by misleading prices or volumes".

¶ 15 Market manipulation compromises the integrity of the entire market. Its impact extends beyond the victims who lost money to the investing public as a whole. In *De Gouveia, Re*, 2013 ABASC 249 the Alberta Securities Commission concluded that manipulative trading "undermines the integrity of the capital market. It is unfair to investors, and jeopardizes the confidence in the capital market on which legitimate investor interest and capital formation depend".

¶ 16 The respondents' manipulation of the market for OSE shares was sophisticated and extensive. As well as involving all five respondents, the scheme used 17 secondary participants, the Phoenix Group who facilitated creation of the pool of victim investors and a number of brokerage firms to carry out the manipulation. During the relevant period, the respondents and secondary participants as a group purchased on the Toronto Stock Exchange – Venture (TSX-V) over 12 million shares of OSE (more than 64% of overall buy volume) at a cost of more than $17 million and sold on the TSX-V over 17 million shares of OSE (more than 88% of overall sale volume) for gross proceeds of more than $25 million.

¶ 17 The scheme was elaborate, involving layers of deception to conceal the respondents' participation in the manipulation. This included: funding OSE private placement share purchases; directing trading of OSE shares in secondary participants' brokerage accounts and funding purchases of OSE shares in those accounts; transferring shares among the respondents and secondary participants; and arranging for and paying commissions to the Phoenix Group for advising its clients to invest in OSE shares.

¶ 18 A breach of section 57(a) of the Act is serious misconduct that causes damage to the integrity of capital markets and harms investors. The scale of this manipulation places it at the most serious level. The arrangements with the Phoenix Group ensured a large victim investor pool of generally unsophisticated investors facing financial distress who were advised to unlock their locked-in RRSPs or retirement accounts and invest in OSE, making this manipulation even more egregious.

Harm to investors

¶ 19 By the end of the relevant period on March 31, 2009, Phoenix clients who had purchased OSE shares during the relevant period suffered unrealized book losses of $7,102,902 (excluding commission costs). The trading price of OSE shares only continued to decline after that date.

¶ 20 Of the 4.6 million OSE shares bought by Phoenix clients, 4.3 million (93%) were sold to them by the respondents and secondary participants. But all 4.6 million shares were purchased during the relevant period at artificially high prices.

¶ 21 Testimony of the three Phoenix investor witnesses and the investor impact statements provided by a number of other Phoenix clients evidence the harm to investors, many of whom suffered financial devastation and emotional distress because of their financial losses as a result of the respondents' manipulation of the shares of OSE. Many of these investors also expressed their unwillingness to ever again invest in the capital markets.

¶ 22 The Poonians submit that there is no evidence that the investor witnesses knew or dealt with any of the respondents during the relevant period and therefore the respondents are not responsible for the losses they incurred.

¶ 23 The fact that the investor witnesses or indeed other investors in OSE did not know or deal directly with the respondents is consistent with the manner in which the manipulation was conducted. The investors in OSE, including the Phoenix clients, purchased in the open market without knowledge of the manipulation or the identity of the persons selling them OSE shares. This does not mean that they did not suffer harm because of the respondents' contraventions of the Act in conducting the manipulation.

¶ 24 Nor, as argued by the Poonians, should the loss to investors be limited to $130,000, the amount the Poonians submit is the maximum loss to British Columbians that can be established from the evidence of the three investor witnesses.

¶ 25 The losses of all investors during the relevant period, both the Phoenix clients who invested and other investors in OSE during the relevant period, are a result of the respondents' contraventions of the Act in conducting the manipulation. The aggregate investor loss is therefore no less than the $7.1 million aggregate unrealized book losses of the Phoenix clients and most likely more since the Phoenix clients purchased only 93% of the shares sold by the respondents and secondary participants.

