COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Poonian v. British Columbia Securities Commission,* 2017 BCCA 207

Date: 20170531
Docket: CA42714; CA42715; CA42718

Docket: CA42714

Between:

Thalbinder Singh Poonian and Shailu Sharon Poonian

Appellants

And

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

Respondents

- and -

Docket: CA42715

Between:

Manjit Sihota and Perminder Sihota

Appellants

And

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

Respondents

- and -

Docket: CA42718

Between:

Michael Patrick Lathigee and Earle Douglas Pasquill

Appellants

And

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

Respondents

Before: The Honourable Madam Justice Saunders
The Honourable Madam Justice A. MacKenzie
The Honourable Mr. Justice Fitch

On appeal from: Orders of the British Columbia Securities Commission dated March 13, 2015 (*Re Poonian*, 2015 BCSECCOM 96) and March 16, 2015 (*Re Lathigee,* 2015 BCSECCOM 78)

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No one appearing for the Respondent, the British Columbia Securities Commission	
Place and Date of Hearing:	Vancouver, British Columbia March 29 and 30, 2017
Place and Date of Judgment:	Vancouver, British Columbia May 31, 2017

Written Reasons by:
The Honourable Madam Justice MacKenzie

Concurred in by:
The Honourable Madam Justice Saunders
The Honourable Mr. Justice Fitch

Summary:

The Commission found the appellants contravened s. 57 of the Securities Act, and pursuant to s. 161(1)(g) of that Act, made joint and several orders to disgorge. The appellants appeal from the s. 161(1)(g) orders on these grounds: (1) the statutory language does not permit orders for joint and several liability; (2) the Commission had not established each of the appellants obtained an amount subject to disgorgement; and alternatively (3) the orders were unreasonable and punitive. The Poonians further contend that certain amounts should be deducted from any amount they are ordered to disgorge. HELD: the Lathigee appeal (CA42718) is dismissed; the Poonian (CA42714) and Sihota (CA42715) appeals are allowed and the matter remitted to the Commission. The statutory language only permits s. 161(1)(g) orders where the particular wrongdoer has obtained an amount, or avoided a payment or loss, directly or indirectly, as a result of that wrongdoer's contravention. A wrongdoer may be found to have obtained an amount "indirectly" if he had control and direction over the person(s) with whom he is held jointly and severally liable. Further, the "amount obtained" does not contemplate deductions or import a profit element. The joint and several disgorgement orders imposed upon Lathigee and Pasquill were proper as the Commission found they had control and direction over the corporate entities that obtained the amount ordered disgorged. The Commission made no finding as to what amount each of the Poonians and Sihotas obtained, directly or indirectly. The s. 161(1)(g) orders imposed against them are set aside, and the matter is remitted to the Commission to make the necessary factual findings to determine whether a s. 161(1)(g) order should be made against each of them.

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Introduction

[1] Before this Court are three appeals from orders of the British Columbia Securities Commission (the "Commission") made pursuant to s. 161(1)(g) of the *Securities Act*, R.S.B.C. 1996, c. 418 (the "*Act*"), commonly referred to as disgorgement orders. The central issue on appeal is the interpretation of s. 161(1)(g), which provides:

> 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:
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> …
>
> (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;

[2] Two of these appeals, *Poonian* (CA42714) and *Sihota* (CA42715), arise from the same facts. The Commission found the Poonians and Sihotas contravened s. 57(a) of the *Act*, commonly referred to as the market manipulation provision. The third appeal, *Lathigee* (CA42718), arises from different facts. There, the Commission found Messrs. Lathigee and Pasquill committed fraud, contravening s. 57(b) of the *Act*. Section 57 provides:

> 57 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
>
> (a) results in or contributes to a misleading appearance of trading activity in, or an artificial price for, a security or exchange contract, or
>
> (b) perpetrates a fraud on any person.

[3] Liability is not in dispute on appeal.

[4] The Commission ordered, *inter alia*, the Poonians and Sihotas to disgorge, pursuant to s. 161(1)(g), $7,332,936 on a joint and several basis: *Re Poonian*, 2015

BCSECCOM 96 ["*Poonian Sanctions*"]. Similarly, the Commission ordered Lathigee and Pasquill to disgorge $21.7 million jointly and severally with certain other corporate entities controlled by them and involved in the fraud: *Re Lathigee*, 2015 BCSECCOM 78 ["*Lathigee Sanctions*"].

[5] Pursuant to s. 167(1) of the *Act*, the appellants sought leave to appeal the respective orders of the Commission. Madam Justice Fenlon only granted leave to appeal the s. 161(1)(g) orders.

[6] All three appeals were heard together and concern principally the interpretation of s. 161(1)(g) of the *Act*, and fundamentally whether the Commission may make joint and several orders pursuant to that subsection.

Background Facts

[7] In that the liability findings are not in dispute, I will only outline the salient facts. The details of the transactions and the other evidence before the Commission are provided in the liability decisions: *Re Poonian*, 2014 BCSECCOM 318 ["*Poonian Liability*"]; and *Re Lathigee*, 2014 BCSECCOM 264 [*"Lathigee Liability*"].

Poonians and Sihotas

[8] The Poonians and Sihotas were involved in the market manipulation of the shares of a publicly traded corporation, OSE Corp. ("OSE"). The Poonians and Sihotas, with a number of acquaintances and relatives (the "Secondary Participants") and a friend, Mr. Leyk, orchestrated, first, the acquisition of a majority position (88%) in OSE (primarily through two private placements in September and November 2007), and secondly, an increase in OSE's share price by trading mostly between the Poonians', the Sihotas', and the Secondary Participants' accounts. OSE's share price increased from $0.29 in November 2007 to $2.00 at the end of January 2008. Nothing else occurred around that time to explain the price increase.

[9] The Phoenix Group is a group of individuals and entities primarily engaged in debt management services helping debtors – often referred by collection agencies or

creditors – access funds in their locked-in RRSPs and retirement accounts. Generally, the Phoenix Group advised and facilitated these unsophisticated individuals in unlocking their funds and using them to invest in higher-return products. The Phoenix Group recommended OSE shares, and earned commissions from the Poonians and Sihotas for these sales. Essentially, the Phoenix Group facilitated the appellants' offloading of these shares at inflated prices to unsophisticated individuals with financial problems.

