British Columbia Securities Commission

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

By Regular Mail

December 13, 2019

Dear Mr. Kentel:

James Theodore Kentel
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 is applying for orders against you under sections 161(6)(d) 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 Settlement Agreement and Undertaking you entered into with the Alberta Securities Commission (ASC).

SETTLEMENT WITH THE ALBERTA SECURIITES COMMISSION

1. On August 23, 2019, you entered into a Settlement Agreement and Undertaking with the ASC.

2. As part of the Settlement Agreement, you admitted to breaching the Alberta Securities Act. You engaged in this misconduct along with David Robert Schiemann (Schiemann), Kurtis Francis Robinson (Robinson), Mark David Ruf (Ruf), Harold Carl Schmidt (Schmidt), the Alberta-British Columbia District (District), and the Alberta-British Columbia District Investments Ltd. (DIL).

Settlement Agreement, para. 2

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

3. Your misconduct involved authorizing, permitting or acquiescing in the District's and DIL's contravention of section 92(4.1) of the Alberta Securities Act.

Settlement Agreement, paras. 48-49

4. As part of the Settlement Agreement, you agreed to:
   (a) Payment of $75,000 to the monitor for distribution to the funds' investors;
   (b) contribution to a cost order of $100,000; and
   (c) broad, permanent market bans with a carve out for trading through a registrant.

Settlement Agreement, para 57-59, 61

5. In reaching the Settlement Agreement, the ASC relied upon the agreed statement of facts containing the following information:

   (a) The District is a corporation and registered charity operating in Alberta. Its purpose is to support congregations in Alberta and British Columbia in advancing the Lutheran Church's religious mission. The District was controlled by the members of a board of directors (Board). Between 1997 and 2000, and again from 2003 to 2015, you were a member of the Board, sitting as a Director. From 2009 to 2015, you were an officer of the District and the Chairman of the Board.

   Settlement Agreement, paras. 5 and 9

   (b) DIL is a not-for-profit company formed by the District.

   Settlement Agreement, para. 6

   (c) The District had a Department of Stewardship and Financial Ministries (DSFM) Committee. From 2009 to 2015, you were a member of the DSFM Committee.

   Settlement Agreement, paras. 8 and 10

   (d) You are an engineer who, was at all material times, a resident of Kelowna.

   Settlement Agreement, para. 9

(e) The District established and operated two funds: the Church Extension Fund (CEF Fund); and the District Investment Fund (DIL Fund) (collectively, the Funds).

Settlement Agreement, paras. 13 and 19

The CEF Fund

(f) The CEF Fund was designed to facilitate the investment of funds by individual investors into faith-based developments such as churches and schools.

Settlement Agreement, para. 13

(g) These investments took the form of savings/investment accounts, term deposits, and/or bonds. The invested funds were pooled and loaned by the District through the DSFM Committee to individual church congregations and affiliated entities. Investors were promised set rates of interest on the invested funds.

Settlement Agreement, para. 14

(h) The DSFM Committee was responsible for making recommendations to the Board regarding congregation loan applications. The Board was responsible for granting final approval of loan applications.

Settlement Agreement, para. 15

The DIL Fund

(i) The DIL Fund offered investors registered investments, which provided tax efficiencies through RRSP, RRIF, and TFSA accounts. Under trust agreements with investors, DIL pooled the investment funds and loaned the DIL Fund investments in a similar manner to the funds in the CEF Fund to individual church congregations and affiliated entities. Security in the form of mortgages was generally taken by DIL over assets of the borrowing church congregations. As with the CEF Fund, investors were promised set rates of interest on the invested funds.

Settlement Agreement, para. 19

(j) The investments in the Funds constituted securities within the meaning of the Act.

Settlement Agreement, para. 27

The Prince of Peace Development

(k) In or about the early to mid-1990s, the District and DIL began loaning money from the Funds to support the Prince of Peace community development, located just east of Calgary, which was developing a large seniors' housing complex (the PoP Development) in addition to its existing church and school.

Settlement Agreement, para. 22

(l) In 2005, the District incorporated ECHS and EnCharis Management and Support Service (EMSS) to hold and manage the PoP Development. The District appointed representatives to ECHS and EMSS.

Settlement Agreement, para. 25

(m) By 2009, approximately $49 million of the approximately $78.8 million raised in the CEF Fund was loaned to ECHS.

Settlement Agreement, para. 26

Representations and promotional practices

(n) The District and DIL engaged representatives from congregations to market the investments in their respective congregations. The representatives were provided with Church Extension Manuals (the Manual) by the District. The Manual provided these representatives with information and resources to provide to investors and potential investors.

Settlement Agreement, para. 29

(o) You, along with the other respondents, authorized statements in the Manual and in promotional literature from 2008 to 2014 about the Funds. You knew or ought to have known that that these statements were misleading as they did not state all of the facts that were necessary to make the statements not misleading (the Omitted Facts). These statements would reasonably be expected

to have a significant effect on the market price or value of the investments.

Settlement Agreement, para. 31

(p) Some of the misleading statements included:

i. **Risk Friendly**: "ABC District Investments is a risk friendly way to invest in RRSPs";

ii. **Normal Repayments**: "...with our loan portfolio – made up of loans to congregations and other ministries – we are experiencing normal repayment histories;"

iii. **Well diversified**: "Our portfolio of investments is well diversified... assisting 69 projects in Alberta and British Columbia. We work with outside professional advisors in the construction of an investment portfolio that is conservative and prudent"; and

iv. **Guaranteed**: "Investments in Church Extension are guaranteed by the ABC District of Lutheran Church–Canada which has in excess of $30 million dollars of assets. Church Extension has a proven record of security."

Settlement Agreement, para. 32 (a), (c), (d) , (e), (g)

(q) The misleading statements were published in the Manual and/or newsletters and circulated to existing and potential investors in Lutheran church congregations throughout Alberta and British Columbia.

Settlement Agreement, para. 34

(r) The Omitted Facts included:

i. Investments were not risk friendly. ECHS defaulted on its principal payments from 2007 onwards and ECHS had insufficient assets to secure its loan with the District;

ii. The portfolio of investments were not diversified. ECHS' mortgages represented 82.2% of the District's loan

portfolio in 2008, and by 2012, comprised 96.8% of the District's loans;

iii. The Funds were not prudently managed as ECHS did not have adequate financial controls in place to ensure accurate financial reporting. Also, ECHS did not produce financial statements to the District in contravention of its loan agreement; and

iv. Investments in the Funds were not guaranteed by the District.

Settlement Agreement, para. 35 (a) to (f)

6. From 1997 through 2000, and 2003 through 2015, you were a member of the Board, an officer of the District, and a member of the DSFM Committee. As a consequence of these positions, you knew:

(a) about the District's and DIL's operations as described herein; and
(b) how the investments were being promoted and sold.

Settlement Agreement, para. 45

THIS APPLICATION

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

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

9. Orders under section 161(1) of the Act are protective, preventative and intended to be exercised to prevent further 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

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

11. 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; and
    (f) the need to deter those who participate in the capital markets from engaging in inappropriate conduct.

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

Application of the Factors

Seriousness of the conduct

12. You knew promotional material for the investment fundamentally misrepresented the risk of the investment. You knew investors were not told significant and substantial information about the investment.

13. Your conduct was particularly egregious as it targeted and exploited investors who were members of the Lutheran Church. The promotional material included statements that the investment was an opportunity for investors to live out their faith, spread God's message, and proclaim the saving gospel of Jesus Christ[1]. These statements exploited investors' beliefs, as well as the trust they had in their religious community.

14. 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.

Michaels (Re), 2014 BCSECCOM 457, para. 8

Harm suffered by investors

15. The quantum of the loss suffered by investors is significant. It is expected that there will be a shortfall of $27.2 million to pay investors after all the assets of ECHS are sold.

[1] *Settlement Agreement*, para. 33

Settlement Agreement, paras. 51-53

16. Your misconduct caused harm to identifiable investors and the integrity of the capital markets.

17. As a result of your failure to comply with the Alberta Securities Act, investors were denied the benefits of fundamental protections to which they were entitled to under Alberta Securities laws.

Risk to investors and the capital markets

18. Your misconduct demonstrates that you pose a risk to other investors and the capital markets of British Columbia.

19. You have failed to comply with securities laws over a prolonged period of time. There is no basis to believe that you will abide by securities laws in the future and your presence in B.C.'s capital markets in any capacity represents a risk to investors.

Fitness to be a registrant or a director or officer

20. 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 Inc., 2018 BCSECCOM 267, para. 34

21. As an engineer, as well as a member, director, and Chairman of various boards and committees, you occupied a position of trust and responsibility. Ensuring compliance with securities regulations is a critical aspect of those making decisions on behalf an issuer.

22. Your disregard of compliance with securities regulations shows that your participation in the capital markets poses a risk and you are ill-suited to act as a registrant, director or officer or as an advisor to any private or public issuers going forward.

Participation in our capital markets

23. Participants who engage in the securities industry do so voluntarily and for their own profit. In exchange for the privilege of participating, individuals and companies must comply with securities laws. Compliance is paramount, ensuring the protection of the public and the integrity of the capital markets.

24. Your conduct was contrary to the public interest and harmful to the integrity of the capital markets.

25. Your participation in the British Columbia capital markets would pose a significant risk to the integrity of the capital markets.