Enrichment

¶ 26 During the third phase of the manipulation (the price maintenance and share liquidation phase running from January 10, 2008 to March 31, 2009), OSE shares were bought and sold from the brokerage accounts of the respondents and secondary participants for an aggregate net trading gain of $7,177,305 million.

¶ 27 The executive director submits that this is the amount of the respondents' enrichment from the manipulation.

¶ 28 The Poonians dispute that they made any money from the OSE manipulation and submit that they lost millions of dollars without further explanation except to reference their "monthly statements". Even if it were true that the Poonians lost money, this is irrelevant to sanction.

¶ 29 The Sihotas simply submit that they did not profit from their actions. While they entered into evidence various documents regarding certain financial transactions in 2012 relating to certain properties, property sales and indebtedness, without more, this evidence is inconclusive as to their overall financial status then or now and does not establish that they did not profit from their participation in the manipulation.

¶ 30 In our view, the aggregate net gain from trading in OSE shares realized in the respondents' and secondary participants' brokerage accounts used to conduct the manipulation is an appropriate way to determine enrichment. While in the end the respondents may not have "profited" for many reasons, including the disruption of the scheme by regulatory authorities, they were enriched by the aggregate net trading gain realized.

¶ 31 The calculation of the aggregate net trading gain should however include the trading activity in the accounts of the respondents and secondary participants during the entire relevant period and not just the trading that occurred in the third phase. As shown in paragraph 20 of the Findings, during the entire relevant period, the respondents' and secondary participants' brokerage accounts realized an aggregate net trading gain of $7,332,936. This is an appropriate measurement of the respondents' enrichment from their contraventions of the Act.

Mitigating factors

¶ 32 The executive director submits that there are no mitigating factors relating to the respondents' conduct.

¶ 33 The Poonians have shown no remorse for their actions in connection with the manipulation. They continue to assert that they have done nothing wrong.

¶ 34 The Poonians submit that Thal Poonian has been involved full time in managing public reporting issuers from 2000 to August 2012 dealing with various government organizations, brokerage firms, investment banks, mutual funds, and accounting, law, engineering and other firms without having any issue he was unable to bring to an amicable conclusion. They submit that this should be given weight, as should the co-operation of both of them with the Commission investigation and the fact that their office at the Vantage Way premises was producing real income and wealth for Canadian citizens.

¶ 35 The executive director submits that these are not mitigating factors and we agree.

¶ 36 The Poonians also submit that the Investment Industry Regulatory Organization of Canada's (IIROC) conclusion that the trading price and volume in shares of Great Pacific International Inc. (GPI) were not the product of price manipulation proves that the Poonians acted in a positive manner as required by industry standards and should be taken into account in the sanctions process.

¶ 37 We agree with the executive director's submission that because the IIROC investigation concerned GPI and the executive director made no allegations in respect of GPI, IIROC's conclusion that there was no market manipulation of GPI shares is irrelevant and is not a mitigating factor.

¶ 38 We also note that the executive director acknowledges that none of the respondents has a regulatory history. While the existence of a regulatory history can be an aggravating factor, the absence of such a history is not a mitigating factor.

¶ 39 While the Sihotas in their written sanction submissions have expressed remorse for their actions, they continue to qualify their participation in the manipulation by saying that what they did was at the request of others or that they were influenced by other respondents. We do not consider such expressions of remorse to be mitigating.

¶ 40 The Sihotas, in particular Perminder Sihota, also submit that they have suffered personal hardships. Personal hardships arising as a result of the misconduct are not mitigating factors.

¶ 41 We conclude there are no mitigating factors.

Past conduct

¶ 42 The Poonians submit they have never been in trouble with the law and do not have any regulatory histories.

¶ 43 As noted above, the executive director acknowledges none of the respondents has any history of regulatory misconduct.

¶ 44 We conclude that there is no history of past misconduct.

Risk to investors and capital markets posed by the respondents' continued participation in the capital markets of British Columbia

¶ 45 The executive director submits that the respondents have demonstrated by their egregious conduct in carrying out the manipulation that they pose a threat to the capital markets of British Columbia going forward.

