BCSC

British Columbia Securities Commission

REPLY TO:
Douglas B. Muir
T: 604-899-6800 / F: 604-899-6633
Email: dbmuir@bcsc.bc.ca

By Regular Mail

December 13, 2019

Dear Mr. Chang:

Lawrence Bradley Chang
Reciprocal Order Application

I am writing this letter on behalf of the Executive Director of the British Columbia Securities Commission (the Executive Director).

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)(c) 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 the Decision on the Merits and Decision on Sanction of the Investment Industry Regulatory Organization of Canada (IIROC).

A. DECISION OF IIROC

1. On August 26, 2013, IIROC concluded you purchased $498,160 of one security in a client account, without instructions from your client and you made misrepresentations to your client to hide the fact that you made these unauthorized purchases. Your conduct was found to be contrary to the Investment Dealers Association of Canada's (IDA) Bylaws. The decision on the merits is contained in *Re Chang*, 2013 IIROC 48 (Decision on the Merits).

2. On January 20, 2014, IIROC imposed a permanent ban on your approval with IIROC, as well as a fine of $100,000. The reasons and decision on sanctions and costs are contained in *Re Chang*, 2014 IIROC 4 (Sanction Decision).

3. In concluding you engaged in unauthorized trading and misrepresentations, IIROC made the following findings:

Tel: 604 899-6500 Fax: 604 899-6506 Toll Free: 1 800-373-6393 www.bcsc.bc.ca
P.O. Box 10142, Pacific Centre, 701 West Georgia Street, Vancouver, BC, Canada V7Y 1L2

(a) On six occasions from December 31, 2007 through March 28, 2008, you purchased a total of $498,160 of one security (USSU) in a client account without authorization from the client, contrary to IDA Bylaw 29.1.

Decision on the Merits, para. 183
Sanction Decision, para. 1

(b) From January 2008 through May 2008, you, contrary to IDA Bylaw 29.1, made misrepresentations to the client regarding the number of USSU shares held in the client's account in order to hide the fact that you had made unauthorized purchases of this security.

Decision on the Merits, para. 185
Sanction Decision, para. 1

(c) In engaging in unauthorized trading and misrepresentations, you engaged in business conduct or practice unbecoming and detrimental to the public interest contrary to IDA Bylaw 29.1.

Decision on the Merits, paras. 186
Sanction Decision, para. 3

4. IDA Bylaw 29.1. states:

> Dealer Members and each partner, Director, Officer, Supervisor, Registered Representative, Investment Representative and employee of a Dealer Member (i) shall observe high standards of ethics and conduct in the transaction of their business, (ii) shall not engage in any business conduct or practice which is unbecoming or detrimental to the public interest, and (iii) shall be of such character and business repute and have such experience and training as is consistent with the standards described in clauses (i) and (ii) or as may be prescribed by the Board.[1]

5. IIROC came to these conclusions based on the following facts:

(a) You were registered and working as a retail investment advisor from 2000 to March 2009.

Decision on the Merits, para. 31

[1] Replaced by IIROC Consolidated Enforcement, Examination and Approved Rules (Consolidated Rules). Both the IDA rules and the IIROC Dealer Member Rules contain the standards of conduct that applies to regulated persons

(b) A client, GP, sent you an email with instructions for orders within a limit of $100,000 and a max of $30,000 per position. GP also instructed you to keep him informed on a regular basis.

Decision on the Merits, paras. 35 and 40

(c) Prior to the material time, there were 30,000 shares of USSU in GP's account. On December 31, 2007, you arranged for an additional 250,000 USSU shares at a price of $216,000 on GP's behalf. This transaction was, by dollar value, over twice as large of any other purchase that had occurred in GP's account. You testified that you could not recall this transaction or whether there were discussions associated with it.

Decision on the Merits, para. 46

(d) In March 2008, you arranged for an additional 924,000 shares of USSU for GP's account at a price of $277,148.50. You testified that you could not recall receiving instructions from GP for these purchases. The phone and email records do not support any discussions between you and GP at this time.

Decision on the Merits, paras. 67, 70-72

(e) You also could not recall the theory behind increasing your client's stake in USSU from 30,000 shares to over a million shares.

Decision on the Merits, para. 72

(f) You prepared and continually sent weekly summaries and spreadsheets to GP, which showed the wrong number of USSU shares at 30,000, despite the large purchases of USSU shares.

Decision on the Merits, paras. 49, 56-59

(g) You did not deny that you intentionally misled GP by sending him inaccurate monthly statements and summaries.

Decision on the Merits, para. 63

(h) When GP finally discovered the large amount of USSU shares purchased for his account, he asked you whether you had purchased 879,000 shares of USSU on his behalf.

Decision on the Merits, para. 84

(i) You initially responded to GP's question by asserting that the amount of USSU shares must be a mistake. You blamed your assistant, as well as a mix-up with a different account holder for the mistake.

Decision on the Merits, paras. 87-94

(j) When GP asked you to immediately solve the anomaly of the large amount of USSU shares in his account, you then shifted the blame onto GP. You asserted that GP had placed orders for the amount of USSU shares and that GP had failed to inform the firm of any discrepancies in a timely manner.

Decision on the Merits, paras.107-115

B. THIS APPLICATION

6. With this letter, the Executive Director is applying to the Commission for orders against you under section 161 of the Act. I enclose a copy of section 161 of the Act for your reference.

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, 2001 SCC 37 (CanLII), 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) factors that mitigate the respondent's conduct,
(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,
(f) the need to deter those who participate in the capital markets from engaging in inappropriate conduct, and
(g) orders made by the Commission in similar circumstances in the past.

Application of the Factors

Seriousness of the Conduct

11. A consideration of the facts shows that your contravention of IDA rules was serious. The IDA rules you contravened are designed to prevent conduct which is unbecoming and detrimental to the public interest.

12. Your conduct was deliberately dishonest, and abusive of your client. You intentionally mispresented the number of shares in GP's account in an attempt to hide the fact from GP that you had made significant share purchases on his behalf without his authority.

Decision on the Merits, paras. 183, 185
Sanction Decision, para. 8b

13. The transgressions were not isolated transgressions. They occurred repeatedly over a number of months and involved a large amount of money.

Decision on the Merits, para. 186
Sanction Decision, paras. 3, 8d.

14. You admitted that you prepared and sent GP weekly summaries showing the wrong number of USSU shares.

Decision on the Merits, paras. 144, 146

15. Your misrepresentation of the number of USSU shares in GP's account was completely at odds with your fundamental obligation to treat your client honestly.

Sanction Decision, para 8b

Harm suffered by investors

16. You purchased about $500,000 worth of USSU shares in GP's account without authority and, during a period of time when the price of USSU shares were declining, you repeatedly misrepresented the size of the share position to GP. In doing so, you exposed GP to large losses.

Sanction Decision, para. 8a.

17. The price of USSU decreased from $0.78 on December 31, 2008 (sic) to $0.24 on March 31, 2008.

Decision on the Merits, para. 15

18. The amounts involved are very significant and because of your misconduct, an identifiable investor was harmed.

Risk to investors and the capital markets

19. The securities market operates on the basis of trust between registrant and client. It is essential to this trust that registrants not expose their client's assets to unauthorized risks. It is also essential that registrants are completely candid with clients about matters relating to the clients' assets.

Sanction Decision, para. 8c.

20. Your conduct fell substantially below what is expected of registrants. It was dishonest and exposed your client to substantial financial harm. Conduct such as this undermines the public's trust in registrants and therefore harms the securities market generally.

Sanction Decision, para. 8c.

21. In engaging in each of the unauthorized trading and the misrepresentations, you failed to observe high standards of ethics and conduct in the transaction of your business and engaged in business conduct or practice unbecoming and detrimental to the public interest.

Decision on the Merits, para. 186,

22. Public confidence in our capital markets is dependent on the honesty and integrity of those who participate in it. Your participation in the capital markets of British Columbia, given the conduct that IIROC found you committed, would cause concern for the protection of the investing public.

Participation in our capital markets and fitness to be a registrant, director, officer or adviser to issuers

23. Honesty is a critical part of being a registrant or a director or an officer of an issuer. In fact, it is part of the basic duties of those positions.

Re SBC Financial Group, 2018 BCSECCOM 267, para. 34

24. Both the unauthorized purchases of the shares and the misrepresentations respecting these shares were substantial departures from the conduct expected of registrants and the level of financial probity which is essential for registrants.

Decision on the Merits, paras. 186

25. The Executive Director has significant concerns about your fitness to be either a registrant or an officer or director of an issuer due to your deceitful conduct with respect to GP. Although your misconduct was not found to be fraudulent, IIROC's findings clearly demonstrate that you engaged in a prolonged deceit of your client.

26. Your unauthorized trading and misrepresentation falls short of that expected of participants in our capital markets. You pose a great risk to our markets and are ill-suited to act as a registrant, director or officer or as an advisor to any private or public issuers going forward.

Deterrence

27. The market as a whole must understand that misconduct like this will result in a significant penalty.

28. Your misconduct calls for orders that are protective of the capital markets and preventative of likely future harm.

29. Through the orders the Executive Director is seeking, the Executive Director intends to demonstrate the consequences of your conduct, to deter you from future misconduct, and to create an appropriate general deterrent. Permanent bans are proportionate to your misconduct and are necessary to ensure that you and others will be deterred from engaging in similar misconduct in the future.

Mitigating/Aggravating Factors

30. IIROC found that your participation in the investigative and hearing process was somewhat mitigating.

Sanction Decision, para. 8 e.

31. It is an aggravating factor that you were a registrant at the time of your misconduct.

Re Lim, 2017 BCSECCOM 319, para. 20
Re SBC Financial Group Inc., 2018 BCSECCOM 267 para. 31

32. The expectation of registrants is much higher than that of the general public and effective implementation of securities legislation depends on the willingness of those who chose to engage in the securities industry to comply with defined standards of conduct.

Johnson (Re), 2007 BCSECCOM 437, para. 59

33. Registrants play a critical role in our capital markets as one of the "gatekeepers".

Re Lim, 2017 BCSECCOM 319, para. 20

34. Instead of fulfilling your role as a gatekeeper, you abused the privilege of your registration to assist in your misconduct.

Previous Orders

35. The Commission has previously made orders under section 161(6) reciprocating sanctions imposed by IIROC. In *Re Pawar*, 2016 BCSECCOM 174, the Commission made an order based on the facts and decision in an IIROC Decision on Sanction.

36. In *Re Pawar*, the respondent had used his status as a registered representative to solicit friends to provide $95,000 in a fictitious investment. On these facts, the Commission ordered broad, permanent market bans against Pawar.

37. The Commission ordered permanent market bans in the following three decisions with similar fact patterns to your own conduct:

- *Maudsley (Re)*, 2005 BCSECCOM 577
  - The respondent was a mutual fund salesperson. He redeemed mutual fund securities in the accounts of his clients, sometimes without their knowledge and consent. When he did have their consent, he obtained it by lying about what he intended to do with the proceeds. In fact, he stole the proceeds.

- *Re Furman*, 2019 BCSECCOM 214
  - The respondent induced ten investors to invest on the misrepresentation that he was a successful licensed day trader who could generate high returns. In reality, he was unlicensed and hugely unsuccessful. He provided investors with fabricated monthly reports and forged account statements. As a result of his misconduct, investors lost approximately $400,000.

- *Zhong (Re)*, 2015 BCSECCOM 383
  - The respondent misled investors into thinking that his trading was safe and he concealed risks from investors. He also ignored his client's instructions to stop trading in their accounts. As a result of his misconduct, his investors lost approximately $500,000.

38. Although the respondents' misconduct in these decisions was ultimately found to be fraudulent, the facts are similar to the circumstances in your case. The respondents in these decisions fabricated reports to clients and/or had conducted unauthorized share purchases on behalf of their clients, similar to your misconduct. The quantum involved in the above decisions is also similar to the amount involved in your misconduct. Furthermore, IIROC found you had participated in a prolonged deceit of your client.

The Davis Consideration

39. In the Court of Appeal decision in *Davis v. British Columbia (Securities Commission)*, 2018 BCCA 149, the Court identified that it is incumbent upon a tribunal to consider a respondent's individual circumstances when determining whether measures short of a permanent ban would protect the investing public where a person's livelihood is at stake.

40. The Executive Director is unaware of any individual circumstances that would support orders short of a permanent ban. However, the Executive Director notes that IIROC considered that a permanent ban from membership in IIROC was a severe penalty and may impose substantial economic hardship on you. Despite that, IIROC concluded that a permanent ban was warranted as your misconduct was sufficiently dishonest that you should not be trusted as a registrant in the future.

Sanction Decision, para. 10

C. ORDERS SOUGHT

41. IIROC permanently barred you from re-applying for registration in any capacity.

42. Although there is no limitation on the Commission from imposing a capital market sanction that is similar or different than the market ban imposed by IIROC, the Commission needs to consider what is reasonable based on the evidence known to it, as well as what is in the public interest.

43. In seeking orders under 161(1) of the Act, the Executive Director has taken the following factors into consideration:

(a) the circumstances of your misconduct including the IIROC decisions;
(b) the factors from *Eron* and *Davis*; and
(c) the sanctions ordered in previous cases cited above.

44. Based on the misconduct described in paragraphs 3 and 4 and the Decision on the Merits and Sanction Decision, 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)(d)(ii), from becoming or acting as a director or officer of any issuer or registrant;

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

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

45. The Executive Director is not seeking any monetary sanctions against you.

D. SUPPORTING MATERIALS

46. In making this application, the Executive Director relies on the following, copies of which are enclosed:

(a) *Re Chang*, 2013 IIROC 48 (Decision on the Merits)
(b) *Re Chang*, 2014 IIROC 04 (Sanction Decision)
(c) *Committee for the Equal Treatment of Asbestos Minority Shareholders v. Ontario (Securities Commission)*, [2001] 2 SCR 132, 2001 SCC 37 (CanLII)
(d) *Davis v. British Columbia (Securities Commission)*, 2018 BCCA 149
(e) *Johnson (Re)*, 2007 BCSECCOM 437
(f) *Michaels (Re)*, 2014 BCSECCOM 457
(g) *Re Eron Mortgage Corporation*, [2000] 7 BCSC Weekly Summary 22
(h) *Re Furman*, 2019 BCSECCOM 214
(i) *Re Lim*, 2017 BCSECCOM 319
(j) *Re Pawar*, 2016 BCSECCOM 174
(k) *Re SBC Financial Group*, 2018 BCSECCOM 267
(l) *Maudsley (Re)*, 2005 BCSECCOM 577

(m) *Zhong (Re)*, 2015 BCSECCOM 383

E. YOUR RESPONSE

47. You are entitled to respond to this application. To do so, you must deliver any response in writing, together with any supporting materials, to the Secretary to the Commission by **Monday, January 20, 2020.**

48. The contact information for the Secretary to the Commission is:

Hearing Office
British Columbia Securities Commission
PO Box 10142, Pacific Centre
12th Floor, 701 West Georgia Street
Vancouver, BC V7Y 1L2
E-mail: commsec@bcsc.bc.ca
Telephone: 604-899-6500

49. 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. The Commission will send you a copy of its decision.

Yours truly,

Mark Hilford
Acting Director, Enforcement

DWF/crc
Enclosures
cc: Hearing Office (by email to commsec@bcsc.bc.ca)

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

British Columbia Statutes

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

British Columbia* Statutes > *SECURITIES ACT* > *Part 18 -- Enforcement

Notice

Current Version: Effective 20-04-2012

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.

End of Document

Re Chang

IN THE MATTER OF:

The Dealer Member Rules of the Investment Industry Regulatory Organization of Canada

and

Lawrence Chang

2013 IIROC 48

Investment Industry Regulatory Organization of Canada
Hearing Panel (Pacific District)

Heard: October 18, 2012; February 15, 2013; April 16, 17 and 18, 2013; June 5, 25 and 26, 2013
Decision: August 26, 2013

Hearing Panel:
Catherine Esson, Chair; Bob Sutherland, Member; Brian Worth, Member
Appearances:
Paul Smith, Enforcement Counsel for IIROC
Ron Pelletier, for Lawrence Chang

DECISION ON THE MERITS

¶ 1 These are the reasons for judgment for the liability portion of a hearing held under IIROC Dealer Member Rule 20. In a Notice of Hearing dated September 28, 2012, IIROC alleged that:

- From November 2006 through March 2008, the Respondent engaged in discretionary trading in a client account without first having the account approved and accepted as a discretionary account, contrary to IDA Regulation 1300.4.
- From December 31, 2007 through March 28, 2008, the Respondent purchased a combined total of approximately $498,160 of one security in a client account without authorization from the client, contrary to IDA Bylaw 29.1.
- From January 2008 through May 2008, the Respondent, contrary to IDA Bylaw 29.1, made misrepresentations to a client regarding the number of shares held in the client's account in order to hide the fact that he had made unauthorized purchases of a security.

¶ 2 The Respondent was represented by counsel at the hearing and attended a portion of it.

¶ 3 The allegations against the Respondent relate to his dealings with one client, GP, while the Respondent was registered and employed by Canaccord Capital Corporation (now known as Canaccord Genuity Corp. and referred to in this Decision as "Canaccord"). While GP traded through his corporation, EuroP, there is generally no significance in this proceeding to the distinction between the individual GP and his corporation EuroP or between EuroP's various accounts. The accounts at Canaccord in the name of EuroP are referred to in this Decision as "GP's account".

¶ 4 IIROC alleged that the Respondent engaged in discretionary trading in GP's account without authority from his firm. IIROC alleged that this was initially done within general parameters agreed to in emails between

the Respondent and GP but that, commencing on December 31, 2007, the Respondent exceeded those general parameters by purchasing large amounts of one stock, USSU, in GP's account without GP's consent. IIROC also alleged that the Respondent misrepresented to GP the number of USSU shares in GP's account in order to hide these purchases.

I. Standard of Proof and Evidence

¶ 5 The onus is on IIROC to prove its allegations on a balance of probabilities. In determining whether the evidence establishes that it is probable an event has occurred, we must scrutinize the evidence with care. The evidence must be clear, convincing and cogent.

¶ 6 In considering the evidence, we have been guided by the following comments from *Palmer* v. *Godfrey Associates Ltd.*, 2004 NBQB 176 (CanLII), (appeal dismissed, 2005 NBCA 114 (CanLII):

> In deciding what is proof, the court must distinguish conjecture, suspicion or possibility from reasonable inference, deduction or probability. The law is well established that:
>
> In civil cases an inference may be drawn if it is a reasonable deduction from the circumstances, and the court must act on a reasonable balance of probabilities. Not each piece of evidence, individually, is required to lead to the conclusion sought to be proved. Pieces of evidence, each by itself insufficient, may however, when combined, justify the inference that the fact exists.
>
> [...]
>
> The absence of action, no less than positive acts, can be the basis for an inference as to the existence of a fact in issue. The Law of Evidence in Civil Cases, Sopinka and Lederman, pages 33-34 and 37.

and by the following comments from the Alberta Securities Commission in *Re Holtby,* 2013 ABASC 45 (CanLII):

> [463] To summarize, when drawing an inference from circumstantial evidence, we must ensure that the inference is grounded on proved, not hypothetical or assumed, facts and is a reasonable one – one drawn using common sense, human experience and logic having considered the totality of the evidence and any competing inferences. That said, a reasonable inference need not be the only inference that can be drawn...

¶ 7 The only witnesses who provided oral evidence at the hearing were Wes Chan, a senior investigator for IIROC, and Chris Perkins, IIROC's manager of investigations. Both were credible witnesses.

¶ 8 The Respondent did not testify at the hearing but IIROC introduced into evidence a videotape of his investigative interview and a transcript of that interview. Mr. Chan testified to statements made by GP and by the Respondent's assistant during interviews he conducted of those individuals. We also received documentary evidence, including emails between GP and the Respondent, from both parties. We have addressed the Respondent's evidence, the statements of GP and the Respondent's assistant, and the emails below.

A. The Respondent's interview evidence

¶ 9 The BC Court of Appeal said the following about assessing credibility in *Faryna* v. *Chorny*, [1952] 2 D.L.R. 354 (BCCA) at 357:

> The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanor of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions.

¶ 10 We have also found these comments from *Young Estate* v. *RBC Dominion Securities*, [2008] O.J. No. 5418 on assessing a witness' evidence to be helpful:

> It is always well to bear in mind the probability or improbability of a witness' story and to weight it accordingly. That is a sound common sense test. Did his evidence make sense? Was it reasonable? Was it probable?

¶ 11 The Respondent was interviewed in December, 2010. There were numerous significant matters that he testified he could not recall. His testimony about matters he purported to recall was at times difficult to follow and changed in response to documents he was shown. Some was implausible or not consistent with the documentary evidence. We have referred throughout this Decision to examples of the Respondent's poor or inaccurate recollection and other difficulties with his evidence. Viewed as a whole, the Respondent's testimony was so problematic that we have generally not relied on it.

¶ 12 The Respondent's counsel suggested it is understandable that the Respondent would have a poor recollection given that two and a half to four years passed between the events in question and his interview.

¶ 13 We agree that it is often difficult for registrants to recall trades which occurred in client accounts. The passage of time exacerbates this problem. We do not consider it surprising that the Respondent would not recall the particulars of the trades which were the subject of Count 1. Those trades appear to have been routine. To our knowledge, no issue arose with respect to them until long after they had occurred.

¶ 14 We consider it implausible, however, that the Respondent would have such a poor recollection at the time of his interview of the events which gave rise to Counts 2 and 3. We do not accept that the context of these events was sufficiently routine that one would not be expected to have better recall and to give more accurate evidence than the Respondent did, particularly as it was apparent shortly after the events that there was a serious dispute with respect to them.

¶ 15 We conclude from circumstances such as the following that the purchases of USSU in the Respondent's account from December 31, 2007 through the spring 2008 were likely significant to the Respondent:

- The Respondent and his pro accounts had a large personal position in USSU by December 31, 2007 and actively traded USSU in the period leading up to the March, 2008 purchases in GP's account. They stopped buying USSU one day after the first of the March 2008 purchases in GP's account. By that time, they had about 775,000 shares worth over $300,000.
- Another of the Respondent's clients sold a large position in USSU on or within a couple of days before December 31, 2007, the date of the first large purchase of USSU in GP's account. The Respondent's wife also bought 17,000 shares during the same few days.
- The Respondent traded USSU for his clients (including himself) actively in 2008 until April 11, 2008 and then almost completely stopped trading USSU for a month. According to the trading blotter, he entered over 300 orders for trades in USSU from January 1, 2008 to April 11, 2008. His active trading then stopped. Other than one sale for a client on April 17, he did not do any transactions in USSU until May 7, 2008. He only did three trades for clients between April 12, 2008 and May 13, 2008.
- The price of USSU was declining through the time in question. It decreased from $0.78 on December 31, 2008 to $0.24 on March 31, 2008.
- The purchases of USSU on December 31, 2007 and in March 2008 in GP's account were by far the largest purchases in GP's account.

¶ 16 This is not a case where the registrant had no reason to focus on the events giving rise to the allegations for many months or years after they occurred. The USSU purchases in GP's account stopped on March 28, 2008. GP took issue with the USSU position in his account, and its variance from the spreadsheet, on May 4, 2008. By June, 2008, there was a dispute between the Respondent and GP with respect to over 1 million shares

of USSU. The Respondent was seeking advice from his Compliance department and wrote a letter formally setting out his position. GP said he would consult a lawyer. GP sued the Respondent over these purchases a year later. We conclude that the Respondent would have focused on the circumstances of the purchases of USSU and on the weekly summaries when this dispute developed in the late spring, 2008 and again when he was sued.

¶ 17 Against this backdrop, it is surprising that the Respondent purported to have such a poor recollection of the events giving rise to his dispute with GP and that his evidence on matters he purported to recall was often unclear or not believable. We have concluded that the Respondent was not a credible witness. We have referred to some portions of his evidence in the Decision, in order to address it in the context of other evidence. However, we have not generally given it weight.

B. Statements by GP and the Respondent's assistant

¶ 18 IIROC introduced evidence of what two other individuals, GP and the Respondent's assistant, had told IIROC's investigator. In both cases the investigator had conducted an unsworn interview of the individual over the phone. The interviews were taped and the tapes were transcribed by an IIROC employee. The transcript was reviewed and, if necessary, corrected by the investigator. The tapes were not played during the hearing. Portions of the transcripts were read in at the hearing, and the investigator confirmed that it accurately represented what was said during the interview. The transcripts were not marked as exhibits.

¶ 19 Neither GP nor the assistant testified at the hearing. IIROC did not have the power to compel GP to attend but did ask him to do so. It appears that, although GP did not definitively refuse to ever attend the hearing, he did not agree to attend the hearing on the dates it proceeded. It is not known if the hearing could have been rescheduled to accommodate him.

¶ 20 IIROC's investigator tried unsuccessfully to contact the Respondent's assistant in advance of the hearing. There was evidence she was not in Canada.

¶ 21 The Respondent sought an order that no evidence of what GP told the investigator be accepted into evidence. We declined to make this order but advised the Respondent he could renew his application with respect to the admissibility of particular portions of the evidence. He declined to do so. He argued, however, that GP's evidence should not be given weight, particularly with respect to central matters. He did not object to us receiving the evidence of the Respondent's assistant but argued that it needed to be approached cautiously.

¶ 22 Rule 13 of IIROC's Rules of Practice and Procedure establishes that the unsworn evidence of a witness who is not available for cross examination should not generally be accepted in IIROC hearings. We recognize that we have the power under the Rules to make exceptions but there must be a substantial reason for doing so. Otherwise, Rule 13 becomes meaningless. It may be appropriate, for example, to allow hearsay evidence of unsworn statements where it meets the principled exception to the hearsay rule.

¶ 23 We admitted evidence of GP's statements over the Respondent's objections because IIROC could not compel GP as a witness and because the Respondent had an opportunity to discover GP with respect to those issues which relate to the purchases of USSU in December 2007 and March, 2008. The evidence arguably at least met the principled exception to the hearsay rule. We have concluded, however, that we should not rely on GP's statements to the investigator as evidence against the Respondent. In addition to the general concerns about unsworn evidence, we are concerned because, at the time of the interview, GP had sued the Respondent concerning the same matters which form the basis of Counts 2 and 3. We have on occasions considered GP's evidence where it supports the Respondent's case.

¶ 24 We have also concluded that we should not rely on the unsworn statements of the Respondent's assistant. There were many matters which she did not recall. Our main concern with her remaining evidence is that she could easily have been mistaken. She was interviewed about 30 months after the events in question. She was at a new job. We do not know when or under what circumstances she parted ways with the Respondent or Canaccord. To our knowledge, she had no particular reason to recall or focus on her dealings

with GP after they occurred. We are not aware of any reason these dealings were particularly significant to her at the time or after. She was not represented by counsel at her interview. We infer from the circumstances of her interview that she likely did not do anything to refresh her memory in preparation for it. During her interview, she was not referred to documents which might assist her recollection. Although we have no basis to believe she was not honest, we do not have confidence in the accuracy of her evidence.

¶ 25 In addition to these concerns, we note that the procedure which was followed in this case to create transcripts from these individuals' oral statements is potentially problematic. There were a number of passages where the transcriptionist was unable to discern what was said on the tape and the word "inaudible" appears. In addition, the tapes were transcribed by an IIROC employee and then reviewed and potentially changed by IIROC's investigator. In our view, this procedure does not have the hallmarks of reliability of a certified transcript created by an independent court reporter. We wish to stress that these comments are directed at the procedure, not at the actions of the transcriptionist or investigator in this case. We are not suggesting any wrongdoing on the part of these individuals. The process, however, provides an opportunity for important evidence to be lost or for the unconscious biases of IIROC personnel to be reflected in the transcript.

C. The emails

¶ 26 The Respondent's case relied to a significant degree on emails between GP and the Respondent. IIROC received and made disclosure prior to the hearing of over 550 such emails which it had compelled from Canaccord, as well as emails received from GP. A selection of these emails was introduced in evidence.

¶ 27 The Respondent stressed the need to be cautious both in interpreting the emails and in treating them as though they were the only communications between the Respondent and GP. We accept this.

¶ 28 The emails were not the only communications between GP and the Respondent. On occasion, the emails themselves refer to other communications.

¶ 29 The Respondent's counsel raised a possibility that the emails IIROC produced to him might not be all of the emails between the Respondent and GP. We understand that the Respondent received all emails compelled from Canaccord as well as all emails produced by GP in the civil action. The Respondent was also involved in the discovery process in the civil case. The Respondent's counsel's suggestion that he might not have access to all relevant emails was speculation. In any event, our task is to determine whether the evidence which was presented to us provided clear, convincing and cogent evidence that the Respondent engaged in the misconduct alleged.

¶ 30 We agree that we must be cautious about interpreting the emails. We have taken this into account generally and have addressed it below in the context of particular emails.

II. Facts

¶ 31 The Respondent was registered and worked as a retail investment advisor with member firms from 2000 until March, 2009. He is not currently working for a member firm.

¶ 32 GP was a European national and resident. The parties agreed that he was a sophisticated investor with a high risk tolerance. There was no issue of suitability raised in this hearing.

¶ 33 GP have been a client of the Respondent since about 2000. He opened his account with the Respondent at Canaccord in December, 2005. GP's account was not approved or accepted as discretionary by Canaccord.

¶ 34 In January, 2006, GP transferred numerous security positions into his account. With one exception, each position transferred in was worth $35,000 or less at the end of January, 2006.

¶ 35 Initially, the Respondent was solely an order taker for GP. The Respondent would regularly send him commentary on securities. Over time, the Respondent became interested in the Respondent's ideas.

¶ 36 The evidence relating to how trading instructions were given is central to this case and will be considered in more detail below.

¶ 37 GP received monthly statements and trade confirmations. He entered information from those documents onto a spreadsheet he maintained of the positions in his account.