Deterrence

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

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

28. 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 deterrent to others (a 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 Factors

29. You cooperated with ASC Staff during the investigation. The Settlement Agreement saved the ASC the time and expense associated with a contested hearing.

Settlement Agreement, paras. 55-56

Previous Orders

30. The Commission ordered permanent market bans in the three decisions below. These decisions contain similar fact patterns to your conduct and involve over a million dollars.

- *Michaels (Re)*, 2014 BCSECCOM 457
  - the respondent made misrepresentations to investors that the investments he was selling were guaranteed, better, and safer than shares on the stock market. Relying on these and other misrepresentations, the respondent was able to raise over $65 million from investors.

- *Re Manna*, 2009 BCSECCOM 595
  - the respondents made misrepresentations to investors that the investments they sold were low risk, safe, secure and had

high trading profits. Relying on these misrepresentations, the respondents raised US$16 million from 800 investors.

- *Re Dominion Grand*, 2019 BCSECCOM 150
  - the respondents misrepresented to investors, through their marketing materials, that investment funds would be invested in mortgages. Relying on this misrepresentation, the respondents raised over $1 million from 39 investors.

31. Although respondents in these decisions were found to have committed the more serious offence of fraud, there are similarities between their fraud and your misrepresentations. Specifically, the panels in the three decisions referred to above found the respondents had misrepresented the investments to investors through their promotional and marketing material.

The Davis Consideration

32. 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.

33. The Executive Director is unaware of any individual circumstances that would support orders short of a lengthy or permanent market ban.

Orders Sought

34. You agreed to a Settlement Agreement with the ASC that bars you permanently from participating in the capital markets, except to trade in or purchase securities through a registrant.

35. Although the Commission could impose a sanction that is less or more onerous than the sanction that you agreed to in the Settlement Agreement with the ASC, the Commission needs to consider what is reasonable based on the evidence known to it, as well as what is in the public interest.

36. In seeking orders under section 161(1) of the Act, the Executive Director has taken the following factors into consideration when applying for orders in this proceeding:

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

37. The Executive Director is seeking the same broad permanent market bans that you agreed to in the Settlement Agreement, but is not seeking any monetary sanctions. The sanctions sought will contain orders pursuant to section 161(1) of the Act that:

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

    (b) you are permanently prohibited:

        (i) under section 161(1)(b)(ii), from trading in or purchasing any securities or exchange contracts except that you may trade and purchase securities through a registrant if you give the registrant a copy of the Reciprocal Order;

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

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

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

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

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

SUPPORTING MATERIALS

38. In making this application, the Executive Director relies on the following:
    (a) the Settlement Agreement;
    (b) *Committee for the Equal Treatment of Asbestos Minority Shareholders v. Ontario (Securities Commission)*, [2001] 2 SCR 132, 2001 SCC 37 (CanLII);
    (c) *Re Eron Mortgage Corporation*, [2000] 7 BCSC Weekly Summary 22;
    (d) *Michaels (Re)*, 2014 BCSECCOM 457;
    (e) *Re SBC Financial Group Inc.*, 2018 BCSECCOM 267;
    (f) *Re Manna*, 2009 BCSECCOM 595;

(g) *Re Dominion Grand,* 2019 BCSECCOM 150; and
(h) *Davis v. British Columbia (Securities Commission)*, 2018 BCCA 149.

39. 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 Commission Secretary by **Monday, January 20, 2020.**

40. 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

41. 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.

42. 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

ALBERTA SECURITIES COMMISSION

Docket: ENF-010583
Date: 20190911

Citation: Re Lutheran Church-Canada, the Alberta-British Columbia District, 2019 ABASC 140

SETTLEMENT AGREEMENT AND UNDERTAKING

Lutheran Church–Canada, the Alberta British-Columbia District, Lutheran Church–Canada, the Alberta British-Columbia District Investments Ltd., Donald Robert Schiemann, Kurtis Francis Robinson, James Theodore Kentel, Mark David Ruf, and Harold Carl Schmidt

Introduction

1. Staff of the Alberta Securities Commission (**Staff** and **Commission**, respectively) conducted an investigation into Lutheran Church–Canada, the Alberta-British Columbia District (the **District**), Lutheran Church–Canada, the Alberta-British Columbia District Investments Ltd. (**DIL**), Donald Robert Schiemann, Kurtis Francis Robinson, James Theodore Kentel, Mark David Ruf, and Harold Carl Schmidt (collectively, the **Respondents**) to determine if securities laws had been breached.

2. The investigation confirmed, and the Respondents admit that they breached those sections of the *Securities Act*, R.S.A. 2000, c. S-4, as amended, (***Act***), referred to in this Settlement Agreement and Undertaking (**Agreement**).

3. Solely for securities regulatory purposes in Alberta and elsewhere, and as the basis for the settlement and undertakings referred to at paragraphs 57 to 61 herein, each of the Respondents agree to the facts and consequences set out in this Agreement.

4. Terms used in this Agreement have the same meaning as provided in Alberta securities laws, a defined term in the *Act* or as specifically defined herein.

Parties

5. The District is a corporation originally formed on or about March 24, 1944, pursuant to the laws of Alberta. The District is a registered charity and at all material times operated out of Edmonton, Alberta. Its purpose was to support congregations in Alberta and British Columbia in advancing the Lutheran Church's religious mission. The District was controlled by the members of the board of directors (**Board**) of the District.

6. DIL is a not-for-profit company formed by the District on or about December 2, 1996, pursuant to the laws of Alberta. At all material times, it operated out of Edmonton, Alberta.

7. Donald Robert Schiemann (**Schiemann**) is an ordained Lutheran minister who was at all material times a resident of Stony Plain, Alberta. Between 2000 and 2015, Schiemann was an officer and director of the District and DIL, sat on the Board, and held the title of District President.

8. Kurtis Francis Robinson (**Robinson**) is an individual who was at all material times a resident of one or the other of Calgary and Edmonton, Alberta. Between 2007 and 2015, Robinson was an Executive Director of District Finances, the President of DIL, and an advisory (non-voting) member of the District's Department of Stewardship and Financial Ministries (**DSFM**) Committee. Robinson obtained his designation as a certified financial planner and was licensed to sell mutual funds from 2003 to 2007.

9. James Theodore Kentel (**Kentel**) is an engineer who was at all material times a resident of Kelowna, British Columbia. Between 1997 and 2000, and again from 2003 to 2015, Kentel was a member of the Board, sitting as a Director. From 2009 to 2015, he served as Chairman of the Board, was an officer of the District, and a member of the DSFM Committee.

10. Mark David Ruf (**Ruf**) is an ordained Lutheran minister who was at all material times a resident of Calgary, Alberta. Between 2006 and 2015, he was a member of the Board, was an officer and director of the District and DIL, and held at certain times the office of Vice President of the District. He was also a member of the DSFM Committee.

11. Harold Carl Schmidt (**Schmidt**) is a licensed realtor who was at all material times a resident of St. Albert, Alberta. From 2006 to 2015, Schmidt was a member of the Board and DIL. He was also a member of the DSFM Committee.

Agreed Statement of Facts

History and Background

12. This Agreement is focused primarily on events and practices subsequent to January 1, 2008, by which time the Respondents ought to have known that the financial situation of EnCharis Community Housing and Services (**ECHS**) required disclosure to investors, and in particular, the practices of the District and DIL accepting investments and/or deposits (collectively, **investments**) into one or the other of two funds:

    (a) the Church Extension Fund (**CEF Fund**); and

    (b) the District Investment Fund (**DIL Fund**).

    (collectively, the **Funds**)

13. The District established and operated the CEF Fund. The CEF Fund was an unregistered trade name designed to facilitate the investment of funds by individual investors into faith-based developments such as churches and schools in Alberta and British Columbia. At all times, investments in the CEF Fund were promoted as an investment opportunity distinct from donations made by church members to the church and/or their own specific congregations.

14. The District operated the CEF Fund by soliciting and obtaining funds for investments from individuals, primarily congregants. These investments took the form of savings/investment accounts, term deposits, and/or bonds. The invested funds were pooled and loaned by the District through the DSFM Committee to individual church congregations and affiliated entities. Some of the money invested in the CEF Fund was held in cash and marketable securities. Investors were promised set rates of interest on the invested funds.

15. The DSFM Committee was responsible for making recommendations to the Board regarding congregation loan applications. The Board was responsible for granting final approval of loan applications.

16. In exchange for their investments, investors were granted flexible terms which permitted investors to withdraw their funds upon request.

17. The tradition underlying the establishment of the Funds was longstanding within the District and the Church, generally. The creation of the Funds arose from an intention to enhance the Church's ministry by providing loans to fund capital projects for congregations.

18. The CEF Fund was created in or about 1920 and was operated continuously from its inception until January 2015. As of November 30, 2014, over $95 million had been invested by over 2,600 investors in the CEF Fund.

19. The DIL Fund was created and operated by the District from about 1996 to offer investors registered investments, which provided tax efficiencies through RRSP, RRIF, and TFSA accounts. Under trust agreements with investors, DIL pooled the investment funds and loaned the DIL Fund investments in a similar manner to the funds in the CEF Fund to individual church congregations and affiliated entities. Security in the form of mortgages was generally taken by DIL over assets of the borrowing church congregations. As with the CEF Fund, investors were promised set rates of interest on the invested funds.

