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

Citation: Re Poonian, 2018 BCSECCOM 160 Date: 20180516

Thalbinder Singh Poonian, Shailu Sharon Poonian, Manjit Singh Sihota and Perminder Sihota

Panel	Suzanne K. Wiltshire	Commissioner
	Audrey T. Ho	Commissioner
	George C. Glover, Jr.	Commissioner

Submissions Completed February 14, 2018

Decision date May 16, 2018

Appearing

David Hainey	For the Executive Director
Mikhail Magaril	For Thalbinder Singh Poonian and Shailu Sharon Poonian
Marc Dumais	For Manjit Singh Sihota and Perminder Sihota

Decision

I. Introduction

[1] This hearing is held pursuant to the British Columbia Court of Appeal's remission of this matter to the Commission under section 167(3) of the *Securities Act*, RSBC 1996, c. 418.

[2] In its Findings (*Re Poonian*, 2014 BCSECCOM 318), the Commission found Thalbinder Singh Poonian, Shailu Sharon Poonian, Manjit Singh Sihota, Perminder Sihota and a fifth respondent, Robert Joseph Leyk, contravened section 57(a) of the Act, commonly referred to as the market manipulation provision. In its Sanctions decision (*Re Poonian*, 2015 BCSECCOM 96), the Commission made orders against the Poonians, the Sihotas and Leyk under sections 161 and 162 of the Act.

[3] Pursuant to section 167(1) of the Act, the Poonians and Sihotas, separately, sought leave to appeal the orders of the Commission. Leyk did not seek leave to appeal. Leave to appeal was granted only with respect to the section 161(1)(g) orders that ordered the Poonians and Sihotas to pay $7,332,936 on a joint and several basis.

[4] In its decision (*Poonian v. British Columbia Securities Commission* 2017 BCCA 207), the Court of Appeal, at paragraph 164 set aside the section 161(1)(g) orders made against the Poonians and Sihotas and at paragraph 165 remitted the matter to the Commission "to assess the evidence already before it to make the necessary factual findings as to whether a section 161(1)(g) order should be made against each of them."

II. Background

A. Findings

[5] The Commission had made the following findings of facts in this matter, as set out in the Findings.

[6] The Poonians and Sihotas 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 Corp.

[7] Certain friends, relatives and associates of the Poonians and Sihotas who were not named as respondents in the Notice of Hearing giving rise to this matter (the secondary participants) were OSE shareholders or warrant holders. The secondary participants were involved directly or indirectly in various purchases, sales or transfers of OSE shares, or in payments and transfers of money to or from the respondents, their companies, other secondary participants or brokerage accounts of various respondents and secondary participants.

[8] Acquisition of control of OSE began in May 2007 when Thalbinder Poonian arranged the private purchase of a controlling interest in OSE by three secondary participants, MB, LN and AP. Manjit Sihota, Leyk and secondary participant RB2 were subsequently elected to the OSE board in July 2007.

[9] Two private placements of units consisting of OSE shares and warrants followed - the first closing on September 10, 2007 and the second on December 17, 2007. After the second private placement, the respondents and 13 of the secondary participants held 11,486,000 OSE shares (88.33% of the outstanding OSE shares). Subsequently additional OSE shares were issued to certain of the respondents and secondary participants on the exercise of warrants.

[10] Thalbinder Poonian directed trading of OSE shares in the brokerage accounts of Perminder Sihota as well as the accounts of nine secondary participants (identified in the Findings as AP, DS, KEI, LN, SP, MB, BM, RB and GVP).

[11] Trading in OSE shares on the TSXV by the respondents and secondary participants in the period from September 10, 2007 to March 31, 2009 (the relevant period) resulted in an aggregate net trading gain of $7,332,936.

[12] The table at paragraph 20 of the Findings (Table 20) breaks down this trading by each respondent and provides trade totals for each of the respondents and for the respondents and secondary participants as a group. This table is reproduced below.