¶ 38 GP made nine purchases in his account prior to November 7, 2006. In each case, the total value of the purchase was less than $30,000. GP sent emails which contained at least some form of instruction for seven of the purchases. There was no evidence of emailed (or any) instructions for two of the purchases.

¶ 39 On November 7, 2006, there was a series of emails between the Respondent and GP. The initial emails concerned specific stocks, two of which GP bought that day. There is also reference to a phone call between GP and the Respondent. There is no evidence what the Respondent and GP talked about in that call.

¶ 40 The following email exchange occurred after the telephone call on November 7, 2006:

- From GP to Respondent: "Lawrence, within a limit of C$100,000 and use the segregated account please, you can put on some long or short plays, but try to keep to max $30,000 per position, maybe? Keep me informed on a regular basis. Thanks."
- From the Respondent to GP: "OK, will do".

¶ 41 There were emails in evidence which appear to be trading instructions for some trades in GP's account after November 7, 2006 (although these emails contain varying degrees of specificity). For other trades, there were no emails in evidence which appeared to contain instructions. IIROC alleged that those trades after November 7, 2006 for which there are no emailed instructions were discretionary. The December 31, 2007 and March 2008 purchases of USSU are the subject of Count 2. The remaining allegedly discretionary trades are the subject of Count 1.

¶ 42 The purchases in GP's account were generally in amounts of about $35,000 or less. There were a few purchases for between about $35,000 and about $100,000. The only purchases over this amount were the USSU purchases referred to in Count 2. There were also a small number of very large short sales.

¶ 43 The value of at least three of the positions (including USSU) which IIROC alleged were purchased on a discretionary basis substantially exceeded the $30,000 per position value referred to in the November 7, 2006 email.

¶ 44 At the end of September, 2007, the positions held in the account which IIROC alleged resulted from discretionary purchases had a total purchase price of over $350,000.

¶ 45 On January 22, 2007 GP sent an email to the Respondent which said: "I suppose all your discretionary purchases / sales are in that segregated account, right?". The Respondent responded by email that "All of the purchases that I recommend to you go into the appropriate accounts...". The email did not expressly address GP's use of the term "discretionary".

¶ 46 Prior to December 31, 2007, there were 30,000 shares of USSU in GP's account. On December 31, 2007, an additional 250,000 shares of USSU were purchased. The purchase price was $216,000. The Respondent testified that he did not recall this transaction or whether there were telephone calls or emails associated with it. This transaction was, by dollar value, over twice as large as any other purchase that had occurred in GP's account at Canaccord.

¶ 47 There was a reference during IIROC's interview of the Respondent to there being a note on one or both of the trade tickets for the December 31, 2007 purchase that the order was contracted at 16:01. The trade tickets were not in evidence and there was no additional evidence relating to this, or to its significance.

¶ 48 On January 7, 2008 GP requested by email "the 31 12 2007 position of the account rather than waiting for mail receipt". That day, the Respondent prepared and emailed to the Respondent a list of the stocks in GP's account and the quantity of each stock.

¶ 49 The list the Respondent prepared accurately set out the quantity of each security held in GP's account on December 31, 2007, except that it included 6500 shares of Finavera, a position which was purchased on January

3, 2008 (and settled on January 8), but did not include the 250,000 shares of USSU purchased on December 31, 2008. It listed the quantity of USSU as being 30,000 shares, rather than 280,000 shares.

¶ 50 The Respondent testified he would have obtained the information from Canaccord's order management system (OMS) and that he likely typed it out. The Respondent did not recall what computer screen he used to create the list or why he included the Finavera but not the December 31, 2007 purchases of USSU.

¶ 51 On January 8, 2008, GP advised the Respondent by email that he wanted the monthly statement, not the typed list of stock names and quantities.

¶ 52 On January 14, 2008 GP sent the Respondent an email in which he said that he did not have time throughout 2007 to follow closely the deals the Respondent had traded for his account. He listed 17 stocks, including USSU, whose performance he wanted to review. He also asked whether the Respondent had sent him the December 31, 2007 statement.

¶ 53 The Respondent testified that the stocks listed in this email were the ones he had profiled or written commentary on. There was other evidence in the proceeding that suggests that two of the stocks were not profiled by the Respondent.

¶ 54 On January 18, 2008 the Respondent sent GP an email which provided an update on the securities listed in GP's January 14 email. It included a profile of USSU which said in part:

> USA Superior Energy average price 0.86
>
> "...I remain bullish on the stock...I remain bullish on it and would look to add on a dip. Technicals setting up nicely for a move higher."

¶ 55 On Jan 29, 2008, GP emailed the Respondent that:

> I was not very happy when I saw some of the results of those positions; lets follow the market closely and close them out at some point;
>
> Please provide me with a table every Monday for those positions you created showing Number Average Cost Market Price Value and Loss (Profit).

¶ 56 On February 4, 2008, the Respondent sent GP an email attaching a spreadsheet entitled "Europhorics positions "02.04.08". The covering email described it as "a spreadsheet of the positions". The Respondent did not recall how he prepared the spreadsheet, although he said it appeared to be a cut and paste from OMS to an Excel spreadsheet.

¶ 57 The spreadsheet included 14 securities, including USSU. The Respondent's evidence on how he had chosen these stocks was that, "if [GP] asked specifically for the ones that we had outlined then those are the ones that I would have cut and pasted". For each one, the spreadsheet listed the Security Name, Quantity, Avg Cost, Price, Fds, and Market Value. It did not include the "Loss (Profit)" column GP had requested.

¶ 58 The February 4, 2008 spreadsheet correctly reflected the details of the stocks which were listed, with one exception. The spreadsheet stated that GP's account held only 30,000 shares of USSU when in fact it held 280,000 shares. The market value of the holdings of USSU was based on 30,000 shares, but the average cost was based on the purchases of all 280,000 shares. The Respondent testified that he had no idea why there was a discrepancy in the spreadsheet.

¶ 59 The Respondent sent a similar email and spreadsheet almost every week until at least May 19, 2008. The number and the average cost of USSU listed on the spreadsheets were never changed, despite the large purchases of USSU in March.

¶ 60 There were no purchases of shares in the other securities listed on the spreadsheet, although there were sales. The position of other shares changed to reflect the sales, although not all sales were reflected entirely accurately in a timely fashion. There were therefore inaccuracies in the schedule from time to time in addition to the inaccuracy relating to USSU although, over time, all of the inaccuracies other than the USSU were

corrected.

¶ 61 The Respondent's testimony regarding his practice in updating the weekly spreadsheets changed throughout the interview. He initially agreed that he would update price and quantity on the spreadsheet. When shown that he did not update the quantity of USSU, he said he only updated price, not quantity. When shown he updated the quantity of stocks which were sold, he testified he updated price and sometimes quantity to show sales but not purchases. He provided no rationale for this. We conclude that, in giving this testimony, the Respondent was offering explanations he thought explained the documents he was shown, rather than testifying to facts he recalled.

¶ 62 The Respondent admitted he did not know if GP's only concern in obtaining the spreadsheets was to monitor price.

¶ 63 When asked if he intentionally misled his client, the Respondent did not expressly deny it. He said, in essence, "how could I, when he received his monthly statements and confirmations?".

¶ 64 On Feb 18, 2008 the email the Respondent sent to GP with the weekly spreadsheet included an update on the companies listed on the spreadsheet. With respect to USSU, the Respondent said:

> USA Superior has been experiencing good success with its reworking of its wells and cashflow is increasing. I hear they are going to bring a few new people to their team and some new projects that fall into their business model. I would also hold and let it develop.

¶ 65 On February 24, 2008, the email the Respondent sent to GP with the spreadsheet said in part "positions overall improving in price from prior week...with exception to ICP Solar. I think we hold most for what I anticipate will be an upcoming rally in the next months and sell pre May". In fact, the price of a number of the positions, including USSU, was lower than on the weekly spreadsheet the week before.

¶ 66 The Respondent and his "pro" accounts held 385,000 shares of USSU at the end of December, 2007, worth about $275,000. They increased that position by 150,000 shares in January, 2008 and by a further 241,000 shares to March 13, 2008. By March, 13, 2007 the Respondent and his pro accounts held 776,000 shares worth about $310,000.

¶ 67 There were additional purchases for GP's account of 924,000 shares of USSU for a total of $277,148.50 on five days from March 12, 2008 to March 28, 2008:

- March 12 - 125,000 shares for $48,641
- March 13 - 55,000 shares for $17,975
- March 20 - 230,000 shares for $84,632
- March 26 - 189,000 shares for $42,260
- March 28 - 325,000 shares for $83,640.50

¶ 68 During this time period, there were also sales of ICP Solar in GP's account.

¶ 69 There are references in emails sent by the Respondent in March, 2008 to the sales of ICP Solar but not to the purchases of USSU. The March18 email attaching the spreadsheet said:

> We just have a few shares of ICP Solar left to sell. I am working them best offer. Crazy market recently with the Bear Stearns buyout and gold over 1,000 and oil over 105.

¶ 70 The Respondent testified that he could not recall receiving instructions for the March, 2008 purchases of USSU. While at times his testimony suggested he had received instructions, we conclude that he did not recall this. The Respondent testified that *if* there were no emails regarding these trades, there *would have been* phone calls and he agreed that those calls *would have* been from either his home or office. He did not, however, recall any discussions.

¶ 71 The telephone records for the Respondent's home office and his office at Canaccord do not show any phone calls from the Respondent to GP from those phones around the time of these purchases.

¶ 72 The Respondent could not recall the theory behind building up such a large position of USSU, or what GP's thoughts were about USSU at this time. He also could not recall any discussions he may have had with GP about USSU during the time GP's stake in it increased from 30,000 shares to over a million shares. When asked what the rationale was for the purchases, the following exchange occurred:

> Q. But you don't recall any rationale behind the purchase for those securities?
>
> A. I don't – I didn't ask – when people put orders in I don't ask what their rationale is.
>
> Q. So he was placing those purchases independent from your recommendations?
>
> A. Right, based on the information he receives.
>
> Q. From someone other than you?
>
> A. Or including the updates that I give him, right?

¶ 73 On March 31, 2008, the Respondent sent GP the "Europhorics positions 033108" spreadsheet. The covering email said:

> Most of the positions are just hovering and I expect them to improve.

¶ 74 Later that day, GP sent an email to the Respondent which said:

> Lawrence, do I see you buying even more of them?
>
> Should we really continue to do so or liquidate some of them?
>
> Revisit your earlier memo with rational for keeping rather than adding?

¶ 75 The Respondent testified he did not know what stock or stocks GP was referring to in the March 31, 2008 email and did not know if it was USSU.

¶ 76 On April 1, 2008, the Respondent sent GP an email which started as follows:

> I cut the ICP Solar position and am working out the Park Place positions as I type this...there are a few stocks I would consider adding too...the commentary is below...

¶ 77 In the remainder of the email, he reviewed the status of a number of companies. He included an update with respect to USSU which said in part:

> The stock has pulled back to its old lows, the company is completing a debt financing with a texas bank to increase oil production and jv with the bank on existing properties the bank has acquired. I think many people were anticipating the close of this deal months ago and got impatient with the stock...technically it can move very quickly back to $0.70 on an announcement of the financing and new fields.

¶ 78 On April 4 GP emailed the Respondent that:

> I would like you to close out 50% of the positions you've referred to, over the next 10 days, and no longer buy any shares without my prior approval.
>
> However, Helio...you can double.

¶ 79 The Respondent replied by email "OK will do...". The Respondent testified that he had a conversation with GP about the wording because he bought stock based on GP's criteria. He testified that that conversation was likely following this email.

¶ 80 On April 8, 2008, the Respondent's covering email attaching the Europhorics positions 041408 document said that:

> I am trimming positions in half as you requested ...We are working best offer on all the positions that have not already been trimmed.

¶ 81 On April 15, 2008, the Respondent's covering email attaching the Europhorics positions 041415 spreadsheet said that:

> I have trimmed the majority of positions in half as requested and am completing the rest, attached is the spreadsheet with the reduced quantities. Still working on IWWI, USSU, DUSS and SV.

¶ 82 On April 22, 2008, the Respondent's covering email attaching the Europhorics positions 041422 spreadsheet said that:

> Attached are the current positions. all the positions have been trimmed in half with exception to SV, IWWI, USSU and BEE. BEE is halted and the other positions are on best offer at the moment, they are trading thin. I remain bullish on oil and gas stock with oil at all time highs, I think we will see a move north on oil plays in the coming weeks.

¶ 83 On April 29, 2008 GP received a further spreadsheet. His email sent in response said in part:

> Will review but intention is to get rid of those, indeed.

¶ 84 On May 4, 2008 GP sent an email to the Respondent entitled "Positions > USA Superior" in reply to the April 22 email from Mr. Chang enclosing the weekly spreadsheet. The Respondent referenced the March 31 statement and the weekly spreadsheet and questioned whether the Respondent had bought 879,000 shares of USSU.

¶ 85 The Respondent did not recall receiving this email although when he was shown he responded to it, he agreed he must have received it.

¶ 86 The Respondent testified that around this time he had a telephone conversation with GP. His evidence concerning this call and our reason for not putting weight on this evidence are considered elsewhere in this Decision.

¶ 87 On May 5, 2008, the Respondent sent GP an email which said:

> There must be an error in where orders were keyed. [My assistant] is away until Wednesday but I will ask her when she gets in.

¶ 88 Later that day, he sent GP an email which attached the "Europhorics positions 050508" spreadsheet and said:

> Attached is a spreadsheet of your current positions. I will figure out on Wednesday what happened when I speak to [my assistant].

¶ 89 The Respondent testified that he asked his assistant to ensure she had not keyed in orders wrong. He testified she did that and told him she did not do anything wrong, after which he telephoned GP who continued to insist the position size was wrong.

¶ 90 The Respondent testified that he went through the order book himself and then talked to BST, another client who was actively trading USSU at the time, to determine if BST had placed orders which might have improperly been credited to GP (there was evidence that the name of GP's account was similar to the name by which the Respondent referred to BST).

¶ 91 BST was not actively trading USSU at the time. BST had not purchased USSU in 2008 and had not sold it since February 1, 2008. BST had sold 310,500 shares around the same time GP had purchased 250,000 USSU at the end of December, 2007.

¶ 92 On May 12, 2008, the Respondent sent an email attaching the "Europhorics positions 051208 and saying "Attached is a spreadsheet of your current positions." When asked why he did not change the number of USSU

shares on this occasion, he said "I didn't want to represent something that we were arguing about. Plus, I never changed it prior, so I changed the price."

¶ 93 On May 15, 2008, the Respondent sent GP an email which said:

> I tried call you this morning, I got in touch with the client and am having everything fixed.

¶ 94 The Respondent testified that he did everything he could think of to check whether the orders were GP's and that he discussed with Compliance how to handle this situation. He said:

> I said to him like basically one guy's adamant it's not his; another guy's adamant it's not his; I'm in the middle here...I explained to him we've checked through everything.

¶ 95 On May 20, the Respondent sent another email attaching the "Europhorics positions 051908" spreadsheet and saying "Attached is the spreadsheet of current positions".

¶ 96 On June 2, 2008, GP sent the Respondent an email which included, in the subject line, instructions to purchase a stock and said:

> Please can you fax me ...or email me, as pdf, as soon as possible, the Statement of May 31 so that I can see the corrected situation after two months of incorrect reporting

¶ 97 The Respondent responded by email "ok, will do".

¶ 98 On June 7, 2008, GP emailed the Respondent that "I urgently need your 31 May corrected position by the way. Please pdf email it"

¶ 99 On June 9, 2008, the Respondent sent an email on June 9, 2008 which said:

> Attached is the spreadsheet of positions. I am getting a pdf of your March statements processed and will email it to you tomorrow. ..

The June 9, 2008 email did not attach a spreadsheet.

¶ 100 On June 11, 2009, the Respondent sent an email attaching the May statement and saying:

> Attached is the May 31, 2008 statement which you should have received by now, please confirm you have also received it by mail.

¶ 101 The Respondent said there were no discussions following this. In an email dated June 13, 2008, GP said he did not yet have the May 31, 2008 statement by mail.

¶ 102 On June 14, 2008, GP emailed the Respondent that:

> I've looked at this now. The correction we discussed has never been executed. There are still those many USA Superior that should not have concerned my account at all.

¶ 103 According to the Respondent, GP was referring back to when there was discussion of the stock belonging to the other client. The Respondent also testified that at some stage he said he would check again because GP was a sizable client who the Respondent did not want to upset.

¶ 104 On June 17, 2008, the Respondent sent an email which addressed an issue raised in the June 14, 2008 email concerning another stock and said:

> I am also working on the statement issue and will have it dealt with shortly.

¶ 105 The Respondent testified that the "statement issue" was that GP had not received his monthly statement. It appears, however, that he was basing this testimony not on his recollection of what the email meant, but on having seen another email that "shows that I once sent him the statement and he said there was nothing attached to it or something". Later in the interview, the Respondent agreed this was the June 24, 2008 email. There is in evidence GP's received version of the June 11, 2008 email, with the statement attached. Read in context with the other emails of the period, we conclude that the "statement issue" was GP's ongoing concern that his

monthly statement showed him having the wrong number of USSU shares.

¶ 106 The Respondent agreed during his interview that the obvious inference from his June 17, 2008 email is that there would be a correction and the Respondent was working on it.

¶ 107 On June 20, 2008, GP sent an email asking the Respondent to "please solve this issue immediately". According to the Respondent, GP was still adamant the statement was incorrect.

¶ 108 On June 24, 2008 the Respondent sent an email to GP in which he advised GP that:

> Further to our recent communications by email, I have now reviewed all of our records. I have determined that all of the trades credited to account accorded to the orders made on the account.

¶ 109 On June 24, 2008 GP sent an email to the Respondent which said:

> Just send me the exact position, Lawrence. There was no attachment to your email of just now.

¶ 110 In reply to this, the Respondent emailed GP a copy of the May 31, 2008 statement.

¶ 111 On June 25, 2008, GP sent the Respondent an email with the re line "Please call me back". The Respondent replied that:

> Just tried you back, the positions I sent you on you May 31, 2008 are the most recent. I will be able to send you a pdf of you June statement on July 1st.

¶ 112 The Respondent testified he did not recall anything about the telephone conversation referenced in the email.

¶ 113 On June 25, GP sent an email to Respondent which said in part:

> Let me be very frank, since I have brought up this anomaly of USA SUPERIOR ENERGY HOLDINGS INC you have consistently maintained that this was a mistake and that it should have been booked into a different account starting with the same letters. But as the months of this year passed by, the correction was never executed on the end of month statements.
>
> Let me be very clear that I am not going to accept a position of 1,204,000 shares, after 4 months during which you have sent me your regular "position" updates which show the correct – and in line with what you are authorized to do for my account, and have been doing – 30,000 USA Superior Engy Hldgs shares.

¶ 114 He stated that, if the matter was not resolved, he would pass it on to his lawyers the next day and concluded that "Meanwhile I maintain my previous instructions not to trade at all for my account any longer unless explicitly instructed by me."

¶ 115 On June 26, the Respondent responded by email. He said in part that:

> My position and that of the firm is that all of the trades that were posted to your account were based on market orders that you placed with me. We dutifully carried out the instructions that you conveyed to me.
>
> Your most recent email to me contains some inaccuracies. There is no other client that no longer wants to accept this position. The position was ordered by you and was yours at all times. Based on your assertion that the balances in your account were not correct, I did check to ensure that these were your orders. I am now confident that all of the transactions in your account were as a result of orders that you made. It is not correct to say that another client no longer wants to accept this position. It is correct to say that at your request I reviewed these transactions and found that no other client placed an order for this position.
>
> Further I have to state my surprise at you taking issue with trades that were posted to your accounts months ago. You received a trade confirmation for each transaction in your account

and saw those positions on your monthly statements for a few months before you made any objections. Clients do have a responsibility to read their statements and inform the firm of any discrepancies on a timely basis, which it seems you have not done.

¶ 116 While GP's account remained open until at least May, 2009, there were no purchases or sales in the account after June 20, 2008.

¶ 117 On June 15, 2009, GP commenced a civil action against the Respondent and Canaccord based on substantially the same allegations as Counts 2 and 3. The Respondent's counsel examined GP for discovery in the civil case. The Respondent made, but did not pursue, an application for a court order that evidence from the examination for discovery could be used in these proceedings.

III. Count 1

A. The discretionary trading allegation in Count 1

¶ 118 According to the Respondent, GP's practice in giving instructions was to provide him with dollar limits and a price limit on a security, but not the quantity. There are emails which suggest that there were numerous transactions which were authorized on the basis that GP gave specific instructions for the Respondent to buy, for example, a specified dollar amount of a particular stock. The instruction might specify that it was open, or not specify the timing. IIROC did not allege wrongdoing with respect to these types of instructions in this proceeding. IIROC also did not, however, concede that these transactions were properly authorized by the client in accordance with IIROC's Rules.

¶ 119 IIROC's allegations in Count 1relate to transactions for which it asserted GP did not provide any specific direction as to the particulars of what to buy or sell. Given the manner in which the case unfolded, the only question for these transactions is whether the evidence establishes on a balance of probabilities that one or more of these transactions was done without instructions from GP, other than those in the general grant of discretion given in the November 7, 2006 email.

¶ 120 Given the particulars provided to the Respondent and IIROC's position throughout this hearing, we have not considered the adequacy of instructions for transactions other than those particularized in the Notice of Hearing. We wish to emphasis, however, that in our view for a trade not to be considered discretionary, the parties must *explicitly* agree on each of the criteria of security, quantity, price and timing. Partial instructions which leave room for ambiguity about any of these criteria are not sufficient.

B. Count 1 Analysis

¶ 121 IIROC alleged that the November 7, 2006 email was GP's authority for the Respondent to buy without further instructions any securities up to the limits in the email of about $30,000 per position and $100,000 total and that the Respondent acted pursuant to this authority in conducting transactions. IIROC itemized in the Notice of Hearing 16 stocks which it alleged were traded pursuant to this discretion. The USSU purchases which are the subject matter of Count 2 are not included in Count 1.

¶ 122 There was very little evidence regarding the specific trades particularized in Count 1. To a significant degree, IIROC's argument hinges on the lack of emailed instructions for them. In essence, IIROC asserted that it is reasonable to infer from the evidence that, if there was no email instruction for a transaction which occurred after November 7, 2006, then there were no instructions for it beyond those given in the Nov. 7, 2007 email. We have concluded that the evidence does not support this inference.

¶ 123 The November 7, 2006 email exchange does, on its face, suggest that GP gave the Respondent discretion to make trades in the account, within the parameters set out in that email. Numerous other emails from GP are consistent with this theory. Other evidence convinces us, however, that we must be particularly cautious about the meaning of these emails.

¶ 124 GP's description to the investigator of what he meant by "discretion" and by other wording in the emails such as "[the Respondent's] traded positions" leaves us concerned whether GP distinguished in using these

words between trades for which he did not give instructions and trades which were not his idea.

¶ 125 In his Statement of Claim in the civil proceeding, GP alleged that he gave the Respondent discretion, but the description of the discretion is somewhat different from what the November 7, 2006 email appears to describe.

¶ 126 We also note that the Respondent did, in his January 22, 2007 email, take issue with GP's characterization that the Respondent was exercising discretion.

¶ 127 Given this evidence and the fact that GP did not testify before us, we have concluded that we cannot rely on GP's emails alone to establish that GP gave the Respondent discretion to trade without instructions.

¶ 128 IIROC also argued that there was a pattern of emailed instructions which both confirms that the November 7, 2006 email was acted on by the Respondent to trade without specific instructions and allows us to determine which transactions were done without instructions. As noted above, IIROC urged us to draw an inference that trades for which there were no emailed instructions were done pursuant to a general grant of authority by GP given in the November 7, 2006 email.

¶ 129 Such an inference might be reasonable if the evidence established the pattern on which it is based - that prior to the November 7, 2006 email there were emailed instructions for each trade; that there were emailed instructions for all trades in stock GP picked after the November 7, 2006 email but not for any trades in stock the Respondent picked; and that the trades for which there were no emailed instructions fit the parameters of the November 7, 2006 email. However, the evidence does not establish this pattern:

- There are transactions both before and after the Nov 7, 2006 email for which there are no emailed instructions in evidence. On the evidence available to us, we cannot conclude that there was a clear change of practice as of that date.
- It is not clear on the evidence who picked a number of the securities bought after November 7, 2006.
- The discretion allegedly granted was for a total value of $100,000 and a maximum per position purchase price of about $30,000. The positions allegedly acquired pursuant to this discretion exceeded these limits. There are plausible explanations for this which are inconsistent with IIROC's allegation, such as that there was no agreement that the Respondent would make discretionary purchases within these limits or that the Respondent had instructions for some of the trades IIROC alleged were done pursuant to the alleged discretionary trading agreement.

¶ 130 In our view, therefore, we cannot draw the inference IIROC suggested.

¶ 131 We have considered whether there is other evidence from which we could conclude that trades for which there were not emailed instructions were done on a discretionary basis. We have not put weight on GP's evidence against the Respondent generally or with respect to the meaning of the November 7, 2006 email for the reasons described above. In addition to these concerns, his evidence relating to the giving of instructions was very general. With one exception, he was not directed to the transactions particularized in Count 1. Even if we were otherwise prepared to put weight on GP's evidence, we would be concerned about relying on such general statements as proof that there were not instructions with respect to any particular transaction without the Respondent having the opportunity to probe this.

¶ 132 We received phone records showing outgoing calls from the Respondent's phone at Canaccord from December 3, 2007 to June 10, 2008 and outgoing calls from the Respondent's home office from October, 2007 to May, 2008. We did not receive phone records for the Respondent's cell phone, which the phone company apparently could not provide, or any phone records which would show calls from GP to the Respondent. The phone records we did receive show only one call to GP, a call from the home office on October 12, 2007.

¶ 133 These incomplete phone records have no probative value prior to October, 2007 and limited probative value after that. The fact that there were no phone calls from the Respondent's office or home office to GP from December 3, 2007 to May, 2008 is relevant with respect to the credibility of the Respondent's evidence

concerning the frequency of phone calls to GP and whether he called GP from his home or office with respect to the USSU trades in March, 2008. This is discussed below in relation to Count 2. However, the lack of phone calls on these phone lines during this period does not prove that instructions were not provided by phone for any trade particularized in Count 1. The transactions particularized in Count 1for which instructions should have been given during this period could have been authorized in a relatively small number of calls. At best, the phone records create some doubt whether this occurred.

¶ 134 In its final argument, IIROC reviewed the circumstances of some of the specific transactions which are alleged to have been done without instructions. In some cases, IIROC's only evidence about a particular transaction was that there was no email providing instructions. For the reasons given above, we have concluded that the lack of emails is not sufficient to establish that no instructions were given. There were other transactions for which IIROC pointed to additional evidence. We have concluded that IIROC has not established that any of the specific transactions were done without instructions. For example:

- IIROC contrasted the purchase of Intralese to the short sale of MegaUranium which occurred at the same time and about which there were many emails. IIROC argued that because none of the emails refer to Intralese, it is reasonable to conclude Intralese was purchased without instructions. We do not agree that this establishes instructions were not given in another way.
- IIROC argued that emails relating to the purchase of Southampton in March, 2007 establish that the trade was done on the basis of insufficient instructions. On March 12, 2007, the Respondent said in an email with respect to a potential purchase of Southampton that "I think open market in the 1.50 area will represent good value". GP responded that "If you like it Lawrence, go ahead". Southampton was purchased in the account on March 13 at $1.57, March 22 at $1.64 and March 27 at $1.45. We do not conclude from this evidence that there were no telephone conversations regarding these transactions. This is particularly so given that there was evidence GP was having email problems on March 13, the first two transactions did not occur at the price GP and the Respondent emailed about, and the second and third transactions occurred significantly after the March 12 email.
- IIROC alleged that a July, 2007 short sale of Amazon was discretionary. IIROC argued that an email exchange from October, 2007 in which GP questioned a September, 2007 purchase and asked for information about the sale which preceded it suggested that GP had not known about that sale. When interviewed by IIROC, GP could not recall this incident, but suggested it could have been a mistake or a misunderstanding. This evidence does not prove that the July 2007 trade was done without instructions.

¶ 135 While the emails between the parties and the lack of phone calls on the limited phone records in evidence concern us, we have concluded that there is not clear, convincing and cogent evidence which satisfies us on a balance of probabilities that any of the trades particularized for Count 1 were done without instructions.

IV. Counts 2 and 3

¶ 136 IIROC alleged in Count 2 that the purchases of USSU from December 31, 2007 on exceeded any general discretion GP had given and were done without his authorization. IIROC alleged in Count 3 that the Respondent intentionally did not show these purchases on either his January 7, 2008 schedule or his weekly spreadsheets in order to hide them from GP. IIROC's theory was that the Respondent was buying time, hoping that a potential business deal referred to in his updates on USSU would occur, leading to a rise in the share price.

¶ 137 The Respondent denied the allegations. He argued that there were circumstances which made it unlikely that the allegations were true, such as that GP was a sophisticated client who kept track of his trades and would not likely have been deceived, and that GP remained a client until the Respondent voluntarily resigned in February 2009. He also focused on what he asserted were shortcomings in the evidence, such as the possibility that the emails might not be complete and, in any event, were ambiguous and subject to interpretation and the

lack of complete phone records.

¶ 138 The Respondent testified that he received or confirmed all instructions for trades by GP by phone, using one of his office phone at Canaccord, the phone in his home office or his cell phone. He also testified that there were definitely more phone calls than emails between the Respondent and GP. He did not recall any phone calls or emails concerning the USSU purchase on December 31, 2007 or in March, 2008.

¶ 139 We have described elsewhere our general concern with the Respondent's evidence. We have concluded that his evidence that he received or confirmed all trading instructions by phone and that there were more phone calls than emails is at best an exaggeration and not probative of whether the Respondent had instructions for the purchases of USSU.