20. DIL operated continuously from its inception until approximately January 2015. As of November 30, 2014, over $37 million was invested by over 900 investors in the DIL Fund.

21. Between 2008 and 2013, inclusive, the Funds raised $33,078,754, which represents new investments and interest from extant investments that were rolled over and reinvested into the Funds.

The Prince of Peace Development

22. In or about the early to mid-1990s, the District and DIL began loaning money from the Funds to support the Prince of Peace community development, located just east of Calgary, which was developing a large seniors' housing complex (the **PoP Development**) in addition to its existing church and school.

23. Over the next several years, substantial amounts from the Funds were used to fund and/or finance the PoP Development.

24. By 2003, approximately $35 million of the approximately $50 million raised in the CEF Fund was loaned to the PoP Development.

25. In 2005, the District incorporated ECHS and EnCharis Management and Support Service (**EMSS**) to hold and manage the PoP Development. The District appointed representatives to ECHS and EMSS.

26. By 2009, approximately $49 million of the approximately $78.8 million raised in the CEF Fund was loaned in ECHS.

Investments Were Securities

27. The investments in the Funds constituted securities within the meaning of section 1(ggg) of the *Act*.

28. Although most investors were affiliated with congregations within the District, investing in the Funds was not specifically closed to members of the public.

Representations and Promotional Practices

29. The District and DIL engaged representatives from congregations to market the investments in their respective congregations. The representatives were provided with Church Extension Manuals (the **Manual**) by the District. The Manual provided these representatives with information and resources to provide to investors and potential investors.

30. The Manual identified that "the primary goal of Church Extension is to provide loans with reasonable interest rates to congregations that need property/buildings in order to carry out the ministry of reaching souls for Christ." It also included descriptions of the loan eligibility requirements, criteria, and conditions under which investors' funds were to be loaned. These requirements included, among other things, obtaining "security documentation appropriate to the size and conditions of the loan." Representatives referred to these statements, requirements, criteria and conditions in promoting the investments.

31. The Respondents authorized statements in promotional literature from 2008 to 2014 about the Funds that they knew or ought to have known were misleading in that the statements did not state all of the facts that were required to be stated or that were necessary to be stated to make the statements not misleading (**Omitted Facts**, as particularized in paragraph 35 below). These statements (**Statements**) would reasonably be expected to have a significant effect on the market price or value of the investments.

32. The Statements were as follows:

(a) "ABC District Investments is a risk friendly way to invest in RRSPs" (January 2008);

(b) [There is] "$80 million plus invested throughout the District with congregations in the form of loans for land and buildings" (February 2009);

(c) "...with our loan portfolio – made up of loans to congregations and other ministries – we are experiencing normal repayment histories" (February 2009);

(d) "Our portfolio of investments is well diversified. We work with outside professional advisors in the construction of an investment portfolio that is conservative and prudent" (February 2009);

(e) "Investments in Church Extension are guaranteed by the ABC District of Lutheran Church–Canada which has in excess of $30 million dollars of assets. Church Extension has a proven record of security" (Church Extension Manual—until at least July 2009);

(f) "...no investor has ever lost any portion of account principal or interest in the history of ABC District Church Extension—over 88 years" (January 2010);

(g) "Church Extension Fund is presently assisting 69 different projects in Alberta and British Columbia by providing funding through either a loan or a mortgage" (January 2011); and

(h) "With more than $130 million in assets today, CEF is assisting more than 50 congregations throughout Alberta and British Columbia with loans to help" (January 2013).

33. Additional promotional language included the following statements:

(a) "The Mission of Church Extension Fund is to provide opportunity for making funds and services available in support of the Great Commission through Lutheran Church–Canada, the Alberta British Columbia District" (all Fund related publications);

(b) "Church Extension is a partnership between investors and congregations to share the Good News of Jesus Christ. Church Extension is managed prudently and built on solid financial principles. Church Extension actions are based on the question, 'Will this further the Great Commission?'" (2009);

(c) "Church Extension provides investment opportunities for Lutheran Christians. Through God's grace, these investors make the work of CEF possible" (2009);

(d) "Church Extension is a ministry. Its ministry is not dollars, not size, not growth, but reaching more people with the gospel" (2009);

(e) "When you invest a portion of your blessings in CEF in an investment account (no investor has ever lost a portion of account principal or interest in the history of ABC District Church Extension—over 88 years), you know that your dollars will make a difference today and enable Church Extension Fund to meet the needs of the Church tomorrow" (June 2008);

(f) "CEF not only allow [*sic*] members to earn a competitive return on their money, but more importantly, gives them an opportunity to live out their faith by participating in a common goal, vision and mission" (January 2014);

(g) "We want to always put the ministry first and interest rate second so that in all things God will have the glory and that we might spread His news to our communities and beyond" (January 2014);

(h) "The Church Extension Committee membership includes a lawyer, an accountant, a bank manager, and others with experience in the financial marketplace" (undated);

(i) "You have our permission and encouragement to share this stewardship 'secret.' Tell others about this simple way to increase their support to the mission of the LCC—telling the Good News about Jesus Christ—by expanding their stewardship practices though CEF investment" (2011); and

(j) "The Board of Directors, the Department of Stewardship and Financial Ministries, the Church Extension Committee and the staff regularly seek God's will in the decisions that are made and in the management of the Fund. However the most convincing aspect of the security of the fund is that God is in control and the fund exists totally for the purpose of providing resources for the sake of proclaiming the saving gospel of Jesus Christ" (undated).

34. The Statements were published in newsletters and circulated to existing and potential investors in Lutheran church congregations throughout Alberta and British Columbia. The statement about the investments being guaranteed was contained in the Manual.

35. The Omitted Facts were that:

(a) ECHS' mortgages represented 82.2% of the District's loan portfolio in 2008, and by 2012, comprised 96.8% of the District's loans;

(b) ECHS defaulted on its principal payments, pursuant to its loan agreement with the District of $2 million per year in 2007, 2008, and 2009. ECHS never made any payments towards the principal outstanding. ECHS paid off its accrued interest in 2011 by selling a parcel of land;

(c) ECHS never produced any financial statements to the District in contravention of its loan agreement with the District;

(d) ECHS had inadequate financial controls in place to ensure accurate financial reporting;

(e) ECHS had insufficient assets to secure its loan with the District;

(f) there was no guarantee by the District of the Funds. It was a simple promise to pay; and

(g) there was a conflict of interest between the District and ECHS as four members of the Board were also members of the board of ECHS. As a result of the Board's close relationship with ECHS, including oversight and certain shared management, the Board was acting as both a borrower and lender vis-à-vis funds loaned to ECHS.

Other Relevant Facts

36. Robinson was seconded by the District to ECHS for the purpose of managing the PoP Development from mid-2010 through 2015. He took on the role of Executive Director of ECHS, and as such, was responsible for the day-to-day operations of ECHS, all while continuing in roles with the District, DIL, and DSFM Committee.

37. In 2011, the Board retained a new auditing firm (**New Auditor**). In or about October 2012, the New Auditor provided an opinion that the assets of the PoP Development were overvalued, and that an impairment write-down was necessary in respect of the District's financial statements. The District did not agree with this opinion.

38. This unfavourable opinion was not released to investors until 2014. Throughout the course of 2013, the District continued to evaluate options in regards to the PoP Development including the sale of all assets held by ECHS.

39. In or about January 2014, the District retained Deloitte LLP (**Deloitte**) to evaluate options for the District's assets and provide an evaluation of available options in respect of the PoP Development.

40. In or about March 2014, the District and DIL stopped soliciting new investments, but continued to accept contributions, which had been set up through automated deposits and/or fund transfers.

41. On or about July 18, 2014, Deloitte suggested to the District and DIL that they may be "insolvent."

42. On January 23, 2015, the Alberta Court of Queen's Bench made an order under the *Companies' Creditors Arrangement Act*, RSC 1985, c C-36, as amended (**CCAA**), granting a stay of proceedings against the District, DIL, and others, and appointing Deloitte as the Monitor (the **CCAA Proceedings**).

Executive Responsibility

43. From approximately 2000 through 2015, Schiemann was an officer and director of the District and DIL, sat on the Board, and held the title of District President. From 2012 onward, he held a non-voting, ecclesiastical role. As a consequence of his position on the Board, with the District, and with DIL, he knew:

    (a) about the District's and DIL's operations as described herein; and

    (b) how the investments were being promoted and sold.

44. From approximately 2007 through 2015, Robinson was the Executive Director of ECHS and maintained positions with the Board and the District. As a consequence of his position on the Board, with the District, and with DIL, he knew:

    (a) about the District's and DIL's operations as described herein; and

    (b) how the investments were being promoted and sold.

45. From approximately 1997 through 2000, and 2003 through 2015, Kentel was a member of the Board, an officer of the District, and a member of the DSFM Committee. As a consequence of his positions, he knew:

    (a) about the District's and DIL's operations as described herein; and

    (b) how the investments were being promoted and sold.

46. From approximately 2006 through 2015, Ruf was a member of the Board, and officer and director of the District and DIL, and a member of the DSFM Committee. As a consequence of his positions, he knew:

    (a) about the District's and DIL's operations as described herein; and

    (b) how the investments were being promoted and sold.

47. From approximately 2006 through 2015, Schmidt was a member of the Board and the DSFM Committee. As a consequence of his positions, he knew:

    (a) about the District's and DIL's operations as described herein; and

    (b) how the investments were being promoted and sold.