[10] OSE's share price continued to close around $2.00 between February and September 2008; from October to December 2008 the share price declined to $1.50; the share price then declined steadily to close at $0.08 on March 31, 2009. Phoenix clients suffered an estimated total book loss of around $7.1 million.

[11] Based on trading records over the relevant period of September 10, 2007 to March 31, 2009, the brokerage accounts of the Poonians, the Sihotas, Mr. Leyk and the Secondary Participants had aggregate net trading gains of $7,332,936.

[12] The Commission made findings on the extent of the involvement of each of the Poonians and Sihotas (*Poonian Liability* at paras. 149–162).

[13] As to Mr. Poonian, the Commission found he was the mastermind. He arranged the private placements to obtain control of a majority of OSE's shares, funded those purchases through various accounts, traded those shares in various accounts, and entered agreements with Phoenix Group members to pay them commissions for inducing Phoenix clients to buy OSE shares.

[14] As to Ms. Poonian, the Commission found she was actively and extensively involved in many aspects of the market manipulation. She acquired OSE shares, sold OSE shares to Phoenix clients, made and received payments to other participants in the scheme, and paid commissions to the Phoenix Group.

[15] Regarding both Sihotas, the Commission found they funded payments to Secondary Participants' accounts, made and received payments to other participants, and indirectly paid commissions to the Phoenix Group.

[16] As to Mr. Sihota only, the Commission found, as an officer of OSE he signed treasury orders to issue shares in the two private placements, he received OSE shares, traded OSE shares, received a transfer of OSE shares from a Secondary Participant, and received cheques from the Poonians and Mr. Leyk's company.

[17] Respecting Ms. Sihota only, the Commission found she received shares from the second private placement, acquired additional OSE shares by exercising warrants from the private placements, received cheques from Ms. Poonian, and allowed OSE shares to be bought and sold in her accounts as a nominee for Mr. Poonian.

[18] The Commission considered Mr. Poonian's conduct to be the most egregious, and Ms. Poonian's and Mr. Sihota's conduct to be the next most serious, essential to the scheme. It found Ms. Sihota to be the "least involved directly" in the market manipulation, but noted her effort to "cover up for the other respondents" as an aggravating factor.

Lathigee and Pasquill

[19] Lathigee and Pasquill jointly directed a group of companies called the "Freedom Investment Club" (the "FIC Group") which purported to provide members a chance to learn and develop investment skills while presenting them with the opportunity to participate in investments offered by the FIC Group.

[20] The FIC Group's primary business was real estate development, mostly in Alberta, of which the largest project was Genesis on the Lakes, a residential development ("Genesis"). In May 2007, TD Bank provided a $22.1 million credit facility to FIC Group entities for Genesis. As part of the security for the loan, TD required, among other things, that it be assigned an investment portfolio held by 0760838 BC Ltd. ("076"), an FIC Group company. The market value of the portfolio was to be maintained at a minimum value of $9 million for the life of the Genesis project.

[21] Genesis faced difficulties, including $10 million in cost overruns. In February 2008, contractors had filed liens against the development, violating a term of the TD loan prohibiting subsequent encumbrances. By early March 2008, 076 also had a $2.2 million tax bill due. The market value of the 076 portfolio fell well below $9 million – by the end of March it was at $5.9 million, at the end of April its value was $7.9 million, and by the end of May 2008, it fell to only $4.9 million. The Commission found Lathigee and Pasquill knew of the breaches of the terms of the TD credit facility, they knew that FIC would be "doomed" if TD called its loan, and they knew that it was a real possibility that could happen.

[22] Email communications and meeting minutes indicated the FIC Group faced severe cash flow problems. From February 1 through August 21, 2008, the FIC Group, through three of its investment companies, proceeded to raise $21.7 million.

[23] On March 7, 2008, Lathigee held a conference call and webcast, primarily with FIC members, to promote the distribution of promissory notes to investors in FIC Real Estate Projects Ltd. ("FIC Projects"), an FIC Group company which invested in Alberta real estate, and the issuance of shares in WBIC Canada Ltd. ("WBIC"). From the issuance of promissory notes in March, April and July 2008, $9.8 million was raised. An additional $2 million was raised in April and May 2008 through the issuance of the WBIC shares. The Commission found that what Lathigee said in the conference call was untrue and grossly misleading, and that he omitted any mention of the important fact of FIC Group's cash flow problems and financial condition. This dishonesty and failure to disclose FIC Group's financial condition formed the basis for the first finding of fraud against Lathigee and Pasquill.

[24] Another FIC Group investment was FIC Foreclosure Fund Ltd. ("FIC Foreclosure"), which was promoted as investing in foreclosures of residential properties in the United States. In statements contained in a subscription agreement, an offering memorandum, and in another conference call in April 2008, Lathigee promoted his expertise and reasons for investing in U.S. foreclosures through FIC Foreclosure. From February through August 2008, FIC Foreclosure raised $9.9

million. However, instead of making investments in foreclosure properties in the U.S., Lathigee and Pasquill used at least part of these funds to meet their short-term cash needs by extending unsecured loans to other FIC Group companies to pay liabilities that included Genesis's contractors and 076's tax liability. This misuse of funds formed the basis for the second finding of fraud against them.

[25] The Commission noted in *Lathigee Sanctions* at para. 8, "The magnitude of the fraud perpetrated in this case is among the largest in British Columbia history."

Issues

[26] The appellants all advance the argument that s. 161(1)(g) does not permit the Commission to make joint and several orders. The appellants also argue s. 161(1)(g) requires the Commission to establish that the person against whom the order is made in fact obtained the amount ordered to be disgorged. Some of the appellants, namely the Poonians, further submit that amounts related to trading expenses and amounts paid to the Commission by the Secondary Participants under a separate settlement order should be deducted from the amount the Poonians are ordered to pay.

[27] Alternatively, the appellants variously say the Commission's orders were unreasonable, punitive, clearly wrong, inequitable, unsupported by the evidence, or otherwise inappropriate in the circumstances of their cases. For example, the Sihotas argue there was no finding they ever obtained any amount as a result of their failure to comply with or contravention of the *Act*, regulations or decision of the Commission. The Poonians contend they received less than the ordered amount, if anything, and the Commission failed to consider that a substantial sum was recovered from other participants (primarily, members of the Phoenix Group). Lathigee and Pasquill similarly argue they never received any of the amounts ordered, save for a much smaller sum paid to them as salary.