¶ 140 There were a number of transactions (which are not the subject of the Notice of Hearing) for which the emailed communications appear to be complete "conversations" concerning the transactions. For these transactions, we consider it unlikely that there was also a phone call and conclude that the emailed instructions formed the entire instructions.

¶ 141 We heard evidence that Canaccord provided over 550 emails between GP and the Respondent. The emails in evidence refer to only a handful of calls. While there were probably some calls which were not reflected in these emails, it is also likely that, if the Respondent and GP spoke by phone more than 550 times during the three years that GP was a client of the Respondent at Canaccord, there would be more indications of this in the emails.

¶ 142 Similarly, if the parties were speaking by phone this frequently, we would expect there to be more than one phone call from Canaccord or the Respondent's home office during the period of time covered by the phone records.

¶ 143 Having concluded that we should not put weight on the Respondent's interview evidence or on GP's statements to the investigator regarding whether there were instructions for the USSU purchases, we must decide whether the remaining evidence establishes that the Respondent did not have instructions for these trades. The evidence relating to this question also relates to whether the Respondent tried to hide these transactions from GP. For this reason, although the allegations in Count 2 and 3 are different, and each must be proved, we have considered the evidence relating to these Counts together.

A. The Weekly Summaries

¶ 144 The Respondent admitted that he prepared and sent to GP the weekly summaries and that those weekly statements showed the wrong number of USSU shares. The market value was also incorrect, as it was calculated based on the incorrect quantity of shares.

¶ 145 The Respondent offered no explanation of why the initial weekly summary on February 4, 2008 did not disclose the correct number of USSU shares. He testified that, apart from the price entry, the spreadsheets were a "cut and paste" from the OMS system. While we accept that the spreadsheets generally may have been copied from the OMS system, we do not accept this would have shown 30,000 USSU shares on February 4, 2008, as there had been 280,000 shares of USSU in GP's account since the December 31, 2007 purchase. It is even less likely that the OMS system would show the quantity of USSU shares as 30,000 but then show the average cost for USSU based on all 280,000 shares, as the spreadsheet does. We conclude that, in preparing the February 4 spreadsheet, the Respondent manually changed the number of USSU shares from what the OMS system showed to 30,000 shares, the number prior to the December 31, 2008 purchase.

¶ 146 The spreadsheet continued, week after week, to show the quantity of USSU shares as 30,000. Even when over 900,000 additional USSU shares were purchased in a two week period in March, the Respondent did not update the quantity of USSU on the spreadsheet.

¶ 147 The Respondent offered no reasonable explanation for this. At times, the Respondent appeared to suggest he simply overlooked these purchases. We consider this unlikely, given the size and significance of

these purchases and that the spreadsheets were changed (albeit not always immediately) to reflect much smaller sales of other securities. At other points in his evidence, the Respondent appeared to suggest that there was a rationale for not updating the quantity of USSU shares to reflect the March purchases but, as noted above, we have concluded he was offering whatever explanations he thought might explain the documents he was being shown at the interview rather than testifying to facts he recalled.

¶ 148 There was no credible evidence GP wanted spreadsheets which tracked only price or only price and sales, or that GP knew the spreadsheets were inaccurate. GP's request for information was straightforward. He said he wanted, among other things, the number of shares, the average cost, and the position's value. These numbers are meaningless if the number of shares is not accurate.

¶ 149 The Respondent's suggestion that the spreadsheets were only intended as a price update or to show price and sales is not supported by the manner in which the Respondent described the spreadsheets at the time. The Respondent did not advise GP when he sent the spreadsheets that they were only partially accurate. In fact, his emails suggest otherwise. The Respondent labeled the spreadsheets "[GP] positions [date]". On a number of occasions, his covering email referred to the attachment being a spreadsheet of "your current positions". On April 8, 15 and 22, the covering memos expressly focused on the quantity of securities in the accounts as the Respondent reported on his efforts to reduce the positions.

¶ 150 The Respondent's own evidence suggests he knew or at best did not care if he was sending out inaccurate information to GP and that he recognized, at least at the time he testified, that providing incorrect information could affect GP . For example, he testified that he only updated price, or price and sales, but admitted that he did not know if GP's concern in getting the spreadsheets was just to keep an eye on price. The Respondent agreed that GP requested the spreadsheets to be informed of his positions and that sending incorrect information could affect how GP conducted his affairs.

¶ 151 Respondent's counsel suggested that GP's statements established that he did not in fact rely on the weekly spreadsheets or on the portion of the spreadsheets concerning the quantity of shares. We do not agree that this is a fair characterization of GP's evidence or that, even if GP had not relied on the spreadsheets, it would provide a defense to IIROC's allegations.

¶ 152 We have concluded that the Respondent intentionally misrepresented the number of USSU shares in the spreadsheets he sent to GP.

B. The January 7, 2008 list of stocks

¶ 153 The Respondent prepared and sent the January 7, 2008 list of stocks in response to GP's request for the December 31, 2007 position of his account. On December 31, 2007, GP held 280,000 shares of USSU (although the purchase of 250,000 had not yet settled) and no shares of Finavera. On January 7, 2008, the date the list was sent, GP held 280,000 shares of USSU and 6500 shares of Finavera. The list said GP held 30,000 shares of USSU and 6500 shares of Finavera. There was no point in time when this was correct. Regardless of what exactly the list was intended to represent, it was incorrect.

¶ 154 It is possible that the Respondent created this list from information on the OMS system which did not show the 250,000 shares purchased on December 31, 2007 because, for example, the screen showed only trades which had settled by December 31, 2007 or because the transaction may not have been contracted until after the market closed on December 31. We consider this possibility to be unlikely, however. It would not explain why the list included the Finavera shares purchased on January 3 (which had not settled by the time the list was created).

¶ 155 The inclusion of Finavera is evidence that the Respondent was not intending to send a list which only reflected December 31, 2007 settlement. It is also evidence that the Respondent did not make the list from an OMS screen which showed only transactions which had settled by December 31, for example, without considering whether this was accurate. When considered in the context of the other evidence, we conclude that the Respondent intentionally misrepresented the number of USSU shares on this list.

C. The emails between the Respondent and GP in the period prior to GP questioning the USSU purchases on May 4

¶ 156 Neither the purchases of USSU nor GP's large position in USSU was mentioned or alluded to in any of the emails between the Respondent and GP prior to May, 2008. The emails, viewed as a whole, are inconsistent with GP choosing to buy a very large position in USSU or being aware he had a large position in USSU.

¶ 157 We recognize that the emails in evidence do not necessarily reflect all of the communications between the Respondent and GP and that we must be cautious in interpreting the emails. We are, however, satisfied that in the emails which commenced on January 14, 2008, the Respondent and GP treated USSU as part of a group of stocks the Respondent had recommended and which GP was concerned about and, from January 29, 2008, wanted to reduce in size. USSU is consistently treated as part of this group in the emails, including in the Respondent's updates on companies, in the spreadsheets, and in the emails regarding reducing position sizes. It is never, prior to May 4, singled out in the emails in evidence.

¶ 158 These emails are not consistent with GP having chosen to buy large amounts of USSU in March, 2008 or having known at any time prior to May 4 that his position in USSU was many times larger, by both number of shares and value, than any other position in the group.

D. GP's May 4, 2008 email and the emails which follow it

¶ 159 GP first questioned something in his account on March 31. The evidence does not allow us to determine whether this related to USSU.

¶ 160 On May 4, 2008, GP sent an email questioning the purchases of USSU in the account. We conclude that GP had by this time received the March 31, 2008 statement and compared the holdings in USSU to those shown on the weekly spreadsheets.

¶ 161 The Respondent argued that one cannot conclude from this email that GP was outraged. We agree. However we do conclude that GP was concerned that the size of the USSU position shown on his monthly statement was wrong. This conclusion is supported by the email itself, by subsequent emails and by the Respondent's actions in telling GP he was checking with another client about the position and in discussing the matter with his Compliance department. If GP was not overly concerned or upset at that stage, it may have been because, for example, he trusted the Respondent would rectify the problem.

¶ 162 The emails the Respondent sent after receiving GP's May 4 email are not consistent with the Respondent having known at this time that GP authorized the USSU purchases. He did not refer to GP having authorized the purchases. Rather, he sent emails suggesting he was investigating it and that he had contacted another client and was having it fixed.

¶ 163 We consider it unlikely that the Respondent did not know on May 4, 2008 whether or not he had instructions from GP for the USSU trades, given the circumstances surrounding this trading which are set out above. This is particularly true for the March 2008 purchases which had concluded just over a month prior.

¶ 164 We recognize the possibility that, even if the Respondent knew he had orders for the trades, he may have tried to get another client to take the trades and led GP to believe another client was taking the trades in order to satisfy GP. However, even when the Respondent finally took the position in his June 24 emails that the trades were GP's responsibility, the Respondent did not say he recalled GP placing orders. Rather, he said that, having looked into it, he had determined that the trades accorded with orders.

¶ 165 Similarly, the Respondent's evidence that he told Compliance he was stuck in the middle between two clients who said the stock was not theirs suggests that he did not know GP had authorized the transactions. If he knew GP authorized the transactions, he would have no reason to think the stock might belong to another client.

¶ 166 The Respondent testified that around the time he got the May 4 email (which he did not recall getting), he had a telephone call with GP in which he reminded GP that GP had placed separate orders for the first 800,000 USSU shares purchased and that GP accepted this. However, the Respondent's description of this call

was not credible. It was difficult to follow and appeared to change during the interview. In addition to his testimony that he told GP and GP accepted that GP had placed separate orders for the first 800,000 trades, he gave other accounts of this conversation, including that:

- GP did not say what his position size should be and that the Respondent did not know and did not ask during the conversation;
- the Respondent would have told GP the position size was what he could see in the account; and
- GP told the Respondent he should only have 800,000 to 900,000 shares of USSU.

¶ 167 Some aspects of the Respondent's description of the telephone call are at odds with other evidence. For example, the Respondent's evidence that he reminded GP of the separate orders he had placed for some 800,000 shares is difficult to reconcile with the Respondent inability to recall at the interview anything about orders for the March trades. It is not reflected in any of the contemporaneous emails. Even on June 24 and 26, 2008 when the Respondent set out his more formal position, the Respondent did not say he recalled some or all of the orders. He said that when GP raised an issue, he checked to ensure they were GP's orders and that he was now confident they were.

¶ 168 The Respondent's testimony concerning this call is also inconsistent with him stating in the covering note for the May 5 spreadsheet that:

> Attached is a spreadsheet of your current positions [showing 30,000 USSU shares]. I will figure out on Wednesday what happened when I speak to [my assistant].

¶ 169 In our view, this email, which was sent the day after GP's email about the USSU position size, suggests that the Respondent believed that GP's then current position of USSU was (or at least might be) 30,000 shares. It is not consistent with the Respondent having known the correct position was at least some 800,000 shares.

¶ 170 The Respondent also testified that from the time of this conversation, GP's concern related only to the last 200,000 to 400,000 shares purchased. This is difficult to reconcile with the emails, particularly the June 25th and 26th emails. GP clearly stated in his June 25 email that he should only have 30,000 shares. In his June 26 response, the Respondent does not make any reference to GP having agreed the issue related only to the last 200,000 to 400,000 shares purchased.

¶ 171 We have not put any weight on the Respondent's testimony about this conversation.

¶ 172 We conclude that the emails from May 4, 2008 support the conclusion that GP was not aware prior to that date of the USSU purchases.

E. The communications at the time of the purchases.

¶ 173 There is no evidence that GP and the Respondent were in contact around the time of the December 31, 2007 purchase. There is, however, some evidence that they were not in contact. There is no evidence of emails between the Respondent and GP between December 22 and January 7, 2008. In the last email in evidence from 2007, the Respondent wished GP happy holidays. In emails on January 7, 2008, GP and the Respondents wished each other Happy New Year. The only transaction done for GP's account during those dates (other than the purchase of USSU) was the Finavera purchase which GP had authorized earlier in December, 2007. There were also no phone calls from the Respondent's home office or Canaccord phone to GP during those dates.

¶ 174 There are also very few emails in evidence between the Respondent and GP around the time of the March, 2008 purchases (other than the Respondent sending the weekly spreadsheets) and none in relation to USSU. The Respondent testified that every purchase of USSU would have been preceded by him phoning GP from his office or his home. There were no phone calls from the Respondent's phone line at Canaccord or the Respondent's home office to GP during the time period of the March USSU purchases. While it is possible that the Respondent called GP from his office or his home on his cell phone, we consider it unlikely this would have occurred regularly, or for every USSU purchase.

¶ 175 Given the limitations of the phone records and our general concerns about the reliability of the Respondent's evidence, we would not conclude from this evidence alone that there were no communications concerning the USSU purchases. However, in combination with the other evidence discussed, we consider the lack of evidence of communications to support the conclusion that the Respondent and GP did not communicate about these purchases.

F. The Respondent's inability to recall instructions for the USSU transactions

¶ 176 In our view, given the backdrop of the USSU purchases we have described earlier, it is likely that if the Respondent had instructions for these transactions he could have recalled at least some aspects of the circumstances of this when asked about them at his interview.

¶ 177 Similarly, there was a suggestion that it was possible that the Respondent's assistant could have taken the instructions for at least the December 31, 2007 trade. In our view, given the particular circumstances of this trade and the fact that there was a dispute about these transactions by June, 2008, it is likely that the Respondent would have recalled some aspect of this at the time of his interview. The suggestion that the Respondent's assistant took the order is also contrary to the Respondent's assertion in his June 26 email that GP placed all orders with him.

¶ 178 The explanation the Respondent gave for why GP purchased shares in March, 2008 – that the Respondent did not know and did not ask the reason but that GP was bullish on resource stocks such as this at the time – was in our view, not reasonable on the evidence. We consider it unlikely that the Respondent simply took orders for these trades.

¶ 179 In our view, the circumstances are inconsistent with the Respondent having received unsolicited and unexplained orders to buy about 900,000 shares of USSU in March. The Respondent had provided a positive update about USSU about a month before these trades commenced. He had been purchasing a large amount of USSU personally right up to the time the purchases started in GP's account. A few days after the last of GP's purchases of USSU, the Respondent sent him an update which stated "there are a few stocks I would consider adding to…the commentary is below". The email included a summary of USSU which did not make any reference to the Respondent being knowledgeable about USSU or to GP having recently instructed the Respondent to buy almost one million shares of it. His suggestion that the trades were unsolicited is also difficult to reconcile with his evidence that he would have called GP before each of the purchases of USSU (rather than GP calling him).

G. GP's failure to complain earlier of the December 31, 2007 purchase

¶ 180 The Respondent pointed to the lack of timely objection by GP to the trades as evidence he was aware of them. GP was a sophisticated investor who received monthly statements and confirmation slips. He tracked the positions in his account on his own spreadsheet. There is no evidence GP objected in a timely way to the December 31, 2007 purchase of USSU, although he did raise an issue in a reasonably timely way to the March, 2008 trades.

¶ 181 It is possible that GP did not object more quickly to the December 31, 2007 purchases because he was aware of it at the time it was made. However, it is equally plausible that he did not review his confirmations and statements in a timely way during this period. There are emails in evidence which suggest that GP only focussed on this account sporadically. In any event, the fact that GP would have received monthly statements and confirmations evidencing the transactions does not, in our view, overcome the substantial evidence that GP was not aware of the purchases or that the Respondent misrepresented the USSU position.

H. GP's continued status as a client

¶ 182 The Respondent argued that it was inconsistent with IIROC's allegations that GP remained a client of the Respondent until the Respondent left Canaccord in early 2009. In fact, while GP's account stayed open, there were no purchases and sales in the account after June 22, 2008. This is consistent with the dispute between the Respondent and GP having crystalized in the June 24 to 26 period, as suggested by the emails.

I. Conclusion on Counts 2 and 3

¶ 183 We have concluded on a balance of probabilities that GP did not authorize the Respondent to purchase the large amounts of USSU which were purchased for his account on December 31, 2007 and in March, 2008. We also conclude that the Respondent intentionally misrepresented the number of USSU shares in GP's account in the January 7 list and the weekly summaries to hide from GP the number of USSU shares in his account.

¶ 184 We recognize that it was unlikely that the Respondent could hide the true position of USSU from GP for long by sending him incorrect information. It was probable that GP would (as he did) review his documentation at some point and see the large position of USSU. Perhaps the Respondent, who appears to have believed USSU would increase in price, was hoping the price would rise before GP made this discovery. This would at least have made the shares in GP's account easier to deal with.

¶ 185 Even accepting that it was a plan which was likely to ultimately fail, we conclude that there is no other reasonable explanation for the evidence other than that the Respondent intended to hide from GP purchases of USSU that GP had not authorized.

¶ 186 Both the unauthorized purchases of USSU and the misrepresentations of what was in GP's account were substantial departures from the conduct expected of registrants and the level of financial probity which is essential for registrants. The transgressions occurred repeatedly and over a number of months. They involved a large amount of money. In engaging in each of the unauthorized trading and the misrepresentations, the Respondent failed to observe high standards of ethics and conduct in the transaction of his business and engaged in business conduct or practice unbecoming and detrimental to the public interest, contrary to IDA Bylaw 29.1.

V. Summary of Findings

¶ 187 We have concluded that IIROC has not proven the allegations in Count 1, but we have concluded that IIROC has proven the allegations in Count 2 and 3.

Dated at Vancouver, BC, this 26th day of August, 2013.

Catherine Esson, Chair

Mr. Bob Sutherland, Member

Mr. Brian Worth, Member

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

British Columbia Statutes

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

British Columbia* Statutes > *SECURITIES ACT* > *Part 18 -- Enforcement

Notice

Current Version: Effective 20-04-2012

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.

End of Document

Re Chang

IN THE MATTER OF:

The Dealer Member Rules of the Investment Industry Regulatory Organization of Canada

and

The By-Laws of the Investment Dealers Association of Canada ("IDA")

and

Lawrence Chang

2014 IIROC 04

Investment Industry Regulatory Organization of Canada
Hearing Panel (Pacific District)

Sanction Hearing: November 22, 2013
Decision on Sanction: January 20, 2014

Hearing Panel:
Catharine Esson, Chair; Bob Sutherland and Brian Worth
Appearances:
Paul Smith, Enforcement Counsel for IIROC
Ron Pelletier, for Lawrence Chang

DECISION ON SANCTION

¶ 1 These are the reasons for judgment relating to sanction for a proceeding conducted pursuant to IIROC Dealer Member Rule 20. In a decision dated August 26, 2013, we concluded that:

- on six occasions from December 31, 2007 through March 28, 2008, the Respondent purchased a combined total of approximately $498,160 of one security (USSU) in a client account without authorization from the client, contrary to IDA Bylaw 29.1; and
- from January 2008 through May 2008, the Respondent, contrary to IDA Bylaw 29.1, made misrepresentations to the client regarding the number of shares of USSU held in the client's account in order to hide the fact that he had made unauthorized purchases of USSU.

¶ 2 We concluded that a third allegation had not been proven.

¶ 3 In our August 26, 2013 decision, we characterized the Respondent's conduct in the following manner:

> 186. Both the unauthorized purchases of USSU and the misrepresentations of what was in GP's account were substantial departures from the conduct expected of registrants and the level of financial probity which is essential for registrants. The transgressions occurred repeatedly and over a number of months. They involved a large amount of money. In engaging in each of the unauthorized trading and the misrepresentations, the Respondent failed to observe high standards of ethics and conduct in the transaction of his business and engaged in business conduct or practice unbecoming and detrimental to

the public interest, contrary to IDA Bylaw 29.1.

¶ 4 Pursuant to IIROC Dealer Member Rule 20.33, we have the discretion to impose any one or more of a number of types of sanction on the Respondent, including a fine and a bar from approval with IIROC. We held a hearing on November 22, 2013 to consider sanction. The Respondent was represented by counsel who made submissions on his behalf. He did not attend the hearing personally. Neither party called evidence.

¶ 5 IIROC Staff sought the following sanction:

- A permanent bar from approval with IIROC;
- A fine of $100,000;
- Costs of $20,000, and
- Disgorgement of commissions earned on the impugned trades in the amount of $3,318.

¶ 6 The Respondent did not propose a specific sanction, although he argued that the facts did not justify a lengthy bar from approval. He posed the question whether any forward looking suspension was necessary, given that the Respondent has voluntarily been out of the industry since 2009.

¶ 7 IIROC Staff relied on IIROC's *Dealer Member Disciplinary Sanction Guidelines* as providing guidance for determining the appropriate sanction. We are not bound by the *Guidelines*, but we consider that they provide a useful analysis of the purposes of sanctions and of factors which a hearing panel may find relevant in assessing the sanction in a specific case. We have had regard to the *Guidelines* in reaching our decision. We have also considered the decision in *Re: Pan*, 2012 IIROC 22, although we recognize that there are substantial factual differences between it and this case.

¶ 8 In our view, the most significant considerations in determining sanction in this case are the following:

a. *The harm to the client* - The Respondent purchased about $500,000 worth of USSU in the client's account without authority and, during a period of time when the price of USSU was declining, repeatedly misrepresented the size of the share position to the client. In so doing, he exposed the client to large losses.

b. *The deliberate and dishonest nature of the misconduct* - We do not know the Respondent's motivation for purchasing USSU without instructions. However, he deliberately misrepresented to his client the size of the client's holdings of USSU in order to hide from the client the unauthorized transactions. He misrepresented the holdings on a number of occasions and in a number of ways. This was completely at odds with his fundamental obligation to treat his client honestly.

c. *The harm to the securities market generally from the type of misconduct in this case* – The securities market operates on the basis of trust between registrant and client. It is essential to this trust that registrants not expose their clients' assets to unauthorized risks. It is also essential that registrants are completely candid with clients about matters relating to the clients' assets.

   The Respondent's conduct fell substantially below what is expected of registrants. It was dishonest and exposed the Respondent's client to substantial financial harm. IIROC Staff characterized it as being exactly the type of conduct which gives IIROC a bad name and affects public trust. We agree. Conduct such as this undermines the public's trust in registrants, and therefore harms the securities market generally.

d. *Multiple incidents of misconduct over an extended period of time* – The Respondent made six unauthorized trades in one client's account and misrepresented the quantity of USSU in the account to the client on numerous occasions. The misconduct occurred over a number of months. It was not isolated.

   That being said, we recognize that the misconduct did not involve multiple clients or multiple

different factual situations. It does not establish that the Respondent generally treated his clients dishonestly.

e. *The Respondent's participation in the investigative and hearing process even after leaving the industry.* In our view, this is somewhat mitigating. It indicates respect for the regulatory process and, as a general matter, should be encouraged as it allows for a better disciplinary process.

¶ 9 We also note that the Respondent has a prior disciplinary record, having been sanctioned in late 2009 for failing to make inquiries of a client in violation of his gatekeeper obligation. We have not considered this to be an aggravating factor for two reasons. First, the previous misconduct was of a different type and relatively minor in comparison to the misconduct in this case. Second, the previous sanction was imposed after the events which form the basis of this hearing. It cannot be said that the Respondent failed to be deterred by the earlier sanction.

¶ 10 In the circumstances of this case, we have concluded that it is appropriate to permanently bar the Respondent from membership in IIROC. We recognize that this is a severe penalty and may impose substantial economic hardship on the Respondent. However, in our view the misconduct, viewed as a whole, was sufficiently dishonest and abusive of the Respondent's client that the Respondent should not be trusted as a registrant in the future.

¶ 11 We have also concluded that it is appropriate to impose a fine of $100,000. We have reduced the fine which we otherwise would have imposed on these facts to acknowledge both the potential economic impact of a permanent ban and that the Respondent participated responsibly in the disciplinary process and presumably incurred substantial costs to do so.

¶ 12 IIROC Staff sought disgorgement, in addition to a fine. IIROC's Rules do not provide for disgorgement, although Rule 20.33 frames the maximum allowable fine in terms of a multiple of the profit made by the Respondent. In this case, the fine we have imposed is very large in comparison to the amount of the commissions earned by the Respondent on the impugned trades. We do not consider it appropriate to increase the fine to add on the amount of the commissions.

¶ 13 Pursuant to Dealer Member Rule 20.49, we have discretion to assess and order any IIROC Staff investigation and prosecution costs we determine are appropriate and reasonable in the circumstances. IIROC Staff acknowledged the ongoing issues in applying Rule 20.49. These issues have been discussed in decisions such as *Re: Blackmont Capital Inc.* 2010 IIROC 57.

¶ 14 IIROC Staff sought costs of $20,000 and provided us with a Bill of Costs in the amount of $24,719. Enforcement counsel advised us it was based on a very conservative tally of the hours that he and IIROC's investigator incurred in connection with this matter, multiplied by the hourly rate IIROC's Finance Department ascribes to these individuals. IIROC Staff did not attempt in the Bill of Costs to include only time which related to the counts on which we found against the Respondent.

¶ 15 IIROC Staff did not call any evidence in support of its claim for costs. In our view, it should do so. However, we conclude based on the evidence we received at the hearing about the investigation and based on the hearing itself that IIROC Staff's investigator and Enforcement Counsel spent more hours on this matter than are claimed on the Bill of Costs.

¶ 16 We accept that the amount claimed of $20,000 is significantly less than IIROC would have paid a third party to investigate and prosecute this matter. It is less clear how the amount claimed relates to IIROC's actual costs in connection with this matter. That being said, if costs were to be ordered solely to compensate IIROC for the costs it incurred, without regard to the fact that there was divided success or other factors, we would accept the amount claimed as reasonable.

¶ 17 In our view, however, Rule 20.49 requires that we consider more than simply whether IIROC Staff succeeded on part of its claim and the costs it reasonably incurred. In *Blackmont*, supra, the hearing panel declined to make an order regarding costs, despite IIROC Staff having succeeded on some of its allegations.

The panel in that case took into account that the Respondent had responsibly approached the disciplinary process and that the parties had had divided success.

¶ 18 We recognize that in this case IIROC Staff succeeded on the most serious allegations it made and that IIROC has a legitimate interest in recovering its costs related to that. At the same time, however, there are equally legitimate interests in ensuring that costs awards (which can be made in IIROC's favor, but not in favor of a Respondent) do not cause a perception of unfairness or undermine the goal of allowing respondents to defend themselves in a reasonable manner.

¶ 19 The Respondent in this case attended an investigative interview and defended himself through counsel at the hearings into both liability and sanction. He was successful in defending himself on one of the three allegations made against him. While it was the least serious of the allegations, it consumed a significant amount of time at the hearing and, presumably, during the investigation.

¶ 20 We have concluded that IIROC Staff should recover a portion of the costs which it reasonably and appropriately incurred, but that the total amount of costs awarded to it should be relatively modest, on account of divided success and to ensure that costs awards do not become a deterrent to respondents defending themselves. In an effort to balance these objectives, we order costs in the amount of $7500.

Summary of Sanction

¶ 21 We make the following orders against the Respondent:

- A permanent bar from approval with IIROC;
- A fine of $100,000, and
- Costs of $7,500.

Dated at Vancouver, BC, this 20th day of January, 2014.

Catharine Esson, Chair

Bob Sutherland, Member

Brian Worth, Member

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.

Cases Cited

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.

Statutes and Regulations Cited

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.

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.

Jurisprudence

Arrêts mentionnés : *Re Canadian Tire Corp.* (1987), 10 O.S.C.B. 857, conf. par (1987), 59 O.R. (2d) 79, autorisation de pourvoi à la C.A. refusée (1987), 35 B.L.R. xx; *Re H.E.R.O. Industries Ltd.* (1990), 13 O.S.C.B. 3775; *Pezim c. Colombie-Britannique (Superintendent of Brokers)*, [1994] 2 R.C.S. 557; *Canada (Directeur des enquêtes et recherches) c. Southam Inc.*, [1997] 1 R.C.S. 748; *R. c. Wholesale Travel Group Inc.*, [1991] 3 R.C.S. 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 c. Bibeault*, [1988] 2 R.C.S. 1048; *Pushpanathan c. Canada (Ministre de la Citoyenneté et de l'Immigration)*, [1998] 1 R.C.S. 982; *Université Trinity Western c. British Columbia College of Teachers*, [2001] 1 R.C.S. 772, 2001 CSC 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. c. Colombie-Britannique (Securities Commission)*, [2000] 1 R.C.S. 494, 2000 CSC 21.

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.

Securities Act, R.S.O. 1980, ch. 466, art. 124(1).

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

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.

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.

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.

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. Facts

I. Les faits

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.

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.

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.

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.

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.

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.

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.

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. 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.

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. 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.

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. 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.

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 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.

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".

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

(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.

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 ».

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.]

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) : 40

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

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. 41

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.

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

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.

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.

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. *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.

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 . . . .

Therefore, Québec's intention was relevant.

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.

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

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 . . .

L'intention du Québec était donc pertinente.

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.

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?

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. 57

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) : 58

[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.

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. 61

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-

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- 62

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.

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Davis v. British Columbia (Securities Commission)*, 2018 BCCA 149

Date: 20180420
Docket: CA44114

Between:

Larry Keith Davis

Appellant

And

British Columbia Securities Commission and the Executive Director of the British Columbia Securities Commission

Respondents

Before: The Honourable Mr. Justice Frankel
The Honourable Mr. Justice Groberman
The Honourable Madam Justice Garson

On appeal from: Decisions of the British Columbia Securities Commission dated June 22, 2016 and November 7, 2016 (*Re Davis*, 2016 BCSECCOM 214 and 2016 BCSECCOM 375).