Trades in OSE shares between September 10, 2007 and March 31, 2009

Party	**Buy Volume**	**Purchase cost**	**Sell Volume**	**Sell value**
Thal Poonian	1,124,200	$1,475,731	1,354,100	$2,222,407
Sharon Poonian	1,476,800	$1,977,448	3,204,000	$5,127,383
Manjit Sihota	449,900	$693,330	329,000	$548,065
Perminder Sihota	337,900	$545,481	1,273,100	$1,671,741
Leyk/Leyk Co.	198,500	$383,109	1,650,000	$2,273,042
Respondents and Secondary Participants (total)	12,750,800	$17,789,851	17,507,700	$25,122,787

B. Sanctions decision

[13] In the Sanctions decision (at paragraph 85), the Commission found the aggregate net trading gain during the relevant period of $7,332,936 to be the amount obtained as a result of the respondents' contraventions of the Act. The Court of Appeal (paragraph 147) confirmed that this finding was sound.

[14] Pursuant to section 161(1)(g) of the Act, the Commission ordered that amount ($7,332,936) to be paid by the respondents jointly and severally to the Commission. The Court of Appeal found the joint and several aspect of this order to be problematic.

C. Appeal decision

[15] The Appeal decision concerns only the section 161(1)(g) orders made against the Poonians and Sihotas. Section 161(1)(g) provides:

> 161(1) If the commission …considers it to be in the public interest, the commission … may order one or more of the following:
>
> …
>
> (g) if a person has not complied with this Act, …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.

[16] The Court of Appeal agreed with the two-step approach to considering applications for orders under section 161(1)(g) identified in *Re SPYru Inc.*, 2015 BCSECCOM 452 at paragraphs 131 – 132 and summarized below:

- the first step is to determine whether a respondent, directly or indirectly, obtained amounts arising from his or her contraventions of the Act; and

- the second step is to determine if it is in the public interest to make such an order.

[17] As noted by the Court of Appeal, the second step was not at issue in the appeal, as the determination whether it is in the public interest to make an order is a decision for the Commission, with its expertise. The only concern of the Court on the *SPYru* two-step approach was whether the first step was satisfied.

[18] The Court of Appeal adopted several principles to apply concerning section 161(1)(g) which it summarized at paragraph 143 of the Appeal decision, as follows:

> 1. The purpose of s. 161(1)(g) is to deter persons from contravening the *Act* by removing the incentive to contravene, i.e. by ensuring the person does not retain the "benefit" of their wrongdoing.
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> 2. The purpose of s. 161(1)(g) is not to punish the contravener or to compensate the public or victims of the contravention. Those objectives may be achieved through other mechanisms in the *Act*, such as the claims process set up under Part 3 of the *Securities Regulation* or the s. 157 compliance proceedings in the *Act*.
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> 3. There is no "profit" notion, and the "amount obtained" does not require the Commission to allow for deductions of expenses, costs, or amounts other persons paid to the Commission. It does, however, permit deductions for amounts returned to the victim(s).
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> 4. The "amount obtained" must be obtained *by that respondent, directly or indirectly*, as a result of the failure to comply with or contravention of the *Act*. This generally prohibits the making of a joint and several order because such an order would require someone to pay an amount that person did not obtain as a result of that person's contravention.
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> 5. However, a joint and several order may be made where the parties being held jointly and severally liable are under the direction and control of the contravener such that, in fact, the contravener obtained those amounts *indirectly*. Non-exhaustive examples include the use of a corporate *alter ego*, use of other person's accounts, or use of other persons as nominee recipients.

[19] Applying these principles, the Court of Appeal found it problematic that the Commission held all four of the Poonians and Sihotas jointly and severally liable for the full amount of $7,332,936, without determining what amount each of them had individually obtained, whether directly or indirectly, as a result of their respective contraventions of the Act.

[20] More specifically, the court stated in the Appeal decision at paragraphs 150 to 153:

> **150** The scheme in question involved controlling and directing trading in a number of accounts to realize the aggregate net trading gain. It involved making payments to others to facilitate some of those sales.
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> **151** The Commission has before it the trading records of all the relevant accounts. Some accounts belong to the Sihotas or the Poonians. It is clear that portions of the aggregate net trading gain in those accounts were "obtained" by