[28] Common to all three appeals are the threshold statutory interpretation issues concerning joint and several disgorgement orders, who obtained any amount, and

whether deductions are allowed. There are also the respective complaints about the particular orders based on the circumstances of each appellant.

[29] Therefore, I find it useful to reframe the issues as follows:

1. Does s. 161(1)(g) of the *Act* permit certain amounts to be deducted from the amount ordered to be disgorged?

2. Does s. 161(1)(g) require the "amount obtained" to be obtained by the person against whom the order is made?

3. Does s. 161(1)(g) permit joint and several orders, and if so, under what circumstances?

4. Were the orders made in these cases otherwise appropriate?

Standard of Review

[30] The parties agree there is a presumption that the reasonableness standard applies where the issue concerns an administrative tribunal's interpretation of its home statute: *Edmonton (City) v. Edmonton East (Capilano) Shopping Centres Ltd.,* 2016 SCC 47 at para. 22. The presumption of reasonableness may be rebutted if the context indicates the Legislature intended correctness to apply: *Edmonton (City)* at para. 32.

[31] The appellants submit the presumption of reasonableness is rebutted here, and the applicable standard of review is correctness. They rely on *Rogers Communications Inc. v. Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 35, for the proposition that where the legislation provides concurrent jurisdiction to both the tribunal and the court to consider the same legal question at first instance, there is an inference the legislative intent was not to recognize the tribunal's superior expertise in respect of that question.

[32] The appellants point to s. 155.1(b) of the *Act*, which provides:

> 155.1 If the court finds that a person has committed an offence under section 155, the court may make an order that
>
> …
>
> (b) the person pay to the commission any amount obtained, or payment or loss avoided, directly or indirectly, as a result of the offence.

[33] The appellants submit the language in s. 155.1(b) is analogous to that in s. 161(1)(g). In essence, s. 155.1(b) is the "court version" of a disgorgement order. The appellants contend it is clear the Legislature conferred jurisdiction on both the court and the Commission to make orders on the same terms. The congruent language used in both sections, central to the question on this appeal ("the person pay to the commission any amount obtained, or payment or loss avoided, directly or indirectly, as a result of…") suggests the sections should be interpreted consistently. The appellants also note a contravention of s. 57 of the *Act* constitutes an "offence" under s. 155 for the purposes of s. 155.1(b).

[34] The Executive Director of the British Columbia Securities Commission submits the standard of review is reasonableness and *Rogers* is distinguishable. The Executive Director argues the issues raised by s. 161(1)(g) are distinct from those under s. 155.1(b) because an order may be made, in the opening language of s. 161(1), "If the commission or the executive director considers it to be in the public interest…" For its part, s. 155.1 does not require the court to consider the public interest. The Executive Director argues this signals a different "statutory context".

[35] The Executive Director submits *Rogers* addressed a specific situation unique to the Copyright Board's structure. Unlike the Copyright Board, the Commission is a "discrete and special administrative regime", charged under the *Act* to protect the public interest in relation to investors and capital markets. (See *Rogers* at para. 15.)

[36] The Executive Director relies on *McLean v. British Columbia (Securities Commission)*, 2013 SCC 67. The Executive Director submits that Justice Moldaver, for a majority of the Court, confirmed that the Commission has the discretion to

resolve any statutory uncertainty in s. 161(1)(g) by adopting "any interpretation that the statutory language can reasonably bear" (*McLean* at para. 40).

[37] I cannot agree with the Executive Director's characterization of the reasoning in *McLean.* Moldaver J., for the majority, rejected an argument, premised on *Rogers*, that correctness applied to a review of the Commission's interpretation of s. 159 (which concerns limitation periods) as applied to s. 161(6)(d) (which concerns proceedings against persons who have entered settlement agreements) – s. 161(1)(g) was not discussed. In *McLean*, the interpretive exercise involved whether "the events" that trigger the running of the limitation period in the context of settlement agreements are (i) the underlying misconduct giving rise to the settlement agreement, or (ii) the settlement agreement itself (*McLean* at para. 3). Moldaver J. distinguished *Rogers*:

> [24] This case is different. As Rothstein J. made clear in *Rogers*, it was the fact that both the tribunal and the courts "may each have [had] to consider the same legal question at first instance" that "rebutt[ed] the presumption of reasonableness review" (para. 15 [emphasis of Moldaver J.]). Here, **the legal question is the interpretation of s. 159 as it applies to s. 161(6)(d) — and it is *solely* the Commission that is tasked with considering that matter in the first instance. Accordingly, there is no possibility of conflicting interpretations with respect to the question actually at issue**. The logic of *Rogers* is thus inapplicable.
>
> [Emphasis in bold added.]

[38] In my view, the situation in *McLean* is distinguishable from the present one.

[39] The Executive Director takes the emphasized statement in para. 24 of *McLean* to say that here only the Commission is tasked with interpreting the words in s. 161(1)(g). While it is true s. 161(1)(g) only concerns the Commission, and in the same way s. 155.1(b) only concerns the court, what is also true is that virtually the same language – "may order … the person pay to the commission any amount obtained, or payment or loss avoided, directly or indirectly, as a result of" – appears in both sections and are both intended to provide jurisdiction to order certain persons to surrender ill-gotten amounts. The Legislature expressly chose the same language to delineate the contours of this type of order – whether made by the Commission or

the court – and the issue of what those contours are, as a matter of statutory interpretation, would be before both forums as a matter of first instance. Thus, it is *not* solely the Commission that is tasked with considering that legal interpretive question in the first instance.

[40] To be clear, the issue to be resolved on this appeal is not whether a disgorgement order would be in the public interest, nor is the issue whether there has been non-compliance with the *Act*. Those requisite elements of a s. 161(1)(g) order are not before this Court. The issue before this Court is: what does the statutory language allow and require? Does it allow joint and several orders? Does it require the Commission to establish that the person subject to the order obtained the amount to be disgorged? These questions of statutory interpretation are questions of law.

[41] In other words, the identical interpretive issue arises whether the appeal is, as here, from the Commission's orders under s. 161(1)(g), or from a court's order under s. 155.1(b).