Counsel for the Appellant:	P.A.A. Taylor H. Thauli
Counsel for the Respondents:	J.L. Whately O.L. Fagbamiye
Place and Date of Hearing:	Vancouver, British Columbia January 8, 2018
Place and Date of Judgment:	Vancouver, British Columbia April 20, 2018

Written Reasons by:
The Honourable Mr. Justice Frankel
The Honourable Madam Justice Garson

Concurred in by:
The Honourable Mr. Justice Groberman

Summary:

A hearing panel found D. committed fraud by falsely representing to an investor that he owned the company shares he was selling. D. used the $7,000 paid by the investor for his personal expenses. D. never received any shares and it was necessary for the investor to commence a small claims action to recover her money. D. testified that, by reason of a non-binding arrangement with the company's principal, he believed he would receive the shares needed to complete the transaction. The sanctions imposed by the panel included several permanent market bans. D. appealed both the finding of liability and the sanctions. Held: Liability appeal dismissed; sanctions appeal allowed. Even if D. honestly believed he would receive the shares, the elements of fraud were established. The sanctions decision was unreasonable because the panel failed to take into consideration D.'s previously unblemished record and the principle of proportionality.

Reasons for Judgment of the Honourable Mr. Justice Frankel and the Honourable Madam Justice Garson:

Introduction

[1] Larry Keith Davis appeals from the finding of a hearing panel of the British Columbia Securities Commission that he committed fraud contrary to s. 57(b) of the *Securities Act*, R.S.B.C. 1996, c. 418. If that finding is upheld, then Mr. Davis appeals from the permanent market bans the panel imposed on him.

[2] The liability decision is based on Mr. Davis having untruthfully told an investor he owned the shares he was selling to that investor. Mr. Davis contends his actions do not amount to fraud because he believed he would receive those shares in the future. With respect to the permanent market bans, Mr. Davis contends the panel's sanctions decision is unreasonable because it is predicated on such bans being generally imposed in fraud cases, without regard to the circumstances of the offence and the offender.

[3] For the reasons that follow, we would dismiss Mr. Davis's appeal from the liability decision but allow his appeal from the sanctions decision.

Factual Background

[4] Mr. Davis is a resident of British Columbia. He has been involved in providing investor-relations services for approximately 25 years.

[5] In 2009, using the name Bravo International Services, Mr. Davis began providing investor-relations services for FormCap Corporation, a Nevada company trading over-the-counter in the United States of America. Mr. Davis had no formal agreement to provide services to FormCap and received no remuneration directly from FormCap. Rather, he was compensated for his services in FormCap shares transferred to him from existing shareholders.

[6] The transfer of FormCap shares to Mr. Davis ended in January 2011. By April 2011, he had sold all the FormCap shares he had received.

[7] Wendy McDonald was a friend and neighbour of Mr. Davis. In June 2011, Mr. Davis told Ms. McDonald he had an investment opportunity for her. At this time, FormCap was planning a 1-for-10 share consolidation.

[8] Ms. McDonald agreed to invest $4,000. On June 17, 2011, she gave Mr. Davis a money order in that amount. Mr. Davis told Ms. McDonald that her investment was safe and that she could get her money back.

[9] A few days later, Mr. Davis deposited the money order into his personal bank account, which was then overdrawn by approximately $1,900. In the next few days, Mr. Davis used some $900 of the money he had received from Ms. McDonald to pay for his personal expenses.

[10] On June 24, 2011, Mr. Davis issued Ms. McDonald a receipt on Bravo International letterhead for $4,000, with reference to "attached Share Exchange Agreement for, FormCap Corp.", a document Mr. Davis drafted. The agreement, which was for the sale of 40,000 shares of FormCap for $4,000, made several references to Mr. Davis as the "owner" or "seller" of those shares, including:

> THIS AGREEMENT is made and entered into this 24 day of June, 2011 by and between Larry Davis, ("Seller") and Wendy McDonald ("Purchaser");
>
> WHEREAS, the Seller is the record owner and holder of the issued and outstanding shares of the capital stock, ("FormCap Corporation"), a Nevada Corporation, which is consolidating its issued capital stock on a 1 new share for 10 old shares.
>
> ...

> 3. REPRESENTATIONS AND WARRANTIES OF SELLER.
>
> Seller hereby warrants and represents:
>
> ...
>
> (b) Restrictions on Stock...ii. Seller is the lawful owner of the Stock, free and clear of all security interests, liens, encumbrances, equities and other charges...
>
> [Emphasis added.]

[11] With respect to the completion of the transaction, the agreement stated:

> The certificates representing the Corporation's Stock shall be delivered by the Seller to the Purchaser upon the closing of the transactions contemplated by this Agreement ("Closing"), shall be held on or about AUG/SEPT/2011, or date and time as the parties hereto may otherwise agree.

[12] Mr. Davis's signature on the agreement was witnessed by his wife, Diane Jane Davis. Mr. Davis did not ask Ms. McDonald to sign the agreement as it did not have a place for her signature.

[13] By July 14, 2011, Mr. Davis had used what remained of Ms. McDonald's money for his personal expenses. His bank account was overdrawn again.

[14] On October 17, 2011, FormCap issued a report publicly disclosing its intention to abandon the planned 1-for-10 share consolidation. Mr. Davis was aware the 1-for-10 consolidation would no longer take place but did not advise Ms. McDonald of this.

[15] In April 2012, Mr. Davis told Ms. McDonald that another opportunity to invest in FormCap shares had come available. He told her there was a short time-window to invest and that other investors were investing more funds. Ms. McDonald agreed to invest a further $3,000, and gave that amount to him in cash. Mr. Davis used that money for his personal expenses.

[16] After making the second investment, Ms. McDonald asked Mr. Davis where her FormCap shares would go. Mr. Davis recommended a brokerage firm and Ms. McDonald opened an account with that firm.

[17] On August 10, 2012, FormCap issued a news release publically disclosing it proposed to proceed with a 1-for-50 share consolidation.

[18] In late March 2013, Ms. McDonald, who had misplaced her copy of the 2011 agreement, asked Mr. Davis for documentation with respect to her $7,000 investment. She and Mr. Davis exchanged emails through April and May.

[19] On April 4, 2013, Ms. McDonald emailed Mr. Davis. She stated that due to a change in her financial circumstances she would like to withdraw the $7,000 she had given him to invest. Mr. Davis replied that day:

> Your investment in FormCap resulted in you becoming a shareholder. Your original paperwork that you misplaced reflected that fact. Therefore, you, me and all the other shareholders are stuck and will have to wait for FormCap to get its act together. Myself and others are keeping the pressure on, but we remain skeptical due to the majority shareholder's declining health issues. I have touched on that topic in my previous e-mail and telephone conversation. I know it sucks, however, I have always guaranteed your investment so you will never loose [*sic*] your principal amount of $7,000. As previously mention [*sic*], I was prepared to do the following for you, so when I close on any of the three projects that I am currently working on, I can switch you into that first project which would allow your position to be eligible for sale either privately or when we go public. I hope this note serves as reassurance for you, Wendy, and your investment is still sound and intact, however, just not liquid at this time.

[20] Over the next few weeks Ms. McDonald sent further emails to Mr. Davis asking why the shares had not be deposited into her account at the brokerage firm and requesting the return of her money. In his responses, Mr. Davis told Ms. McDonald that neither the shares nor her money were available but her investments were fine. For example, in an email sent on April 23, 2013, Mr. Davis stated:

> As a friendly reminder... this is an investment that is in the form of shares that are tied to the stock market. If you recall, I had you open an account with a brokerage firm in Vancouver. This payment request you are now asking for would be considered or categorized as a favour re your situation. This is something that you are obviously coming up now because of your circumstances, however, I'm sorry to say, my dear, that your timing for this (favour, request or demand) doesn't work that way. But please don't panic. All is fine with your investment.

[21] On April 25, 2013, Mr. Davis responded as follows to an email in which Ms. McDonald asked him why the FormCap shares were not in her brokerage account:

> As previously mentioned, you will receive your shares once the certificates are issued. Then they can go either to you directly or to an account of your choosing. I will notify you when this takes place.

[22] In an email sent on May 13, 2013, Ms. McDonald advised Mr. Davis that if he did not return her money by May 17, 2013, then she would "pursue the regulatory avenues open to [her]." Mr. Davis replied on May 15, 2013, that everything outlining the investment was in the 2011 agreement and he would go through it with her again. He declined to return the $7,000.

[23] On May 17, 2013, the person handling the brokerage account Ms. McDonald had opened suggested she have the 2011 agreement revised to reflect the total amount of her investment. As a result, Ms. McDonald went to Mr. Davis's home that day. She took David H. Stone with her as a witness. The 2011 agreement was revised in handwriting to reflect the sale of 70,000 shares of FormCap for $7,000. The recital with respect to FormCap consolidating its stock on a 1-for 10 basis was not changed. The amended agreement was signed by Mr. Davis, Ms. McDonald, and Mr. Stone.

[24] On May 28, 2013, Ms. McDonald contacted the Commission by telephone; she advised Mr. Davis by email she had done so. In his reply email, Mr. Davis stated (in part):

> This has nothing to do with the BC Securities Commission. This is a Nevada, USA based company. You don't own these shares. I do. You have been told that many times.

[25] On May 29, 2013, Ms. McDonald again asked Mr. Davis to return her money. On June 4, 2013, the money not having been returned, she filed a written complaint with the Securities Commission.

[26] On March 13, 2015, the executive director of the Commission issued a notice of hearing to Mr. Davis alleging he had committed fraud contrary to s. 57(b) of the Act. That section provides:

> A person must not, directly or indirectly, engage in or participate in conduct relating to securities or exchange contracts if the person knows, or reasonably should know, that the conduct
>
> ...
>
> (b) perpetrates a fraud on any person.

[27] Later in 2015, Ms. McDonald commenced a small claims action against Mr. Davis to recover the $7,000. As a result of that action, Mr. Davis returned the money to her.

[28] The Commission's hearing into Mr. Davis's conduct took place in early February 2016. The executive director called a Commission investigator and Ms. McDonald as witnesses. It is not necessary to set out the details of their evidence. Mr. Davis testified and called his wife as a witness. As their evidence is pertinent to this appeal it is set out below.

Mr. Davis's Evidence

[29] Mr. Davis testified that, starting in the fall of 2009, he performed investor-relations services on behalf of FormCap. FormCap's majority and controlling shareholder, Terry Butchart, arranged for Mr. Davis to be compensated in the form of FormCap shares. Those shares were transferred to Mr. Davis from companies Mr. Butchart either owned or over which Mr. Butchart had influence. The last transfer took place in December 2010 or January 2011.

[30] In January 2011, Mr. Davis and Mr. Butchart discussed Mr. Davis continuing to work on FormCap's behalf. In June 2011, Mr. Davis learned FormCap was planning a 1-for-10 share consolidation. Mr. Davis and Mr. Butchart agreed that once the consolidation was completed, Mr. Davis would receive 100,000 post-consolidation shares as compensation for his services. At the time, the consolidation was expected to occur in August/September 2011.

[31] When Ms. McDonald approached Mr. Davis looking for an investment opportunity, he suggested FormCap once he was confident the consolidation would take place. He told her about the consolidation and that he would get his shares after it had taken place. Although confident he would get the shares, Mr. Davis told Ms. McDonald he would personally guarantee her investment, i.e., if he did not get his shares, then she would get her money back.

[32] Mr. Butchart kept Mr. Davis informed as to the progress of the consolidation. When the consolidation did not proceed, Mr. Davis so advised Ms. McDonald.

[33] When Ms. McDonald approached Mr. Davis in May 2012, about investing more money, he believed there would be a consolidation and that he would then receive FormCap shares. Mr. Butchart had agreed to provide him with shares regardless of the nature of the consolidation. Mr. Davis intended to provide Ms. McDonald with her shares once he received them. He continually updated her on what was happening with the consolidation.

[34] When, in August 2012, FormCap announced a 1-for-50 consolidation, Mr. Butchart assured Mr. Davis he would still be receiving a substantial number of shares. At that time, Mr. Davis was working on behalf of FormCap. Mr. Butchart repeated those assurances to Mr. Davis later that summer, when the two met at Mr. Butchart's home.

[35] When Ms. McDonald and Mr. Stone came to Mr. Davis's house on May 17, 2013, Mr. Davis believed he would be getting FormCap shares. He explained to Mr. Stone that Ms. McDonald would not receive her shares until after the consolidation. After hearing the explanation, Mr. Stone told Ms. McDonald everything was fine.

[36] Mr. Davis said because he was "forward selling" shares to Ms. McDonald he could do whatever he wanted with the money she gave him.

[37] Mr. Davis never received any FormCap shares.

Ms. Davis's Testimony

[38] Ms. Davis said Mr. Butchart "hired" Mr. Davis in 2009 to work for FormCap. Mr. Davis was paid in FormCap shares.

[39] In the summer of 2012, Ms. Davis was frustrated and upset by the fact Mr. Davis was not being paid in a timely way. As a result, Mr. Davis asked her to come with him to Mr. Butchart's house. She overheard Mr. Butchart and Mr. Davis discussing when a share rollback/consolidation would take place. Large amounts of shares were mentioned, but nothing could happen until after the rollback. Although no timeframe for the rollback was given, she was told it would not be very long.

Liability Decision
(2016 BCSECCOM 214)

[40] Before the panel, Mr. Davis acknowledged he did not receive any FormCap shares after January 2011. He further acknowledged he did not own any FormCap shares at the time of Ms. McDonald's investments, or at the time he amended the written agreement at her request.

[41] The panel concluded Mr. Davis had perpetrated fraud in the amount of $7,000 contrary to s. 57(b) of the Act. With respect to the elements of fraud, it relied on the following from the judgment of Justice McLachlin (as she then was) in *R. v. Théroux*, [1993] 2 S.C.R. 5 at 20, a case dealing with fraud under s. 380(1) of the *Criminal Code*, R.S.C. 1985, c. C-46:

> ... the *actus reus* of the offence of fraud will be established by proof of:
>
> 1. the prohibited act, be it an act of deceit, a falsehood or some other fraudulent means; and
> 2. deprivation caused by the prohibited act, which may consist in actual loss or the placing of the victim's pecuniary interests at risk.
>
> Correspondingly, the *mens rea* of fraud is established by proof of:
>
> 1. subjective knowledge of the prohibited act; and
> 2. subjective knowledge that the prohibited act could have as a consequence the deprivation of another (which deprivation may consist in knowledge that the victim's pecuniary interests are put at risk).

[42] The panel found Mr. Davis's testimony about a collateral oral agreement with Ms. McDonald was not credible. It rejected his evidence that he and Ms. McDonald had orally agreed that: (a) he was selling her his future interest in post-consolidation FormCap shares; (b) she would receive her shares only after he received his shares; and (c) he would pay her back her money if he did not receive his shares: paras. 57, 66–73.

[43] In finding the *actus reus* element of fraud had been proven, the panel stated:

> [74] [Mr. Davis] represented to [Ms. McDonald] that he owned the FormCap shares he was purporting to sell her when he did not. As late as May 28, 2013 he continued to represent to [Ms. McDonald] that he owned the FormCap shares even though the 1-for-10 share consolidation had been abandoned in October 2011 and he had never received any FormCap shares following the eventual 1-for-50 share consolidation which commenced in August 2012. This falsehood is the prohibited act.
>
> [75] The prohibited act caused deprivation to [Ms. McDonald's] pecuniary interests. The British Columbia Court of Appeal, in *R. v. Abramson*, [1983] B.C.J. No. 1305, confirmed that the payment of money as part of an investment was sufficient to establish deprivation for the purpose of fraud. In *Re Streamline Properties* 2014 BCSECCOM 263, the Commission followed *Abramson*.
>
> [76] While [Ms. McDonald] eventually obtained the return of the monies she had invested, it was only after she had expended considerable time and effort pursuing their return by various means, finally achieving success in late 2015 through the Small Claims Court's processes.

[44] With respect to the *mens rea* of fraud, the panel said:

> [77] While [Mr. Davis] may have believed at the time of the first investment that he would acquire FormCap shares following the initially proposed 1-for-10 share consolidation through [Mr. Butchart], [Mr. Davis] knew at that time that he did not own any FormCap shares. Yet he proceeded to sell FormCap shares he did not own to [Ms. McDonald]. Shortly, thereafter, he spent [Ms. McDonald's] funds on personal expenditures.
>
> [78] By the time of the second investment, [Mr. Davis] not only knew he did not have any FormCap shares to sell to [Ms. McDonald] but also knew the previously proposed FormCap share consolidation had been abandoned and the company was having serious financial difficulties. Yet, he proceeded to agree to sell [Ms. McDonald] another 30,000 FormCap shares which he did not own on the same terms and conditions. When she sought the return of these funds, he rejected

> her request saying there were no funds available and continued his deceit by telling [Ms. McDonald] that the investment was in the form of shares tied to the stock market.
>
> [79] [Mr. Davis] thus knew at the time of each investment of the prohibited act and that the prohibited act could have as a consequence the deprivation of [Ms. McDonald] by putting the monies she had invested with him at risk.

Sanctions Decision
(2016 BCSECCOM 375)

[45] The panel ordered Mr. Davis to pay a $15,000 administrative penalty and permanently prohibited him from participating in the securities market, other than for his own account through a person registered under the Act.

[46] In reaching this conclusion, the panel stated that, "While the amount involved in this case is relatively small, [Mr. Davis's] initial and ongoing deceit is misconduct properly characterized as falling within the most serious misconduct prohibited by the Act": para. 13. The panel also stated that the absence of a prior regulatory history is not a mitigating factor: para. 30.

[47] The executive director provided the panel with four sanctions decisions in which permanent market bans had been imposed, submitting they were comparable to Mr. Davis's case. The frauds in those decisions ranged from $6,000 to $38,250.

[48] The panel rejected Mr. Davis's submission that proportionality is the overarching principle in the determination of appropriate sanctions: para. 42. It noted Mr. Davis had been unable to provide any relevant cases wherein anything less than permanent market bans had been imposed following a finding of liability based on fraud: para. 49. The panel held that "[i]n keeping with similar circumstances in other cases of fraud", imposing permanent market bans on Mr. Davis was appropriate: para. 52.

[49] In the result, the panel ordered that (at para. 61):

> a) [Mr. Davis] cease trading in, and is permanently prohibited from purchasing, securities; except [Mr. Davis] may trade or purchase

securities for his own account through a registrant if he gives the registrant a copy of this decision;

b) any or all of the exemptions set out in the Act, regulations or a decision do not apply to the respondent;

c) [Mr. Davis] resign any position he holds as, and is permanently prohibited from becoming or acting as, a director or officer of any issuer or registrant;

d) [Mr. Davis] is permanently prohibited from becoming or acting as a registrant or promoter;

e) [Mr. Davis] is permanently prohibited from acting in a management or consultative capacity in connection with activities in the securities market; and

f) [Mr. Davis] is permanently prohibited from engaging in investor relations activities.

Analysis

Standard of Review

[50] The parties agree that the reasonableness standard of review applies to the panel's findings of credibility, findings of fact, and imposition of sanctions.

[51] In their factum, the Commission and executive director cite *McLean v. British Columbia (Securities Commission)*, 2013 SCC 67 at paras. 19–21, [2013] 3 S.C.R. 895, for the proposition that the reasonableness standard of review presumptively applies to the panel's interpretation of its home statute. However, in their oral submissions they accepted that the correctness standard of review applies to the panel's determination of the elements of fraud under s. 57(b) of the *Securities Act*.

[52] The elements of fraud are not in issue in this case. Both parties accept that the elements of fraud under s. 57(b) are those under s. 380(1) of the *Criminal Code*, as discussed in *Théroux*. The liability question here is whether those elements were proven.

[53] Mr. Davis's primary position is that the correctness standard applies to this question. Applying that standard, he says the facts do not support the conclusion that he committed fraud. In effect, Mr. Davis says that, as in the criminal law, the legal effect of undisputed or found facts is a question of law to which the correctness

standard applies: see *R. v. Mara*, [1997] 2 S.C.R. 630 at para. 29; *R. v. Greyeyes*, [1997] 2 S.C.R. 825 at para. 40; *R. v. J.M.H.*, 2011 SCC 45 at para. 28, [2011] 3 S.C.R. 197. In the alternative, he submits the panel's determination that he committed fraud is unreasonable.

[54] The Commission and the executive director submit the reasonableness standard applies to the question of whether the elements of fraud were proven.

[55] We need not determine which standard of review applies to the question of whether the elements of fraud were proven because we have concluded that the more rigorous standard of correctness is, in any event, satisfied.

Liability Finding

[56] Mr. Davis does not say the panel erred in considering the elements of fraud to be those discussed in *Théroux*. What he says is that even though he was untruthful in telling Ms. McDonald he owned the FormCap shares he was selling her, he did not commit fraud because he honestly believed he would receive post-consolidation shares and, thereafter, live up to his obligations under the written agreement. He says that by reason of that belief, neither the *actus reus* nor *mens rea* elements of fraud were proven. We do not agree.

[57] Mr. Davis's arguments rest on two passages in the panel's reasons. The first passage is in the section entitled "Background". In discussing Mr. Davis's evidence concerning his conversations with Mr. Butchart in June 2011, the panel stated:

> [12] While [Mr. Davis] may have believed, based on past experience, that [Mr. Butchart] would arrange to have FormCap shares transferred to him from other shareholders for the FormCap investor relations work the [Mr. Davis] was doing in 2011 and later, there was no evidence of any enforceable agreement by [Mr. Butchart] to do so.
>
> [Emphasis added.]

The second passage is para. 77 (which appears in the section entitled "Analysis") which, for ease of reference, we will set out again:

> [77] While [Mr. Davis] may have believed at the time of the first investment that he would acquire FormCap shares following the initially proposed

> 1-for-10 share consolidation through [Mr. Butchart], [Mr. Davis] knew at that time that he did not own any FormCap shares. Yet he proceeded to sell FormCap shares he did not own to [Ms. McDonald]. Shortly, thereafter, he spent [Ms. McDonald's] funds on personal expenditures.
>
> [Emphasis added.]

[58] The parties disagree as to what the words "While [Mr. Davis] may have believed" connote. Mr. Davis's position is that they indicate a positive finding of fact that he honestly believed he would receive FormCap shares, i.e., that those words should be read as if the panel had said, "Mr. Davis believed". The position of the Commission and the executive director is that no such finding was made. In this regard, they point to the panel's adverse finding with respect to Mr. Davis's credibility.

[59] We confess it is not clear to us what finding the panel made with respect to Mr. Davis's state of mind at the time of the first investment. While it is true that the panel did make an adverse finding with respect to Mr. Davis's credibility, it did so only with respect to his assertion that he and Ms. McDonald had entered into a collateral oral agreement. After referring to Mr. Davis's evidence that Ms. McDonald was aware of, and agreed to, his "forward selling" her shares he did not own, the panel stated:

> [68] We do not consider [Mr. Davis's] testimony in this regard to be credible."
>
> [Emphasis added.]

[60] The panel then went on to further discuss the evidence and concluded by stating:

> [73] We reject [Mr. Davis's] testimony and argument as to the existence of a collateral "oral agreement". We find the terms of the agreement between [Mr. Davis] and [Ms. McDonald] as to [Ms. McDonald's] two investments are those set out in the [share purchase agreement] as amended.
>
> [Emphasis added.]

[61] However, even if Mr. Davis's interpretation of the words "may have believed" is correct, it would not affect the panel's finding he committed fraud; a finding grounded on Mr. Davis: (a) misrepresenting to Ms. McDonald that he owned the shares he was selling; (b) using the purchase money she gave him for his own purposes; and (c) continuing to deceive her after she asked for her money back. Those facts satisfy the elements of fraud set out in *Théroux*.

[62] With respect to the *actus reus*, the prohibited act was the falsehood Mr. Davis told Ms. McDonald about being the owner of the FormCap shares he was selling. Her pecuniary interests were put at risk when she provided him with money to purchase those shares.

[63] Mr. Davis submits that despite the panel's rejection of his evidence regarding the existence of a collateral oral agreement, the panel accepted, in para. 12 of the sanctions decision, that Ms. McDonald initially believed she would get her money back if she did not receive her shares. He argues that, as a result, it cannot be said Ms. McDonald's pecuniary interests were at risk. This argument ignores, however, the fact Mr. Davis used the money Ms. McDonald gave him to pay for his personal expenses and refused to return her money when she asked for it in 2013; the mere promise of a refund cannot immunize Mr. Davis from a claim of fraud.

[64] Mr. Davis further submits the panel's *actus reus* analysis is inconsistent with the liability decision in *Re Maddigan*, 2016 BCSECCOM 379, which was released shortly after the sanctions decision in this case. *Maddigan*, however, is distinguishable.

[65] In *Maddigan*, 0902395 B.C. Ltd., a company controlled by Mr. Maddigan, entered into loan agreements with investors, promising to repay the funds advanced in cash by the maturity date, or deliver to the investors shares of an another company equal to the loan amounts. 0902395 B.C. Ltd. failed to deliver cash or shares to two of the investors, electing, instead, to satisfy its obligations to other creditors. The hearing panel noted, with respect to the loan agreements, "[t]here is

no evidence that this promise was, at the time made, in any way deceitful or false": para. 34.

[66] Before the *Maddigan* hearing panel, the executive director argued that regardless of the reason for making it, the decision to prefer one creditor over another constituted the *actus reus* of fraud, i.e., "other fraudulent means" as discussed in *Théroux*. In rejecting that argument, the panel stated that, in circumstances where it is not possible to satisfy all legitimate creditors, a reasonable person would not consider satisfying some over others to be dishonest: paras. 38–39.

[67] In this case, the panel found Mr. Davis engaged in a "falsehood" at the time the investments were made by representing to Ms. McDonald that he owned the FormCap shares he purported to sell her. The "other fraudulent means" analysis required to establish fraud is, therefore, inapplicable.

[68] Turning to *mens rea*, when Mr. Davis told Ms. McDonald he owned FormCap shares, he knew he was being untruthful; he continued that falsehood for years. Mr. Davis also knew that taking Ms. McDonald's money could put her pecuniary interests at risk because his ability to deliver the shares was uncertain; he had no legal entitlement to any shares.

[69] Further, and most importantly, even if Mr. Davis believed he would receive FormCap shares in the future, the *mens rea* element of fraud would still be established. This is evinced by *Théroux*.

[70] Mr. Théroux was the directing mind of a company involved in two residential construction projects. The company falsely represented to buyers that the deposits they paid were insured. When the company became insolvent, the projects could not be completed, and most of the depositors lost their money. The trial judge who convicted Mr. Théroux of fraud found that he knowingly made the misrepresentations without any reasonable assurance that the projects would be completed, although he sincerely believed they would be completed.

[71] In affirming Mr. Théroux's conviction, McLachlin J. held that his sincere belief that the projects would be completed was not a defence. With respect to the *mens rea* element of fraud generally, she stated (at pp. 23–24):

> A person who deprives another person of what the latter has should not escape criminal responsibility merely because, according to his moral or her personal code, he or she was doing nothing wrong or because of a sanguine belief that all will come out right in the end. Many frauds are perpetrated by people who think there is nothing wrong in what they are doing or who sincerely believe that their act of placing other people's property at risk will not ultimately result in actual loss to those persons. If the offence of fraud is to catch those who actually practise fraud, its *mens rea* cannot be cast so narrowly as this.
>
> [Emphasis added.]

With respect to Mr. Théroux in particular, she said (at p. 27):

> The *mens rea* too is established. The appellant told the depositors they had insurance protection when he knew that they did not have that protection. He knew this to be false. He knew that by this act he was depriving the depositors of something they thought they had, insurance protection. It may also be inferred from his possession of this knowledge that the appellant knew that he was placing the depositors' money at risk. That established, his *mens rea* is proved. The fact that he sincerely believed that in the end the houses would be built and that the risk would not materialize cannot save him.
>
> [Emphasis added.]

See also: *R. v. Kingsbury*, 2012 BCCA 462 at para. 46, 297 C.C.C. (3d) 255 (*per* Harris J.A.): "An honest belief that one's conduct is not dishonest is irrelevant. An honest belief that one's conduct is not wrong or a hope or expectation that no deprivation will occur is equally irrelevant."

[72] We, therefore, would not accede to Mr. Davis's challenge to the panel's finding that he perpetrated a fraud on Ms. McDonald.

Sanctions Decision

[73] Mr. Davis challenges only the permanent market bans. He submits the decision to impose those bans was unreasonable because the panel failed to consider: (a) his previously unblemished record; and (b) the principle of proportionality. We agree.

[74] When the sanctions decision is read in its entirety, it is apparent the panel proceeded on the basis that permanent market bans are appropriate in fraud cases, regardless of the circumstances of the offence or the offender. As we will explain, in our view that approach renders the sanctions decision unreasonable.

[75] Sections 161 and 162 of the *Securities Act* provide that the Commission may make various sanction orders if it considers it in the public interest to do so:

> 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 regulations or 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;

(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.

...

Administrative penalty

162 If the commission, after a hearing,

(a) determines that a person has contravened

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

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

> (b) considers it to be in the public interest to make the order,
>
> the commission may order the person to pay the commission an administrative penalty of not more than $1 million for each contravention.

[76] To summarize the above provisions, the Commission may impose a wide range of sanctions, including disgorgement, bans on trading securities, bans on holding certain positions or engaging in certain activities, and administrative penalties up to $1 million.

[77] In *Cooper v. British Columbia (Liquor Control and Licensing Branch)*, 2017 BCCA 451 at para. 42, 5 B.C.L.R. (6th) 44, Justice Newbury stated that "a disproportionately harsh result can render a decision unreasonable." She went on to discuss *Stetler v. The Ontario Flue-Cured Tobacco Growers' Marketing Board*, 2009 ONCA 234, 311 D.L.R. (4th) 109, as an example of that proposition. The reasoning in *Stetler* is pertinent to Mr. Davis's appeal.