> those account holders. The issue is, what portions of the aggregate net trading gain in accounts of *other* persons can be properly found to have been obtained directly or indirectly by any of the Poonians or Sihotas?
>
> **152** In my view, the Commission must determine whether amounts in those other accounts were, effectively, obtained *indirectly* by one or more of the appellants in that one or all of the Poonians and Sihotas had control and direction over those accounts. If such control and direction were established, there would then be a finding that the portion of the aggregate net trading gain in those accounts was obtained *indirectly* by that person. Therefore, that person could be properly held liable for those amounts. …This is a factual finding this Court cannot and should not make.
>
> **153** …In my view, the fact-finding exercise falls within the Commission's province, … the Commission does not have to determine the proportions to a certainty. The amount each person obtained directly or indirectly just needs to be "reasonably approximate". The onus is then on that person to show why such an amount (or apportionment) is not reasonable. Any uncertainty in the calculations is resolved in favour of the Executive Director, since a wrongdoer should not benefit from any ambiguity arising from his or her misconduct …

[21] The Court of Appeal allowed the appeals of the Poonians and Sihotas, set aside the section 161(1)(g) orders made against them and remitted the matter to the Commission to assess the evidence already before it to make the necessary factual findings whether a section 161(1)(g) order should be made against each of them. In the Court's view, it is incumbent on the Commission and properly within its expertise "to make determinations as to the conduct of each person, the existence, if any, of each person's direction and control over accounts containing the 'amounts obtained', and on balance, what proportion of the amount obtained (aggregate net trading gain) can properly be found as having been directly or indirectly obtained by each person. Of course, it is also for the Commission to determine whether it is in the public interest to make any order under s. 161(1)(g)."

III. Positions of the parties

A. Executive Director

[22] The executive director submits that, in accordance with the Court of Appeal decision, the panel must now determine what portion of the total amount obtained of $7,332,936 was obtained by each of the Poonians and Sihotas, directly or indirectly.

[23] Relying on paragraph 151 of the Appeal decision, the executive director submits that the amount obtained directly by each of the Poonians and Sihotas is the portion of the aggregate net trading gain in that person's individual brokerage accounts. Those amounts, derived from Table 20, are as follows:

Party	Purchase Cost (Buy Volume)	Sell Value (Sell Volume)	Net trading gain/loss	Amount obtained "directly" by respondent pursuant to section 161(1)(g)
Thalbinder Poonian	$1,475,731 (1,124,200)	$2,222,407 (1,354,100)	$746,676	**$746,676**
Sharon Poonian	$1,977,448 (1,476,800)	$5,127,383 (3,204,000)	$3,149,935	**$3,149,935**
Manjit Sihota	$693,330 (449,900)	$548,065 (329,000)	-$145,265	**0**
Perminder Sihota	$545,481 (337,900)	$1,671,741 (1,273,100)	$1,126,260	**$1,126,260**

[24] The executive director does not seek a section 161(1)(g) order against Manjit Sihota because in total, his personal brokerage accounts suffered a net trading loss during the relevant period. The executive director submits that because of that, Manjit Sihota did not directly obtain any portion of the aggregate net trading gain as an individual cannot "obtain" a negative value. The executive director says there is insufficient evidence to conclude that Manjit Sihota obtained any amount indirectly as a result of his contravention.

[25] The evidence already before us establishes that the brokerage accounts of Perminder Sihota and six secondary participants referred to in paragraph 10 of this decision (AP, DS, KEI, LN, SP and MB) had net trading gains totaling $3,221,341. The executive director submits that given his direction and control over those accounts, Thalbinder Poonian had obtained, indirectly, the net trading gains in those brokerage accounts. Those amounts are as follows:

Party	Purchase cost (Buy Volume)	Sell Value (Sell Volume)	Net trading gain, i.e. amount obtained "indirectly" by ThalbinderPoonian
AP	$473,486 (305,400)	$806,456 (448,000)	$332,970
DS	$1,144,217 (812,600)	$1,468,623 (1,066,200)	$324,406
KEI	$829,155 (1,057,500)	$1,146,003 (1,709,000)	$316,848
LN	$3,731,503 (2,195,600)	$4,055,527 (2,635,000)	$324,024
SP	$1,307,889 (1,224,400)	$2,081,610 (1,277,400)	$773,721

MB	$1,077,374 (641,600)	$1,100,486 (662,200)	$23,112
Perminder Sihota	$545,481 (337,900)	$1,671,741 (1,273,100)	1,126,260
Total amount obtained "indirectly" by Thalbinder Poonian		**$3,221,341**	

[26] The evidence already before us also establishes that the brokerage accounts of the three other secondary participants referred to in paragraph 10 (BM, RB and GVP) suffered net trading losses totaling $1,522,590 during the relevant period. The executive director says that, in determining the amount obtained by Thalbinder Poonian, those trading losses should not be deducted from the net trading gains that Thalbinder Poonian had obtained, because an individual cannot obtain a negative value under section 161(1)(g). Further, the executive director submits that it would be contrary to the public interest to discount a section 161(1)(g) order against a respondent because accounts held in the names of others suffered net trading losses.