¶ 46 We agree that the continued participation of any of the respondents in the capital markets would pose a significant ongoing risk to both investors and capital markets.

¶ 47 While we found Perminder Sihota to be "the least involved directly" in the manipulation, we also found she was involved in repeated and extensive activities. Her submission that the circumstances were not in her control because she is married to Manjit Sihota and related to Thal Poonian only serve to demonstrate the ongoing risk she presents.

Respondents' fitness to be a registrant or to bear the responsibilities associated with being a director, officer or adviser to issuers

¶ 48 The executive director submits that the respondents' perpetration of the manipulation shows that the respondents are clearly unfit to be registrants or to bear the responsibilities associated with being directors, officers or advisers to issuers.

¶ 49 The Poonians submit in response that they had their own personal money and time invested in each company they were involved in and that OSE was no different. They argue their actions are not indicative of any manipulation or acting contrary to the public interest as proven by the IIROC report's conclusion in the case of GPI.

¶ 50 Investment of time and money in other companies and the outcome of IIROC's investigation into trading in shares of GPI are not relevant to the Poonians' respective roles in the manipulation of the shares of OSE.

¶ 51 Subject to our consideration of Manjit Sihota's request that he be permitted to continue to act as a director and officer of Richmond Plywood Corporation Limited, the OSE manipulation and the roles of the respective respondents in that manipulation are such that none of the respondents is fit to be a registrant or to bear the responsibilities associated with being a director, officer or adviser to issuers.

Specific and general deterrence

¶ 52 The sanctions we impose must be sufficient to ensure that the respondents and others will be deterred from engaging in similar misconduct in the future.

¶ 53 The executive director submits that the respondents engaged in the most egregious conduct and that to deter them and others the Commission ought to impose severe sanctions.

Previous orders

¶ 54 We reviewed the following decisions cited by the parties in considering appropriate financial penalties.

¶ 55 In *Siddiqi* the panel found that Siddiqi had engaged in insider trading and manipulation of the shares of a company. The market manipulation was short-lived taking place over a one-month period and Siddiqi's enrichment was approximately $33,000. The panel noted that persons other than Siddiqi trading in shares of the company at the same time he was trading were likely trading at prices different than they would have been without Siddiqi's activity and would have suffered damages, although there was no way to know the quantum. The panel imposed an administrative penalty of $60,000 (approximately twice the amount of Siddiqi's likely enrichment) and prohibited Siddiqi from trading, acting as a director or officer of an issuer and engaging in investor relations for a period of six years.

¶ 56 In contrast, the OSE manipulation engaged in by the respondents was sophisticated and extensive, took place over many months, involved a number of nominees and other facilitators and targeted a specific pool of largely unsophisticated and vulnerable investors as victims, making it particularly egregious.

¶ 57 In the case of the OSE manipulation, the damages suffered by all investors is not known but the harm to the Phoenix clients who unknowingly bought OSE shares at an artificially inflated price is known. It is their aggregate unrealized loss at the end of the relevant period in the amount of $7,102,902.

¶ 58 The evidence also establishes that the trading of OSE shares in the respondents' and secondary participants' brokerage accounts during the relevant period resulted in an aggregate net trading gain or enrichment of $7,332,936.

¶ 59 The executive director, in citing several fraud cases, submits that such cases are analogous to manipulation cases as both are at the most serious end of the spectrum and appropriate to look to for guidance.

¶ 60 The Poonians object to the use of fraud cases because they do not concern a contravention of section 57(a) of the Act dealing with market manipulation, but rather fraud under section 57(b). However, we agree with the executive director that contraventions of either of sections 57(a) or (b) of the Act can be similarly serious. Each involves some form of deception, which in the case of market manipulation is the misleading appearance of trading activity in, or an artificial price for, a security. Consideration of previous orders in fraud cases is therefore appropriate.