Admissions

48. Subsequent to January 1, 2008, the District and DIL each violated section 92(4.1) of the *Act* by making statements which they knew or ought to have known did not state all of the facts required to be stated to make the statements not misleading, and which would reasonably be expected to have a significant effect on the market price or value of the securities distributed by the District and DIL.

49. Schiemann, Robinson, Kentel, Ruf, and Schmidt each, as a consequence of his position on the Board, with the District, and with DIL, authorized, permitted, or acquiesced in the above-noted breaches of Alberta securities laws by the District and DIL.

Circumstances Relevant to Settlement

50. At all material times, each of Schiemann, Robinson, Kentel, Ruf, and Schmidt assert they believed that ultimately they would be able to save the PoP Development.

51. At the outset of the CCAA Proceedings, the total claims of investors into the Funds were:

    (a) CEF Fund: $89.4 million; and

    (b) DIL Fund: $38 million.

    (collectively, the **Claims**)

52. A significant portion of the Claims have now been distributed to the Funds' investors. While the CCAA Proceedings are ongoing, at the date of this Agreement, and based on the reports of the Monitor in the CCAA Proceedings, it is anticipated that the CEF Fund and the DIL Fund may have a shortfall of approximately:

    (a) CEF Fund: $20 million; and

    (b) DIL Fund: $7.2 million.

53. Regarding the CEF Fund, the assets of ECHS were transferred to a new entity called Sage Properties Corp. (**Sage**). The Sage shares are now owned by the Funds' investors. Sage was ascribed a value of $51,364,729 by the Monitor in the CCAA Proceedings. This value of the Sage shares has been set off against the amount owing to investors for the purpose of calculating the shortfall referred to in paragraph 52.

54. None of the Respondents have previously been sanctioned by the Commission.

55. The Respondents cooperated with Staff during the investigation.

56. This Agreement has saved the Commission the time and expense associated with a contested hearing under the *Act*.

Settlement and Undertakings

57. Based on the agreed facts and admissions, the individual Respondents agree to pay a total of $500,000 (the **Settlement Funds**), attributed as follows:

(a) Schiemann: $175,000

(b) Robinson: $100,000

(c) Kentel: $ 75,000

(d) Ruf: $ 75,000

(e) Schmidt: $ 75,000

58. In lieu of a payment to the Commission, the individual Respondents undertake to pay the Settlement Funds to the Monitor for distribution to the Funds' investors in accordance with the directions of the Court of Queen's Bench in the CCAA Proceedings.

59. The individual Respondents agree to pay to the Commission the amount of $100,000 for costs.

60. Each of the District and DIL undertakes, permanently:

(a) not to trade in or purchase securities or derivatives, and acknowledges that all of the exemptions contained in Alberta securities laws do not apply to it;

(b) not to act as a registrant, investment fund manager or promoter;

(c) not to advise in securities or exchange contracts; and

(d) not to act in a management or consultative capacity in connection with activities in the securities market.

61. Each of Schiemann, Robinson, Kentel, Ruf, and Schmidt undertakes, personally and permanently:

(a) not to trade in or purchase securities or derivatives, and acknowledges that all of the exemptions contained in Alberta securities laws do not apply to them, except

that this order does not preclude them from trading in or purchasing securities through a registrant (who has first been given a copy of this decision);

(b) to resign all positions he holds as a director or officer of any issuer, registrant or investment fund manager, and agrees not to act as a director or officer, or as both a director and an officer, of any issuer, registrant, or investment fund manager;

(c) not to advise in securities or exchange contracts;

(d) not to act as a registrant, investment fund manager or promoter; and

(e) not to act in a management or consultative capacity in connection with activities in the securities market.

Administration

62. The Respondents acknowledge that they received independent legal advice and voluntarily made the admissions and undertakings in this Agreement.

63. The Respondents waive any right existing under the *Act*, or otherwise, to a hearing, review, judicial review or appeal of this matter.

64. The Respondents acknowledge and agree that the Commission may enforce this Agreement in the Court of Queen's Bench or in any other court of competent jurisdiction.

65. The Respondents understand and acknowledge that this Agreement may be referred to in any other proceedings under the *Act*, and in securities regulatory proceedings involving other securities regulators in other jurisdictions, but for no other purpose. The securities laws of some other Canadian jurisdictions may allow for provisions of a settlement agreement made in this matter to be given parallel effect in those other jurisdictions automatically, without further notice to the Respondents. The Respondents understand and acknowledge that they should contact the securities regulator of any other jurisdiction in which they may intend to engage in any securities related activities.

66. Execution and fulfillment of the terms of this Agreement by the Respondents resolves all issues involving the Respondents relating to the conduct described herein, and Staff will seek no further sanction against them arising from these facts.

67. This Agreement may be executed in counterpart.

Signed by the duly authorized signatory of Lutheran Church–Canada, the Alberta British Columbia District at Stony Plain, Alberta this 3 day of September, 2019 in the presence of:	Lutheran Church–Canada, the Alberta British Columbia District
Gloria Velichka WITNESS NAME	Per: *"Original signed by"* Roland Kubke
"Original signed by" SIGNATURE	
Signed by the duly authorized signatory of Lutheran Church–Canada, the Alberta British Columbia District Investments Ltd. at Stony Plain, Alberta this 3 day of September, 2019 in the presence of:	Lutheran Church–Canada, the Alberta British Columbia District Investments Ltd.
Gloria Velichka WITNESS NAME	Per: *"Original signed by"* Roland Kubke
"Original signed by" SIGNATURE	
Signed by Harold Carl Schmidt at St. Albert, Alberta this 26 day of August, 2019 in the presence of:	
J.G. Schmidt WITNESS NAME	
"Original Signed by" SIGNATURE	*"Original signed by"* Harold Carl Schmidt

Signed by Donald Robert Schiemann at Stony Plain, Alberta this 23 day of August, 2019, in the presence of:

Elizabeth Schiemann
WITNESS NAME

"Original signed by"
SIGNATURE

"Original signed by"
Donald Robert Schiemann

Signed by Kurtis Francis Robinson at Kelowna, BC this 26 day of August, 2019, in the presence of:

Nikki Robinson
WITNESS NAME

"Original signed by"
SIGNATURE

"Original signed by"
Kurtis Francis Robinson

Signed by James Theodore Kentel at Kelowna, BC this 23 day of August, 2019, in the presence of:

Nicole Gurr
WITNESS NAME

"Original signed by"
SIGNATURE

"Original signed by"
James Theodore Kentel

Signed by Mark David Ruf at Calgary, Alberta this 23 day of August, 2019, in the presence of:

Michelle Ruf
WITNESS NAME

"Original signed by"
SIGNATURE

"Original signed by"
Mark David Ruf

ALBERTA SECURITIES COMMISSION

Calgary, Alberta, 11 September 2019

"Original signed by"
David C. Linder, Q.C.
Executive Director

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

v.

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

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

Neutral citation: 2001 SCC 37.

File No.: 27252.

2000: December 15; 2001: June 7.

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

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

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

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

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

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

c.

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

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

Référence neutre : 2001 CSC 37.

N° du greffe : 27252.

2000 : 15 décembre; 2001 : 7 juin.

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

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

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

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

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

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

Held: The appeal should be dismissed.

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

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

Arrêt : Le pourvoi est rejeté.

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

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

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

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

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

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

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

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

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

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

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

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.

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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.

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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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.

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

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

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

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

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

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. 10

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. 11

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. 12

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 13

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*

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. 17

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 : 18

. . . 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.

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

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

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

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

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

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

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

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

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

2. *What Is the Appropriate Standard of Review?*

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

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

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

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

2. *Quelle est la norme de contrôle appropriée?*

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

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

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

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

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

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.

British Columbia Securities Commission

Decisions

ERON MORTGAGE CORPORATION, et. al. [Decision]

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

AND

IN THE MATTER OF ERON MORTGAGE CORPORATION, ERON INVESTMENT CORPORATION, ERON FINANCIAL 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

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
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

2009 BCSECCOM 595

Manna Trading Corp Ltd., Manna Humanitarian Foundation,
Legacy Capital Inc. and Legacy Trust Inc.
Hal (Mick) Allan McLeod, David John Vaughan,
Kenneth Robert McMordie also known as Byrun Fox,
Dianne Sharon Rosiek, Robert (Robb) Murray Perkinson

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

Hearing

Panel	Brent W. Aitken	Vice Chair
	David J. Smith	Commissioner
	Shelley C. Williams	Commissioner
Submissions completed	September 22, 2009	
Date of Decision	October 22, 2009	
Submissions filed by		
Douglas B. Muir Graham R. MacLennan	For the Executive Director	
Dianne Sharon Rosiek	For herself	

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. Our Findings on liability, made on August 4, 2009 (see 2009 BCSECCOM 426), are part of this decision.

¶ 2 The executive director and the respondent Diane Sharon Rosiek filed submissions. We made no findings against Robert (Robb) Murray Perkinson. References to the respondents in this decision do not include Perkinson.

II Background

A Summary

¶ 3 Manna was a fraud invented and implemented by the respondents into which more than 800 investors deposited about US$16 million. They received as little as US$3 million, and no more than US$5.6 million, back. There is no apparent hope of recovering the rest.

¶ 4 Hal (Mick) Allan McLeod created the Manna scheme and, with David John Vaughan's assistance, expanded it. The expansion became more aggressive when Kenneth Robert McMordie, who used the name Byrun Fox, and Rosiek joined the scheme later.