[78] Mr. Stetler, who was 70 years old, had been a tobacco farmer for his entire life. The marketing board found that Mr. Stetler sold small amounts of tobacco in excess of his basic production quota and cancelled his entire quota. Mr. Stetler appealed to the Agricultural, Food and Rural Affairs Appeal Tribunal. Being of the view that general deterrence was the primary consideration, the tribunal affirmed the board's decision to cancel Mr. Stetler's quota. The tribunal said neither the number of illegal sales nor the amounts of those sales mattered. Further, it did not consider Mr. Stetler's lack of a prior regulatory history to be a mitigating factor.

[79] Mr. Stetler sought judicial review of the tribunal's decision before the Ontario Divisional Court, which set the tribunal's decision aside and ordered a new sanctions hearing. The board then appealed to the Court of Appeal for Ontario.

[80] In finding in Mr. Stetler's favour, the Court of Appeal found error in the tribunal's failure to consider Mr. Stetler's unblemished record and emphasized the need for some degree of proportionality between the wrongdoing and the penalty imposed: at paras. 34, 37. With respect to these matters, Justice Gillese stated:

> [34] Second, it was unreasonable for the Tribunal to find that there were no mitigating factors in Mr. Stetler's favour. His age and health are mitigating factors. So, too, is his unblemished record. Apart from the incidents in question, he has never been charged with any regulatory or criminal offence. For that matter, there is no evidence or suggestion that anyone in the Stetler family has ever been charged with any type of offence related to his farming business.
>
> ...
>
> [37] Third, it was unreasonable for the Tribunal to give no consideration to the number of times in which a person has engaged in unlawful activity or to the quantities of tobacco which have been unlawfully sold. There can be no quarrel with the Tribunal's view that every unlawful sale of tobacco is serious. However, just because each unlawful sale is serious, it does not mean that every such sale warrants the most serious of penalties, that is, cancellation of 100% of the tobacco grower's basic production quota. There must be some degree of proportionality between the wrongdoing and the penalty imposed. The importance of proportionality is particularly significant where, as here, a person's livelihood is at stake. As the Divisional Court stated in *Carruthers v. College of Nurses of Ontario* (1996), 31 O.R. (3d) 377 at p. 404:
>
> > [N]ot every case is the worst case, nor every person adjudged guilty worthy of the most severe sanction. There must be proportionality between the underlying findings and the penalty imposed.
>
> [Emphasis added.]

See also: *Walton v. Alberta (Securities Commission)*, 2014 ABCA 273 at para. 154, 376 D.L.R. (4th) 448: "[A]t the end of the day the sanction must be proportionate and reasonable for each appellant. The pursuit of general deterrence does not warrant imposing a crushing or unfit sanction on any individual appellant."

[81] Justice Gillese went on to comment on the availability of a large range of possible penalties:

> [40] It can be seen that the Tribunal had a large range of possible penalties at its disposal. Again, in part because it appears that the Tribunal saw its role as reviewing the penalty previously imposed rather than reconsidering penalty afresh, the Tribunal meted out the most severe punishment available, without any apparent consideration of the range of possible penalties and whether something less than full cancellation of Mr. Stetler's basic production quota could meet the appropriate sentencing objectives.

[82] In *Rahmani (Re),* 2009 BCSECCOM 279, leave to appeal ref'd, *Investment Industry Regulatory Organization of Canada v. Rahmani*, 2010 BCCA 93

(Chambers), 284 B.C.A.C. 122, the Commission, acting pursuant to its jurisdiction under s. 28 of the *Securities Act*, reviewed the decision of a hearing panel of the Investment Industry Regulatory Organization of Canada ("IIROC") to permanently prohibit Mr. Rahmani from acting in any registered capacity with any IIROC member. The Commission noted that permanent bans should be reserved for those cases where lesser sanctions would be ineffective in protecting investors:

> 30 Section 4.3 of the [IIROC's *Disciplinary Sanction*] *Guidelines* provides specific guidance about the imposition of a permanent ban:
>
> > A permanent ban ... is a severe economic penalty and should generally be reserved for cases where:
> >
> > - the public itself has been abused
> > - where it is clear that a respondent's conduct is indicative of a resistance to governance;
> > - the misconduct has an element of criminal or quasi-criminal activity; or
> > - there is reason to believe that the respondent could not be trusted to act in an honest and fair manner in all their dealings with the public, their clients, and the securities industry as a whole.
>
> 31 This, appropriately, appears to reserve permanent bans for cases where lesser sanctions would not be effective to protect investors and markets against future misconduct.

[83] *Rahmani* is indicative of what we consider to be the correct approach; one which reserves the harshest penalties for circumstances in which the Commission considers lesser measures to be inadequate to protect the public interest.

[84] Although no explicit guidelines like those in *Rahmani* exist to guide the Commission's application of ss. 161 and 162 of the *Securities Act*, in *Eron Mortgage Corp. (Re),* 2000 LNBCSC 34, the Commission did identify a non-exhaustive list of factors to be considered when imposing sanctions. The Commission referred to the *Eron* factors at para. 10 of its sanctions decision in Mr. Davis's case. In *Eron*, the Commission stated:

> 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.

Applying these factors to this case, it has been clearly established, and we have found, that the conduct of Slobogian and the corporate respondents is of the most egregious nature, has devastated investors and has damaged the integrity of the capital markets of British Columbia. Slobogian and the corporate respondents were substantially enriched by their actions - we found Slobogian's direct income alone from Eron during the relevant period to be $2.7 million. There is no evidence of mitigating conduct. None of these respondents is fit for participation in 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 removing respondents from the market. This case is the most serious fraud dealt with by the Commission in recent memory and similar orders are clearly warranted in these circumstances.

[85] *Stetler, Eron,* and *Rahmani* show it is incumbent upon the tribunal to consider whether measures short of a permanent market ban would protect the investing public where a person's livelihood is at stake. Sections 161 and 162 of the *Securities Act* facilitate this approach by granting the Commission jurisdiction to craft

a wide range of remedies tailored to a particular offence and offender. In doing so, principles of proportionality should be considered by the Commission or, put as the Commission did in *Eron,* the harm suffered by the investor and the extent to which the respondent was enriched are factors pertinent to determination of the appropriate sanctions.

[86] By virtue of the bans imposed by the panel, Mr. Davis is precluded from earning a living as he has done for many years. In effect, he was "given 'capital punishment' for his transgressions": *Stetler* at para. 38. Although the Commission purported to follow the *Eron* factors, it failed to conduct an individualized assessment.

[87] The Commission did not mention the evidence before it of Mr. Davis's personal circumstances. In particular, it did not consider Mr. Davis's long and unblemished career in the securities industry; he testified during the liability hearing that he was 56 and had been working in the industry since his late twenties. The Commission may well have determined that continued participation by Mr. Davis in the market is a risk that could not be ameliorated by a remedy short of a lifetime full market ban, but its reasons for doing so must demonstrate a consideration of individual circumstances and alternative sanctions.

[88] In finding the defects in the Commission's reasoning to be fatal to its decision, we acknowledge that courts must avoid seizing "on one or more mistakes ... which do not affect the decision as a whole" when conducting judicial review on a reasonableness standard: *Law Society of New Brunswick v. Ryan*, 2003 SCC 20 at para. 56, [2003] 1 S.C.R. 247. We also recognize that the *outcome* reached by the Commission may ultimately be justified by the seriousness of Mr. Davis's conduct. However, when reviewing for reasonableness, a court must look to both the outcome *and* the reasons: *Delta Air Lines Inc. v. Lukács*, 2018 SCC 2 at para. 27, 416 D.L.R. (4th) 579. Justice Tysoe explained the proper approach to flaws in the reasoning of a tribunal in *Kenyon v. British Columbia (Superintendent of Motor Vehicles)*, 2015 BCCA 485, 82 B.C.L.R. (5th) 266, as follows:

> [53] ... Judicial review judges should read the reasons of the adjudicator as a whole in order to assess whether the reasoning is so lacking in logic, or is otherwise flawed, that it renders the decision unreasonable despite the fact there is some evidence to support a conclusion that the decision falls within a range of acceptable outcomes.

[89] We, therefore, would allow Mr. Davis's appeal from the sanctions decision and remit that matter to the Commission for reconsideration in accordance with these reasons.

Disposition

[90] We would dismiss the appeal from the liability decision.

[91] We would allow the appeal from the sanctions decision, set aside the bans listed in para. 61(1) of that decision, and remit the issue of sanctions to the Commission for reconsideration.

"The Honourable Mr. Justice Frankel"

"The Honourable Madam Justice Garson"

I AGREE:

"The Honourable Mr. Justice Groberman"

2007 BCSECCOM 437

Edward Bernard Johnson

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

Hearing

Panel	Brent W. Aitken	Vice Chair
	David J. Smith	Commissioner
	Suzanne K. Wiltshire	Commissioner
Submissions completed	June 29, 2007	
Date of Decision	July 20, 2007	
Submissions filed by		
C. Paige Leggat Lisa Ridgedale	For the Executive Director	
John S. Forstrom	For Edward Bernard Johnson	

Decision

I. Introduction

¶ 1 This is a hearing under sections 161(1) and 162 of the *Securities Act*, RSBC 1996, c. 418. This decision should be read with our Findings made on May 11, 2007 (2007 BCSECCOM 257).

¶ 2 Edward Bernard Johnson was a registered representative for a brokerage account in the name of a Robert Taylor. Johnson knowingly accepted trading instructions, without proper authorization, from a third party for at least 400 of 450 trades in the Taylor account in a period spanning more than four years. The third party was Stanley Steven Ross, who at the time was prohibited from trading because of a 1999 order of the executive director.

¶ 3 Johnson gave answers under oath at two compelled interviews by commission staff investigators in late 2004 and early 2005. At the first interview, he appeared alone; at the second he was represented by counsel. At both interviews, when asked by staff investigators about the source of his trading instructions, Johnson

said that he did not know that Taylor had allowed Ross to trade in the account, and that to his knowledge, Ross did not do so. These answers were untrue.

¶ 4 The trades in the Taylor account earned Johnson's firm commissions of about $59,000. Johnson says his share of those commissions would have been "50% or less".

II. Summary of Findings

¶ 5 Based on Johnson's admissions and acknowledgements, we found that he contravened:

1. By-law 201.1(i)(3) of the Investment Dealers Association of Canada by permitting Ross to trade in the Taylor account without a duly signed authorization from Taylor;

2. IDA Regulation 1300.1(b) by failing to exercise due diligence to ensure that the acceptance of instructions from Ross with respect to trading in the Taylor account was within the bounds of good business practice;

3. IDA By-law 29.1 by failing to exercise due diligence, which constituted conduct unbecoming or detrimental to the public interest; and

4. section 168.1 of the Act by making misleading statements to an investigator appointed under the Act.

¶ 6 In the notice of hearing, the executive director alleged that Johnson's conduct was contrary to the public interest. Although in the Findings we did not make this specific finding, clearly Johnson's violation of IDA rules, and his making misleading statements to a commission investigator, is conduct contrary to the public interest.

¶ 7 In the hearing that led to our Findings, the executive director argued that Johnson knew that Ross was trading for his own account through the Taylor account in violation of the 1999 order. The executive director wanted us to make this finding because, she argued, it would be relevant now, when we are determining sanctions.

¶ 8 Although we found that Johnson ought to have known about the 1999 order, the evidence did not establish that he had actual knowledge of the order. Therefore, we did not find that Johnson knew that Ross was trading through the Taylor account in violation of that order. More fundamentally, we found that the notice

of hearing did not allege actual knowledge, and so that was not a part of the case that Johnson had to meet.

III. Discussion and Analysis

A. Positions of the parties

¶ 9 The executive director seeks a six-month suspension of Johnson's registration, followed by six months of close supervision. The executive director also seeks an administrative penalty of $20,000.

¶ 10 Johnson says the appropriate sanction is a reprimand followed by six months of close supervision. He says the administrative penalty should not exceed $10,000.

B. Factors to consider

¶ 11 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 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.

¶ 12 The parties also referred us to the IDA Disciplinary Sanction Guidelines. We are not bound by those guidelines, but they are relevant. The guidelines identify the factors that IDA disciplinary panels ought to consider in sanctioning contraventions of IDA Regulation 1300.1(b), IDA By-law 29.1, and IDA By-law 201.1(i)(3). Those factors are:

For contraventions of IDA Regulation 1300.1(b)

- why the order was not within the bounds of good business practice
- number of orders executed
- magnitude of losses directly attributable to the orders executed
- client's acceptance of the orders
- level of sophistication of the client

For contraventions of IDA By-law 29.1

- seriousness of the legislative breach
- client's knowledge or consent
- loss to the client
- respondent's intent
- respondent's enrichment or financial benefit
- whether respondent concealed or attempted to conceal the conduct from the member firm or the IDA

For contraventions of IDA By-law 201.1(i)(3)

- number of unauthorized instructions acted upon by the registrant
- whether the client provided verbal authority
- underlying reason for accepting unauthorized instructions
- nature of instructions and impact on the account
- magnitude of client losses

¶ 13 Johnson also says his contravention of section 168.1 of the Act is analogous to a contravention of IDA By-laws 19.5 or 19.6, which deal generally with the issue of co-operating with, or impeding, IDA investigations. For contraventions of those By-laws, the IDA guidelines cite these factors:

- disciplinary history of the respondent
- whether the contravention was intentional or inadvertent
- whether complete or only partial non-compliance
- impact of the non-compliance on the investigation
- refusal reasonably based on legal advice
- materiality of the misleading information to the pending investigation

C. Application of the factors to Johnson's conduct

¶ 14 We have considered all of the factors cited in *Eron* and those described above from the IDA guidelines in deciding the sanctions that ought to flow from Johnson's conduct. There is a high degree of overlap among the factors; for convenience, we have organized this discussion around the factors listed in *Eron*.

¶ 15 The parties agree that Johnson should be subject to a six-month period of close supervision, and that he should pay an administrative penalty. As to the amount, the executive director says $20,000, Johnson says $10,000. The main issue between the parties is whether Johnson's registration should be suspended. As is reflected in our orders, we have reached a different decision than the parties on the quantum of the administrative penalty.

¶ 16 Therefore, in applying the relevant factors to Johnson's conduct, we have considered in particular the impact of those factors on two issues – whether a suspension is appropriate, and what the quantum of the administrative penalty ought to be.

¶ 17 Although we found that Johnson contravened three IDA rules, all of those contraventions arose from the same conduct. It is not unusual that the same conduct can result in the contravention of more than one IDA rule. The IDA guidelines take the approach, in essence, that generally what matters is the imputed conduct, not the number of contraventions it generates.

¶ 18 We agree with this approach, although where, as in this case, various contraventions arise from the same conduct, the factors associated with each contravention should be considered in determining the appropriate sanction.

Seriousness of the conduct

¶ 19 In assessing the seriousness of Johnson's conduct, we considered the importance of the provisions he contravened. For Johnson's contraventions of IDA rules, we considered the number of orders he executed in contravention of those provisions, the reason his execution of the orders was not within the bounds of good business practice, the underlying reason for his acceptance of unauthorized instructions, and the nature of the instructions and the impact on the account.

¶ 20 A consideration of these factors show that Johnson's contravention of IDA rules was serious. The IDA rules that Johnson contravened are important ones. They are all designed to prevent, in one way or another, improper trading. They are designed to ensure, not only that trades are not executed against the will of the client (not an issue in this hearing), but also to ensure that there is a record of

which individuals trade. This is so that trades by those who, for whatever reason, ought not to be trading, can be prevented, or at least detected.

¶ 21 As a registrant, Johnson is a person the regulatory system depends upon to be familiar, and comply, with the rules of his self-regulatory organization, the IDA, to ensure that the integrity of the markets is not damaged. Had Johnson followed IDA rules, he would have discovered that Ross was subject to the 1999 order, and could have avoided executing the trades. By failing to comply with those rules, Johnson allowed Ross to make hundreds of trades in our markets that ought never to have taken place, all in violation of a trading ban imposed by this commission. That is the main reason Johnson's execution of the orders was outside the bounds of good business practice.

¶ 22 Furthermore, of the 450 or so trades in the Taylor account during the four-year period, at least 400 of them Johnson executed in contravention of IDA rules. It is hardly a stretch to characterize his conduct as serious when as a result, nearly 90% of the trading in the Taylor account was in violation of IDA rules and, ultimately, in violation of the 1999 order against Ross.

¶ 23 We have no evidence as to the underlying reason for Johnson's acceptance of unauthorized instructions, or the impact of the resulting trades on the account, so these factors did not contribute to our decision.

¶ 24 Turning to Johnson's contravention of section 168.1 of the Act, we considered the importance of that section and also considered whether his contravention was complete or partial, whether his contravention was intentional or inadvertent, the materiality of his statements to the investigation, and their impact on it.

¶ 25 Applying these considerations, Johnson's contravention of section 168.1 was very serious. Section 168.1 is important in preserving the integrity of the regulatory system by requiring those required to provide information to the commission to do so truthfully. While under oath, Johnson falsely told investigators, in two separate interviews (being represented by counsel in the second) that he did not know that Taylor had allowed Ross to trade in the account, and that to his knowledge, Ross did not do so.

¶ 26 Furthermore, Johnson's conduct was not inadvertent. The only reasonable inference to be drawn from the evidence is that he intentionally misled commission investigators. His misleading statements were the exact opposite of the actual facts, and went to the heart of the matter under investigation. That he misled investigators twice while under oath raises serious questions about his personal integrity.

¶ 27 Johnson acknowledges that his misleading statements were regrettable and a "significant aggravating factor", but says they are "considerably ameliorated" by his admissions in the Findings hearing.

¶ 28 We disagree that Johnson's admissions ameliorate his contravention of section 168.1. What is important is that at the crucial time of the investigation, he chose, under oath, to mislead commission investigators on the very matter that was under investigation. Our expectations of registrants are much higher.

¶ 29 The system of securities regulation in Canada depends heavily on high standards of integrity on the part of all those who are part of the registered industry. In *British Columbia Securities Commission v. Branch*, [1995] 2 SCR 3, the Supreme Court of Canada commented on the essential role of registrants in the system (at paragraph 9):

> [T]he *Securities Act* is essentially a scheme of economic regulation which is designed to discourage detrimental forms of commercial behaviour. . . . *the effective implementation of securities legislation depends on the willingness of those who choose to engage in the securities trade to comply with the defined standards of conduct.* [our emphasis]

¶ 30 This obligation falls on individual registrants, those who supervise them directly, and the managers, executives and directors of registered firms. We expect all of these persons to demonstrate integrity not just in day-to-day trading and advising, but also in candour and cooperation with securities regulatory authorities in connection with investigations into suspected wrongdoing. Any lesser standard invites contempt of the enforcement process by the very ones charged to a large degree with protecting the integrity of our markets. Johnson failed to meet that standard of integrity when he misled commission staff investigators.

Harm suffered by the client

¶ 31 We have no evidence of any losses or harm to Taylor as a result of Johnson's conduct. This factor did not contribute to our decision.

Damage to British Columbia's capital markets

¶ 32 We have no evidence of actual damage to British Columbia's capital markets as a result of Johnson's conduct. However, evidence of actual damage is not necessary to consider this as a factor. We know that as a result of Johnson's conduct, Ross was able to make hundreds of trades in our capital markets while being prohibited from trading by an order that the executive director issued in the public interest.

Allowing those prohibited from trading to do so is inherently damaging to our capital markets.

¶ 33 In *Research Capital Corp* 2004 BCSECCOM 128, this commission ruled that the contravention by a registrant of a cease trade order warranted sanction, even in the absence of evidence of any harm to investors or damage to market integrity. The commission noted (at paragraph 42) that a cease trade order "is one of the commission's most important tools for enforcing compliance" but is "effective only if registered dealers comply with it". Research Capital did not intentionally fail to comply with the order, but the commission went on to sanction the firm, saying it was important to do so "to induce future compliance by Research Capital with the defined conduct for registered dealers".

¶ 34 In our opinion, the same reasoning applies here. We did not find that Johnson knew about the 1999 order, so he is not burdened with the knowledge that his contraventions facilitated a breach of that order. However, the IDA rules require registrants to exercise due diligence just so they can discover things like outstanding cease trade orders. Johnson's failure to do so resulted in the damage to our markets described above.

Enrichment

¶ 35 Johnson's firm earned commissions of about $59,000 from his trading in the Taylor account, of which Johnson's share was "50% or less". Johnson says that the commissions he earned in the account should not enter in to our considerations, because they represent merely his compensation for servicing his client's account.

¶ 36 We disagree. Both *Eron* and the IDA guidelines identify the respondent's enrichment or financial benefit as a factor, and appropriately so. The fact remains that 90% of the trades Johnson executed in the Taylor account were in contravention of IDA rules, and the public interest demands that he cannot profit, or be seen to do so, from this misconduct.

Mitigating factors

¶ 37 The IDA guidelines suggest that the client's knowledge and consent is a relevant factor. This is appropriate when a registrant executes orders in a client's account, on the instructions of another, that are against the client's will or are contrary to the client's interests in some way. That is not what this case is about. It is about trading that allowed a cease trade order to be avoided. Taylor's awareness that Ross was giving Johnson trading instructions is therefore not a mitigating factor.

¶ 38 Johnson says that we should consider the fact that he made admissions as a mitigating factor, and that we should also consider the embarrassment and cost he has borne in connection with the hearing.

¶ 39 We disagree. Johnson's admissions came too late to be considered a mitigating factor. Two business days before the hearing began, he admitted that he took instructions on 400 of the 450 trades in the account from Ross. He did not make his remaining admissions (his contraventions of IDA rules and section 168.1) until his closing submissions, after the evidentiary portion of the hearing was over. Johnson says that this was because there is no mechanism for a respondent to make admissions without accepting a settlement with the executive director.

¶ 40 That is not so. It is open to a respondent to admit facts at any time during a hearing. The respondent can enter into an agreed statement of facts with the executive director to be put before the panel so it can make a sanction decision based on those facts. Alternatively, if the party and the executive director cannot agree on the facts, the respondent can enter admissions into evidence unilaterally.

¶ 41 Nor do we regard embarrassment and cost to be mitigating factors. Those are commonly associated with the hearing process. We do not find anything unique about Johnson's circumstances as they relate to these factors.

¶ 42 Aggravating factors can offset mitigating factors. The executive director says that even though we did not find that Johnson had actual knowledge of the 1999 order, the damage to the integrity of the market is the same. That is so, but had we found Johnson had actual knowledge of the 1999 order, his conduct would have involved knowingly assisting the breach of a commission order – much more serious conduct than what we found.

Past conduct

¶ 43 Johnson has been a registrant actively working in the industry for 17 years, with no prior disciplinary history.

Johnson's fitness as a registrant

¶ 44 Two aspects of Johnson's conduct raise questions as to his fitness to be a registrant. First, his contraventions of IDA rules were serious. Had he complied with them, he would not have enabled Ross to make hundreds of trades in violation of the 1999 order.

¶ 45 Second, when questioned by commission staff investigators, he misled them in a deliberate attempt to conceal his misconduct.

¶ 46 Although these factors bear on Johnson's fitness for registration, they do not rise to the level of requiring his removal from the industry. They are, however, relevant to whether a period of suspension is appropriate.

Previous orders and other authorities

¶ 47 We have considered the cases submitted by the parties. In none of them does the conduct under consideration correspond precisely to Johnson's conduct in this case. We note, however, the factors listed in section 4.3.1 of the IDA guidelines as to when a suspension may be appropriate:

> 4.3.1 Suspension
> A suspension may be appropriate where:
> - there have been numerous serious transgressions
> - there has been a pattern of misconduct
> - the respondent has a disciplinary history
> - the misconduct has an element of criminal or quasi-criminal activity; or
> - the misconduct in question has caused some measure of harm to the integrity of the securities industry as a whole.

¶ 48 We note the word "or" at the end of the penultimate factor, suggesting that any one or more of these factors could be enough, depending on the circumstances, to warrant a suspension.

¶ 49 Johnson has no disciplinary history. However, all of the other factors on the list are present. We have found Johnson's misconduct serious. There were numerous transgressions of IDA rules, and a pattern of misconduct that allowed over 400 improper trades to go through over a period of more than four years. We have described the damage to our markets that resulted.

¶ 50 When questioned by commission staff investigators, Johnson misled them in a deliberate attempt to conceal his misconduct, in contravention of section 168.1. That conduct is also quasi-criminal, a contravention of section 168.1 being an offence under section 155.

¶ 51 We also considered the comments of an IDA panel in *Toban* [2005] IDACD No. 28. That panel noted that a suspension was more serious to a person still employed in the industry than to one who had left to work in another industry. One would be hard pressed to reach a different conclusion, but we are unsure how helpful that is when deciding whether or not to impose a suspension. A suspension applied to someone who has left the industry would have essentially

no impact. The difficult situations are always going to be those in which the registrant intends to remain employed in the industry.

¶ 52 On that point, the panel noted the time and hard work required for a registrant to build up his or her business. We recognize that suspension is a serious sanction, and we considered this factor carefully, as we did Johnson's submissions about the consequences to him of a suspension.

¶ 53 The panel in *Toban* also suggested that, in determining whether to impose a suspension or a period of supervision, a panel ought to consider the impact on the registrant's clients, "who are denied his or her services during the period of suspension, or whose ability to trade is affected by the respondent's supervision." We did not consider this factor. In our opinion, where a suspension or period of supervision is otherwise warranted, the client concerns articulated in *Toban* ought not to result in a different outcome. Those concerns can be addressed in how the suspension or period of supervision is implemented.

¶ 54 *Toban* also suggested that a relevant factor is the impact of a period of supervision on the registrant's employer firm. The panel said (at page 4):

> No matter how the reporting provisions for this period of supervision are structured, the imposition of such a penalty on a respondent will also impose additional administrative burdens upon the respondent's employer for the duration of the supervision period.

¶ 55 We did not consider this factor in making our orders. First, we have no evidence of the impact of the supervision on Johnson's employer. Second, the parties are agreed on the nature and duration of the supervision. However, we think it is worthwhile to comment on this aspect of the *Toban* decision. Had it been necessary for us to consider the issue of supervision in more detail, we would not have considered the impact on the employer a relevant factor. The purpose of a supervision order is to promote future compliance by the respondent (and indirectly by others in the industry) and to protect the integrity of the markets and the investing public. Those are the factors that determine the appropriateness of a supervision order. In our opinion, the convenience of the firm has no place in those considerations.

IV. Decision

¶ 56 Through the orders we are making, we intend to demonstrate the consequences of Johnson's conduct, to deter him from future misconduct, and to create an appropriate general deterrent.

¶ 57 We are therefore suspending Johnson's registration for a period. We do not do so lightly, but in our opinion a suspension is necessary to achieve the appropriate outcome in this matter.

¶ 58 Johnson asked that if we were to order a suspension, that it be effective no earlier than September 30. Although he provided no reasons for his request, we assume that at least one reason would be to provide time for him and his firm to make arrangements to service his clients during the period of his suspension. We have framed the order to accommodate that.

¶ 59 As noted above, Johnson cannot be seen to have profited from his wrongdoing, and any penalty we order ought to act as disincentive, both to Johnson and to others in future, to attempt to do so. The penalty therefore must exceed the commissions Johnson earned.

¶ 60 We do not have precise evidence as to the commissions Johnson earned through his trades in the Taylor account. However we do know that his commissions were "50% or less" of the $59,000 that his firm earned on his trades. For the purposes of ordering an administrative penalty, we have set his share arbitrarily at 45%, and have taken into account that he executed about 10% of the trades without violating IDA rules. We then doubled that figure. This accounts for $48,000 of the administrative penalty we are ordering.

¶ 61 In addition, an administrative penalty is appropriate in light of his intentional misleading of commission investigators. That accounts for the balance of the administrative penalty we are ordering.

¶ 62 Therefore, considering it to be in the public interest, we order:

1. under section 161(1)(f) of the Act, that Johnson's registration is suspended beginning September 1, 2007 until the later of
   a. November 1, 2007, and
   b. the date he pays the administrative penalty ordered under item 3 of this paragraph;

2. under section 161(1)(f), that for the first six months of his employment with a registered firm after his suspension, Johnson be subject to close supervision; and

3. under section 162, that Johnson pay an administrative penalty of $68,000.

¶ 63 July 20, 2007

¶ 64 **For the Commission**

Brent W. Aitken
Vice Chair

David J. Smith
Commissioner

Suzanne K. Wiltshire
Commissioner

2014 BCSECCOM 457

David Michael Michaels and
509802 BC Ltd. doing business as Michaels Wealth Management Group

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

Hearing

Panel	Nigel P. Cave	Vice Chair
	George C. Glover, Jr.	Commissioner
	Suzanne K. Wiltshire	Commissioner
Hearing Date	September 30, 2014	
Date of Decision	October 31, 2014	
Appearing		
Derek J. Chapman	For the Executive Director	
Grant N. Smith	For the Respondents	

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 a differently constituted panel of this Commission on liability, made on August 6, 2014 (2014 BCSECCOM 327), are part of this decision.

¶ 2 The Findings panel found that David Michael Michaels:

a) acted as an advisor without being registered, contrary to section 34(b) of the Act;
b) made misrepresentations, contrary to section 50(1)(d); and
c) perpetrated a fraud, contrary to section 57(b).

II Position of the Parties

¶ 3 The executive director seeks:

a) permanent bans against Michaels under subsections 161(1)(b)(ii), (c) and (d) of the Act;
b) a "disgorgement" order for Michaels to pay $65 million pursuant to section 161(1)(g) of the Act; and

c) an order for Michaels to pay an administrative penalty of $65 million pursuant to section 162 of the Act.

¶ 4 Michaels submits that any sanctions against him should be limited to:

a) bans that are not permanent (although no specific length of time was suggested) under subsections 161(b)(ii), (c) and (d) of the Act; and
b) a "disgorgement" order and an administrative penalty that are commensurate with the amount received by Michaels in commissions and fees less amounts which he invested in the same securities as his clients, the net amount being approximately $3.8 million.

III Analysis

A Factors

¶ 5 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.