¶ 61 In *Independent Academies Canada Inc. (Re),* 2014 BCSECCOM 260 at paragraph 27, the panel noted that in fraud cases, the Commission has consistently imposed permanent orders and significant financial sanctions. In that case, the panel found the respondents had raised $5,078,189 under an illegal distribution, of which $1.45 million was fraudulent. The panel ordered permanent bans against the individual respondents, payment under section 161(1)(g) of the Act of the full amount obtained of $5,433,189 and a joint and several administrative penalty of $7 million, having found the individual respondents acted jointly and were equally responsible.

¶ 62 Citing *Samji (Re)*, 2015 BCSECCOM 29, and *Michaels (Re)*, 2014 BCSECCOM 457, two more recent fraud cases, the executive director notes that in serious fraud cases, panels tend to triple the amount to be paid under section 161(1)(g) in arriving at the administrative penalty to be imposed.

C. Appropriate Orders

Market and Trading Bans

¶ 63 Given the extent and duration of the OSE manipulation, the harm to investors and the damage to the integrity of the capital markets, permanent market and trading bans under section 161(1) are appropriate in the case of each of the respondents to protect investors and our capital markets.

¶ 64 The Poonians request that each of them be permitted to act as directors or officers of non-reporting issuers whose shares do not trade on any exchange, even if he or she holds less than all of the issued and outstanding shares of the issuer.

¶ 65 We deny the Poonians' request. The OSE manipulation and the Poonians' roles in carrying out that manipulation were such that the panel concludes it is not in the public interest that either of the Poonians be allowed to act as an officer or director of any issuer.

¶ 66 Manjit Sihota asks that he be permitted to continue as a director and officer of Richmond Plywood Corporation Limited, a plywood manufacturing company that is employee-owned and whose shares are exclusively held by employees and ex-employees. Richmond Plywood does not offer shares to the public. The company is exempted from reporting on that basis.

¶ 67 Manjit Sihota submits that his income depends in part on his being able to continue as a director and officer of Richmond Plywood and that there has been no complaint against him in the past in these roles.

¶ 68 Employees, directors and management of Richmond Plywood provided statements for use in connection with these proceedings in support of Manjit Sihota's request. Those statements note his long service and contributions to the company, both as a mill worker and later as a director of the company, and that he serves as an elected director who has often topped the polls, including in his re-election as a director in 2014 for a two-year term.

¶ 69 The executive director objects to any such carve-out.

¶ 70 In view of the employee-owned nature of Richmond Plywood and Manjit Sihota's continued service as a director being contingent on re-election by the employee and ex-employee shareholders of that company, we consider it would not be prejudicial to the public interest to permit Manjit Sihota to act as a director and officer of Richmond Plywood.

Section 161(1)(g) order

¶ 71 Under section 161(1)(g) of the Act, where a person has not complied with a provision of the Act, the Commission may order that person to pay to the Commission "any amount obtained..., directly or indirectly, as a result of the failure to comply or the contravention".

¶ 72 In *Michaels*, the Commission discussed the principles relevant to section 161(1)(g) orders at paragraphs 42 and 43:

> ¶42 To summarize, these are the principles that are relevant under section 161(1)(g):
>
> a) the focus of the sanction should be on compelling the respondent to pay any amounts obtained from the contravention(s) of the Act;
> b) the sanction does not focus on compensation or restitution or act as a punitive or deterrent measure over and above

compelling the respondent to pay any amounts obtained from the contravention(s) of the Act;

c) the section should be read broadly to achieve the purposes set out above and should not be read narrowly to either limit orders:
(i) to amounts obtained, directly or indirectly, by that respondent; or
(ii) to a narrower concept of "benefits" or "profits", although that may be the nature of the order in individual circumstances.