¶ 5 The Manna scheme's form changed in minor ways and used various entities to perpetrate the fraud: Manna Trading Corp Ltd., the Manna Humanitarian Foundation, and the two Legacy entities, Legacy Capital Inc., and Legacy Trust Inc. All of these entities (which we refer to collectively as "Manna") were in reality a single sham investment scheme which, in this decision, we refer to as the Manna scheme.

¶ 6 Manna induced investors to loan it money and told them that their funds would be placed with experienced traders who had a long history of producing double-digit monthly returns through foreign currency trading. Manna told investors that it had "an annualized trading history of profit returns not less than 20% per month (240% per year)," and that Manna's profits enabled it to pay consistently high rates of return. Manna said it had historically paid returns to investors of 125.22% per year. Manna portrayed the investments as low-risk. It said the investments were "safe" and "secure" and that Manna was "continually mindful of capital preservation."

¶ 7 Manna promised investors 7% monthly returns (later reduced to 5%), sometimes compounded. (A 7% monthly compounded return works out to 125.22% per year.) Investors who became "affiliates" or "consultants" could bring in new investors. When they did so, they earned a commission on the amount invested and a continuing share of the return on the new investment.

¶ 8 Some investors invested through a "private common law spiritual trust." The trust was a mechanism Fox concocted ostensibly to avoid the application of tax and securities laws to investments in the Manna scheme.

¶ 9 All of these statements were misrepresentations. There is no evidence that Manna placed investors' funds with foreign currency traders, or that the investors' funds earned returns from any other source. Manna had no trading profits. No Manna investor experienced the historical returns Manna said investors did. Manna had no source of revenue other than investor contributions. The trust structure was a sham.

¶ 10 Manna also told investors that some of the returns Manna earned from its foreign exchange trading profits would be used for humanitarian causes. There is no evidence that any Manna funds went to humanitarian causes.

¶ 11 The reality is that Manna was a Ponzi scheme. Manna fraudulently used the investments of later investors to fund the promised returns to earlier investors, to pay commissions to the affiliates and consultants, to invest in an online gaming business, and to buy real estate in Costa Rica.

¶ 12 McLeod, Vaughan, Fox and Rosiek fraudulently used investors' funds to enrich themselves.

¶ 13 This was a deliberate and well-organized fraud that resulted in the loss of at least US$10.4 million, and probably closer to US$13 million, by more than 800 investors in British Columbia and elsewhere.

B Findings

¶ 14 We found that McLeod, Vaughan, Fox, Rosiek, Manna Trading, Manna Foundation, Legacy Capital, and Legacy Trust:

1. traded in securities without being registered to do so, contrary to section 34(1) of the Act, and distributed those securities without filing a prospectus, contrary to section 61(1);

2. made misrepresentations, contrary to section 50(1)(d), when they lied to investors about how their money would be invested, the returns offered, and the risk associated with the Manna scheme; and

3. perpetrated a fraud, contrary to sections 57(b) and 57.1(b), when they lied to the investors, inducing them to invest in the Manna securities.

III Discussion and analysis

¶ 15 The executive director seeks the following orders:

1. Permanent orders under section 161(1) of the Act against McLeod, Vaughan, Fox and Rosiek, denying each of them the use of the exemptions under the Act and prohibiting each of them from
   - trading,
   - being a director or officer of any issuer, registrant or investment fund manager,
   - acting as a registrant, investment fund manager, or promoter,
   - acting in a management or consultative capacity in connection with activities in the securities market, and
   - engaging in investor relations activities.

2. Orders under section 161(1)(g) against McLeod, Vaughan, Fox and Rosiek that each of them disgorge the amounts obtained through the fraud.

3. Orders under section 162 imposing an administrative penalty of $6 million against each of McLeod, Vaughan, Fox and Rosiek.

4. Permanent orders under section 161(1) against Manna Trading, Manna Foundation, Legacy Capital, and Legacy Trust, denying each of them the use of the exemptions under the Act and prohibiting each of them from
   - trading,
   - acting as a registrant, investment fund manager, or promoter,
   - acting in a management or consultative capacity in connection with activities in the securities market, and
   - engaging in investor relations activities.

5. Orders under section 161(1)(g) against Manna Trading, Manna Foundation, Legacy Capital, and Legacy Trust that each of them disgorge the amounts obtained through the fraud.

6. Orders under section 162 imposing an administrative penalty of $6 million against each of Manna Trading, Manna Foundation, Legacy Capital, and Legacy Trust.

A Factors to consider

¶ 16 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.

¶ 17 The respondents contravened section 57(b) and 57.1(b) by perpetrating a fraud on the Manna investors. In doing so, they contravened sections 34(1) and 61(1) and more importantly, section 50(1)(d), by making misrepresentations to investors. These misrepresentations were central to the respondents' success in perpetrating and concealing the fraud.

¶ 18 Nothing strikes more viciously at the integrity of our capital markets than fraud, and this case represents a particularly aggressive and flagrant assault on the public's confidence in our markets. We have characterized the respondents' fraud as deliberate and well organized. The respondents built their fraud on a foundation of blatant but carefully constructed lies, which they delivered consistently through an elaborate training program. Their lies about Manna's business and its promised returns induced prospects to invest and stay invested. They exploited prospects' charitable tendencies by telling them that part of Manna's profits went to humanitarian causes, when Manna did no such thing. This was an important factor in many investors' decision to invest.

¶ 19 The respondents produced false account statements, showing returns that did not exist. They created a multi-level marketing structure to maximize distribution of the Manna securities.

¶ 20 The respondents knew exactly what they were doing when it came to dealing with securities laws. They were well aware of the requirements of the Act, and of the role of the Commission in enforcing the Act. They took numerous actions calculated to escape detection. They attempted, unsuccessfully, to construct the Manna scheme in a form that would fit within a specific exemption in the Act.

¶ 21 The emphasis on secrecy worked well for the respondents. Because of the non-disclosure agreements investors signed, they were intimidated from seeking

advice about investing in the Manna scheme. Because of those agreements, and because of false but intimidating statements made to them by the respondents, many investors refused or were reluctant to cooperate with the Commission's investigation.

¶ 22 The respondents took other actions to avoid detection. They received and disbursed funds in cash. They limited the size of bank drafts to avoid the application of money laundering reporting requirements. They frequently switched banks. They set up debit cards and other payment mechanisms to avoid detection and the creation of a paper trail.

¶ 23 Our Findings detail each of the respondents' roles in the scheme, how all of them participated in the serious misconduct described above, and how they profited from it. Through all of this serious misconduct, the respondents significantly harmed investors, as we described in the Findings, and damaged the integrity of British Columbia's capital markets.

¶ 24 There are no mitigating circumstances.

¶ 25 McLeod was president and a director of First Capital Trading & Financing Corp. and a director of First Capital Credit Corp. In 2003 the British Columbia Superintendent of Financial Institutions found that these companies, and a third with whom McLeod was associated, had contravened the *Financial Institutions Act*, RSBC 1996, c. 141, and ordered them to cease carrying on a trust or deposit business. According to the Superintendent's order, the companies took and kept funds from the public, and engaged in conduct that was deceptive and misleading.

¶ 26 Vaughan was disciplined by this Commission for engaging in an illegal distribution that had many features in common with the Manna scheme. Orders against him from that misconduct remain in force today.

¶ 27 The respondents' conduct shows that they are a risk to investors and our capital markets, and that they are not fit to participate in our capital markets.

B Orders in the public interest

¶ 28 This case calls for orders that are protective of our markets and preventative of likely future harm. One of the best ways to do this is to ensure that the orders we make communicate strong specific and general deterrence.

Orders under section 161(1)

¶ 29 The respondents' misconduct occurred between January 2005 and June 2007.

¶ 30 Section 161(1) was amended on November 22, 2007, after the respondents' misconduct occurred and after the executive director issued the notice of hearing (on June 20, 2006).

¶ 31 The amendments added to section 161(1)(d) powers to make orders prohibiting a person from acting

- as a director or officer of a registrant or investment fund manager,
- as a registrant, investment fund manager or promoter, and
- in a management or consultative capacity in connection with activities in the securities market.

¶ 32 Section 161(1) was also amended by adding paragraph (g), which gives the Commission the power to require persons to disgorge any amount obtained by contravening the Act.

¶ 33 There is a presumption against the retrospective operation of statutes. In *Thow v. British Columbia (Securities Commission)* 2009 BCCA 46, the Court of Appeal considered the issue of retrospectivity in the context of securities legislation and concluded that the presumption against the retrospective operation of provisions such as sections 161(1)(b) and (d) is rebutted because they are in the nature of "statutory disqualifications" which serve a "prophylactic purpose." In our opinion, the new prohibitions added to section 161(1)(d) are of the same nature and we are free to apply them if appropriate.

¶ 34 Section 161(1)(g) was not directly addressed by the court in *Thow*, but in stating the exception to the presumption against retrospectivity for orders that serve a prophylactic purpose, the court said (at para. 46):

> "The exception does, however, appear to be applicable only where a prejudicial sanction is imposed, not for penal purposes, but as a prophylactic measure to protect society against future wrongdoing by that person. While the imposition of such sanctions may, incidentally, inflict hardship on the wrongdoer, the infliction of such hardship is not the goal."