[27] Accordingly, the executive director seeks the following orders under section 161(1)(g) and submits they are in the public interest:

- Thalbinder Poonian pay to the Commission $3,968,017, which amount includes $1,126,260 that both he and Perminder Sihota should be jointly and severally liable to pay to the Commission;
- Sharon Poonian pay to the Commission $3,149,935;
- Perminder Sihota be jointly and severally liable with Thalbinder Poonian to pay to the Commission $1,126,260.

B. Poonians

[28] The position of the Poonians is that an order under section 161(1)(g) is not supported by the evidence and also is not in the public interest.

[29] The Poonians submit there is no reliable evidence before the panel that either of the Poonians received any amount personally, and that there is no degree of direction and control such that Thalbinder Poonian could be said to have obtained any amount indirectly.

[30] In the alternative, if the panel were to find that Thalbinder Poonian obtained amounts indirectly through accounts that he directed, the position of Thalbinder Poonian is that trading accounts that resulted in aggregate net losses must be properly accounted for in determining the appropriate scope of a section 161(1)(g) order.

[31] The Poonians say further that even if the panel finds there were amounts obtained by either of them, the executive director has failed to provide cogent evidence that each amount was not only obtained, but also obtained as a result of the contravention.

[32] Lastly, the Poonians submit that if the panel finds there are amounts obtained as a result of the contravention of the Act, an order under section 161(1)(g) is not in the public interest. They say that they do not have any of the money ascribed to them and that must be considered in sanctioning, and a reasonable and properly informed person would see the imposition of a section 161(1)(g) order as being unnecessary and contrary to the public interest, in particular in view of the outstanding administrative penalties for which there has been no recovery and they say, no prospect of recovery.

C. Sihotas

[33] The Sihotas' position is that Perminder Sihota did not obtain any amounts from her contravention of the Act and the effect of a joint and several order pursuant to section 161(1)(g) would be to require her to pay amounts obtained by Thalbinder Poonian. They agree with the executive director that a section 161(1)(g) order is not appropriate against Manjit Sihota.

[34] Perminder Sihota submits that the executive director's interpretation of section 161(1)(g) is incorrect because it wrongly equates the words "obtained directly" with mere possession, however temporary. She argues that the fact that there was a net trading gain in her accounts (accounts that were directed and controlled by Thalbinder Poonian) is not sufficient to hold her jointly and severally liable for those amounts absent any finding that she actually retained any of those amounts personally.

[35] In the alternative, if the panel determines that the net trading gain in her accounts is an amount "obtained directly" by her, Perminder Sihota submits an order under section 161(1)(g) should be refused as being contrary to the public interest. She argues that the evidence is inconclusive whether she actually retained any amounts as a result of contravening the Act. She submits that without a finding that she retained any amounts or was enriched in any way, an order under section 161(1)(g) would go further than required for purposes of deterrence and amount to a penalty against her for her involvement in the overall scheme. As such, it is contrary to the purpose of section 161(1)(g).

IV. Analysis

[36] We are satisfied that the total "amount obtained" as a result of the respondents' contraventions of the Act is the aggregate net trading gain during the relevant period ($7,332,936), as set out in the Sanctions decision. The Court of Appeal confirmed this finding as sound and nothing in the parties' submissions leads us to a different conclusion.

[37] We agree with the executive director that under step one of the two-step test approved by the Court of Appeal, our task is to determine what portion of the total "amount obtained" of $7,332,936 was obtained by each of the Poonians and the Sihotas, directly or indirectly.