[42] As noted above, the Executive Director submits the "statutory context" of each of these provisions is different because of the public interest requirement in s. 161, and says the tribunal and court "cannot share concurrent jurisdiction over free-floating statutory wording … extracted from various provisions and divorced from its relevant statutory context."

[43] With respect, I cannot agree with the characterization of these words as "free-floating". In my view, it is no coincidence the Legislature expressly used the same language in these two provisions, both of which provide for a particular order that has the same purpose: divesting a wrongdoer of ill-gotten amounts. While it is true the condition precedent of "public interest" is not found in the language of s. 155.1, and there are differences between what constitutes an offence in s. 155.1 and what misconduct may give rise to a s. 161(1)(g) order, those differences are not the issue here. (I note that a breach of s. 57 is captured by both s. 155.1 and s. 161(1)(g).) The question is not about "when" such an order may be made, but about "what" that

order can contain. Different considerations inform the "when", but the same question of "what" would concern both forums in respect of the same statutory language as a matter of first instance.

[44] I also note that exact language is used in only one other section of the *Act*. Apart from ss. 155.1(b) and 161(1)(g), it is also used in relation to an order for compliance under s. 157(1)(b):

> 157 (1) In addition to any other powers it may have, if the commission considers that a person has contravened or is contravening a provision of this Act or of the regulations, or has failed to comply or is not complying with a decision, and the commission considers it in the public interest to do so, the commission may apply to the Supreme Court for one or more of the following:
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> …
>
> (b) an order 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;
>
> [Emphasis added.]

[45] Section 157(1)(b) is another example of where the statutory language in question would be squarely before the court as a matter of first instance. The Supreme Court, on a s. 157(1)(b) application, would be required to interpret that language and determine what it may order. Indeed, the Legislature clearly contemplates the *Commission* putting that interpretive issue before the court for determination at first instance. Further, the "contextual" prerequisite the Executive Director relies on to differentiate s. 161(1)(g) from s. 155.1(b) (public interest consideration) is also present here.

[46] This language does not appear anywhere else in the *Act*. In all three instances where it appears, it confers on the court or the Commission the power to do the same thing: order someone to pay to the Commission ill-gotten amounts. In my view, it is clear the Legislature intended the court to interpret this language as a matter of first instance. It cannot be that, on an appeal to this Court, the Supreme Court's interpretation in making a s. 157(1)(b) order is reviewed on a correctness

standard while the Commission's interpretation of that same language in making a s. 161(1)(g) order is reviewed on a reasonableness standard.

[47] Rothstein J., for a majority of the Court in *Rogers,* articulates the concern about inconsistency as follows:

> [13] … The court will examine the same legal issues the Board may be required to address in carrying out its mandate. On appeal, questions of law decided by the courts in these proceedings would be reviewed for correctness: *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, at para. 8.
>
> [14] It would be inconsistent for the court to review a legal question on judicial review of a decision of the Board on a deferential standard and decide exactly the same legal question *de novo* if it arose in an infringement action in the court at first instance. It would be equally inconsistent if on appeal from a judicial review, the appeal court were to approach a legal question decided by the Board on a deferential standard, but adopt a correctness standard on an appeal from a decision of a court at first instance on the same legal question.

[48] The same troubling prospect of inconsistency that concerned Rothstein J. in *Rogers* would arise here were this Court to review the Commission's interpretation on a standard of reasonableness. If the Commission determined the language permitted a joint and several order, and this Court were to review that interpretation on a reasonableness standard, the result would not be reconcilable with a case where the court interpreted the language in ss. 155.1(b) or 157(1)(b) as not permitting joint and several orders, and this Court reviewed that interpretation on the correctness standard. The same language in the same statute used in provisions with the same purpose should be read consistently. To this extent, the statutory context is not different just because the body making the order is different, or where the conditions precedent (the "when") are arguably different.

[49] I recognize the Commission's important public interest mandate that informs the Commission's exercise of discretion to make an order under s. 161(1), which provides a host of tools to the Commission to use alone or in combination. I also acknowledge the Commission's superior expertise in determining what would be in the public interest, including how the *Act* should be interpreted to further those policy considerations: *Re Cartaway Resources Corp.,* 2004 SCC 26 at para. 46.

[50] I also agree with the Executive Director that the Copyright Board is in a unique situation distinct from the discrete and specialized nature of the Commission. The Commission is often the preferable arbiter in most issues concerning the *Act*, including having the interpretive upper hand, given its specialized expertise. The role of the court under the *Act* is limited, reflecting the Legislature's assignment of issues and disputes in this specialized area to a specialized body. However, in the very rare instances the *Act* grants the court power to make certain orders, and the language defining the scope of those orders is the same as the language defining the scope of the same type of order the Commission may make, the statutory interpretation exercise defining that scope must be done in a consistent manner.

[51] Unlike the provision and statutory language at issue in *McLean,* the present question is one of those rare instances where the Legislature, through its adoption of express language identical in its material respects, grants both the Commission and the court the ability at first instance to order a person to "pay to the commission any amount obtained, or payment or loss avoided, directly or indirectly, as a result of" a violation of s. 57 of the *Act*. The situation in *Rogers* arises. Whether that language means such an order – by whichever body making it – can be a joint and several order and whether it requires establishing the person against whom the order is made obtained the amount, are questions of law, reviewable on the correctness standard.

[52] I also recognize the fact this is a statutory appeal requiring leave does not in itself lead to a correctness review: *Edmonton (City)*. Instead, the exercise is to determine whether the Legislature intended the standard of review to be correctness. For the reasons explained, I conclude the Legislature did so intend.

[53] Therefore, I agree with the appellants that *Rogers* is determinative in this case, and the proper standard of review on the statutory interpretation question is correctness.

Interpretation of s. 161(1)(g)

[54] This is a case of statutory interpretation. Therefore, I propose first to review the guiding principles on statutory interpretation generally and in the securities regulation context specifically. I will then turn to the Commission's case law on s. 161(1)(g).