¶ 6 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

¶ 7 The Commission has consistently held that fraud is the most serious misconduct prohibited by the Act. In *Manna Trading Corp Ltd.*, 2009 BCSECCOM 595, the

Commission, at para. 18, said, "Nothing strikes more viciously at the integrity of our capital markets than fraud."

¶ 8 Not far behind fraud, in the scale of seriousness of misconduct, stands misrepresentation. Those who operate and profit in the capital markets by misstating material facts (through commission or omission), undermine the confidence of the public in one of the cornerstones of capital markets regulation, the provision of accurate and complete information for investors to make informed investment decisions.

¶ 9 Lastly, contraventions of section 34 are also inherently serious because the registration requirements of the Act are foundational for protecting investors and the integrity of the capital markets. The requirement in section 34(b) that those who advise others on investments must be registered is intended to ensure that those who seek advice are advised to invest in securities that are suitable. This case clearly illustrates the catastrophic losses that can occur where investments are made without care as to the suitability of those investments for their purchasers.

¶ 10 Here, Michaels convinced people to purchase $65 million of securities through the triumvirate of fraud, misrepresentation and unregistered advising.

¶ 11 Michaels argues that there are gradations of fraud and misrepresentation; this case being less serious than Ponzi schemes or cases where bogus securities are sold. He says that none of the funds invested were diverted for personal use or put into non-arm's length investments. He says that he invested his own money in the same investments that his clients invested in and in no case did he encourage investment in issuers that he knew were failing.

¶ 12 There is no dispute that the investments made by Michaels' clients were in actual securities and that their money went into investments in accordance with their intentions. In that sense, this is different from some cases of fraud. However, in this case, the seriousness of the misconduct is heightened by Michaels' business model, which was astonishingly predatory. He focused his marketing efforts on seniors, especially those with little or no investing experience. His marketing pitch was directed to those who were frightened for their retirement portfolios following the significant stock and bond market downturns in 2008 and 2009 and the low interest rate environment that followed.

¶ 13 Some of the issues raised by Michaels do play a role in our sanctions decision, as will be discussed below, but they are not persuasive in suggesting that the Findings in this case are anywhere other than on the absolute upper end of the scale of seriousness of misconduct by a market participant.

Harm to investors; damage to capital markets

¶ 14 Clearly Michaels' misconduct has resulted in massive harm to investors. The Findings panel concluded that securities representing $40 million of the original $65 million invested by Michaels' clients are now worthless.

¶ 15 Michaels argues that the loss for the investors may ultimately be much less than this $40 million figure. He points to some investments that have already produced a known

return. He also points to certain other investments which may yet yield a return, although that is far from certain and any such return may be well in the future.

¶ 16 With respect to the investments that have an uncertain future we would note that the opposite of what Michaels suggests may ultimately be true. The loss here may significantly exceed $40 million when all is finally known. Other than noting that $40 million of the original $65 million of investments are now worthless and that investor losses will ultimately be significant, we do not need to determine the exact amount of the losses with any greater specificity than this.

¶ 17 It is trite to say that Michaels' misconduct has done significant damage to his clients and to the reputation and integrity of our capital markets. The Findings panel heard testimony from a number of Michaels' clients whose financial futures have been ruined.

Michaels' enrichment

¶ 18 The evidence is that Michaels received $5.8 million in commissions and marketing fees for his sales efforts that involved contraventions of the Act.

¶ 19 Michaels says that in considering the question of his enrichment we should deduct $2 million, being the amount of his personal losses in the same investments that he recommended to his clients, and that his level of enrichment was also reduced because he incurred significant costs related to the maintenance and promotion of his business. In effect, he says he was enriched in the net amount of $3.8 million or less.

¶ 20 We do not agree with this submission for two reasons. First, it is apparent from the Findings that a critical element of Michaels' sales pitch for the exempt market securities that he advised his clients to purchase was his being able to say that he had personally purchased some of the same securities. On that basis alone, it would be highly cynical to deduct the amounts of his personal investments from his enrichment. Secondly, how someone chooses to spend the commissions and fees received from contraventions of the Act is irrelevant.

¶ 21 Michaels was personally enriched by his misconduct in the amount of $5.8 million.

Aggravating or mitigating factors; past misconduct

¶ 22 It is an aggravating factor that Michaels' business model was highly predatory in nature. His sales pitch was formulated to prey on investors by frightening them into purchasing highly risky securities with little or no liquidity. In addition, the average age of his clients was 72 years. Most investors of this age have little or no opportunity to earn income from work or otherwise financially recover lost amounts.

¶ 23 It is an aggravating factor that a number of Michaels' clients were advised by him to borrow money in order to purchase unsuitable investments sold to them through his fraud and misrepresentation. These clients have suffered losses not only on their investments but are now burdened with loan repayment obligations.

¶ 24 Michaels also has a significant history of regulatory disciplinary actions. He was suspended by the Investment Dealers Association of Canada (IDA) for two months in

2006 for failing to complete a required course. In 2007 he was suspended for a further two months and fined $60,000 by the IDA for engaging in off-book transactions with clients of his firm, for unregistered advising and for misleading IDA staff in their investigation.

¶ 25 Michaels cites as mitigating factors that:

a) he did not sell any securities that he knew or thought were in distress and none of the investments were fictitious;
b) he invested $2 million of his own money into these investments;
c) some of the investments still have value; and
d) he only received a commission for selling the securities and that the investors' money went to purchase securities in accordance with their intentions.

¶ 26 In our view, none of these is a mitigating factor. Generally, a mitigating factor is some positive behaviour by a respondent or a respondent's personal circumstances that should be taken into account. To say that Michaels' misconduct could have been even worse or that the consequences of his misconduct could have been even more catastrophic are not one and the same as mitigating factors. His having invested in the same securities as his clients is both irrelevant and not a mitigating factor.

Fitness to act as a registrant and continued participation in the capital markets

¶ 27 Michaels suggested that his best chance to repay any financial orders in this proceeding would come from his being allowed to participate in our capital markets again. He says that any ban from participating in our capital markets should not be permanent. This submission is astonishing.

¶ 28 Michaels has a significant history of securities markets misconduct. The Findings show that his previous suspensions from the IDA led to his restructuring his business to avoid regulatory oversight by the IDA. Previous sanctions have not deterred Michaels from misconduct; rather, they have simply led him to restructure his affairs.

¶ 29 Michaels has been found to have committed fraud under the Act. Michaels was not able to point to any decision of this Commission or a commission in any other jurisdiction in Canada in which someone having engaged in fraudulent misconduct of this magnitude has been banned from the capital markets for any period other than permanently. There is a reason for this. As noted above, fraud is the most serious misconduct contemplated by our Act.

¶ 30 In addition, Michaels' sales practices were reliant upon misrepresentations and he advised his clients without being registered. His advising without registration showed a callous disregard for the regulatory scheme designed to protect investors from making unsuitable investments. Michaels' conduct falls far below the standard we expect of our market participants. Our orders consider these factors in determining his ability to continue participation in the capital markets.

Specific and general deterrence

¶ 31 The sanctions we impose must be sufficient to ensure that Michaels and others will be deterred from engaging in similar misconduct.

C Previous Orders and Application

Orders under sections 161(1)(b)(ii), (c) and (d) of the Act

¶ 32 As noted above, in fraud cases the Commission has consistently imposed permanent orders to ban fraudsters from the capital markets. Protection of the public is of paramount importance to the public interest. The public must be protected from those who commit fraud. Michaels cited no decisions to support any bans less than permanent bans. The misconduct here was so serious that Michaels must be kept out of our capital markets permanently.

Order under section 161(1)(g) of the Act

¶ 33 Section 161(1)(g) of the Act, reads as follows:

> (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:
>
> ...
>
> (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;

¶ 34 Past Commission decisions have applied this section, coming to seemingly different results. There are fraud cases with multiple respondents such as *Manna Trading Corp. Ltd. (Re),* 2009 BCSECCOM 595 and illegal distribution cases similar to *Oriens Travel & Hotel Management Corp., Alexander Anderson and Ken Chua*, 2014 BCSECCOM 352 (as it dealt with the individual respondent, Chua) where the orders under section 161(1)(g) were for the full amount obtained through contraventions of the Act. Factors such as relative levels of culpability of the respondents, inability to determine where investor funds actually went and cases where an individual respondent was the alter ego of a corporate issuer that received the investor funds were significant in these types of cases.

¶ 35 Other Commission decisions, including *Oriens* (as it dealt with the other individual respondent, Anderson), and *Pacific Ocean Resources Corporation and Donald Verne Dyer*, 2012 BCSECCOM 104, demonstrate that in other circumstances it may be inappropriate to make a section 161(1)(g) order in the total amount obtained. Where a party to a contravention of the Act does not control the issuer of the securities, has not been equally culpable with another respondent, or the funds obtained have clearly gone to a third party, the Commission may issue a section 161(1)(g) order in an amount less than the full amount obtained through contraventions of the Act.

¶ 36 In the matter before us, it is useful to set out certain principles applicable to orders under this section and then apply them to determine the appropriate sanction.

¶ 37 The decision of the Ontario Securities Commission in *Limelight Entertainment Inc.* (2008), 31 O.S.C.B. 12030 is that commission's seminal decision on the Ontario equivalent to our section 161(1)(g) and analyzed the purposive background to that

sanction. For the purposes of our decision, the following extract from the *Limelight* decision of the Ontario Securities Commission is helpful:

> **(ii) Applying the Disgorgement Remedy**
>
> **47** As a background, the disgorgement remedy was added to the Act based on recommendations contained in the final report of the Five Year Review Committee, *Reviewing The Securities Act of Ontario* (the "Five Year Review Report"). That report stated that the objective of the disgorgement remedy is to deprive a wrongdoer of ill-gotten gains, reflecting the view that it would be inappropriate for those who contravene Ontario securities law to be able to retain any illegally obtained profits. (*Five Year Review Committee, "Reviewing the Securities Act (Ontario)"* Final Report (2003), at p. 218, online at www.osc.gov.on.ca/Regulation/FiveYearReview/fyr_20030529_5yr-final-report.pdf).
>
> **48** The Five Year Review Report referred to the United States Securities and Exchange Commission ("SEC") disgorgement powers and noted that the following principles have been established in SEC decisions:
>
> (a) the SEC has ruled that disgorgement is "an equitable remedy designed to deprive [respondents] of all gains flowing from their wrong, rather than to compensate the victims of fraud" (*In the Matter of Guy P. Riordan*, initial Decision, 2008 SEC LEXIS 1754 at p. 68);
>
> ....

¶ 38 The decision in *Limelight* determined that the sanction should focus on amounts obtained and not on the "profits" derived from the misconduct. Subject to our comments below, we accept the principles imbedded in this background; the focus of the sanction should be on compelling the respondent to pay any amounts obtained from contraventions of the Act.

¶ 39 The Ontario Court of Appeal decision in *Fischer v. IG Investment Management Ltd.*, [2012] O.J. No. 343 (C.A.), makes clear that the purpose of the Ontario equivalent to our section 161(1)(g) is not to "empower the OSC to make orders requiring a party to make compensation or restitution or to pay damages to affected individuals." (at para. 52).

¶ 40 We agree that compensation or restitution is not the purpose of an order under section 161(1)(g). Although the Act, in section 15.1, sets out that any monies collected from an order under 161(1)(g) may be subject to a claim by those persons who have suffered loss as a result of the wrongdoer's actions, any analysis of restitution would arise under this section of the Act, not under 161(1)(g).

¶ 41 The *Oriens* decision, at para. 63, supports a broad interpretation of section 161(1)(g):

> "In making that argument, Chua is reading into section 161(1)(g) a limitation that the Commission may only order a person to pay an amount that is obtained **by that person**. We do not accept that interpretation. The section is clearly worded and there is no such limitation on a plain reading of it."

¶ 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 are 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.

¶ 44 In this case, the executive director says that we should make a section 161(1)(g) order for the payment of $65 million, being the total amount of the investments made by Michaels' clients arising from his misconduct (fraud, misrepresentation and advising without registration).

¶ 45 Michaels suggests that we should make an order under this section that is more commensurate with the net $3.8 million benefit he retained from his misconduct (his commissions and fees received, less amounts he invested in the same products as were sold to his clients).

¶ 46 Applying the principles in paragraphs 42 and 43 to the order we may make in this case under section 161(1)(g), we find:

a) we have the discretionary authority to make an order for any amount up to $65 million; that is the amount that was obtained, directly or indirectly, as a result of Michaels' contraventions of the Act; this is consistent with a broad interpretation of the provision;
b) the losses of the investors as at the date of the liability hearing (being $40 million) are to be considered only for the purposes of determining whether it is in the public interest to make a section 161(1)(g) order and do not correlate to the amount of the order; this sanction is not focussed on compensation or restitution;
c) all but $5.8 million of the amounts obtained as a result of Michaels' contraventions of the Act were retained by third parties in accordance with the intentions of the investors; to make an order for an amount in excess of the $5.8 million, in this case, would be punitive and would be inappropriate in the circumstances;
d) reducing the amount of the section 161(1)(g) order to $3.8 million, as suggested by Michaels, to take into account his lost personal investments and business expenses would both limit the sanction to a narrower concept of "benefit" received by Michaels which is not appropriate and would also be inequitable in the circumstances; and

e) an order to pay $5.8 million would strip Michaels of all amounts he received personally by his misconduct and would be consistent with the broad purpose of section 161(1)(g).

Order under section 162 of the Act

¶ 47 Section 162 of the Act sets out that the panel may, if it finds that a respondent has contravened the Act and considers it to be in the public interest, make an order for an administrative penalty of not more than $1 million for each contravention.

¶ 48 The executive director says that we should impose a $65 million administrative penalty on Michaels. In the course of his contraventions of the Act, he advised his clients to purchase unsuitable investments and $65 million of securities were purchased by 484 clients. The executive director submits the number of clients would support the number of contraventions of the Act necessary for an order of this magnitude. He also cites this Commission's decision in *IAC – Independent Academies Canada Inc.*, 2014 BCSECCOM 260 and that decision's review of previous fraud cases, as support for the proposition that in fraud cases an administrative penalty of two to three times the amount raised by the fraudulent misconduct is common.

¶ 49 Michaels says that the administrative penalty should be more commensurate with the net $3.8 million that he says he benefitted from his contraventions (without suggesting a specific amount for the administrative penalty). He also says that an administrative penalty of $65 million is unrealistic in the context of his ability to ever pay the penalty and his personal circumstances. He cites the Alberta Court of Appeal decision in *Walton v. Alberta (Securities Commission)*, 2014 ABCA 273 as support for an approach to administrative penalties that is not formulaic, but rather one tied to the circumstances of the case, the respondent and his ability to pay.

¶ 50 We do not agree with the submissions of the executive director as to the quantum of the appropriate administrative penalty in the circumstances. While we agree that the number of contraventions of the Act could support an administrative penalty in the amount suggested by the executive director, we do not think it to be in the public interest to do so. The *IAC* decision and the other decisions dealing with administrative penalties in the context of fraud reviewed therein considered circumstances involving significantly smaller amounts than those found here. Two or three times the amount raised by the fraudulent misconduct would, in this case, put the administrative penalty in the range of $130 million to $195 million, an amount so excessive as to go far beyond any meaningful bounds of deterrence for Michaels or others. Even an administrative penalty of $65 million is excessive from this perspective.

¶ 51 We also do not agree that an administrative penalty in the $3.8 million range suggested by Michaels is sufficient in the circumstances. The seriousness of Michaels' misconduct and the catastrophic losses that have been suffered by the investors through his misconduct justify a significant administrative penalty. A significant administrative penalty is warranted both as a specific deterrent to Michaels who has not been deterred by the previous sanctions imposed on him, and as a general deterrent to others who would commit fraud, make serious misrepresentations or provide investment advice without

being registered to do so and callously recommend unsuitable investments to others for personal gain.

¶ 52 The appropriate starting place in this case is to look at the $5.8 million benefit that Michaels received personally from his misconduct. A two to three times multiplier of this amount, consistent with the cases reviewed in *IAC*, is appropriate in the circumstances. This will place the administrative penalty in excess of those levied in fraud cases (as described in *IAC*) where the amounts derived from the misconduct are smaller, without making the amount so large as to exceed the purposes of specific and general deterrence.

IV Orders

¶ 53 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), Michaels cease trading in, and is permanently prohibited from purchasing securities, except Michaels may trade or purchase securities for his own account through a registrant, if he gives the registrant a copy of this decision;

2. under section 161(1)(c), all exemptions set out in the Act do not apply to Michaels permanently, except for those exemptions necessary to enable Michaels to trade or purchase securities in his own account;

3. under section 161(1)(d)(i), Michaels resign any position he holds as a director or officer of an issuer or registrant;

4. under section 161(1)(d)(ii), Michaels is permanently prohibited from becoming or acting as a director or officer of any issuer or registrant;

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

6. under section 161(1)(d)(iv), Michaels is 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), Michaels is permanently prohibited from engaging in investor relations activities;

8. under section 161(1)(g), Michaels pay to the Commission $5.8 million; and

9. under section 162, Michaels pay to the Commission an administrative penalty of $17.5 million.

¶ 54 October 31, 2014

¶ 55 **For the Commission**

Nigel P. Cave
Vice Chair

George C. Glover, Jr.
Commissioner

Suzanne K. Wiltshire
Commissioner

British Columbia Securities Commission

Decisions

ERON MORTGAGE CORPORATION, et. al. [Decision]

BCSECCOM #:	Document Type:
---	Decision
Published Date:	Effective Date:
2000-02-18	2000-02-16
Details:	

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 SERVICES LTD., CAPITAL PRODUCTIONS INC., BRIAN 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 Weekly Summary 84 Submissions with respect to sanctions and costs were received from the Executive Director and from Frank Biller. No submissions were received from any other respondent. No party requested the opportunity to make 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 Services Ltd. (Eron Financial), Capital Productions, Inc. (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 the *Securities Act*,R.S.B.C. 1996, c 418;
- 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 of risk associated with the investments and how their money was being invested and spent. Eron encouraged investors, many of whom were unsophisticated, to trust Eron and they did so. As is apparent from our Findings, this trust was abused by the respondents, who acted dishonestly, contrary to the public interest and contrary to fundamental provisions of the Act. As a result of the respondents' actions, the investors' financial losses will exceed $170 million. The loss of the investors' health, their happiness and the security they expected to enjoy in their retirement years is incalculable.

Slobogian and the Corporate Respondents

We found that Slobogian and the corporate respondents traded promissory notes without being registered, contrary to section 34, and without filing a prospectus, contrary to section 61. These sections of the Act are fundamental to investor protection. The breach of these sections by these respondents was a significant factor in the investors' losses.

Eron raised about $47.5 million from investors through notes issued by Maxim, Eron Financial, EIC and Capital, of which a maximum of $7.7 million (before costs) may be recovered. After 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 misrepresentations with the intention of effecting trades in 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 investors' knowledge or consent;
- Slobogian and Eron Mortgage knowingly put investors into mortgages that were in higher amounts than promised without the investors' knowledge or consent;
- Slobogian and Eron Mortgage knowingly raised funds from investors with respect to mortgages with face values that exceeded the amounts secured by those mortgages;
- Eron Mortgage, EIC, Capital, Eron Financial and Slobogian falsely assured investors that their funds would be properly spent on and by the projects, and spent those funds in other 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 capital payments to existing investors without the knowledge of the investors.

We found that the elements of fraud, dishonesty and deprivation, were clearly established with respect to Slobogian and the corporate respondents. We found that total investor losses will exceed $170 million. Dishonesty was apparent from Slobogian's conduct and knowledge, described in our Findings as follows (at page 166):

> The evidence also clearly establishes dishonesty. Slobogian directly solicited investment from investors. He was aware that the statements that he himself was making to investors, and that were being made by Biller and other Eron brokers, were misrepresentations. Slobogian knew everything that was going on at Eron and with respect to the management of its investments and projects. He insisted on tight control over all aspects of Eron's business. He dealt directly with the borrowers. He prepared and approved the hot sheets. He increased mortgages and put new ones on existing projects. He improperly transferred funds among the projects. He was aware of all of the appraisals that showed the properties were worth less than what he told investors. He was aware of the problems with the projects, both through direct contact with them and through warnings he received from advisers and experts.

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.

Applying these factors to this case, it has been clearly established, and we have found, that the conduct of Slobogian and the corporate respondents is of the most egregious nature, has devastated investors and has damaged the integrity of the capital markets of British Columbia. Slobogian and the corporate respondents were substantially enriched by their actions – we found Slobogian's direct income alone from Eron during the relevant period to be $2.7 million. There is no evidence of mitigating conduct. None of these respondents is fit for participation in 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 removing respondents from the market. *See In the Matter of Mindoro Corporation et al,* [1997] 7 BCSC Weekly Summary 13 and *In the Matter of Armstrong* [1999] 8 BCSC Weekly Summary 10. This case is the most serious fraud dealt with by the 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 Act. We have ordered separate administrative penalties for 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 played on the investors' desire to invest in high return, low risk 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 many different projects,
- 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 establish a deterrent.

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 Eron Financial;

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 apply to Eron Mortgage, EIC, Capital and Eron Financial;

3. under section 162 of the Act, that each of Eron Mortgage, EIC, Capital and Eron Financial pay an administrative penalty of $100,000 for their respective contraventions of sections 34 and 61;

4. under section 162 of the Act, that each of Eron Mortgage, EIC, Capital and Eron Financial pay an administrative penalty of $100,000 for their respective contraventions of section 50(1)(d);

5. under section 162 of the Act, that each of Eron Mortgage, EIC, Capital and Eron Financial pay an administrative penalty of $100,000 for their respective contraventions of 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 apply to Slobogian for the rest of his life;

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 issuer;

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

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

10. under section 162 of the Act, that Slobogian pay an administrative penalty of $100,000 for his contraventions of sections 34 and 61;

11. under section 162 of the Act, that Slobogian pay an administrative penalty of $100,000 for his contraventions of section 50(1)(d); and

12. under section 162 of the Act, that Slobogian pay an administrative penalty of $100,000 for his contraventions of section 57(b).

Biller

Biller also contravened section 34 and 61. It was his responsibility to ensure, in the absence of applicable exemptions, that he was registered as required by the Act, and to ensure that a prospectus was filed with respect to the securities he was distributing. However, considering the respective roles of Biller and Slobogian at Eron as described in our Findings, we see Slobogian as having the greater responsibility of the two to ensure that Eron's operations were conducted in accordance with the requirements of the Act. This is reflected in the orders we have made.

We found that Biller knowingly made misrepresentations with the intention of effecting trades in securities, contrary to section 50(1)(d) and that he acted fraudulently, contrary to section 57 (b). There is a difference, however, made clear in our Findings, in the culpability of Biller from that of Slobogian and the corporate respondents. Although we found dishonesty with respect 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 following mitigating factors:

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 correspondence.
- When overfunding concerns came to his attention about Arrowhead, STGR, Emerald Estates, Nexus and Shuswap, he stopped raising money for those projects (with the exception 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, nor did he simply carry on with business as usual. Biller ensured he was kept informed, especially once he understood the scope of the regulatory concerns, and he worked with Eron's professional advisers to help find a solution to Eron's problems.

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

Our task is to make orders in the public interest that are appropriate in these circumstances, having regard to the factors set forth above. We have found that Biller's conduct was in some respects dishonest, but there is no question that the seriousness of his conduct was far less than Slobogian's. Nevertheless, Biller's conduct contributed significantly to the investors' losses and to the damage to the integrity of the capital markets. In addition, Biller enjoyed substantial enrichment during the relevant period. We found his earnings from Eron to be between $6 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 permanent risk to the markets. He testified that he understood that he had acted wrongly and wishes to take responsibility for his actions. He also said that he has learned from the Eron experience. The mitigating factors referred to above indicate that Biller is capable of both taking responsibility and learning from his experience. Biller is a young man and we do not believe it will serve the public interest to permanently 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)), 74, 75, 98 or 99 do not apply to Biller for a period of 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 issuer, except that he may continue to act as a director or 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 period of 10years, except that he may act as a director or 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 period of 10years;

5. under section 162 of the Act, that Biller pay an administrative penalty of $100,000 for his contraventions of sections 34 and 61;

6. under section 162 of the Act, that Biller pay an administrative penalty of $100,000 for his contraventions of section 50(1)(d); and

7. under section 162 of the Act, that Biller pay an administrative penalty of $100,000 for his contraventions of section 57(b).

Costs

The scope of the respondents' illegal and fraudulent activity gave rise to a complex investigation and a lengthy hearing, complicated by Eron's failure to keep proper records. Considering all 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 respondents pay on a joint and several basis 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 Director, provided that Biller's liability to pay such 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 available funds ought to go to the Eron investors. It is the Commission's responsibility to make orders that are appropriate in the circumstances. We leave collection to the discretion of the Executive Director.

DATED February 16, 2000

FOR THE COMMISSION

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

John K. Graf
Member

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

Citation: Re Furman, 2019 BCSECCOM 214 Date: 20190610

William Wade Furman

Panel	Nigel P. Cave	Vice Chair
	Audrey T. Ho	Commissioner
	Suzanne K. Wiltshire	Commissioner
Submissions Completed	May 9, 2019	
Decision date	June 10, 2019	

Appearing

Nicholas Isaac	For the Executive Director

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 April 3, 2019 (2019 BCSECCOM 107) are part of this decision.

[2] We found that that the respondent contravened section 57(b) of the Act in respect of 12 investments for total proceeds of at least $452,000.

[3] The parties were given an opportunity to make written and oral submissions with respect to the appropriate sanctions for the respondent's misconduct. The executive director provided written submissions. We did not receive any submissions from the respondent. There was no oral hearing with respect to this matter.

[4] This is our decision on sanction.

II. Position of the Parties

[5] The Executive Director sought the following orders under sections 161 and 162 of the Act:

(a) Furman be 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;

(b) Furman pay to the Commission $410,847.97 pursuant to section 161(1)(g) of the Act; and

(c) Furman pay to the Commission an administrative penalty of $500,000 under section 162 of the Act.

III. Analysis

A. Factors

[6] 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.

[7] 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

[8] The Commission has repeatedly found that fraud is the most serious misconduct under the Act. As noted in *Manna Trading Corp Ltd. (Re)*, 2009 BCSECCOM 595, "nothing strikes more viciously at the integrity of our capital markets than fraud".

[9] The respondent's fraudulent misconduct was significant. This case involved the respondent misappropriating a significant portion of investor funds Furman promised that investor funds would be used in his day trading activities but, instead, used a portion of those funds for other purposes. He also deceived investors about his experience and registration status in the securities industry.

[10] The deception on investors was exacerbated by, in many cases, the respondent preparing fraudulent account statements which, long after investments were made, purported to show that the investors' funds were performing in a manner consistent with the respondent's promises. Finally, the respondent then communicated to a number of investors a further litany of lies and deceits designed to delay their discovery of the loss of their invested funds.

[11] This case is on the upper end of the seriousness of fraudulent misconduct that comes before the Commission.

Risk to investors and the markets and fitness to be a director or officer

[12] It is sufficient to note that the respondent used two corporations as part of his fraudulent misconduct and that the length and breadth of his lies and deceits make him a serious risk to investors and our capital markets and completely unfit to be a director or officer of an issuer or a registrant.

Harm to investors/ Enrichment

[13] The respondent's misconduct has resulted in substantial harm to investors and substantial enrichment to the respondent.

[14] The respondent raised $452,000 from investors through his fraudulent misconduct. The evidence during the hearing was that a portion of that amount was invested in trading accounts and then lost and the remainder was used by the respondent on unrelated expenditures. Although a portion was used for trading activities, we find that the respondent was enriched by the full amount of the funds raised from his misconduct. We make this finding on the basis that the entire amount of the funds raised from investors was obtained via the respondent's deceit and that all of those funds were then expended as determined by the respondent.

[15] The evidence was that investors received a total of $41,152.03 from the respondent in repayments of invested funds or as fictional "returns". All other investor funds have been lost or expended by the respondent.

[16] We heard testimony during the hearing from investors as to the significant financial and emotional harm caused by these losses.

Mitigating or aggravating factors; past misconduct

[17] The respondent does not have a history of securities regulatory misconduct. There are no aggravating or mitigating circumstances in this case.

Specific and general deterrence

[18] The sanctions that we impose must be sufficient to establish that both the respondents and others will be deterred from engaging in conduct similar to that carried out by the respondents.

[19] Our orders must also be proportionate to the misconduct (and the circumstances surrounding it) of the respondents.

Prior orders in similar circumstances

[20] The executive director directed us to five decisions of the Commission as guidance as to the appropriate sanctions in this case: *Re Spangenberg*, 2016 BCSECCOM 180, *Re Nickford*, 2018 BCSECCOM 57, *Re Zhong*, 2015 BCSECCOM 383, *Re Braun*, 2019 BCSECCOM 65 and *Re The Falls Capital Corp.*, 2015 BCSECCOM 422.

[21] All of these decisions offer general support for the executive director's submissions on sanction. However, several of these decisions are distinguishable, to an extent, due to the existence of findings of additional contraventions of the Act (over and above a finding of fraudulent misconduct). The two most analogous decisions are *Braun* and *Nickford*.

[22] In *Braun*, the individual respondents were found to have committed fraud with respect to two investors with investments totaling $450,000. The panel found that the misconduct in that case was exacerbated by the predatory nature of the misconduct against a vulnerable investor. With respect to the individual respondent A. Braun, the panel made orders against him imposing permanent market prohibitions, a disgorgement order of $325,000 (being the amount that he obtained from his misconduct) and an administrative penalty of $450,000.

[23] In *Nickford*, the respondent was found to have fraudulently misappropriated $318,000 from a total of 13 investors. Those investors included clients, friends and members of her religious community. The panel imposed permanent market prohibitions against Nickford and made a disgorgement order of $318,000 (being the amount that she obtained from her misconduct) and an administrative penalty of $300,000.