Amounts obtained directly

(i) Poonians

[38] We agree with the executive director that the amounts obtained directly by the Poonians were as follows:

- Thalbinder Poonian $746,676
- Sharon Poonian $3,149,935

[39] The Poonians argue that Table 20 is not an accurate summary from which to calculate the aggregate net trading gains and losses because the only individual who bought more shares than were sold is Manjit Sihota. The Poonians say that the others all sold more shares than they bought in order to obtain any net trading gain and the executive director could not explain how someone could sell more shares than they own, and the evidence is therefore simply unreliable.

[40] The Poonians' argument misses the point that this table only captures secondary market trading on the TSXV and therefore trading gains or losses realized through trading on the TSXV during the relevant period when the market manipulation was ongoing.

[41] As pointed out by the executive director, the fact that the respondents and secondary participants sold more shares into the secondary market than they purchased on the secondary market was the essence of the manipulation. The respondents and secondary participants had obtained OSE shares via the initial private purchase and the private placements (including the exercise of warrants) so they could later sell those shares on the secondary market after artificially inflating the price of OSE shares.

[42] In any event, Thalbinder Poonian, Sharon Poonian and Perminder Sihota had more OSE shares than the numbers traded in their brokerage accounts. In the Findings (paragraphs 99, 110 and 113), the Commission found that, in addition to the shares purchased in their respective brokerage accounts: Sharon Poonian acquired 1.7 million OSE shares through the private placements and the exercise of warrants and over one million additional private placement shares were transferred to her by secondary participants; 1.2 million private placement shares were transferred to Thalbinder Poonian by secondary participants and Leyk; and, Perminder Sihota obtained 1.3 million shares through the private placements and the exercise of warrants.

[43] The Poonians' second argument that they never obtained any money because no amount of money has yet been discovered by the Commission does not mean that the Poonians did not obtain these amounts as a result of the trading in their respective accounts during the relevant period. What they may have subsequently done with the net trading gains made in their accounts during the relevant period is not in evidence.

[44] Thalbinder Poonian held three brokerage accounts in his name in which he traded OSE shares during the relevant period for a total net trading gain of $746,676. Sharon Poonian held five brokerage accounts in her name in which she traded OSE shares during the

relevant period for a total net trading gain of $3,149,935. As the holders of those accounts, each obtained and had control and direction over the net trading gains realized in his or her respective accounts.

[45] As stated in the Appeal decision at paragraph 151: "It is clear that portions of the aggregate net trading gain in those accounts [belonging to the Poonians and Sihotas] were 'obtained' by those account holders."

[46] We find that Thalbinder Poonian obtained, directly, the total net trading gain realized in his trading accounts during the relevant period of $746,676. He obtained these amounts during the course of and as a result of his conduct in the manipulation of OSE shares contrary to section 57(a), as set out in the Findings at paragraph 99.

[47] We find that Sharon Poonian obtained, directly, the total net gain realized in her trading accounts during the relevant period of $3,149,935. She obtained these amounts during the course of and as a result of her conduct in the manipulation of OSE shares contrary to section 57(a), as set out in the Findings at paragraph 110.

(ii) Sihotas

[48] Since Manjit Sihota had a net trading loss in his trading accounts, we accept the executive director's submission that Manjit Sihota did not obtain any amounts directly during the relevant period.

[49] We agree with the executive director that the amount obtained directly by Perminder Sihota as a result of her contravention was $1,126,260 during the relevant period.

[50] Perminder Sihota does not dispute that the trading accounts in her name accrued a net trading gain of $1,126,260 during the relevant period.

[51] Perminder Sihota submits, however, that there is no evidence she actually obtained any amounts personally as a result of the manipulation.

[52] Perminder Sihota argues that the executive director is wrong to infer from paragraph 151 of the Appeal decision that the Court found both as a matter of fact and law that any net trading gains in the accounts of the respondents were amounts obtained directly by that person for the purposes of section 161(1)(g). In this regard, she refers us to paragraph 148 of the Appeal decision stressing those portions underlined below:

> **148** Although the Commission made findings as to the degree of involvement of each of the Poonians and Sihotas, the difficulty is that it made no finding that each of these four individuals obtained amounts *personally*. Furthermore, the Commission found that each of these four individuals participated and contributed to the manipulation scheme in different ways, with varying degrees of culpability, but made no finding as to the existence or degree of direction and

> control required for a finding as to whether any individual *indirectly* obtained an amount.