¶43 Principles that apply to all sanction orders would also be applicable to section 161(1)(g) orders, including:

a) a sanction is discretionary and may be applied where the panel determines it to be in the public interest; and
b) a sanction is an equitable remedy and must be applied in the individual circumstances of each case.

¶ 73 The executive director submits that the amount obtained as a result of the contraventions is $7,177,305, being the aggregate net trading gain with respect to trades in the shares of OSE in the brokerage accounts of the respondents and secondary participants during the third phase of the manipulation.

¶ 74 The Poonians' submissions do not address section 161(1)(g) directly. We have already considered and rejected their submission that the maximum loss to British Columbians that can be established is $130,000.

¶ 75 The Poonians' submissions that each of them should be fined $1000 because of their inability to pay any larger amount and their suggestion that $20 to $30 million in sanctions as sought by the executive director is bizarre and abusive, might be read as submissions that no order should be made under section 161(1)(g).

¶ 76 The Sihotas submit that no order should be made against them under section 161(1)(g) or, if an order is made, it should be in a significantly smaller amount as their involvement was lesser in extent than that of the other respondents and they are not equally culpable.

¶ 77 While agreeing that it is not necessary to trace funds, the Sihotas argue more of an evidentiary record is required to order disgorgement in the context of five individual respondents. They also suggested that some of the $7.1 million which the executive director has identified as the amount obtained may have flowed to secondary participants.

¶ 78 The Sihotas cite *Michaels* at paragraph 35 which references other Commission decisions as demonstrating that "in other circumstances it may be inappropriate to make a section 161(1)(g) order in the total amount obtained" such as where a party "has not been equally culpable with another party". They argue that their circumstances fall squarely within the guidance in that paragraph. We do not agree that paragraph 35 provides the guidance suggested by the Sihotas. Rather, that paragraph and the preceding paragraph are merely summaries of past Commission decisions applying section 161(1)(g) noting some of the factors considered in those cases. This led the panel in *Michaels* to set out at paragraphs 42 and 43 certain principles applicable to section 161(1)(g) orders. It is in the context of those principles that we have considered the appropriate section 161(1)(g) order.

¶ 79 The Sihotas also dispute the executive director's submissions that the panel should infer the Sihotas profited from their actions. However, there is no need to address whether or not the Sihotas at the end of the day profited. In considering section 161(1)(g), the calculation is not one of profit but of the amount obtained as a result of the contravention.

¶ 80 As outlined in *Michaels*, the focus of a section 161(1)(g) sanction order is on compelling a respondent to pay any amounts obtained as a result of contraventions of the Act and not on compensation or restitution, nor deterrence beyond compelling payment of such amounts.

¶ 81 Section 161(1)(g) is to be read broadly. The amount obtained need not be traced to an individual respondent, nor does it have to be obtained or retained by that respondent. It is not limited to "benefits" or "profits".

¶ 82 All of the respondents' activities, including the Sihotas', contributed to the OSE manipulation. In the case of the Sihotas, those activities included funding secondary participants' brokerage accounts used to trade in OSE shares, making payments to and receiving payments from other respondents, and the indirect payment of commissions to the Phoenix Group for referring Phoenix clients to purchase OSE shares. As well, Manjit Sihota traded OSE shares in his brokerage accounts and a joint account with Perminder Sihota, and Perminder Sihota allowed OSE shares to be traded in her brokerage accounts as a nominee of Thal Poonian.

¶ 83 While the respondents' roles in conducting the manipulation varied, each respondent was directly involved in and contributed to the manipulation.

¶ 84 It is therefore appropriate to make a single disgorgement order jointly and severally against all five respondents for the amount obtained as a result of their contraventions of section 57(a) of the Act.

¶ 85 While we agree the amount obtained may be determined by calculating the aggregate net trading gain, we have concluded that the appropriate period over which such gain is to be calculated is the entire relevant period. The aggregate net trading gain over that time period in the respondents' and secondary participants' brokerage accounts is $7,332,936. We find that this is the amount obtained as a result of the respondents' contraventions of the Act.