Guiding Principles

[55] This Court recently summarized the seminal principles in *British Columbia v. Philip Morris International, Inc.*, 2017 BCCA 69:

> [23] … The correct approach to statutory interpretation is long settled. It was recently expressed in *B.C. Freedom of Information and Privacy Association v. British Columbia (Attorney General),* 2017 SCC 6:
>
> > [21] …This follows from the application of our long-accepted approach to statutory interpretation, namely that "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament": *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559, at para. 26, quoting both E. A. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87, and *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 21.
>
> [24] In *Canada Trustco Mortgage Co. v. Canada,* 2005 SCC 54, the Court said at para. 10:
>
> > [10] …The interpretation of a statutory provision must be made according to a textual, contextual and purposive analysis to find a meaning that is harmonious with the Act as a whole. When the words of a provision are precise and unequivocal, the ordinary meaning of the words play a dominant role in the interpretive process. On the other hand, where the words can support more than one reasonable meaning, the ordinary meaning of the words plays a lesser role. The relative effects of ordinary meaning, context and purpose on the interpretive process may vary, but in all cases the court must seek to read the provisions of an Act as a harmonious whole.

[56] Although primarily concerned with the definition of "security" in the *Act*, the Court's comments in *Pacific Coast Coin Exchange v. Ontario Securities* Commission, [1978] 2 S.C.R. 112, on the remedial and protective nature of securities legislation and the requirement for broad construction sensitive to economic reality are instructive (at 126–27):

> I have alluded to the policy of the legislation. It is clearly the protection of the public as was said by Hartt J. in *Re Ontario Securities Commission and Brigadoon Scotch Distributors (Canada) Limited* [[1970] 3 O.R. 714] at p. 717:
>
> > …the basic aim or purpose of the Securities Act, 1966, … is the protection of the investing public through full, true and plain disclosure of all material facts relating to securities being issued.
> >
> > * * *
> >
> > Such remedial legislation must be construed broadly, and it must be read in the context of the economic realities to which it is addressed. Substance, not form, is the governing factor. As noted in *Tcherepnin v. Knight* [389 U.S. 332 (1967)], at p. 336:
> >
> > > …in searching for the meaning and scope of the word 'security' in the Act, form should be disregarded for substance and the emphasis should be on economic reality.
> >
> > [Emphasis added.]

The Commission's Jurisprudence on s. 161(1)(g)

[57] The Commission has considered and made s. 161(1)(g) orders in many cases: see e.g., *Re Streamline Properties Inc.*, 2015 BCSECCOM 66; *Re HRG Healthcare Resource Group,* 2016 BCSECCOM 5; *Re SPYru Inc.*, 2015 BCSECCOM 452; *Re Michaels*, 2014 BCSECCOM 457; *Re VerifySmart Corp.,* 2012 BCSECCOM 176; *Re Oriens Travel & Hotel Management Corp.*, 2014 BCSECCOM 352.

[58] The Commission has repeatedly held that s. 161(1)(g) permits joint and several orders without the requirement of establishing the particular wrongdoer was the one who obtained the amount. In *Michaels,* a unanimous panel of the Commission (including Vice Chair Cave) reviewed past cases of the Commission and summarized the principles as follows:

> [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.
>
> [Emphasis in original.]

[59] In essence, the Commission is of the view that a broad interpretation of s. 161(1)(g) is required to achieve the purpose of ensuring the respondent does not retain any amount obtained from contravening the *Act*.

[60] Vice Chair Cave has also repeatedly dissented on the s. 161(1)(g) issue: *Streamline* at paras. 70–111; *SPYru* at paras. 126–142.

[61] In the opinion of Vice Chair Cave, joint and several liability is not consistent with the purpose of s. 161(1)(g), which is to divest a wrongdoer of ill-gotten amounts. Further, he opines that an order under s. 161(1)(g) can only follow after a finding that the "amount obtained" was obtained by *the person who failed to comply*. In his view, aside from the situation of, for example, a person and his corporate *alter ego* (e.g., *Michaels*), a joint and several order would result in a person being ordered to pay amounts that person did not obtain (e.g., obtained by another person). This would constitute a punitive order going beyond the scope of s. 161(1)(g).

[62] In Vice Chair Cave's view, the plain reading of s. 161(1)(g) and its ordinary, grammatical sense support this interpretation. In *Streamline*, he put it this way in his dissenting reasons:

> [86] Section 161(1)(g) must be interpreted to mean that an order under that subsection is limited to:
>
> (a) the amount a person obtained, that was
> (b) directly or indirectly a result of that person's misconduct.
>
> [87] This is based on the language in the subsection:
>
> (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
>
> The phrase "the failure to comply" can only refer to the opening phrase of the section "if a person has not complied with the Act". The "amount obtained" referred to in the subsection must be based on that person's failure to comply, not the failure of anyone else.
>
> [Emphasis in original.]

[63] Significantly, Vice Chair Cave reconciled his view in *Streamline* with the view he shared with the other panel members in *Michaels* on the basis there was, in effect, only one respondent, explaining:

> [84] The *Michaels* decision provided that an order for disgorgement of the full amount obtained through contraventions of the Act can be made without having to establish that the amount obtained through the contravention was obtained by that respondent.
>
> [85] The *Michaels* case dealt, effectively, with only one respondent (the corporate respondent was the alter ego of the individual respondent). Where there are multiple respondents, as in this case, the principle set out above must be refined.
>
> [Emphasis in original.]

[64] In Vice Chair Cave's view, a s. 161(1)(g) order cannot be made on a joint and several basis, except when the persons being held jointly and severally liable are, in effect, one person, such as where one is the corporate *alter ego* of the other. In either case, Vice Chair Cave was of the opinion that the Commission must establish that the amount ordered to be paid was obtained by the person(s) against whom the order is made. For example, the Commission must establish that either Mr. Michaels or his corporate *alter ego* obtained the amount. Apart from such situations, Vice Chair Cave opined that a joint and several s. 161(1)(g) order is impermissible.

Parties' Positions

[65] The appellants essentially advance Vice Chair Cave's reasoning. In their submission, the plain language of s. 161(1)(g) requires the "amount obtained" be obtained *by the person* who failed to comply. Not having this requirement would result in persons paying amounts they did not obtain, or which other persons obtained. The result, they argue, is a punitive or compensatory order, which is beyond the permissible scope of the purpose of s. 161(1)(g).