C. Analysis of appropriate orders

Market prohibitions

[24] The executive director sought orders imposing permanent market prohibitions against the respondent.

[25] As set out above, we consider the respondent's misconduct to have been significant. He caused significant investor harm and he was substantially enriched by his misconduct. Finally, as a consequence of the length and breadth of the dishonesty engaged in by the respondent, we consider him to be a significant future risk to our capital markets. We consider permanent market prohibitions to be necessary in the circumstances.

Section 161(1)(g) orders

[26] The British Columbia Court of Appeal in *Poonian v. British Columbia Securities Commission*, 2017 BCCA 207, recently adopted a two-step approach to considering applications for orders under section 161(1)(g) (para 144):

> I now turn to apply these principles to the three appeals before this Court. I agree with and adopt the two-step approach identified by Vice Chair Cave in *SPYru* at paras 131-132:
>
> > [131] The first step is to determine whether a respondent, directly or indirectly, obtained amounts arising from his or her contraventions of the Act. This determination is necessary in order to determine if an order can be made, at all, under section 161(1)(g).
> >
> > [132] The second step of my analysis is to determine if it is in the public interest to make such an order. It is clear from the discretionary language of section 161(1)(g) that we must consider the public interest, including issues of specific and general deterrence.

[27] The Court of Appeal in *Poonian* further adopted several principles to apply in interpreting section 161(1)(g) (para 143):

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.

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*.

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).

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.

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.

[28] Finally, the Court of Appeal in *Poonian* approved an approach to determining the amounts obtained, directly or indirectly, by a respondent that requires the executive director to provide evidence of an "approximate" amount, following which the burden of proof switches to the respondent to disprove the reasonableness of this number.

Step 1 – Can a section 161(1)(g) order be made?

[29] The evidence established that the respondent obtained the $452,000 raised from investors through his fraudulent misconduct as these funds were deposited into bank accounts controlled by the respondent. Accordingly, we could make an order under section 161(1)(g) of the Act against the respondent in that amount.

[30] However, as noted in *Poonian,* in determining the quantum of an order under section 161(1)(g) we may take into account amounts returned by the respondent to investors. In this case, the evidence established that the respondent returned $41,152.03 to investors. We will reduce our order under section 161(1)(g) by that amount to $410,847.97.

Step 2 – Is it in the public interest?

[31] It is in the public interest to make an order under section 161(1)(g) against the respondent in the amount set out above. That is the amount that Furman obtained as a consequence of his fraudulent misconduct.

Administrative penalties

[32] The executive director asked that we make an order under section 162 against the respondent in the amount of $500,000.

[33] We view the seriousness of the respondent's misconduct in this case as falling somewhere between that of the respondents in *Nickford* and *Braun*. Furman did not engage in predatory behavior against vulnerable investors as was the case in *Braun*. However, the quantum of the misconduct, the extensive efforts of Furman to produce fraudulent account statements and his lies to delay detection of his misconduct make his misconduct more serious than that of the respondent in *Nickford*.

[34] As set out above, we view the respondent's misconduct as serious and a significant risk to our capital markets. For reasons of both specific and general deterrence a sizeable order under section 162 is appropriate in the circumstances. We find an order under section 162 in the amount of $350,000 to be in the public interest and proportionate to the misconduct.

IV. Orders

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

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

(b) Furman is 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;

(c) Furman pay to the Commission $410,847.97 pursuant to section 161(1)(g) of the Act; and

(d) Furman pay to the Commission an administrative penalty of $350,000 under section 162 of the Act.

June 10, 2019

For the Commission

Nigel P. Cave
Vice Chair

Audrey T. Ho
Commissioner

Suzanne K. Wiltshire
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

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

Citation: Re Pawar, 2016 BCSECCOM 174 Date: 20160518

Reciprocal Order

Gurpreet Singh Pawar

Section 161 of the *Securities Act*, RSBC 1996, c. 418

Introduction

[1] This is an order under sections 161(1) and 161(6)(d) of the *Securities Act*, RSBC 1996, c. 418.

Background

[2] Section 161(1)(6) facilitates cooperation between the Commission and other securities regulatory authorities, self-regulatory bodies and exchanges. The executive director of the Commission has applied for an order reciprocating in British Columbia the sanctions imposed by the Investment Industry Regulatory Organization of Canada (IIROC) against Gurpreet Singh Pawar on October 10, 2012.

[3] The Commission makes reciprocal orders under section 161(1)(6) when such an order will, in the public interest, protect investors and the capital markets in British Columbia. Although Pawar was provided the opportunity to make submissions, he did not participate in the hearing.

[4] IIROC found that Pawar used his status as a registered representative to solicit four friends to provide $95,000 in a fictitious investment. Further, IIROC found that Pawar used various subterfuges and deceptions to persuade his friends to make payments to Pawar personally. Pawar intended to invest the funds in his own account to make sufficient money to pay off his personal debts, and repay the funds stolen from his friends. Among other things, IIROC permanently barred Pawar from re-applying for registration in any capacity. We find that it is in the public interest to make similar orders, preventing Pawar from participating in the capital markets in British Columbia.

Order

[5] After providing Pawar an opportunity to be heard, and considering staff's submissions, and considering it to be in the public interest, we order under section 161(1)(d) that:

1. Pawar is permanently prohibited from becoming or acting as a director or officer of any registrant; and

2. Pawar is permanently prohibited from becoming or acting as a registrant.

May 18, 2016

For the Commission

Nigel P. Cave
Vice Chair

Gordon Holloway
Commissioner

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

Citation: Re SBC Financial Group Inc., 2018 BCSECCOM 267 Date: 20180905

SBC Financial Group Inc. and Prabhjot Singh Bakshi

Panel	Nigel P. Cave	Vice Chair
	Judith Downes	Commissioner
	Gordon L. Holloway	Commissioner
Hearing Date	July 18, 2018	
Submissions Completed	August 9, 2018	
Date of Findings	September 5, 2018	
Appearing		
Mila Pivnenko	For the Executive Director	
Nicholas Isaac		

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 April 16, 2018 (2018 BCSECCOM 113) are part of this decision.

[2] These are the reasons of all panel members on all issues, except for the decision on orders under section 161(1)(g) of the Act. Commissioner Downes' dissenting reasons on that issue are below.

[3] We found that the respondents:

a) contravened section 34(a) of the Act with respect to trading in securities between October 2010 and September 2014 in the amount of $2,675,238; and

b) contravened section 61 of the Act with respect to 45 issuances of securities for $1,535,238.

[4] The parties were given an opportunity to make written and oral submissions with respect to the appropriate sanctions in this case. The executive director provided written and oral submissions. The respondents provided written submissions only.

[5] During the oral hearing, we asked the parties for further written submissions concerning the application of orders under section 161(1)(g) of the Act in circumstances where such order arises only from contraventions of section 34(a) of the Act. The executive director provided those submissions to us and we have considered those submissions as part of reaching our decision in this matter. The respondents were advised of our request for further submissions but did not provide further written submissions on this issue.

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

II. Position of the Parties

[7] The executive director sought the following sanctions in this case:

(a) market prohibitions of 10 years under sections 161(1)(b)(ii), 161(1)(c), and 161(1)(d)(i), (ii), (iii), (iv) and (v) of the Act against Bakshi;

(b) market prohibitions of 10 years under sections 161(1)(b)(ii) and 161(1)(d)(v) of the Act against SBC;

(c) an order under section 161(1)(g) of the Act in the amount of $2,115,040, to be made jointly and severally, against Bakshi and SBC; and

(d) an order under section 162 of the Act in the amount of $75,000 against Bakshi.

[8] The respondents submitted that market prohibitions of five years under sections 161(1)(b)(ii), 161(1)(c) and 161(1)(d)(ii), (iii), (iv) and (v) of the Act would be appropriate in the circumstances.

[9] With respect to any orders made under section 161(1)(b)(ii) of the Act, Bakshi submitted that it would be appropriate to grant him a carve-out to allow him to maintain:

- a personal trading account;
- an RRSP segregated fund account; and
- an unregistered joint account.

[10] With respect to Bakshi's unregistered joint account, his submissions stated that no trading in this account was permitted, yet his submissions further set out that the account contained mutual fund securities which were security for a loan.

[11] With respect to financial sanctions, the respondents did not stipulate any financial sanctions that they suggested would be appropriate. However, Bakshi did submit that any order under section 161(1)(g) of the Act against SBC should not also be made, jointly and severally, against him.

III. Analysis

A. Factors

[12] 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.

[13] 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

[14] Sections 34 and 61 are "cornerstone" provisions of the Act as they relate directly to protection of the investing public in the purchase and sale of securities.

[15] As set out in *Re Michaels*, 2014 BCSECCOM 457 (paragraph 9):

> … contraventions of section 34 are also inherently serious because the registration requirements of the Act are foundational for protecting investors and the integrity of the capital markets. The requirement in section 34(b) that those who advise others on investments must be registered is intended to ensure that those who seek advice are advised to invest in securities that are suitable. This case clearly illustrates the catastrophic losses that can occur where investments are made without care as to the suitability of those investments for their purchasers.

[16] Similar comments are also appropriate with respect to the requirement to be registered to trade under section 34(a) of the Act and with respect to the significant investor losses that occurred in this case as a consequence (at least in part) from the respondents' contraventions of that provision.

[17] Section 61 is also foundational to the investor protection aspects of our regulatory regime. As set out in *Re Flexfi Inc.*, 2018 BCSECCOM 166 (paragraph 45):

> Contraventions of section 61 of the Act are inherently serious. This section is one of the Act's foundational requirements for protecting investors and preserving the integrity of the capital markets. It requires those who wish to distribute securities to file a prospectus with the Commission or to have an exemption from this requirement. This is intended to ensure that investors receive the information necessary to make an informed investment decision.

[18] The harm to the investors caused by the respondents' contraventions of sections 34 and 61 was manifest in this case. The investors lost substantial investments without having received sufficient information regarding SBC and its securities with which to make an informed investment decision and the respondents dealt with the investors in an unregistered capacity and without fulfilling basic obligations that, as a registrant, they would have owed to their clients.

Harm suffered by investors and the enrichment of the respondents

[19] The respondents raised a total of $2,675,238 during an almost four year period, through their unregistered trading activities and engaged in 45 issuances of securities for $1,535,238 in contravention of section 61 of the Act.

[20] Some of the investors received payments from the respondents, in the form of interest or a repayment of principal on their loans to SBC. The total of these payments was $560,198. The remainder of the investors' investments in SBC were lost when SBC was petitioned into bankruptcy. The investors did not receive any distributions out of the bankruptcy proceedings.

[21] In addition to the significant financial losses and the impact of these losses on the financial lives of the investors, we heard testimony from several of the investors who spoke about the damage that this experience had on their investing confidence and trust in financial services providers.

[22] The respondents were significantly enriched by their misconduct.

[23] SBC was the beneficiary of all of the proceeds of its unregistered trading and illegal distributions (as it was engaged in unregistered trading of its own securities). It was enriched by $2,115,040 (being the net difference between the proceeds from the unregistered trading and the amount returned to investors).

[24] SBC was a company owned and controlled by Bakshi so he was indirectly enriched by SBC's enrichment. However, Bakshi also directly obtained a portion of the investors' funds. Commission investigators reviewed the bank statements (from the relevant period) of SBC, Bakshi and another company owned and controlled by Bakshi. Those records reveal considerable cash flows back and forth between the entities. In aggregate, the records indicate that Bakshi (and his company) received from SBC $380,309 more than they contributed to it and were therefore directly enriched by that sum.

[25] Bakshi challenged the quantum of his personal enrichment. We will address these submissions below in our discussion of our orders under section 161(1)(g) (as the issues overlap). It is sufficient for our purposes here to note that we do not agree with Bakshi's submissions on this issue.

[26] In totality, this is a case that involved both significant financial and other harm to the investors and substantial enrichment to the respondents as a consequence of their misconduct.

Aggravating or mitigating circumstances

[27] There are no mitigating circumstances in this case.

[28] Bakshi submitted that he has suffered mental health issues as a consequence of "this ordeal". Firstly, the submissions do not suggest that he suffered these mental health issues at the time of the misconduct and, as a consequence, could not be construed as a mitigating circumstance. More importantly, Bakshi did not provide any evidence in support of this submission. We have not considered this as part of our orders in this matter.

[29] The executive director submitted that there are no aggravating circumstances with respect to SBC.

[30] However, the executive director submitted that it is an aggravating factor that Bakshi was formerly a registrant (for nine years) under the Act.

[31] There are a number of decisions of this Commission which have found a respondent's previous registration status under the Act to be an aggravating factor (see: *Re Waters*, 2014 BCSECCOM 369, *Re McIntosh*, 2015 BCSECCOM 69 and *Re McCleary*, 2015 BCSECCOM 281). Although a respondent's previous registration status is not material in all cirucmstances, this is an obvious and clear case where it must be considered an aggravating factor. Bakshi's previous registration status will (or should) have provided him with sufficient background and information to know that his (and SBC's) conduct triggered the requirement to be registered and to know that certain of his investors did not qualify for exemptions from the prospectus requirements in connection with SBC's offering of securities. While we did not make a determination in our Findings that the respondents' contraventions of the Act were intentional, we have no difficulty now in assessing that the respondents' misconduct was not accidental or even merely negligent.

Participation in our capital markets and fitness to be a registrant or a director or officer

[32] The respondents' conduct falls far short of that expected of participants in our capital markets.

[33] In particular, Bakshi was the sole officer and director of SBC. His failure to ensure that SBC complied with securities laws raises significant concerns about his fitness to be an officer or director of a company.

[34] More importantly, we have significant concerns about Bakshi's fitness to be either a registrant or an officer or director of an issuer due to his deceitful conduct with respect to certain of his clients. In our findings, we dismissed allegations of fraud against the respondents on the grounds that the conduct alleged to constitute fraud did not involve a "security" under our Act. However, the evidence led during the hearing clearly established that Bakshi engaged in a sophisticated level of deceit against several of his clients. Those investors were clients of the respondents in their financial services business. Honesty is a critical aspect of being either a registrant or a director or officer of an issuer. In fact, it is part of the basic duties of those positions. Our orders must take into account the risk that Bakshi poses to the public through his demonstrated dishonesty.

Specific and general deterrence

[35] The sanctions that we impose must be sufficiently severe to establish that both the respondents and others will be deterred from fraudulent misconduct.

[36] Our orders must also be proportionate to the misconduct of the respondents, and the circumstances surrounding it.

Previous decisions

[37] The executive director referred us to four previous decisions of this Commission which he submitted were helpful guidance in ascertaining the appropriate sanctions in this case: *Re VerifySmart* Corp., 2012 BCSECCOM 176 (with respect to the respondent Scammell), *Re Williams*, 2016 BCSECCOM 283 (with respect to the respondent Nemeth), *Re HRG Healthcare*, 2016 BCSECCOM 5 (with respect to the respondent Mohan) and *Streamline Properties Inc. (Re)*, 2015 BCSECCOM 66 (with respect to the respondent Weigel).

[38] The decisions referred to above involved respondents who were found liable of contravening, in some cases, only section 61 and, in other cases, both section 34 and section 61. The quantum of the amounts raised by the respondents (in these decisions) from investors through their misconduct varied from between $1.2 million to $3.6 million. The seriousness of the misconduct of the respondents in these decisions was also generally similar to that of the respondents in the current case.

[39] These decisions suggest a range of length of market prohibitions for misconduct of this type (including the magnitude of investor losses and the enrichment of the respondents) between five and ten years and a range of quantum of orders under section 162 of between $50,000 to $100,000. The decisions involve a variety of factors which caused the specific respondents to receive orders that were on the higher or lower end of that range. As such, these decisions are generally supportive of the orders requested by the executive director in this case.

[40] The respondents only referred us to the Court of Appeal decision in *Poonian* (discussed below) and to three decisions of this Commission (*Michaels, Re Oriens Travel & Management Corp.*, 2014 BCSECCOM 352 and *Re Pacific Ocean Resources Corp.*, 2012 BCSECCOM 104). Each of those cases was referred to in the context of submissions made by the respondents with respect to the appropriate orders to be made under section 161(1)(g) of the Act and we will deal with those submissions below.

C. Analysis of appropriate orders

Market prohibitions

[41] The executive director asked for broad market prohibitions lasting 10 years against the respondents. The respondents submitted that market prohibitions of five years would be more appropriate.

[42] As noted above, those two positions mark the "bookends" of the length of market prohibition orders in recent decisions of this Commission for misconduct of the general nature that the respondents engaged in.

[43] This is a case that warrants orders at the upper end of this spectrum. We say that based upon the following:

- the quantum of investor losses and enrichment of the respondents;
- that the misconduct in this case involved significant multiple contraventions of *both* sections 34 and 61, which were sustained over a long period of time;
- the significant aggravating factor of Bakshi's previous registration status; and
- Bakshi's demonstrated dishonesty.

[44] Because of these factors and the need for both specific and general deterrence we find it to be in the public interest and proportionate to Bakshi's misconduct to make market prohibition orders against Bakshi with a length of 10 years.

[45] Although SBC has been dissolved, we find it to be in the public interest to make our market prohibition orders against the company. Dissolved companies can be reinstated relatively easily and we would not be adequately protecting the public if we did not make orders to cover off that possibility. Therefore, we find it to be in the public interest and proportionate to SBC's misconduct to make market prohibition orders against SBC with a length of 10 years.

[46] Bakshi asked for carve-outs from our market prohibition orders that would allow him to trade in securities for his own account.

[47] Previous decisions of this Commission have permitted this carve out, even with respect to those respondents found to have committed much more serious misconduct, including fraud (see: *Re Samji*, 2015 BCSECCOM 29 and *Re Lathigee*, 2015 BCSECCOM 78).

[48] The executive director submitted that Bakshi did not provide evidence in support of his need to maintain brokerage accounts of the type requested. In addition, he submitted that the misconduct in this case arose from the respondents' trading in securities and that there was a demonstrated risk to the public in permitting Bakshi to trade.

[49] While it is true that the nature of the misconduct in this case indirectly involved the respondents trading in securities, there was no evidence that Bakshi or SBC (a company he controlled) used a brokerage account to carry out any aspect of the misconduct. More importantly, it was not Bakshi's trading of securities for his own account that led to the respondents' misconduct in this case. As a consequence, we do not find that granting Bakshi's request for a carve out from our market prohibition orders to permit him to maintain a personal trading account and an RRSP account would be contrary to the public interest in the circumstances.

[50] However, Bakshi also asked for a specific carve-out with respect to an unregistered account and a loan arrangement related to it. We were neither provided with any evidence related to this account and these arrangements nor was it clear to us what "trading" was occurring or could occur in respect of this account. Section 171 of the Act provides a mechanism for respondents to apply to vary previously made orders of this Commission. Without further evidence from Bakshi of the nature of this account and a fulsome understanding of the transactions involved, we are not satisfied that it is in the public interest to add this carve-out to our orders.

Section 161(1)(g) orders

[51] The British Columbia Court of Appeal in *Poonian v. British Columbia Securities Commission*, 2017 BCCA 207, recently adopted a two-step approach to considering applications for orders under section 161(1)(g) (para 144):

> I now turn to apply these principles to the three appeals before this Court. I agree with and adopt the two-step approach identified by Vice Chair Cave in *SPYru* at paras 131-132:
>
> > [131] The first step is to determine whether a respondent, directly or indirectly, obtained amounts arising from his or her contraventions of the Act. This determination is necessary in order to determine if an order can be made, at all, under section 161(1)(g).
> >
> > [132] The second step of my analysis is to determine if it is in the public interest to make such an order. It is clear from the discretionary language of section 161(1)(g) that we must consider the public interest, including issues of specific and general deterrence.

[52] The Court of Appeal in *Poonian* further adopted several principles to apply in interpreting section 161(1)(g) (para 143):

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.

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*.

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).

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.

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.

[53] Finally, the Court of Appeal in *Poonian* approved an approach to determining the amounts obtained, directly or indirectly, by a respondent that requires the executive director to provide evidence of an "approximate" amount, following which the burden of proof switches to the respondent to disprove the reasonableness of this number.

Step 1 – Can a section 161(1)(g) order be made?

[54] The evidence during the hearing was that SBC directly obtained the benefit of the full amount of the $2,675,238[1] that was obtained from investors by its contraventions of the Act.

[1] The $1,535, 238 obtained by SBC from its contraventions of section 61 represent a subset of the amount obtained by SBC from its contraventions of section 34. Therefore, the total amount obtained by SBC from its contraventions of the Act is the amount obtained from its contraventions of section 34 of the Act.

[55] The executive director's submitted that there was nothing in section 161(1)(g) to suggest that contraventions of section 34(a) should be treated any differently with respect to determining orders under that section. The executive director further submitted that, as a matter of policy, there was no reason to approach the legal determination of whether we can make orders under section 161(1)(g) for contraventions of section 34(a) differently from other contraventions of the Act.

[56] We agree with those submissions. There is nothing in section 161(1)(g), or elsewhere in the Act to suggest that we should approach the legal determination of what orders we can make under that section for contraventions of section 34 from other contraventions of the Act. As a consequence, we could make an order under section 161(1)(g) of the Act in this amount against SBC. However, as will be discussed below, there may be circumstances in which the public interest issues (in step 2 of the approach to making orders under this section) associated with making disgorgement orders for contraventions of section 34 may differ from other contraventions of the Act.

[57] As noted in *Poonian*, in determining the appropriate quantum of any order under this section the Commission may take into account the portion of the gross amount obtained from SBC's contraventions of the Act that it returned to investors.

[58] The executive director acknowledged, and this figure was not disputed by the respondents, that a total of $560,198 was paid to investors by SBC in the form of interest and principal repayments. It is appropriate to take this amount into consideration in crafting our orders under section 161(1)(g) such that the total amount of an order under this section against SBC would be reduced to $2,115,040.

[59] Bakshi submitted that further payments were made by him to, or on behalf of, investors (which amounts were disputed by the executive director) and we will consider those submissions below.

[60] The evidence during the hearing was that Bakshi directly (and through his control of another company) obtained a portion of the gross amount obtained from investors by the respondents' contraventions of the Act. As noted above, that amount was $380,309. As a consequence, we could make an order under section 161(1)(g) of the Act for at least this amount (subject to the discussion of whether he indirectly obtained further funds below) against Bakshi.

[61] Bakshi submitted that we should take into consideration a further $284,166.62 in payments that he says were made by him to, or on behalf of, the investors in this case. Of this total, Bakshi submitted that he made $30,666.62 in interest payments to investors and purchased $252,500 in investments for the benefit of SBC (which would indirectly have been of benefit to the investors).

[62] The Commission recently addressed the issue of which party bears the burden of proof in establishing repayments to be taken into account for the purposes of making orders under section 161(1)(g) in *Re Oei*, 2018 BCSECCOM 231 (paragraph 77):

> In assessing the evidentiary issues associated with the purported investor repayments, the first issue is which party bears the onus of proof. In *Poonian,* the Court set out that the executive director has the onus of establishing a reasonable approximation of the benefit obtained, directly or indirectly, following which the burden of proof switches to the respondent to disprove the reasonableness of this number. Given that the purpose, in this case, of taking investor repayments into account is to establish that Oei and Canadian Manu have "benefitted" from their misconduct in a lesser quantum than the amount of their fraud, we find that the respondents bear the onus of establishing, on a balance of probabilities, that such repayments were made.

[63] As the executive director has established a reasonable approximation of the benefit obtained, we agree that it is the respondent who bears the onus to prove the amount of any repayment to investors in these circumstances.

[64] The panel in *Oei* also set out the evidentiary matters that the respondent must establish (at paragraph 78):

> Given that some of the purported transactions involve payments from a third party (i.e. a person who is not a respondent) and/or to a third party (i.e. a person who is not an investor in Cascade) and, in certain cases, were made in kind, the following aspects of each purported payment must be established by the respondents:
>
> a) that a payment was made;
>
> b) that a payment was made by, or on behalf of, a respondent;
>
> c) that a payment was made to, or for the benefit of, an investor;
>
> d) that such payment was in respect of the investor's investment in Cascade; and
>
> e) where the payment was in kind, the value of such payment.

[65] Not all of the evidentiary issues that are discussed in this paragraph from *Oei* are relevant in this case but several are critical, namely subparagraphs (d) and (e).

[66] With respect to the purported interest payments that Bakshi says were made to investors, there were banking records which support the submission that Bakshi made certain (although not all) of these payments. What is lacking from this evidence is to whom these payments were made and, more importantly, why such payments were made. The evidence from the bankruptcy trustee in SBC's bankruptcy was that certain investors advanced funds directly to Bakshi. Those amounts were not part of the allegations in this hearing. Whether the payments that Bakshi submitted were interest payments were, in fact, interest payments and, just as importantly, were interest payments which represent repayments of amounts improperly obtained from his misconduct is not possible to determine from the evidence before us. Those payments could represent interest payments on personal debt obligations that are not part of the allegations of misconduct

in this case. Therefore, Bakshi has failed to demonstrate, on a balance of probabilities, that these were investor repayments that we should take into account in making our orders under section 161(1)(g).

[67] With respect to the purported acquisitions of securities that Bakshi submitted were payments made on behalf of SBC, we also find that Bakshi has failed to demonstrate, on a balance of probabilities, that these are payments that we should take into account in making our orders under section 161(1)(g).

[68] First, although there was evidence from the trustee's report in the SBC bankruptcy proceeding that SBC owned some (although not all) of the securities that Bakshi submitted he purchased on behalf of SBC, there was no evidence to support Bakshi's submissions that he originally purchased any those securities (nor their cost to him) or that he transferred them to SBC *for no consideration*. Even if there had been that evidence, there was no evidence to support the valuation of those securities at the time of purchase.

[69] Second, securities owned by SBC were not really owned for the benefit of the investors in the sense that the investors loaned funds to SBC and had no entitlement to SBC's assets. If, in fact, the assets held by SBC had been successful investments, Bakshi, as the owner of SBC, would have been the primary beneficiary of those assets. We do not see how these purported transactions can be viewed as Bakshi being stripped of the benefit of his misconduct in the same way that SBC's direct repayments of cash (in the form of interest and principal) to investors is.

[70] As a consequence, none of Bakshi's submissions in this regard lead us to conclude that any order that we make against him under section 161(1)(g) should be less than the $380,309 he directly obtained from the respondents' contraventions of the Act.

[71] The only remaining issue is whether Bakshi indirectly obtained the funds, directly obtained by SBC, from the respondents' contraventions of the Act. The wording of section 161(1)(g) expressly contemplates making orders under that section where a respondent has indirectly obtained those funds. The decision in *Poonian* expressly acknowledges this and includes several examples of circumstances where someone may indirectly obtain funds which may then properly be made part of an order under this section. One of those examples is where a corporate alter ego of an individual respondent has directly obtained the funds derived from misconduct. In such circumstances, it is possible to view the individual respondent as having indirectly obtained those funds.

[72] We find that SBC is exactly the kind of corporate alter ego for which we can find that Bakshi indirectly obtained the benefit of the respondents' misconduct. Not only was Bakshi the company's sole officer, director and shareholder but the banking records of the respondents show that there were significant deposits and withdrawals between their respective accounts such that there was a significant intermingling of their financial affairs.

[73] Therefore, we conclude that we could make orders under section 161(1)(g) against both SBC and Bakshi in the amount of $2,115,040.

Step 2 – Is it in the public interest to make a section 161(1)(g) order?

[74] There remains only the question of whether it is in the public interest to make orders in this amount, in a lesser amount or not at all with respect to either of the two respondents. This is not a legal question but one of the exercise of our public interest jurisdiction.

[75] We think that there may be circumstances in which the determination of a quantum of an order under section 161(1)(g) for contraventions of section 34 may raise different public interest considerations than for other contraventions of the Act. There are several reasons for this:

- section 34 creates a requirement to be registered; however, the activities that trigger the requirement to be registered encapsulates activity that may go beyond the mere purchasing and selling of securities and both the amounts obtained by a respondent from a failure to be registered and the damage to the public from a failure to comply with section 34 may, in certain cases, be difficult to quantify;

- even where the activity that triggers the requirement to be registered is the strict purchasing and selling of securities, a respondent may have obtained an investor's funds in the legal sense but those funds may then be used to purchase the securities of a third party.

[76] Although different public interest issues may arise in cases involving contraventions of section 34, this is not one of those cases. In this case, the activity that triggered the requirement to be registered was the purchase and sale of securities and the securities that were sold were "proprietary securities" (i.e. securities of SBC which was also the entity that was required to be registered) such that the entity that obtained the benefit of those purchases and sales was also the firm that should have been registered. As a result, in this matter, we do not see any reason in the public interest to limit the potential order under section 161(1)(g) against either of the respondents on the basis that their contravention of the Act is limited to a breach of section 34. .

[77] However, there are other relevant factors we must consider in the public interest analysis, when determining the quantum of a section 161(1)(g) order. As evidenced by the majority decisions of this Commission in *HRG*, *Pacific Ocean* and *Michaels*, and in the dissent from the majority decision in *Streamline,* orders under section 161(1)(g) have been made (or would have been made, in the case of *Streamline*) against a respondent for less than the full amount obtained, directly or indirectly, by that respondent from their contraventions of the Act, on public interest grounds. Those grounds have included that the funds obtained, directly or indirectly, were subsequently sent by the respondent to third parties (in a manner consistent with the investors' expectations) or used by the respondent for a business purpose in a manner that conformed with investors' expectations of the respondent's use of proceeds. Those orders can be understood through the perspective of (one or both):

a) the purpose of our orders under section 161(1)(g) are to strip respondents of the benefit of their misconduct; or

b) the orders should be equitable (not in the strict legal sense of that term) and proportionate to the misconduct.