¶ 86 We order that the amount of $7,332,936 be paid by the respondents jointly and severally to the Commission.

Administrative penalty

¶ 87 The executive director seeks a joint and several administrative penalty against all respondents of $21,530,000, being approximately three times the $7.1 million that the executive director submits is the amount obtained as a result of the respondents' contraventions of the Act.

¶ 88 As noted previously, the Poonians argue that to suggest sanctions in the range of $20 million to $30 million is bizarre and abusive. The Poonians refer to "the Alberta model where they actually analyze the ability to pay and then set the sanctions accordingly" but do not refer to any specific authority for that statement.

¶ 89 The Sihotas submit that the Findings are explicit in respect of the different levels of involvement of each respondent. They argue that to order a single administrative penalty in the amount of $21.5 million for which all respondents would be jointly and severally liable would be contrary to the Findings.

¶ 90 Citing *Walton v. Alberta (Securities Commission)*, 2014 ABCA 273, the Sihotas submit that a $21.5 million administrative penalty is "crushing" and that it would be stretching it to say that the Sihotas' conduct is equivalent to that of the respondents in either *Michaels* or *Samji*.

¶ 91 We agree with the executive director's submission that the level of the Sihotas' involvement in the manipulation was greater than they now portray it.

¶ 92 We conclude that the administrative penalties in total should be in an amount approximately three times the amount obtained as a result of the respondents' contraventions of the Act. The OSE manipulation is, like the fraud cases cited, at the most serious end of the spectrum and made even more egregious by the establishment of a victim pool of investors through the arrangements made with the Phoenix Group.

¶ 93 But we do not agree that it is appropriate to order a single administrative penalty payable jointly and severally by all respondents.

¶ 94 We found each respondent was directly involved in activities that resulted in both artificial trading activity in, and artificial prices for, OSE shares. However, there is some variation in level of involvement as among the respondents. Looking at individual conduct:

- We found Thal Poonian was the mastermind of the scheme. His conduct was the most egregious and the administrative penalty against him should reflect this and his leading role in the manipulation. We order an administrative penalty against him of $10 million.

- At the next level are Robert Leyk, Sharon Poonian and Manjit Sihota. We found all three actively and extensively participated in the manipulation. Their conduct contributed to and was essential to the scheme. The administrative penalty of $3.5 million we order against each of them reflects this.

- The lowest level of involvement is that of Perminder Sihota. We found she too was directly involved in various activities that contributed to and furthered the manipulation, but also that she was "the least involved directly". We note the executive director's submission that Perminder Sihota's effort to cover up for the other respondents is an aggravating factor. The administrative penalty of $1 million we order against her reflects the very serious nature of her misconduct while at the same time taking into account her lesser role in the overall scheme.

¶ 95 In aggregate, the administrative penalties total $21.5 million or approximately three times the amount obtained through contraventions of the Act of $7,332,936.

IV Orders

¶ 96 Considering it to be in the public interest, and pursuant to sections 161 and 162 of the Act, we order that:

1. under section 161(1)(b)(ii), the respondents are permanently prohibited from trading in, or purchasing, securities and exchange contracts;

2. under section 161(1)(c), any or all of the exemptions set out in the Act, regulations or a decision do not apply to the respondents;

3. under section 161(1)(d)(i), the respondents resign any position held as a director or officer of any issuer, except that Manjit Sihota may continue to act as a director and officer of Richmond Plywood Corporation Limited provided that Richmond Plywood Corporation Limited remains a non-reporting issuer;

4. under section 161d(1)(d)(ii), the respondents are permanently prohibited from becoming or acting as a director of officer of any issuer, except that Manjit Sihota may act as a director and officer of Richmond Plywood Corporation Limited provided that Richmond Plywood Corporation Limited remains a non-reporting issuer;