[66] The Poonians further argue the Commission failed to consider amounts disgorged from other parties related to the scheme. The Poonians point to a settlement between Phoenix Group entities whereby those entities paid back certain amounts to the Commission (approximately $2.7 million). The Poonians submit those amounts should be deducted from any amount they must disgorge.

[67] The Executive Director essentially advances the opinion of the majority in the Commission's cases. The Executive Director stresses the important and specialized role of the Commission in crafting sanctions that are in the public interest in the particular circumstances of the case before it. The Executive Director contends that limiting s. 161(1)(g) by adding language that is not there (*"by that person*") is untenable because it would essentially allow wrongdoers to benefit from the complexity and opaqueness of their schemes. In other words, by making it difficult, if not impossible, to trace and prove *that person* actually *got the money*, the Commission's ability to protect the public interest would be unduly limited. The Executive Director points to the use of offshore banking and nominee entities as examples.

[68] The Executive Director argues the Legislature deliberately left the language open to permit the Commission to choose the proper language to fulfill its mandate. Any requirement that *that person* be the one obtaining the amount would be against the Commission's established jurisprudence and jurisprudence from other provinces.

Discussion

[69] I will first review the purpose of s. 161(1)(g). With this purpose in mind, I will then turn to the text of the provision to answer the following questions:

1. Does the provision require the amount to be "profit" or permit deductions?
2. Does the "amount obtained" have to be obtained *by the person against whom the order is made*?
3. Does the provision allow joint and several orders?

Purpose of s. 161(1)(g)

[70] It is clear, in my opinion, that the purpose of s. 161(1)(g) is neither punitive nor compensatory. This view is held consistently among the various decisions of the Commission and the securities commissions of other provinces: *Poonian Sanctions* at para. 80; *Michaels* at paras. 39-40; *Fischer v. IG Investment Management Ltd.,* 2012 ONCA 47 at para. 52; *Re Planned Legacies Inc.*, 2011 ABASC 278 at para 71; *Re Sabourin,* 2010 LNONOSC 385 at para. 65; and *Re Arbour Energy Inc.,* 2012 ABASC 416 at para. 37.

[71] It is noteworthy that in *Michaels* a unanimous panel (including Vice Chair Cave) held:

> [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).
>
> [Emphasis added.]

[72] Sections 15 and 15.1 of the *Act* address what the Commission may do with funds received under s. 161(1)(g). Subsections 15(3) and 15(3.1) require, in effect, the Commission to put aside moneys received under ss. 155.1(b), 157(1)(b), 161(1)(g) or 162. Section 15.1 and the corresponding regulations (*Securities*

Regulation, B.C. Reg. 196/97, Part 3) provide a notice and claims procedure for persons who have suffered pecuniary loss as a direct result of misconduct that resulted in an order under s. 155.1(b), 157(1)(b) or 161(1)(g); the notice is to be posted until the earlier of three years from the date it is first posted, or the date on which all the money has been paid out. After the requisite period of time has expired, the Commission may use any remaining funds only for educating securities market participants and the public about investing, financial matters or the operation or regulation of securities markets (s. 15(3)).

[73] The Executive Director characterizes this procedure under s. 15.1 as an "expeditious" mechanism for victims to receive compensation for losses suffered as a result of conduct giving rise to a s. 161(1)(g) order. Therefore, the Executive Director says, s. 161(1)(g) has a compensatory purpose: the order produces money that must be used to compensate victims (or if not paid on adjudicated claims, for public education purposes).

[74] The appellants submit s. 15.1 is a financial administration provision setting out how moneys collected under those provisions are used. However, the analysis of the purpose of s. 161(1)(g) should focus on the provision itself.

[75] I agree with the passage from *Michaels* at para. 40, quoted above. In my view, it does not follow that just because moneys collected under certain sections may be used for "compensation", the sections giving rise to orders to pay those moneys (ss. 155.1(b), 157(1)(b), 161(1)(g), and 162) have a compensatory purpose. I recognize the modern approach to statutory interpretation requires consideration of the context and the statute as a harmonious whole, which includes other provisions of the statute relating to the provision at issue, such as s. 15.1. However, considering the extensive case law discussing the purpose of s. 161(1)(g) and its nature as a sanction, I would endorse the view of the Commission in *Michaels* at para. 42, which concluded that: "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*".

[76] While "compensation" may well be a possible effect of a s. 161(1)(g) order, I cannot say that is its purpose. Any analysis of restitution would arise under s. 15.1, not s. 161(1)(g). Although not determinative, I note s. 15.1 is contained in "Part 3 – Financial Administration" of the *Act*. Section 161(1)(g) (under "Part 18 – Enforcement") does not refer to "compensation" or "restitution". Nor do ss. 15 and 15.1, or Part 3 of the *Securities Regulation*, refer to "restitution". The only reference to "compensation" is in s. 7.4(3)(a) of the *Securities Regulation*, requiring the Commission to consider, in adjudicating a claim, "whether the applicant received or is entitled to receive compensation *from other sources*" [emphasis added].

[77] This conclusion is also consistent with the observation that generally the power to order a person who has contravened the *Act* to pay compensation or restitution is reserved for the courts (ss. 155.1(a) and 157(1) (i) and (j)). While a victim may receive money from the s. 15.1 mechanism, that is distinct from the power to order restitution. First, notice to the public under this "expeditious" method is only made *after* money has been received through an order. If no money is received, the mechanism is not engaged. Second, the victim has no enforceable order against the wrongdoer, whereas ss. 155.2(1) and (3) give the person to whom the court awards compensation all the usual enforcement tools available for court orders.

[78] I also find persuasive Vice Chair Cave's explanation in *Streamline* (in dissent) as to why compensation or restitution is not the purpose of a s. 161(1)(g) order:

> [77] Compensation or restitution to investors is not the purpose of a disgorgement order. Only the BC Supreme Court can order compensation or restitution under the Act, pursuant to sections 155.1(a) or 157(1)(i). Since these two provisions specifically refer to compensation and restitution, it would be incorrect to interpret section 161(1)(g) as also being a compensation or restitution provision.
>
> [78] The wording of section 161(1)(g) shows it is not a compensation or restitution provision. The goal of restitution is to restore the victim to his or her original position, which requires the court to consider victims' losses. In contrast, section 161(1)(g) requires the panel to consider the amount obtained as a result of misconduct. These are two different things.