[78] In this case, investors were told that their funds were being used by the respondents to make investments in public and private company securities and in real estate. The evidence, although less than complete in this regard, demonstrates that this is what the majority of the investors' funds were used by the respondents. However, there was no evidence to support the notion that the $380,309 that was transferred from SBC to Bakshi's account (and to another company Bakshi controlled) was used in a manner consistent with the investors' expectations.

[79] In the circumstances of this case, we find that the public interest lies in making an order against each of the respondents, on a joint and several basis, under section 161(1)(g) in the amount of $380,309.

Administrative penalties

[80] The executive director asked for an order under section 162 in the amount of $75,000 against Bakshi. The executive director did not seek an order under section 162 against SBC. His rationale for this position is that SBC did not act independently from Bakshi and that the company has both gone through bankruptcy and been dissolved (as of November 21, 2016). If the second issue were persuasive it would also suggest that we should not make an order under section 161(1)(g) against SBC. We do not find it persuasive. However, we do agree that SBC cannot be viewed to have acted independently from Bakshi and therefore we do not find it necessary, in the circumstances, to make an order under section 162 against SBC.

[81] Bakshi did not provide us with an appropriate quantum of an order under section 162.

[82] Bakshi submitted that he was impecunious.

[83] A respondent's financial circumstances can be a factor to take into account with respect to specific deterrence, although it is not a factor to consider with respect to general deterrence. However, in order for us to take a respondent's financial circumstances into account we must be provided with evidence of that respondent's finances. In this case, we were provided no evidence of Bakshi's financial circumstances (income or assets) and, as a consequence, we have not taken this into account in crafting or orders under section 162.

[84] As noted above, we were presented with previous decisions of this Commission which suggested that the bookends for the quantum of orders under section 162 for misconduct of the type engaged in by the respondents is $50,000 to $100,000. Therefore, the

executive director's submissions suggesting that $75,000 would be an appropriate amount for an order under section 162 is not unreasonable.

[85] However, as we noted above, we find the misconduct of the respondents and the risk to the public that they pose to be on the upper end of this spectrum. For all of the reasons set out in paragraph 43 above, with particular emphasis on the sustained breaches of *both* sections 34 and 61, and the need for both specific and general deterrence, we find it to be in the public interest and proportionate to Bakshi's misconduct to make an order against him under section 162 in the amount of $100,000.

[86] For all of the reasons discussed above, we do not find it necessary to make an order under section 162 against SBC.

IV. Orders

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

Bakshi

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

(b) Bakshi is prohibited until the later of 10 years from the date of this order and the date that he pays the amounts set out in subparagraphs (c) and (d) below:

  (i) under section 161(1)(b)(ii), from trading in or purchasing any securities or exchange contracts, except that he may trade and purchase securities or exchange contracts for his own account (including one RRSP account) through a registered dealer, if he gives the registered dealer a copy of this decision;

  (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;

(c) Bakshi pay to the Commission $380,309 pursuant to section 161(1)(g) of the Act; and

(d) Bakshi pay to the Commission an administrative penalty of $100,000 under section 162 of the Act.

SBC

(e) SBC Financial Group Inc. is prohibited for 10 years:

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

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

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

(f) SBC pay to the Commission $380,309 pursuant to section 161(1)(g) of the Act; and

(g) with respect to our orders under subparagraphs (c) and (f), Bakshi and SBC shall be jointly and severally liable for $380,309.

September 5, 2018

For the Commission

Nigel P. Cave
Vice Chair

Gordon L. Holloway
Commissioner

Reasons for the Decision of Judith Downes, Commissioner

[88] I concur with the majority decision in all respects other than the decision to limit the amount of the order made against SBC and Bakshi under section 161(1)(g) to $380,309 on the basis that the balance of the investor funds obtained by the respondents was used in a manner consistent with the investors' expectations.

[89] I would have ordered that Bakshi and SBC, on a joint and several basis, pay to the Commission $2,115,040 pursuant to section 161(1)(g) of the Act.

[90] I agree with the two-step approach adopted in the majority decision in considering whether section 161(1)(g) orders are appropriate against the respondents.

[91] As set out in *Poonian*, the first step is to determine whether the respondents, directly or indirectly, obtained amounts arising from their contraventions of sections 34(a) and 61 of the Act.

[92] I concur with the reasoning and conclusion of the majority that we have the authority to make orders under section 161(1)(g) against both SBC and Bakshi in the amount of $2,115,040.

[93] The second step is to determine whether it is in the public interest to make such an order. As set out in *Poonian*, the discretionary language of section 161(1)(g) makes it clear that the public interest, including issues of specific and general deterrence, must be considered in a determination of whether a section 161(1)(g) order should be made.

[94] I agree with the majority view in *Streamline* that, as a general principle, it is not inequitable or punitive to make a section 161(1)(g) order in the full amount of the benefit obtained by respondents where the proceeds raised from investors were used in accordance with investor expectations and not for personal gain.

[95] In this case, the investors lost substantial investments without having received sufficient information regarding SBC and its securities with which to make an informed investment decision and the respondents dealt with the investors in an unregistered capacity and without fulfilling basic obligations that, as a registrant, they would have owed to their clients.

[96] In my view, where investors have been denied the fundamental protections of the Act, it is not relevant that the investment proceeds have been used in accordance with investor expectations. A focus on the use of proceeds is misplaced when the investment decision itself was ill-informed.

[97] SBC obtained a net benefit of $2,115,040 from its unregistered trading and illegal distributions. Bakshi, as the alter ego of SBC, indirectly obtained the full amount of that benefit.

[98] In my view, it is in the public interest to order that SBC and Bakshi disgorge, on a joint and several basis, the full amount of the benefit obtained by them to deter those respondents and others who obtain a benefit, directly or indirectly, in connection with unregistered trading and illegal distributions.

September 5, 2018

Judith Downes
Commissioner

2005 BCSECCOM 577

Paul Robert Maudsley
and
Shaylor Management Ltd.

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

Hearing

Panel	Brent W. Aitken	Vice Chair
	John K. Graf	Commissioner
	Robert J. Milbourne	Commissioner
Submissions Completed	August 5, 2005	
Date of Decision	September 9, 2005	
Submissions Filed By		
Joyce M. Johner	For the Executive Director	

Decision

Introduction

¶ 1 This decision should be read with our Findings in this matter made on July 14, 2005 (see 2005 BCSECCOM 463). 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. Only the Executive Director made submissions; neither party sought an oral hearing.

¶ 2 Between July 1997 and December 2002, Maudsley, a mutual fund salesperson, followed a pattern of persuading some of his mutual fund clients to redeem their funds and, ostensibly, invest the proceeds in other securities. In some cases he redeemed clients' mutual funds without their consent, only later obtaining their concurrence with the purported reinvestment strategy. Twenty-three of his clients (through 16 accounts) followed his advice and redeemed about $1.6 million worth of mutual funds. At Maudsley's request, the clients paid the proceeds to him or to Shaylor. Maudsley did not invest their funds in other securities. Instead, he took their money for his own use.

Findings

¶ 3 We found that Maudsley contravened section 57(b) of the Act when he perpetrated a fraud on persons in British Columbia by redeeming mutual fund securities without his clients' knowledge, or did so with their consent by deceiving them about how the proceeds of the redemptions would be invested. We put it this way:

> 32 In our opinion, the evidence provides clear and convincing proof that Maudsley and Shaylor committed what *Théroux* [[1993] 2 SCR 5] describes as a "prohibited act" and that it caused deprivation. Maudsley redeemed mutual fund securities without his clients' knowledge, or did so with their consent by deceiving them about how the proceeds of the redemptions would be invested. He simply took their money, or caused Shaylor to do so – about as stark an instance of deceit as there can be.
>
> 33 Because of Maudsley's deceit, his clients suffered deprivation. They were deprived not just of the money they transferred to him, but of the investment opportunities associated with those funds. The money transferred to Maudsley and Shaylor by his clients was about $1.6 million, but the deprivation was much greater: to make them whole, [Investors Group Inc.] had to compensate them with over $2.3 million.

¶ 4 We also found that Maudsley failed to deal fairly, honestly and in good faith with his clients, contrary to section 14(2) of the *Securities Rules*, BC Reg. 194/97. We said:

> 40 We have already found that Maudsley redeemed mutual fund securities in the accounts of his clients, sometimes without their knowledge and consent. When he did have their consent, he obtained it by lying about what he intended to do with the proceeds. In fact, he stole the proceeds. In addition, he relied on his relationship with his clients as a financial adviser to facilitate this pattern of organized thievery, and targeted his vulnerable clients as his victims.
>
> 41 There could not be a more blatant contravention of section 14(2) . . . .

Discussion

¶ 5 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 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.

¶ 6 Applying these factors to this case, the respondents' conduct was serious. Maudsley betrayed the trust of his clients, many of whom were especially vulnerable, and stole their money. His clients were harmed by his conduct, their losses amounting to about $2.3 million. Conduct this dishonest, and that does this much damage cannot help but damage the integrity of our markets.

¶ 7 Maudsley and Shaylor were enriched by about $1.6 million, the amount Maudsley actually stole from his clients.

¶ 8 There are no mitigating factors. Fortunately, Investors compensated their clients for the losses they suffered at Maudsley's hands, but this does not in any way mitigate Maudsley's conduct. In our opinion, Maudsley poses a significant risk to investors and British Columbia's capital markets were he allowed to continue to participate in those markets. He is unfit to be a registrant; he abused his status as a registered mutual fund salesperson by betraying the trust of those who looked to him for financial advice. He repaid their trust, not by dealing with them fairly, honestly and in good faith, but by defrauding them.

¶ 9 The orders we make below demonstrate, in our opinion, the consequences of conduct such as Maudsley's, and will have the appropriate deterrent effect on both Maudsley and others. They are also consistent with orders made by the Commission in similar circumstances in the past (see *Barker*, 2005 BCSECCOM

146, *Rast*, 2003 BCSECCOM 609, and *Stenner*, [1998] 4 BCSC Weekly Summary 18).

Orders

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

Maudsley

1. under section 161(1)(c) the exemptions described in sections 44 to 47, 74, 75 , 98 and 99 of the Act do not apply to Maudsley permanently;

2. under section 161(1)(d)(ii), that Maudsley is permanently prohibited from becoming or acting as a director or officer of any issuer;

3. under section 161(1)(d)(iii), that Maudsley is permanently prohibited from engaging in investor relations activities;

4. under section 162, that Maudsley pay an administrative penalty of $250,000;

5. under section 174, that Maudsley pay, jointly and severally with Shaylor Management Ltd., costs of or related to the hearing in the amount of $57,959.95;

Shaylor

6. under section 161(1)(b), that all persons cease trading in and be prohibited from purchasing the securities of Shaylor permanently;

7. under section 161(1)(b), that Shaylor is permanently prohibited from trading or purchasing any securities;

8. under section 162, that Shaylor pay an administrative penalty of $500,000; and

9. under section 174, that Shaylor pay, jointly and severally with Maudsley, costs of or related to the hearing in the amount of $57,959.95.

¶ 11 September 9, 2005

¶ 12 **For the Commission**

Brent W. Aitken
Vice Chair

2005 BCSECCOM 577

John K. Graf
Commissioner

Robert J. Milbourne
Commissioner

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

Citation: Re Zhong, 2015 BCSECCOM 383 Date: 20151208

Hong Liang Zhong

Panel	Audrey T. Ho	Commissioner
	George C. Glover, Jr.	Commissioner
	Gordon L. Holloway	Commissioner
Hearing Date	September 22, 2015	
Date of Decision	December 8, 2015	
Appearing		
Shaneel Sharma	For the Executive Director	
Hong Liang Zhong	For himself	

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 dated May 5, 2015 (2015 BCSECCOM 165) are part of this decision.

[2] The panel found that Hong Liang Zhong:

1. engaged in the business of trading in securities, without being registered, with respect to 14 investors, contrary to section 34 of the Act,

2. guaranteed the return of the principal of their investments to at least 10 investors, thereby making prohibited representations contrary to section 50(1)(a)(ii) of the Act, and

3. perpetrated fraud on investors, contrary to section 57(b) of the Act.

II. Position of the Parties

[3] The executive director seeks the following orders under sections 161(1) and 162 against Zhong:

1. Zhong be permanently prohibited from:

    a) trading in or purchasing securities and exchange contracts,
    b) becoming or acting as a director or officer of any issuer or registrant, and be required to resign from any such position that he holds,
    c) becoming or acting as a registrant or promoter,
    d) acting in a management or consultative capacity in connection with activities in the securities market, and
    e) engaging in investor relations activities;

2. Zhong pay to the Commission the following amounts:

    a) Canadian $250,376.88 and US$142,987.20, representing the amounts of the 14 investors' money that he traded and lost in contravention of sections 34 and 57 of the Act, and
    b) Canadian $11,834.54 and US$108,405, representing the amounts of trading agent fees and referring broker commissions, respectively, that Zhong obtained as a result of his misconduct; and

3. Zhong pay an administrative penalty of $250,000.

[4] Zhong attended the hearing and made oral submissions, but on matters that were relevant to liability which we had already determined in our Findings. Zhong did not make any oral or written submissions that were relevant to sanctions.

III. Analysis and Findings

A. Factors

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

[6] In *Re Eron Mortgage Corporation* [2000], 7 BCSC Weekly Summary 22, the Commission identified a non-exhaustive list of factors that are usually relevant to orders under sections 161 and 162 of the Act:

- 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 conduct

[7] The Commission has consistently held that fraud is the most serious misconduct prohibited by the Act. In *Manna Trading Corp. Ltd.*, 2009 BCSECCOM 595, the Commission, at paragraph 18, said: "Nothing strikes more viciously at the integrity of the capital markets than fraud."

[8] A promise to return the principal of an investment is also very serious misconduct. As demonstrated in this case, such a promise disguises the real risks associated with an investment and prevents investors from fully understanding and making informed investment decisions.

[9] The Commission has also consistently held that any contravention of section 34 is inherently serious as the required registration of persons who advise investors and trade on their behalf is one of the foundational investor protections of the Act.

[10] Zhong's misconduct was egregious. Through deceit and prohibited representations, Zhong deliberately misled investors into thinking that forex trading through him was a safe way to conduct forex trading, and concealed from investors the additional risks arising from the conflict of interest between how he would make money versus how the investors would make money from the trading. Zhong did not stop trading even when several investors learned of their losses and asked him to stop trading in their accounts.

Harm to investors; damage to integrity of the capital markets

[11] Zhong's misconduct resulted in significant harm to his 14 investors. In total, they invested Canadian $362,980 and US $148,030, and lost Canadian $250,376.88 and US$142,987.20.

[12] To date, they have not recovered any of their losses from Zhong. There is no evidence they will be able to recover any of that money. Two investors obtained judgements against Zhong in civil court. They had not been able to collect payment on those judgments.

[13] The fact that one investor recovered about $80,000 from one of the forex firms for a technical error committed by that firm does not lessen the harm caused by Zhong.

[14] One investor testified that this experience had a very adverse effect on her emotional health. The money she lost was personal savings from many years of hard work at a low wage. In an investor impact statement, another investor stated that she invested and lost the $20,000 that she had saved to help establish her family after they immigrate to Vancouver.

[15] It is trite to say that Zhong's misconduct has done significant harm to the reputation and integrity of our capital markets. Investors become hesitant to invest in the market if they cannot trust those who trade and advise on securities to be ethical and to carry on these activities in compliance with applicable securities laws.

Enrichment

[16] Zhong or his wife earned $11,834.54 in trading agent fees, and additional amounts in referring broker commissions, from trading in the accounts of the 14 investors.

[17] Zhong and his wife form a family unit; Zhong's wife allowed her name to be used in this scheme as Zhong requested. We consider Zhong to have been personally enriched by the fees and commissions earned in the name of his wife, in addition to those that were earned by Zhong in his own name. We find that Zhong was personally enriched as a result of his misconduct.

Aggravating and mitigating factors

[18] There are no mitigating factors.

[19] The executive director submits that the following are aggravating factors:

1. Zhong deceived the two forex firms when he forged his wife's signature on trading agent and referring broker forms. He also forged his clients' e-signatures on forex account applications.

2. Zhong created a fake Chinese passport for one investor, which he used to open a forex account for that investor.

3. Zhong told one forex firm that an investor was a New Zealand resident at the time the investor's account was opened, when that was not true.

[20] These factors largely pertain to dealings between Zhong and the forex firms. It is not obvious how they aggravate the misconduct that gave rise to our findings of liability. In the liability phase, we declined to make any finding of misconduct by Zhong with respect to the forex firms. Similarly, we do not find these are aggravating factors with respect to the misconduct for which Zhong has been found liable.

Respondent's past conduct

[21] Zhong does not have a securities regulatory history.

Risk to investors and the capital markets; fitness as director and officer

[22] Zhong carried out a deliberate scheme to make money at his investors' expense. He showed callous disregard for the investors and the safeguards the forex firms put in place to protect investors. At the sanctions hearing, Zhong continued to deny any wrongdoing and maintained that the investor witnesses lied to the Commission.

[23] We see no basis for believing that Zhong will abide by securities laws in the future and conclude that his presence in our markets in any capacity represents a risk to investors.

Specific and general deterrence

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

Previous orders

[25] With respect to market prohibitions, the executive director cited *Re Samji*, 2015 BCSECCOM 29, and noted that the Commission has consistently imposed permanent bans in fraud cases for the protection of investors and our capital markets.

[26] With respect to section 161(1)(g) orders, the executive director referred to *Re Samji*; *Re Streamline Properties Inc.*, 2015 BCSECCOM 66; and *Re Michaels*, 2014 BCSECCOM 457.

[27] The executive director cited three Commission decisions in support of his submissions on administrative penalty: *Great White Capital Corp.*; 2011 BCSECCOM 303, *Canadian Pacific Consulting Inc.*, 2012 BCSECCOM 195; and *Re Cho*, 2013 BCSECCOM 454.

[28] In *Great White Capital Corp.*, the Commission found that the respondent Adam Keller defrauded four investors of $523,100. Keller told investors he would use the money to execute foreign exchange trades or otherwise invest it on their behalf. He did not invest any of the money and used all of it for personal purposes. The panel ordered Keller to pay $523,100 under section 161(1)(g) and an administrative penalty of $1.6 million.

[29] In *Canadian Pacific Consulting Inc.*, the Commission found that Canadian Pacific and Michael Robert Shantz defrauded 11 investors of $1.5 million and Shantz took $210,000 of that money for his own use. The Commission found a blatant fraud. Canadian Pacific told investors their money would be used to invest in gold futures or foreign exchange contracts, but none of it was used for that purpose. There was no evidence that Canadian Pacific was engaged in any legitimate business - it lied to investors, stole their money and took elaborate steps to make the whole scam appear legitimate. The panel found that Shantz knew he was deceiving investors and ordered him to pay to the Commission the $1.5 million and an administrative penalty of $630,000.

[30] In *Re Cho*, the Commission found that Won Sang Shen Cho perpetrated a fraud and made misrepresentations when he raised $101,846 from five investors. There was no finding that Cho was enriched by his misconduct. The panel ordered Cho to pay to the Commission the amount he obtained from the investors (after deducting the amount he had since repaid to them), and an administrative penalty of $200,000.

C. Appropriate sanctions

Market prohibitions

[31] The Commission has consistently issued permanent market bans against those who have been found to have committed fraud.

[32] Given the serious nature of Zhong's misconduct and his continuing denial of wrong-doing, we agree with the executive director that protection of the public requires that a complete ban be imposed so that Zhong cannot participate in our capital markets.

Section 161(1)(g) order

[33] Under section 161(1)(g), if a person has not complied with a provision of the Act, the Commission may order that the person pay to the Commission "any amount obtained... directly or indirectly, as a result of the failure to comply or the contravention." A section 161(1)(g) order is sometimes referred to as a "disgorgement order".

[34] The executive director asks that we order Zhong to pay under this section the amount of the trading losses suffered by the 14 investors, plus the referring broker commissions and trading agent fees. He acknowledges there has not been any prior Commission decision where the Commission has ordered payment of all these amounts, but submits that we have the authority to do so.

[35] In *Michaels* and *Streamline Properties Inc.*, the Commission confirmed that, in determining the appropriate order under section 161(1)(g), the question is not whether a respondent "profited" from the illegal activity but whether the respondent "obtained amounts" as a result of that activity. All money illegally obtained from investors can be ordered to be paid to the Commission, not just the "profit" made as a result of that activity.

[36] The majority of the panel in *Streamline* (in paragraphs 49-50), quoting the Alberta Securities Commission in *Arbour Energy Inc.*, 2012 ABASC 416, indicated that the "amount obtained" in section 161(1)(g) does not mean "the amount retained, the profit, or any other amount calculated by considering expenses or other possible deductions". They further stated (in paragraphs 54-55) that the purpose of a section 161(1)(g) payment is to remove from a respondent any amounts obtained through a violation of the Act and, given the critical importance of investor protection, the fact that proceeds raised were used for the stated purpose of an investment should not automatically reduce the amount of the section 161(1)(g) order. The "amount obtained" can be the full amount raised in contravention of the Act and is not limited to a respondent's personal gain from the misconduct.

[37] We agree with the above interpretations of section 161(1)(g).

[38] Here, the amounts that the 14 investors invested in forex trading were obtained as a result of Zhong's misconduct. Zhong engaged in the business of trading for these investors without being registered under the Act. He gave the investors prohibited guarantees of their principal. He told them their investments were safe and he would make money only if they made money from the trading. One investor specifically testified that Zhong's guarantee of her principal was a condition to her decision to invest.

[39] Accordingly, we find that the Commission has the authority under section 161(1)(g) to order payment of the full amounts invested by the 14 investors.

[40] The next step is to consider if we should make that order in the circumstances of this case.

[41] In *Re Michaels*, the Commission ordered the respondent to pay the commissions and marketing fees he earned, but declined to order payment of the amounts invested by Michaels' clients arising from his misconduct. The panel said (in paragraph 46(c)):

> All but $5.8 million of the amounts obtained as a result of Michaels' contraventions of the Act were retained by third parties in accordance with the intentions of the investors; to make an order for an amount in excess of the $5.8 million would be punitive and inappropriate in the circumstances.

[42] The circumstances here are very different from those in *Michaels*. Superficially, the investors' money was remitted to arms-length third parties (the forex firms) for forex trading as the investors intended, and Zhong did not use that money for personal purposes. However, Zhong had complete and sole control over that money and the trading. He alone determined how and when to trade and he did all the trading, and he used the investors' money to generate personal gain (commissions) at the investors' expense. Furthermore, unlike *Michaels*, the investments here were so different in risk profile than Zhong had represented to the investors that it is difficult to say that, in substance, the investments were what the investors had intended.

[43] Given these circumstances, we find it is appropriate to order a section 161(1)(g) payment with respect to the amounts invested. We then consider if the order should be for the full amounts invested or some lesser amounts.

[44] The Commission in *Michaels* said (in paragraph 46(b)):

> The losses of the investors ... are to be considered only for the purpose of determining whether it is in the public interest to make a section 161(1)(g) order and do not correlate to the amount of the order, as this sanction is not focused on compensation or restitution.

[45] The Commission also said, in the majority decision in *Streamline*, that it would be punitive and inequitable if the amount payable pursuant to a section 161(1)(g) order together with the amount payable pursuant to a court order obtained by investors in civil court exceed the total amount obtained by a respondent from investors through contraventions of the Act.

[46] Although we agree with the *Michaels* principle reproduced in paragraph 44 above, it would be punitive to order Zhong to pay the full amounts invested by the 14 investors without deducting the amounts that the investors withdrew from these accounts and therefore were not lost to them.

[47] However, we also find it is not appropriate to reduce the amount to be paid by Zhong under section 161(1)(g) by the $80,000 that was returned by one forex firm to one of the 14 investors. As stated in *Michaels*, the purpose of section 161(1)(g) is not to compensate the investor for his loss caused by Zhong's misconduct. It is to remove from Zhong the amount that was obtained through his misconduct. Although the $80,000 payment ultimately reduced the loss to that investor, it was made by a third party for a reason unrelated to Zhong's misconduct and does not lessen the amount that was in fact obtained through that misconduct.

[48] Accordingly, we find that it is appropriate and in the public interest to order Zhong to pay under section 161(1)(g) the amounts deposited by the 14 investors into their forex accounts, minus the investors' withdrawals from, and incidental fees charged to, those accounts. The net of those amounts (i.e. the net deposits) are Canadian $250,376.88 plus US$142,987.20.

[49] For the purpose of the order, we converted US$142,987.20 into Canadian $139,672.02. In doing the conversion, we used the Bank of Canada noon exchange rate on the date of the consolidated losses on the account statements in evidence, and on the account opening date for the one forex account without account statements. We have summarized our calculations in Schedule A to this decision.

[50] Clearly, the trading agent fees and commissions were personal gains obtained as a result of Zhong's misconduct and the Commission has the authority to order him to pay those amounts. It would have been appropriate to require Zhong to pay to the Commission both amounts.

[51] However, we find that the executive director has not proven the appropriate amount of commissions to be paid under section 161(1)(g). In our view, under section 161(1)(g), the executive director must prove, on a balance of probabilities, a reasonable approximation of the amount obtained by a respondent as a result of misconduct. The respondent may then attempt to prove that that amount is unreasonable. Any ambiguity is resolved in favour of the executive director, since a respondent should not benefit from any ambiguity when his or her wrong-doing gave rise to the uncertainty.

[52] As the Ontario Securities Commission stated in *Re Limelight Entertainment*, (2008) 31 OSCB 12030 (paragraph 53), which was quoted with approval in *Re Ground Wealth Inc.*, (2015) 38 OSCB 9835 (paragraph 28):

> Staff has the onus to prove on a balance of probabilities the amount obtained by a respondent as a result of his or her non-compliance with the Act. Subject to that onus, we agree that any risk of uncertainty in calculating disgorgement should fall on the wrongdoer whose non-compliance with the Act gave rise to the uncertainty.

[53] In this case, we only have evidence on the amount of commissions and trading agent fees received by Zhong from trading at one forex firm. With respect to the commission amounts, between December 31, 2008 and September 30, 2010, Zhong earned a total of US$108,405 in referring broker commissions from MG Financial Group based on the volume of trading in all of his referred clients' accounts. The executive director advised that, despite his efforts, he was unable to obtain a break-down of the commissions to ascertain the portion that pertained to trading in the 14 investors' accounts. We are satisfied from the evidence that this amount included referring broker commissions with respect to the 14 investors. However, the evidence also indicates that other referred clients of Zhong maintained open accounts at MG Financial in that same time period. We were not provided with any evidence to indicate what portion of the commissions related to the contraventions of the Act. Therefore, we do not know to what extent the US$108,405 included commissions generated from trading for these other referred clients of Zhong where misconduct has not been alleged.

[54] The executive director submits that this uncertainty should not benefit Zhong, because he received the commissions during a pattern of fraud and unregistered trading. As noted above, the executive director must first prove, at least, a reasonably approximate amount obtained through misconduct. Had the executive director made submissions on the portion of the total commissions that represented an amount obtained in contravention of the Act, we would then consider if that amount was reasonable. However, we were directed to a global amount that included but may not be limited to the amount obtained in contravention of the Act. We appreciate that the executive director did try but was unable to obtain the necessary information to provide us with that evidence. Nevertheless, for this reason, the executive director has not met the burden of proof as it relates to the payment of commissions under section 161(1)(g). Although we are not ordering any payment of commission amounts, we are satisfied that the totality of the sanctions, even without the disgorgement of commissions, is adequate for purposes of specific and general deterrence.

[55] We therefore order, under section 161(1)(g), that Zhong pay to the Commission the sum of $390,048.90 ($250,376.88 for the investors' Canadian accounts, and $139,672.02 for the US accounts), together with $11,834.54 in trading agent fees earned on these investors' accounts.

Administrative penalty

[56] The executive director asked for an administrative penalty of $250,000 on the basis that Zhong's misconduct was less egregious than that of Keller in *Great White Capital Corp.* and Shantz in *Canadian Pacific Consulting Inc.*, but more egregious than that of Cho in *Re Cho*.

[57] We agree that Zhong's misconduct was less egregious than that of Keller and Shantz, in the sense that Zhong at least used his investors' money to trade in forex. We also agree that his misconduct was more egregious than that of Cho.

[58] We agree with the executive director that an administrative penalty of $250,000 is appropriate and consistent with the previous orders cited by the executive director. It significantly exceeds the amount of Zhong's personal enrichment and reflects the seriousness of Zhong's misconduct and other factors relevant to sanction, making it appropriate for Zhong personally. Further, it serves as a meaningful and substantial general deterrent to others from engaging in similar misconduct.

IV. Orders

[59] 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), Zhong is permanently prohibited from trading in or purchasing any securities or exchange contracts;

2. under section 161(1)(c), on a permanent basis, no exemption set out in the Act, in the regulations or a decision as defined in the Act, will apply to Zhong;

3. under section 161(1)(d)(i), Zhong resign any position he holds as a director or officer of any issuer or registrant;

4. under section 161(1)(d)(ii), Zhong is permanently prohibited from becoming or acting as a director or officer of any issuer or registrant;

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

6. under section 161(1)(d)(iv), Zhong is 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), Zhong is permanently prohibited from engaging in investor relations activities;

8. under section 161(1)(g), Zhong pay to the Commission Canadian $401,883.44; and

9. under section 162, Zhong pay to the Commission an administrative penalty of Canadian $250,000.

[59] December 8, 2015

For the Commission

Audrey T. Ho
Commissioner

George C. Glover, Jr.
Commissioner

Gordon L. Holloway
Commissioner

Schedule A

Date	Net Deposit (US$)	Bank of Canada (noon) Exchange Rate	Net Deposit (CAN$)
MG Financial			
February 27, 2012	$47,216.34	0.9983	$47,136.07
Forex Capital Markets, Ltd.			
June 9, 2011	$50,000.00	0.9732	$48,660.00
July 7, 2011	$45,770.86	0.9586	$43,875.95
Total	$142,987.20		$139,672.02