5. under section 161(1)(d)(iii), the respondents are permanently prohibited from becoming or acting as a registrant or promoter;

6. under section 161(1)(d)(iv), the respondents are permanently prohibited from acting in a management or consultative capacity in connection with activities in the securities market;

7. under section 161(1)(d)(v), the respondents are permanently prohibited from engaging in investor relations activities;

8. under section 161(1)(g), the respondents pay to the Commission $7,332,936 and the respondents are jointly and severally liable to pay this amount;

9. under section 162,
   a) Thal Poonian pay to the Commission an administrative penalty of $10 million;
   b) Sharon Poonian pay to the Commission an administrative penalty of $3.5 million;
   c) Robert Leyk pay to the Commission an administrative penalty of $3.5 million;
   d) Manjit Sihota pay to the Commission an administrative penalty of $3.5 million; and
   e) Perminder Sihota pay to the Commission an administrative penalty of $1 million.

¶ 97 March 13, 2015

¶ 98 **For the Commission**

Suzanne K. Wiltshire
Commissioner

George C. Glover, Jr.
Commissioner

Audrey T. Ho
Commissioner

Current to September 18, 2018

R.S.B.C. 1996, c. 418, s. 161

[eff since April 20, 2012](Current Version)

SECURITIES ACT

RSBC 1996, CHAPTER 418

Part 18 -- Enforcement

SECTION 161

Enforcement orders

161 (1) If the commission or the executive director considers it to be in the public interest, the commission or the executive director, after a hearing, may order one or more of the following:

(a) that a person comply with or cease contravening, and that the directors and officers of the person cause the person to comply with or cease contravening,

(i) a provision of this Act or the regulations,

(ii) a decision, whether or not the decision has been filed under section 163, or

(iii) a bylaw, rule, or other regulatory instrument or policy or a direction, decision, order or ruling made under a bylaw, rule or other regulatory instrument or policy of a self regulatory body, exchange or quotation and trade reporting system, as the case may be, that has been recognized by the commission under section 24;

(b) that

(i) all persons,

(ii) the person or persons named in the order, or

(iii) one or more classes of persons

cease trading in, or be prohibited from purchasing, any securities or exchange contracts, a specified security or exchange contract or a specified class of securities or class of exchange contracts;

(c) that any or all of the exemptions set out in this Act, the regulationsor a decision do not apply to a person;

(d) that a person

(i) resign any position that the person holds as a director or officer of an issuer or registrant,

(ii) is prohibited from becoming or acting as a director or officer of any issuer or registrant,

(iii) is prohibited from becoming or acting as a registrant or promoter,

(iv) is prohibited from acting in a management or consultative capacity in connection with activities in the securities market, or

(v) is prohibited from engaging in investor relations activities;

(ii)is prohibited from becoming or acting as a director or officer of any issuer or registrant,

(iii)is prohibited from becoming or acting as a registrant or promoter,

(iv)is prohibited from acting in a management or consultative capacity in connection with activities in the securities market, or

(v)is prohibited from engaging in investor relations activities;

(e) that a registrant, issuer or person engaged in investor relations activities

(i) is prohibited from disseminating to the public, or authorizing the dissemination to the public, of any information or record of any kind that is described in the order,

(ii) is required to disseminate to the public, by the method described in the order, any information or record relating to the affairs of the registrant or issuer that the commission or the executive director considers must be disseminated, or

(iii) is required to amend, in the manner specified in the order, any information or record of any kind described in the order before disseminating the information or record to the public or authorizing its dissemination to the public;

(f) that a registration or recognition be suspended, cancelled or restricted or that conditions, restrictions or requirements be imposed on a registration or recognition;

(g) if a person has not complied with this Act, the regulations or a decision of the commission or the executive director, that the person pay to the commission any amount obtained, or payment or loss avoided, directly or indirectly, as a result of the failure to comply or the contravention;

(h) that a person referred to in subsection (7) submit to a review of its practices and procedures;

(i) that a person referred to in subsection (7) make changes to its practices and procedures;

(j) that a person be reprimanded.