[53] In our view, paragraph 148 of the Appeal decision comments on the need to determine the "amount obtained" on an individual rather than a group basis when assessing sanctions under section 161(1)(g). Thus we read "personally" in paragraph 148 to refer to the amount obtained by each of the Poonians and Sihotas individually. This is consistent with the subsequent statements in paragraph 151 of the Appeal decision which speak to the specifics of this matter. In that paragraph, the Court deals first with the net trading gains in the accounts of each of the Poonians and Sihotas and concludes the portions of the aggregate net trading gain in the accounts of each of the Poonians and Sihotas were obtained by the respective account holders. The Court then considers the issue of amounts obtained indirectly which is not relevant in the case of Perminder Sihota since the $1,126,260 was directly obtained by her.

[54] Perminder Sihota further submits that the executive director is wrong in equating the words "obtained directly" with mere possession, however temporary. She submits that the fact there was a net trading gain in her accounts is not sufficient to hold her liable for those amounts, absent any finding that she actually retained any of those amounts personally.

[55] She submits that the evidence whether she actually retained any amounts personally was inconclusive. She argues that to the extent those amounts simply passed through her accounts they cannot be deemed to have been amounts obtained directly by her for the purposes of section 161(1)(g). She submits that to hold otherwise would be to hold her liable simply for being used as a conduit, a result that is expressly contrary to the Court's reasons and the underlying purpose of section 161(1)(g). She also submits that the effect of a joint and several order would be to require her to pay amounts obtained by another, namely, Thalbinder Poonian.

[56] Section 161(1)(g) refers to the "amount obtained" and not to the "amount retained". Perminder Sihota held two brokerage accounts in her name that traded in shares of OSE during the relevant period. As the holder of those accounts she obtained and had control and direction over the net trading gains realized in her accounts totaling $1,126,600 during the relevant period.

[57] What Perminder Sihota may have subsequently done with the net trading gains realized during the relevant period in the brokerage accounts in her name is not in evidence. If she permitted her accounts to be used as conduits, it does not negate the fact that she obtained those amounts in her accounts in the first instance. As the holder of those accounts, she had both direction and control over those accounts and the assets in them and had the power to deal with the net trading gains as she chose. The fact that she gave Thalbinder Poonian the right to direct trading in accounts in her name and acted as his nominee neither affects her direction and control over those accounts as their legal owner nor her obtaining the net trading gains in those accounts.

[58] As the holder of those brokerage accounts, Perminder Sihota permitted Thalbinder Poonian to trade in the shares of OSE in those accounts and accumulate trading gains. As the holder of those accounts, she allowed herself to be used as Thalbinder Poonian's nominee (Findings paragraph 83) and in doing so she engaged in conduct contrary to section 57(a) of the Act. She not only acted as a nominee but also engaged in other conduct contrary to section 57(a) as set out in the Findings at paragraphs 111 and 113. We are satisfied that Perminder Sihota obtained the trading gains in her brokerage accounts as a result of her contravention of section 57(a).

[59] Accordingly, we find that Perminder Sihota obtained, directly, as a result of her contravention of the Act, the net trading gains realized in her brokerage accounts during the relevant period of $1,126,260.

Amounts obtained indirectly

[60] Thalbinder Poonian points to the fifth principle in paragraph 143 of the Appeal decision, which is replicated above at paragraph 18. He argues that the words "direction" and "control" are "not synonymous" but two distinct legal criteria, and both elements must be present. He submits that "the ability to direct trading in another's account" does not meet the criteria "for an indirect obtainment" and that the executive director must further establish that a respondent has an element of control over the account, such as the ability to withdraw money from the account. He submits there is no evidence that he was able to request any gains be provided to him or that he benefitted from the "uncrystallized" gains that occurred in the others' trading accounts.

[61] The executive director refers to the online Oxford Dictionary that defines "direct" to include "control the operations of; manage or govern". The executive director submits that the terms "direction and control" are not two distinct legal criteria but "quite literally synonyms" that were used by the Court because they are "complementary".

[62] We do not find support for Thalbinder Poonian's interpretation of "direction and control" in the Appeal decision. On the contrary, the Court of Appeal, in the fifth principle set out in paragraph 143 of the Appeal decision, specifically lists the use of another person's accounts or use of other persons as nominee recipients as examples where a joint and several order may be made.