¶ 35 In *Strother v. 3464920 Canada Inc.*, 2007 SCC 24 the Supreme Court of Canada held that disgorgement orders serve a prophylactic purpose, noting that "the objective is to preclude the fiduciary from being swayed by considerations of personal interest." The court goes on to say that such orders "teaches faithless fiduciaries that conflicts do not pay. The prophylactic purpose thereby advances the policy of equity . . . "

¶ 36 Although *Strother* is about civil disgorgement orders against fiduciaries, the reasoning, in our opinion, applies equally well to administrative disgorgement orders under section 161(1)(g). Those orders serve to deter persons from illegal activity by removing the incentive of profiting from illegal misconduct. Section 161(1)(g) does not have punishment as its objective. It removes from contravening parties money not rightfully theirs, thus advancing the policy of ensuring that those who contravene securities laws do not profit from their misconduct, and that money obtained by contravening the Act is returned.

¶ 37 We conclude that we are free to make orders under sections 161(1)(d) and (g) as they now read, if appropriate. Would it be unfair to do so in the context of this hearing?

¶ 38 The amendments to section 161(1) came into force after the respondents' misconduct had occurred, and after the executive director issued the notice of hearing. However, they came into force about seven months before the executive director issued the amended notice of hearing on June 27, 2008, and about 13 months before the hearing started. The respondents had ample notice of the potential orders that could be made against them. In these circumstances, it would not be unfair to apply section 161(1) as amended.

¶ 39 The respondents' conduct is well over the threshold where permanent bans from our markets are appropriate. Their conduct also demands that the public be protected by ensuring those bans be as broad as possible. We are making the appropriate orders under sections 161(1)(b) and (d).

¶ 40 The respondents also obtained funds through their contravention of the Act. We are therefore making appropriate orders under section 161(1)(g).

¶ 41 Section 161(1)(g) says:

> 161(1) If the commission . . . considers it to be in the public interest, [it] may order . . .
>
> (g) if a person has not complied with this Act . . . that the person pay to the commission any amount obtained . . . directly or indirectly, as a result of the contravention . . . .

¶ 42 In our Findings, we noted the challenge in accounting for all of the US$16 million that Manna fraudulently took from investors. Manna kept no proper records or accounts, it used bank accounts in the names of other entities, it conducted much of its business in cash, and many relevant records are located offshore. Although Commission staff could trace about 80% of investor funds through numerous bank

accounts in British Columbia and Costa Rica, they could trace only 58% to identified recipients. Even when a recipient was identified, the reason for the payment or its ultimate destination was often unclear.

¶ 43 That said, it is not necessary, in making orders under section 161(1)(g), to trace investor funds into the hands of the respondents. We have found that the individual respondents committed a large-scale, deliberate, and well-organized fraud in contravention of the Act. They obtained US$16 million as a result of the contravention. None of that money was used in the manner they told investors it would be used.

¶ 44 Each respondent contravened the Act. We described the role of each of the individual respondents in the Findings. Each of their individual contraventions, directly or indirectly, resulted in the investment of US$16 million in the Manna scheme. Under section 161(1)(g), we may order each of them to pay to the Commission that amount: it is the amount obtained, directly or indirectly, as a result of their individual contraventions of the Act.

Orders under section 162

¶ 45 Section 162 was also amended after the respondents began contravening the Act. On May 18, 2006 section 162 was amended to increase the maximum administrative penalty the Commission can order from $250,000 to $1 million per contravention.

¶ 46 The respondents perpetrated significant and repeated contraventions of the Act after the amendment came into force. After May 18, 2006, the respondents raised over US$10 million in contravention of sections 34(1) and 61(1), made misrepresentations in contravention of section 50(1)(d), and committed fraudulent acts in contravention of sections 57(b) and 57.1(b).

¶ 47 All of these contraventions after May 18, 2006 were a continuation of the same fraudulent Manna scheme that was underway, and the same pattern of blatant contraventions by the respondents of sections 34(1), 61(1), 50(1)(d), 57(b), and 57.1(b), since at least January 2005. Because the amendment to section 162 came into force during the respondents' continuous and repeated contraventions of the Act, there is no issue of retrospectivity. We can apply section 162 as it now reads.

¶ 48 Neither is there any issue of fairness – the notice of hearing was issued a little over a month after the amendments came into force.

¶ 49 Section 162 allows us to order payment of the maximum administrative penalty for each contravention. We found that each of the respondents contravened four sections of the Act (treating the two fraud sections, 57(b) and 57.1(b) as one). The

respondents contravened all of those sections in their dealings with hundreds of clients. They also contravened those sections multiple times in their dealings with many clients. There are therefore hundreds, if not thousands, of contraventions for which we could order an administrative penalty.

¶ 50 Rather than deal with each of the respondents' contraventions separately, we have considered their conduct globally, and are making orders under section 162 that impose an administrative penalty for all of their respective contraventions.

¶ 51 In amending section 162, the Legislature quadrupled the maximum penalty and authorized the maximum to be applied "per contravention". It seems clear that the Legislature's intent was that the Commission have the power to impose significant administrative penalties in the public interest where appropriate in the circumstances.

¶ 52 In *Thow* 2007 BCSECCOM 758 the Commission first applied the new maximum penalty in section 162. It said, "We anticipate future panels will apply section 162 in varying ways, depending on what is appropriate in the circumstances of the cases before them." This is appropriate. With the power to order administrative penalties at the rate of $1 million per contravention, each panel will have to consider carefully the circumstances of the case before it and make section 162 orders appropriate to those circumstances.

¶ 53 The individual respondents deliberately disregarded the most important fundamentals of our system of regulation. Their activities were at the most serious end of the range of misconduct. They inflicted significant harm on investors. They damaged the integrity of our capital markets. They enriched themselves at the expense of the investors, who lost between US$10 million and US$13 million. In these circumstances, we are making orders based on the upper limit – US$13 million. To provide an appropriate deterrent, we have doubled that amount and allocated that total penalty among the respondents in proportion to what we consider their relative culpability.

¶ 54 McLeod was the mastermind, so attracts individual consideration. Fox and Rosiek were equals in the scheme and so should attract identical penalties. Vaughan's role was slightly less central, but his prior conduct offsets any mitigation of penalty for that reason – he must have been aware that what he was doing was wrong.

¶ 55 As noted above, each of the respondents committed hundreds of contraventions, so the penalty we are ordering against each respondent, when calculated based on the number of contraventions, is far smaller than the maximum penalty allowed for each contravention.

¶ 56 The contraventions by Manna Trading, Manna Foundation, Legacy Capital, and Legacy Trust would usually result in a significant administrative penalty. However, in the circumstances of this case, ordering administrative penalties against these entities seems to serve no useful purpose.

¶ 57 Our orders under sections 161(1)(g) and 162 are in Canadian dollars. At the time of this decision, the Canada and US dollars were close to par.

IV Orders

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

McLeod

1. under section 161(1)(b) of the Act, that McLeod cease trading permanently, and is prohibited permanently from purchasing, securities or exchange contracts;

2. under section 161(1)(d)(i), that McLeod resign any position he holds as a director or officer of an issuer, registrant or investment fund manager;

3. under section 161(1)(d)(ii), that McLeod is prohibited permanently from becoming or acting as a director or officer of any issuer, registrant or investment fund manager;

4. under section 161(1)(d)(iii), that McLeod is prohibited permanently from becoming or acting as a registrant, investment fund manager or promoter;

5. under section 161(1)(d)(iv), that McLeod is prohibited permanently from acting in a management or consultative capacity in connection with activities in the securities market;

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

7. under section 161(1)(g), that McLeod pay to the Commission $16 million, being the amount obtained, directly or indirectly, as a result of his contraventions of the Act;

8. under section 162, that McLeod pay an administrative penalty of $8 million;

Vaughan

9. under section 161(1)(b), that Vaughan cease trading permanently, and is prohibited permanently from purchasing, securities or exchange contracts;

10. under section 161(1)(d)(i), that Vaughan resign any position he holds as a director or officer of an issuer, registrant or investment fund manager;

11. under section 161(1)(d)(ii), that Vaughan is prohibited permanently from becoming or acting as a director or officer of any issuer, registrant or investment fund manager;

12. under section 161(1)(d)(iii), that Vaughan is prohibited permanently from becoming or acting as a registrant, investment fund manager or promoter;

13. under section 161(1)(d)(iv), that Vaughan is prohibited permanently from acting in a management or consultative capacity in connection with activities in the securities market;

14. under section 161(1)(d)(v), that Vaughan is prohibited permanently from engaging in investor relations activities;

15. under section 161(1)(g), that Vaughan pay to the Commission $16 million, being the amount obtained, directly or indirectly, as a result of his contraventions of the Act;

16. under section 162, that Vaughan pay an administrative penalty of $6 million;

McMordie/Fox

17. under section 161(1)(b), that McMordie, also known as Fox, cease trading permanently, and is prohibited permanently from purchasing, securities or exchange contracts;

18. under section 161(1)(d)(i), that McMordie, also known as Fox, resign any position he holds as a director or officer of an issuer, registrant or investment fund manager;

19. under section 161(1)(d)(ii), that McMordie, also known as Fox, is prohibited permanently from becoming or acting as a director or officer of any issuer, registrant or investment fund manager;

20. under section 161(1)(d)(iii), that McMordie, also known as Fox, is prohibited permanently from becoming or acting as a registrant, investment fund manager or promoter;