> [79] For example, a court order for compensation or restitution may include more than what an investor actually invested (and a respondent obtained), such as interest payments or loss of opportunity. A respondent would not have obtained these amounts as a result of misconduct and consequently an order under section 161(1)(g) that included these amounts would be broader than what that section allows.

I note further the Commission is expressly prohibited from including loss of opportunity and interest on the loss in determining an applicant's loss under the Part 3, s. 15.1 claims mechanism: *Securities Regulation, s.* 7.4(3)

[79] I agree with the following discussion in *Re Limelight Entertainment Inc.* (2008) 31 OSCB 12030 about the origins of the disgorgement remedy in Ontario, and find those observations applicable to interpreting s. 161(1)(g), which is similarly worded:

> [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 the fraud" (*In the Matter of Guy P. Riordan* [Doc. 3-12829 (U.S. S.E.C. July 28, 2008)], Initial Decision, 2008 SEC LEXIS 1754 at p. 68.);
>
> (b) the SEC has ruled that "any risk of uncertainty [in calculating disgorgement] should fall on the wrongdoer whose illegal conduct created that uncertainty" (*In the Matter of Pritchard Capital Partners, LLC et al.* [Doc. 3-12753 (U.S. S.E.C. July 10, 2008)], Initial Decision, 2008 SEC LEXIS 1593 at p. 51); and
>
> (c) the SEC has ruled that once the SEC has established a disgorgement figure, the burden shifts to the respondent to disprove the reasonableness of that number (*In the Matter of Thomas C. Bridge et al.* [Doc. 3-12626 (U.S. S.E.C. March 10, 2008)], Initial Decision, 2008 SEC LEXIS 533 at p. 99).
>
> Although we are not bound by SEC decisions, we agree with these general principles, subject to the comments below.

[80] I also agree with the decisions of securities commissions in British Columbia and across the country concluding s. 161(1)(g), or its counterparts, is not compensatory in nature: *Michaels* at paras. 42–43; *Limelight* at paras. 47–48; *Streamline* at paras. 77–82, 88 (dissent); *Sabourin* at para. 65; *Planned Legacies* at

para. 71; *Poonian Sanctions* at para. 72; *Re Schmidt*, 2013 ABASC 320 at paras. 65–66; *SPYru* at para. 80.

[81] The purpose of s. 161(1)(g) is to compel a wrongdoer to give up any ill-gotten amounts. (While the purpose has been described in the cases as "ill-gotten *gains*", I find it more accurate to refer to them as "amounts", as the statute provides, and because, as discussed below, there is no "profit" element.) In *Streamline,* for example, the majority of the Commission said:

> [55] … The purpose of a section 161(1)(g) payment is to remove from a respondent any amounts obtained through a violation of the Act. Given that, how a respondent spent the funds raised is not relevant for such purpose. Also, a respondent's ability to pay the amount is not relevant for such purpose.

[82] The taking away of any amounts obtained or payment or loss avoided deprives a person who fails to comply of any benefit. Therefore, the person is deterred from non-compliance. In that sense, s. 161(1)(g) also has a deterrence purpose. This purpose is consistent with the *Act*'s overarching remedial and protective nature.

The Statutory Text

[83] It is convenient to repeat the statutory provision at issue:

> 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:
>
> …
>
> (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;

Profit

[84] I start with the first question of whether the "amount obtained" refers to profits. Another way of putting this question is to ask whether the "amount obtained" is a "net" amount that allows for deductions of losses and expenses. For instance, the

Poonians argue in their factum that buying and selling securities carries "a number of carrying charges and other related expenses; at the very least, the [Poonians] would have had to pay a commission for every trade…" They argue the Commission erred in not allowing deductions for these amounts.

[85] I reject this argument. The words of the provision do not support a "profit" interpretation. The words the Legislature chose, "any amount obtained", refer to any amount received. They do not contemplate any deductions. If the Legislature had intended to import a profit element, it could have used the word "profit", or "net", or some other language that connotes allowance for losses or expenses.

[86] Two further reasons support the interpretation that s. 161(1)(g) is not profit-driven. First, there is the alternative of "payment or loss avoided". This clearly contemplates a contravention that benefits wrongdoers, not by a positive enrichment, but by allowing them to avoid a loss. For example, a person may contravene the *Act* by committing insider trading. The person may have sold securities at a higher price, with knowledge of material non-public information that would negatively affect the security's price. By selling before the price decreases in response to the public dissemination of that information, the person avoids a loss. Clearly, that benefit, being the loss avoided, may be disgorged under s. 161(1)(g), even if the price at which the person sold the shares was lower than the price at which the person bought them (i.e., he did not make money – or "profit" – from the sale).

[87] Nor does it accord with common sense to permit the insider trader to deduct the trading costs associated with illegally selling his shares before the price drops. The payment of such expenses is what enabled the wrongdoer to obtain the benefit in the first place.

[88] Secondly, the purpose of s. 161(1)(g) also has a deterrence component. Deterrence is a proper consideration for imposing administrative sanctions: *Cartaway* at para. 60. One way to deter is to remove the incentive for non-compliance. However, if the disgorgement amount is based on profits, then

wrongdoers would not be deterred from contravening, or attempting to contravene. They would only face the risk of having to disgorge amounts *if their schemes succeeded*. However, the public is still harmed. A profit-oriented interpretation would undermine the statute's remedial and protective purpose. The failure to "turn a profit" on the wrongdoing should not prevent the regulator from requiring the wrongdoer to give up money received from the wrongdoing.

[89] I agree with the following conclusion reached by the Commission in *McCabe,* 2014 BCSECCOM 512:

> [75] McCabe also said that the circumstances of this case are very different from *Michaels* and necessitate that an order for disgorgement, if any, be limited to net rather than gross proceeds. He sought to distinguish the two cases on a number of grounds including the seriousness of the misconduct, the nature of the deductions sought, the source of the monies subject to disgorgement and the evidence of loss by the investors.
>
> [76] None of the factors identified by McCabe support limiting a section 161(1)(g) order to net, rather than gross, proceeds. It is clear from Michaels that neither the source of the monies subject to the order nor the nature of the deductions sought are determinative.
>
> [77] The panel in *Michaels* stated that the focus of the sanction should be on compelling the respondent to pay <u>any</u> [emphasis [of the Panel]] amounts obtained from the contravention of the Act…

[90] For similar reasons, I do not accept the Poonians' submission that amounts paid to the Commission under settlement orders with other participants in the scheme should reduce the amount the Poonians must disgorge. In my view, those are separate proceedings dealing with the misconduct of different persons or entities and amounts those persons obtained as a result of their contraventions. How *those* persons are sanctioned does not change the fact of how much the *Poonians* obtained as a result of *their* contraventions.