[63] In the Findings, the Commission concluded that Thalbinder Poonian directed trading in Perminder Sihota's brokerage account as well as in the brokerage accounts in the names of secondary participants LN, DS, MB, SP, AP, KEI, BM, RB and GVP.

[64] The Commission found that Thalbinder Poonian made the trades in Perminder Sihota's brokerage accounts and that Perminder Sihota "allowed herself to be used as a nominee". (Findings paragraph 83).

[65] The identified secondary participants also allowed themselves to be used as nominees. They opened brokerage accounts in their names at Thalbinder Poonian's request or allowed him to trade in accounts they already held. They permitted him to trade in those accounts and did not trade in them themselves. Thalbinder Poonian arranged for debits in the accounts to be funded. As one of the secondary participants stated, he never considered any of the holdings in the account in his name to be his but assumed they were Thalbinder Poonian's (Findings paragraphs 73 to 77).

[66] We are satisfied that the evidence already before us establishes that the brokerage accounts of Perminder Sihota and the identified secondary participants were nominee accounts over which Thalbinder Poonian had direction and control.

[67] Consistent with the fifth principle at paragraph 143 of the Appeal decision, we find that because Thalbinder Poonian had direction and control over these nominee accounts, the net trading gains in these accounts during the relevant period were amounts obtained indirectly by Thalbinder Poonian. He obtained these amounts during the course of and as a result of his conduct in the manipulation of OSE shares contrary to section 57(a), as set out in the Findings at paragraph 99.

[68] Having found Thalbinder Poonian obtained amounts indirectly through these brokerage accounts, we turn to Thalbinder Poonian's argument in the alternative that the aggregate net trading losses in accounts that he directed must be properly accounted for in determining the appropriate scope of a disgorgement order. To do otherwise, he submits would result in an order that exceeds the amount actually obtained.

[69] We agree that the net trading losses in the brokerage accounts of BM, RB and GVP should be deducted in calculating the amount obtained by Thalbinder Poonian for the purposes of section 161(1)(g). This is consistent with the Commission's basis in the Findings for the calculation of the aggregate net trading gain and the global amount obtained by reason of the manipulation of OSE shares during the relevant period. It is also consistent with our task as set out by the Court (in Appeal decision paragraph 152) to find "the portion of the aggregate net trading gain" in the accounts over which Thalbinder Poonian had direction and control and as a consequence the portion that he obtained indirectly.

[70] The executive director is not wrong in stating that the amount obtained could have been calculated on the basis of the trading gains in the brokerage accounts without deducting trading losses as those losses could be seen as part of the costs of trading undertaken to artificially inflate the price of OSE shares. However, this is not the basis on which the executive director chose to proceed with this case either initially or now. Therefore, we have continued to base the calculation of amounts obtained on a net trading gain basis, consistent with the Findings.

[71] We therefore find that the amount obtained indirectly by Thalbinder Poonian in contravention of the Act is:

- $572,491, being the total of the net trading gains minus the net trading losses in the accounts of the secondary participants LN, DS, MB, SP, AP, KEI, BM, RB and GVP during the relevant period, plus

- $1,126,260, being the total net trading gains in the accounts of Perminder Sihota.

Joint and several liability

[72] We have found the amount obtained directly by Perminder Sihota was $1,126,260 by reason of the trades in OSE shares in the brokerage accounts she held. We have also found this same amount was obtained indirectly by Thalbinder Poonian through his direction and control of those accounts.

[73] Both Perminder Sihota and Thalbinder Poonian obtained the net trading gains in the accounts in Perminder Sihota's name through their respective conduct in contravention of section 57(a). One obtained the amount directly, the other indirectly. The Court addressed these circumstances in the context of a joint and several order in the Appeal decision, at paragraphs 134 - 135:

> **134** Using a corporate alter ego is but one example of a mechanism a wrongdoer may employ to indirectly obtain funds from wrongdoing. It is impossible to imagine and enumerate the wide variety of tactics wrongdoers may use to do so. The critical element is that the wrongdoer and the person with whom he or she is jointly and severally liable were, in effect, acting as one person. This may occur, in another example, where one wrongdoer directs and controls the accounts of numerous other persons, and effectively has direction and control over the activity and assets in those accounts (e.g., using nominee accounts).
>
> **135** Yet another example may arise where the wrongdoer instructs the person providing the amount to pay the amount to someone else instead of to the wrongdoer, with that "nominee recipient" essentially holding the amounts for the wrongdoer. This may especially be the case where the recipient is closely related to the wrongdoer, such as a spouse or a partner: see e.g., *Zhong* at paras. 16-17; see also, *Streamline* at para. 91 (Vice Chair Cave in dissent). Whether someone is acting just as a "nominee" or as an active participant in the scheme depends on the nature and degree of the person's direction and control, and culpability, which are properly matters of fact for determination by the Commission.

[74] In the matter before us, Perminder Sihota was not merely acting as a nominee. It is clear from the evidence, and from the Findings, that she was an active participant in the underlying market manipulation, contrary to the Act. In the course of that conduct she allowed another respondent, Thalbinder Poonian, access to her trading accounts that, as a result of both respondents' breaches of the Act, had a significant increase in value.

[75] Both respondents now argue that an order under section 161(1)(g) for the amount obtained in the trading accounts should not be made against them individually. They both point to the other as the person who realized the net trading gains in the accounts.

But, neither Perminder Sihota nor Thalbinder Poonian adduced any evidence to support their assertion that it was the other who obtained the amount at issue.

[76] The Appeal decision makes it clear that, having determined that a respondent obtained an amount directly or indirectly arising from his or her contravention of the Act, we must then consider if it is in the public interest to make a 161(1)(g) order. Both Thalbinder Poonian and Perminder Sihota were active participants in the market manipulation involving OSE shares. Both obtained the net trading gains in Perminder Sihota's trading accounts, an amount that has been proven with sufficient detail by the executive director. Neither respondent produced any evidence to account for the improperly obtained total net trading gain of $1,126,260, nor did they submit any compelling argument why they should not be made jointly and severally liable for it. We find that it is appropriate and in the public interest to make a joint and several order against them both for the full amount of $1,126,260.

Summary of amounts obtained in contravention of the Act

[77] Sharon Poonian obtained $3,149,935 directly as a result of her contravention of the Act.

[78] Thalbinder Poonian obtained $746,676 directly as a result of his contravention of the Act. He also obtained $572,491 indirectly through the accounts of secondary participants as a result of his contravention of the Act. These amounts total $1,319,167.

[79] In addition, the amount of $1,126,260 was obtained directly by Perminder Sihota and indirectly by Thalbinder Poonian through the accounts of Perminder Sihota, in contravention of the Act. As we have concluded above, it is appropriate that they be jointly and severally liable in respect of this amount.

Public interest

[80] The activities of each of Thalbinder Poonian, Sharon Poonian and Perminder Sihota as set out in the Findings contributed to the OSE manipulation and each of them was directly involved in the manipulation.

[81] As the Commission commented in the Sanctions decision, "[w]hile we found Perminder Sihota to be the least directly involved in the manipulation, we also found she was involved in repeated and extensive activities."

[82] As the Commission stated in the Sanctions decision at paragraph 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.

[83] A respondent should not be rewarded for sheltering or spending ill-gotten gains. The fact that the Commission has not yet discovered, or the fact that a respondent may no longer have, any of the money obtained, should not excuse the respondent from an order under section 161(1)(g).

[84] We conclude that it is in the public interest to make section 161(1)(g) orders against each of Thalbinder Poonian, Sharon Poonian and Perminder Sihota in the full amounts obtained, directly or indirectly, by each of them as a result of their respective contraventions of section 57(a) of the Act.

V. Orders

[85] Considering it to be in the public interest, and pursuant to section 161(1)(g) of the Act, we order that:

(a) Shailu Sharon Poonian pay to the Commission $3,149,935;

(b) Thalbinder Singh Poonian pay to the Commission $1,319,167; and

(c) Thalbinder Singh Poonian and Perminder Sihota pay to the Commission $1,126,260 on a joint and several basis.

May 16, 2018

For the Commission

Suzanne K. Wiltshire
Commissioner

Audrey T. Ho
Commissioner

George C. Glover, Jr.
Commissioner