21. under section 161(1)(d)(iv), that McMordie, also known as Fox, is prohibited permanently from acting in a management or consultative capacity in connection with activities in the securities market;

22. under section 161(1)(d)(v), that McMordie, also known as Fox, is prohibited permanently from engaging in investor relations activities;

23. under section 161(1)(g), that McMordie, also known as Fox, pay to the Commission $16 million, being the amount obtained, directly or indirectly, as a result of his contraventions of the Act;

24. under section 162, that McMordie, also known as Fox, pay an administrative penalty of $6 million;

Rosiek

25. under section 161(1)(b), that Rosiek cease trading permanently, and is prohibited permanently from purchasing, securities or exchange contracts;

26. under section 161(1)(d)(i), that Rosiek resign any position she holds as a director or officer of an issuer, registrant or investment fund manager;

27. under section 161(1)(d)(ii), that Rosiek is prohibited permanently from becoming or acting as a director or officer of any issuer, registrant or investment fund manager;

28. under section 161(1)(d)(iii), that Rosiek is prohibited permanently from becoming or acting as a registrant, investment fund manager or promoter;

29. under section 161(1)(d)(iv), that Rosiek is prohibited permanently from acting in a management or consultative capacity in connection with activities in the securities market;

30. under section 161(1)(d)(v), that Rosiek is prohibited permanently from engaging in investor relations activities;

31. under section 161(1)(g), that Rosiek pay to the Commission $16 million, being the amount obtained, directly or indirectly, as a result of her contraventions of the Act;

32. under section 162, that Rosiek pay an administrative penalty of $6 million;

Manna Trading, Manna Foundation, Legacy Capital, Legacy Trust

33. under section 161(1)(b), that Manna Trading, Manna Foundation, Legacy Capital, Legacy Trust cease trading permanently, and are prohibited permanently from purchasing, securities or exchange contracts;

34. under section 161(1)(b), that all persons cease trading permanently, and are prohibited permanently from purchasing, any securities of Manna Trading, Manna Foundation, Legacy Capital, Legacy Trust;

35. under section 161(1)(g), that Manna Trading, Manna Foundation, Legacy Capital, and Legacy Trust each pay to the Commission $16 million, being the amount obtained, directly or indirectly, as a result of their respective contraventions of the Act; and

36. that the aggregate amount paid to the Commission under paragraphs 7, 15, 23, 31, and 35 must not exceed $16 million.

¶ 59 October 22, 2009

For the Commission

Brent W. Aitken
Vice Chair

David J. Smith
Commissioner

Shelley C. Williams
Commissioner

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

Citation: Re DominionGrand, 2019 BCSECCOM 335 Date: 20190920

DominionGrand II Mortgage Investment Corporation, DominionGrand Investment Fund Inc., Donald Bruce Wilson, David Scott Wright and Patrick K. Prinster

Panel	Nigel P. Cave	Vice Chair
	Judith Downes	Commissioner
	George C. Glover, Jr.	Commissioner
Hearing Date	August 28, 2019	
Date of Decision	September 20, 2019	
Appearing		
Derek Chapman Deborah Flood	For the Executive Director	
Patrick K. Prinster	For himself	
Donald Bruce Wilson	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 made on April 30, 2019 (2019 BCSECCOM 150) are part of this decision.

[2] We found that:

(a) DominionGrand II Mortgage Investment Corporation (MIC II) contravened section 57(b) of the Act with respect to 19 investors for $610,134[1];

[1] During oral submissions, counsel for the executive director indicated that our findings contained an error in paragraph 100 and that the proper numbers should have referenced 18 contraventions of section 57(b) of the Act with respect to $604,530. We agree that the numbers in paragraph 100 of our Findings were incorrect and that the numbers provided by the executive director are the correct numbers. Our decision is based on the corrected figures.

(b) DominionGrand Investment Fund Inc. (MIC III) contravened section 57(b) of the Act with respect to 21 investors for $506,693;

(c) each of David Scott Wright, Donald Bruce Wilson and Patrick K. Prinster contravened section 57(b) of the Act with respect to 19 investors for $610,134; and

(d) both Wright and Prinster contravened section 57(b) of the Act with respect to 21 investors for $506,693.

[3] Wright, Wilson, Prinster and the executive director provided written submissions on the appropriate sanctions in this case. Wilson, Prinster and the executive director provided oral submissions on the appropriate sanctions in this case.

II. Position of the Parties

[4] The executive director sought the following orders under sections 161 and 162 of the Act:

(a) orders providing for permanent market prohibitions under section 161 of the Act against each of the respondents;

(b) orders under section 161(1)(g) of the Act that:
- MIC II, Wright, Wilson and Prinster be jointly and severally liable to pay $567,083 to the Commission; and
- MIC III, Wright and Prinster be jointly and severally liable to pay (in the case of Wright and Prinster, a further) $500,961;

(c) orders under section 162 of the Act that:
- Wright and Prinster pay an administrative penalty of between $400,000 and $500,000; and
- Wilson pay an administrative penalty of between $200,000 and $250,000.

[5] The individual respondents did not suggest sanctions that they felt would be appropriate in the circumstances. As will be discussed in greater detail below, they did make general submissions that the sanctions sought by the executive director were excessive and not in the public interest.

[6] In his written and oral submissions, Wilson asked the panel to consider carve outs to any market prohibitions that we might impose to allow him to be: a) registered in some capacity under the Act; and b) a director, officer and shareholder in a company in which all of the other directors, officers and shareholders are members of his family or a "close group".

[7] During his oral submissions, Prinster appeared to suggest that he did not think that it was appropriate to ban him from acting as a director or officer of a company.

III. Analysis

A. Factors

[8] 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.

[9] 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

[10] 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".

[11] Notwithstanding that, the fraud in this case was not the most egregious form of fraud that this Commission sees. This case involved the diversion of investor funds from the purpose represented to the investors (to be invested principally in mortgages secured against real estate). Investor funds were, for the most part, diverted to companies related to the corporate respondents. We had little evidence of the purpose to which those funds were put nor, as will be discussed below, was there evidence of direct personal enrichment of the individual respondents. The evidence, such as it was, suggested that all of the misconduct occurred, in the broad sense, within the context of the respondents carrying out a real business and all of this differentiates the seriousness of the

misconduct, to some extent, from cases of fraud such as those which involve Ponzi schemes, direct theft of investor funds or wholly fictitious securities.

Harm to investors/enrichment

[12] There is no question that investors have been substantially harmed by the respondents' misconduct. All of the approximately $1.1 million raised from investors, other than a small amount which was paid to investors as purported returns, has been lost. We heard testimony from two investors as to the financial and other impacts of these losses.

[13] The corporate respondents were enriched by their misconduct. They were the direct recipients of the investors' funds.

[14] Records from the corporate respondents' bank accounts showed that the vast majority of these funds were paid to related corporations. During the hearing, the individual respondents submitted that these related companies were paid these amounts as reimbursements of start-up costs associated with the businesses of the corporate respondents. However, there was no evidence tendered in support of that assertion. There was also no evidence that any of the individual respondents (other than an immaterial amount) were enriched, directly or indirectly, by this diversion of investor funds. There was no evidence that the individual respondents beneficially owned these related companies or any documentary evidence of what those entities did with those funds.

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

[15] Those who commit fraud, because of the *mens rea* associated with the misconduct, represent a significant risk to our capital markets.

[16] The executive director submitted that the risk posed to the capital markets by the individual respondents was heightened by the following factors:

- that a witness who was hired as the CFO of MIC II had resigned that position and expressed concerns to the individual respondents about the use of investor funds in a related mortgage investment corporation that the individual respondents were running;

- notwithstanding the concerns expressed by this witness, the individual respondents continued to operate the corporate respondents in a similar manner (which resulted in the diversion of investor funds from their intended purpose);

- the Commission cease traded MIC II in December 2012 as a result of the offering memorandum associated with the sale of shares in MIC II not being in compliance with securities laws; and

- rather than rectify the deficiencies associated with the offering memorandum for MIC II, Wright and Prinster then commenced selling shares in MIC III.

[17] These factors are additional "red flags" as to the potential risk that the individual respondents pose to our capital markets as, despite warnings and concerns expressed to them from multiple sources, the individual respondents continued in their non-compliant conduct.

[18] We are also concerned about the role that the individual respondents played as actual or *de facto* officers and directors of the corporate respondents[2]. At the heart of this case was the diversion of corporate funds by the corporate respondents. That diversion occurred at the direction and control of the individual respondents. This case highlights the very specific risks that the individual respondents pose when they act in the capacity as directors and officers of corporate entities.

Mitigating or aggravating factors; past misconduct

[19] None of the respondents has any history of securities related misconduct.

[20] The executive director submitted that there were no aggravating or mitigating circumstances.

[21] The individual respondents submitted that the following should be considered mitigating factors:

- they provided disclosure to investors relating to the risks associated with investing in the corporate respondents;
- they complied with cease trade orders issued by the Commission with respect to trading in securities of MIC II and MIC III;
- they entered into an undertaking with the Commission to cease raising funds for real estate related entities and have since complied with the terms of the undertaking; and
- the misconduct in this case was simply a failure to provide the investors with better disclosure related to the use of investor funds.