(2) If the commission or the executive director considers that the length of time required to hold a hearing under subsection (1), other than under subsection (1) (e) (ii) or (iii), could be prejudicial to the public interest, the commission or the executive director may make a temporary order, without providing an opportunity to be heard, to have effect for not longer than 15 days after the date the temporary order is made.

(3) If the commission or the executive director considers it necessary and in the public interest, the commission or the executive director may, without providing an opportunity to be heard, make an order extending a temporary order until a hearing is held and a decision is rendered.

(4) The commission or the executive director, as the case may be, must send written notice of every order made under this section to any person that is directly affected by the order.

(5) If notice of a temporary order is sent under subsection (4), the notice must be accompanied by a notice of hearing.

(6) The commission or the executive director may, after providing an opportunity to be heard, make an order under subsection (1) in respect of a person if the person

(a) has been convicted in Canada or elsewhere of an offence

(i) arising from a transaction, business or course of conduct related to securities or exchange contracts, or

(ii) under the laws of the jurisdiction respecting trading in securities or exchange contracts,

(b) has been found by a court in Canada or elsewhere to have contravened the laws of the jurisdiction respecting trading in securities or exchange contracts,

(c) is subject to an order made by a securities regulatory authority, a self regulatory body or an exchange, in Canada or elsewhere, imposing sanctions, conditions, restrictions or requirements on the person, or

(d) has agreed with a securities regulatory authority, a self regulatorybody or an exchange, in Canada or elsewhere, to be subject to sanctions, conditions, restrictions or requirements.

(7) An order under subsection (1) (h) or (i) may be made against

(a) an exchange or a quotation and trade reporting system,

(b) a self regulatory body,

(c) a clearing agency,

(c.1) a credit rating organization,

(d) a registrant,

(e) a partner, director, officer, insider or control person of a registrant,

(f) a person providing record keeping services to a registrant,

(g) a person that manages a compensation, contingency or similar fund formed to compensate clients of dealers or advisers,

(h) an issuer,

(i) a custodian of assets or securities of an investment fund,

(j) a transfer agent or registrar for securities of an issuer,

(k) a director, officer, insider or control person of an issuer,

(l) a general partner of a person referred to in this subsection, or

(m) a person that the commission has ordered is exempt from a provision of this Act or the regulations.

** Editor's Table **

Provision	Changed by	In force	Authority
161	2006-32-51	2009 Sep 29	BC Reg 223/09
161	2011-29-132	2011 Nov 24	R.A.
161	2010-4-63	2012 Apr 20	BC Reg 61/2012
161(1)(a)	2006-32-51	2007 Dec 21	BC Reg 396/07
161(1)(a)(iii)	2003-24-14	2003 Apr 10	R.A.
161(1)(b)	1999-20-29	1999 Jun 29	R.A.
161(1)(d)	2007-37-32	2007 Nov 22	R.A.
161(1)(e)(ii)	2007-37-33	2007 Nov 22	R.A.
161(1)(f)	2007-37-33	2007 Nov 22	R.A.
161(1)(g)	2007-37-33	2007 Nov 22	R.A.
161(1)(h)	2007-37-33	2007 Nov 22	R.A.

161(1)(i)	2007-37-33	2007 Nov 22 R.A.
161(1)(j)	2007-37-33	2007 Nov 22 R.A.
161(6)	2006-32-51	2006 May 18 R.A.
161(6)	2007-37-34	2007 Nov 22 R.A.
161(7)	2007-37-35	2007 Nov 22 R.A.

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RSBC 1996-418-161; SBC 1999-20-29; SBC 2003-24-14; SBC 2006-32-51;SBC 2007-37-32, 33-35; SBC 2011-29-132; SBC 2010-4-63.