[22] We do not agree that any of these factors represent a mitigating factor. Compliance with the cease trade orders and their undertaking is merely compliance, which is not a mitigating factor. We reject the notion that the misconduct in this case was simply a failure to provide better disclosure to investors. As set out in our Findings, all of the requisite elements of fraud were found in this case, including, most importantly with respect to this point, the subjective knowledge of the *actus reus*.

[23] Wilson filed an affidavit setting out his current financial circumstances. He submitted that we should consider his financial circumstances as a mitigating factor. We will address this issue in further detail below.

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[2] Prinster was never a director or officer of either of the corporate respondents, but we found that he was a *de facto* officer and/or director of both.

Specific and general deterrence

[24] 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.

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

Prior orders in similar circumstances

[26] The executive director directed us to two decisions of the Commission as guidance as to the appropriate sanctions in this case: *Re Zhong*, 2015 BCSECCOM 383 and *Re Braun*, 2019 BCSECCOM 65.

[27] 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.

[28] In *Zhong*, the respondent was found to have engaged in trading without being registered under the Act, made misrepresentations and committed fraud. The respondent represented to investors that he would invest their funds in foreign exchange trading. While the investors' funds were deposited into currency trading accounts, the respondent deceived investors about the risks of their investment and his compensation. In total, 14 investors were found to have lost approximately $400,000 as a consequence of the respondent's misconduct. The panel made orders against Zhong imposing permanent market prohibitions, a disgorgement order of approximately $400,000 and an administrative penalty of $250,000.

[29] While the quantum of the investors' losses in this case were more significant than in either of these two decisions, we find the nature of the respondents' misconduct to be different, and less serious, than that of the respondents in *Braun* and *Zhong*. In *Braun*, the fraudulent misconduct resulted in the misappropriation of investor funds for the personal use of the individual respondents. Further, there was a significant aggravating factor in that the respondent was found to have preyed upon a vulnerable investor. In *Zhong,* there were findings of significant misconduct in addition to fraud (i.e. the respondent's unregistered trading and misrepresentations). Given the distinction between these cases and the one before us, our sanctions in this case must reflect the difference in the seriousness of the misconduct from that of *Braun* and *Zhong*.

C. Analysis of appropriate orders

Market prohibitions

[30] The executive director submitted that broad market prohibitions of permanent duration against each of the respondents was appropriate in the circumstances.

[31] We agree with the executive director's submissions on this point. As noted above, we view those who commit fraud to represent a significant risk to our capital markets. In this case, there are additional "red flags" in the conduct of the respondents that heighten our concern in this regard.

[32] Wilson and Prinster submitted that we should provide for carve-outs from any market prohibitions that would allow them to act as directors and/or officers. Wilson was more specific and submitted that the carve-out be limited to acting as a director, officer and shareholder in a company in which all of the other directors, officers and shareholders are members of his family or a "close group". Wilson also submitted that we should provide for a carve-out to allow him to be registered under the Act.

[33] The requests for these carve-outs were founded on submissions that permanent prohibitions on them acting as a director and/or officer of a company and a registrant would prevent the individual respondents from earning a living, from repaying investors and paying any administrative penalties that we might impose.

[34] We do not agree with Wilson's and Prinster's submissions in this regard.

[35] There was no evidence that broad market prohibitions would materially impair the individual respondents' ability to make a living. None of the individual respondents was registered under the Act nor have they been during any recent period of time. None of the individual respondents is or has been employed in the capital markets. There was abundant evidence that they were all experienced businessmen in various real estate related fields.

[36] With respect to their request that they be allowed to act as directors and/or officers (even in the limited capacity suggested by Wilson), we have specific and heightened concern about the risk that the individual respondents pose to our capital markets when acting as an actual or *de facto* director and/or officer. The misconduct in this case was carried out while the three of them were acting in that capacity in "closely held" and controlled companies. The diversion of corporate assets while acting in a fiduciary capacity was at the heart of this case. As a consequence, we are not prepared to grant any of the carve-outs requested by individual respondents. We note that section 171 of the Act allows respondents to apply for a variance of our orders at some point in the future. This would provide the individual respondents with an opportunity, at that time, to demonstrate why a specific variance might not be prejudicial to the public interest in the specific facts and circumstances of that application.

[37] Our orders will provide broad market prohibitions against each of the respondents of a permanent duration.

Section 161(1)(g) orders

[38] The British Columbia Court of Appeal in *Poonian v. British Columbia Securities Commission*, 2017 BCCA 207, 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.

[39] 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.

[40] 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?

[41] The evidence established that the corporate respondents directly obtained the following amounts raised from investors through their respective fraudulent misconduct:

- MIC II - $604,530
- MIC III - $506,693

[42] Accordingly, we could make an order under section 161(1)(g) of the Act against MIC II in the amount of $604,530 and against MIC III in the amount of $506,693.

[43] 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 MIC II returned $43,051 to investors and MIC III returned $5,732 to investors. We will reduce our orders against the corporate respondents under section 161(1)(g) by those amounts to $561,479 and $500,961, respectively.

[44] There was no evidence that the individual respondents directly obtained any of the amounts derived from the misconduct in this case. However, as noted above in paragraph 5 of the principles from *Poonian*, section 161(1)(g) specifically allows us to make orders (including joint and several orders) in circumstances where a respondent has "indirectly" obtained amounts from their misconduct.

[45] This case raises the sometimes challenging issue of when is it appropriate for us to consider that a respondent has indirectly obtained amounts derived from misconduct?

[46] The evidence was clear that Wilson, Wright and Prinster were the actual or *de facto* directors and officers of MIC II and controlled all of its affairs and its bank accounts. It was also clear that Wright and Prinster were the actual or *de facto* directors and officers of MIC III and controlled all of its affairs and its bank accounts.

[47] However, what is lacking in this case is any evidence that any of the individual respondents personally benefitted, directly or indirectly, from their fraudulent misconduct. This is not a case where the corporate respondents can be said to be the *alter egos* of the individual respondents. Further, there was no evidence that any of the individual respondents had any economic interest in either MIC II or MIC III. There was no evidence of who owned or controlled any of the entities to which MIC II and MIC III forwarded investor funds and no evidence to suggest that any of the individual respondents personally benefitted, directly or indirectly, from any of those funds.

[48] A review of the principles set out by the Court of Appeal in *Poonian* (and set out above in paragraph 39) sets out that in order for us to find that an individual respondent indirectly obtained funds derived from misconduct (and thus make an order under section 161(1)(g)) there must be evidence of more than just direction and control of entities which commit the misconduct. Indeed, the purpose of section 161(1)(g), as outlined by the Court of Appeal, is to ensure the person at issue "does not retain the "benefit" of their wrongdoing". There must be some evidence or indicia of personal benefit to the respondent before an order can be made under this section. In this case, there was no evidence of any "benefit" derived by the individual respondents, and we are therefore unable to make any orders under section 161(1)(g) against any of the individual respondents.

Step 2 – Is it in the public interest to make a section 161(1)(g) order?

[49] Given the finding above, it is unnecessary to consider step 2 of this analysis.

Administrative penalties

[50] The executive director asked that we make orders under section 162 against the individual respondents as follows:

- Wright and Prinster pay an administrative penalty of between $400,000 and $500,000; and

- Wilson pay an administrative penalty of between $200,000 and $250,000;

and the executive director cited the decisions of *Braun* and *Zhong* in support of those amounts.

[51] The executive director did not seek an order under section 162 against either of the corporate respondents.

[52] As noted above, Wilson provided affidavit evidence which set out his limited income and financial circumstances. That evidence was not challenged by the executive director at the sanctions hearing and we accept that evidence.

[53] Evidence of a respondent's ability (or lack thereof) to pay financial sanctions is something that we must consider and we have taken that into account in determining the appropriate financial sanctions to order against Wilson, but his financial circumstances are not, in and of themselves, determinative of what financial sanctions should be ordered. Impecuniosity is clearly relevant to issues of specific deterrence but of no relevance to issues of general deterrence.

[54] As set out above, we find that the individual respondents' misconduct in this case was less serious (or lacked an aggravating factor) than that of the respondents in *Braun* and *Zhong*. Our orders take that into account. Our orders also take into account the fact that Wilson was not involved in the misconduct relating to MIC III and his current financial circumstances.

[55] Other important considerations in this case include that significant investor losses and the lack of evidence of personal enrichment.

[56] Taking all of this into account we consider that orders under section 162 of $250,000 against each of Wright and Prinster and $150,000 against Wilson to be in the public interest and appropriate and proportionate in the circumstances.

IV. Orders

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

Wilson

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

(b) Wilson 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 the 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; and

(c) Wilson pay to the Commission an administrative penalty of $150,000 under section 162 of the Act;

Wright

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

(e) Wright 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 the 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; and

(f) Wright pay to the Commission an administrative penalty of $250,000 under section 162 of the Act;

Prinster

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

(h) Prinster 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 the 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; and

(i) Prinster pay to the Commission an administrative penalty of $250,000 under section 162 of the Act;

MIC II

(j) MIC II 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 the 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; and

(k) MIC II pay to the Commission $561,479 pursuant to section 161(1)(g) of the Act; and

MIC III

(l) MIC III 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 the 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; and

(m) MIC III pay to the Commission $500,961 pursuant to section 161(1)(g) of the Act.

September 20, 2019

For the Commission

Nigel P. Cave
Vice Chair

Judith Downes
Commissioner

George C. Glover, Jr.
Commissioner

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"