[91] There is a clear exception to the general "no deductions" principle. Amounts the wrongdoer has returned to the victims (e.g., the investors) should properly be deducted from the disgorgement amount. This is consistent with the purpose of s. 161(1)(g) of removing ill-gotten amounts: no amount obtained remains when the amount has been returned to the victim(s). I would agree with Vice Chair Cave's

comment (in dissent but not on this point) in *Streamline* at paras. 92–97, and in particular, the comments at paras. 92–94:

> [92] Section 161(1)(g) should be read to refer to the financial benefits respondents continue to have at the time the order is made. Amounts returned to investors should be deducted from the amount of the disgorgement order.
>
> [93] This is consistent with the purpose of a disgorgement order, namely to deprive a respondent of wrongly obtained benefits. If an order requires disgorgement of a benefit a respondent no longer has, then it will not serve the purpose of removing wrongly obtained benefits, and instead will simply be a penalty.
>
> [94] The OSC [Ontario Securities Commission] consistently has deducted amounts returned to investors when fashioning disgorgement orders. For example: *North American Financial Group Inc. (Re)* 2014 LNONOSC 580; *Rezwealth Financial Services Inc. (Re)* 2014 LNONOSC 450; *Empire Consulting Inc. (Re)* 2013 LNONOSC 132; *McErlean (Re)* 2012 LNONOSC 782; *Maple Leaf Investment Fund Corp. (Re)* 2012 LNONOSC 196.

[92] I pause to note this analysis does not mean the Commission may *never* permit deductions in other circumstances. The provision is clear that the Commission may order the person to pay *any* (not necessarily all) amounts obtained to the Commission. The Commission's jurisprudence is well established that in some circumstances deductions may be permitted: *Michaels* at para. 35. One example noted in *Michaels* is where the respondents have unequal degrees of culpability. Of course, how much to deduct (if any) is within the discretion of the Commission in its determination of what would be in the public interest in the circumstances of each case.

[93] In sum, I conclude s. 161(1)(g) does not require the amount obtained to be "profit" or that there be a "netting" or deduction of expenses, costs, or of amounts paid to the Commission by other persons.

"Amount obtained"

[94] I now turn to the question of whether the "amount obtained" means the amount obtained by the person who failed to comply with the *Act*. Related to this issue is whether and when a joint and several order may issue.

[95] I find it helpful in the present exercise to reiterate some well-established principles of statutory interpretation.

[96] First, the court must read the words of the statute in their plain, ordinary and grammatical sense. Secondly, the court must be informed by the context, which includes the surrounding wording in other parts of the provision or other provisions, and the scheme of that provision and the statute as a whole. This context includes the purpose of the provision specifically, and of the statute generally.

[97] Turning first to a plain reading of the text, I note the "amount obtained" has to be obtained by *someone*. As a matter of plain meaning and common sense, an amount cannot be obtained if no one obtains it.

[98] The interpretive challenge arises from the language of s. 161(1)(g), which omits explicit reference to who is doing the obtaining. In other words, the present interpretive exercise is to determine whom the Legislature intended, implicitly, to do the "obtaining". The appellants contend it is the person who has failed to comply. The Executive Director submits that no words should be added, and essentially the "obtaining" is by anyone who contributed to the failure to comply or whose wrongful act contributed to the amount being obtained. In other words, as long as the person has contravened the *Act* or failed to comply, and the Commission considers it in the public interest, that person may be subject to a joint and several order despite not having directly or indirectly obtained any amount.

[99] Read grammatically, the clause "that the person pay to the commission any amount obtained" is the object of the verb "order". It refers to the order that may be made. It is also obvious from "if a person has not complied with this Act…the person pay to the commission any amount obtained" who the person is, what is being paid, and to whom it is being paid.

[100] It follows that the phrase "any amount obtained" refers to amounts obtained directly or indirectly by the person who is to pay pursuant to the order, because the person contravened the Act. The fact that "amount obtained" must also be causally

connected to ("as a result of") the contravention (or failure to comply) of the person further supports this interpretation as the consistent, plain, and ordinary meaning.

[101] This interpretation appears to be understood by other securities commissions. In *Limelight*, the Ontario Securities Commission said (using "respondent" rather than "person"):

> [49] We note that paragraph 10 of subsection 127(1) of the Act provides that disgorgement can be ordered with respect to "any amounts obtained" as a result of non-compliance with the Act. Thus, the legal question is not whether a respondent "profited" from the illegal activity but whether the respondent "obtained amounts" as a result of that activity.
>
> [Emphasis added.]

The panel in *Limelight* further said:

> [52] In our view, the Commission should consider the following issues and factors when contemplating a disgorgement order in circumstances such as these:
>
> (a) whether an amount was obtained by a respondent as a result of non-compliance with the Act;
>
> …
>
> (c) whether the amount that a respondent obtained as a result of non-compliance with the Act is reasonably ascertainable;
>
> …
>
> [53] Staff has the onus to prove on a balance of probabilities the amount obtained by a respondent as a result of his or her non-compliance with the Act. Subject to that onus, we agree that any risk of uncertainty in calculating disgorgement should fall on the wrongdoer whose non-compliance with the Act gave rise to the uncertainty.
>
> [Emphasis added.]

[102] For its part, in summarizing the underlying principles of disgorgement, the Alberta Securities Commission explained in *Arbour Energy*:

> [37] This Commission discussed the underlying principles of disgorgement in *Re Planned Legacies Inc.*, 2011 ABASC 278 at paras. 71-75, referring there to several other cases. As noted in *Planned Legacies*, disgorgement is another tool that may be used to achieve specific and general deterrence. The Commission stated there (at para. 71) that disgorgement "reflects the equitable policy designed to remove all money unlawfully obtained by a respondent so that the respondent does not retain any financial benefit from breaching the Act. It is not a compensation mechanism for victims of the wrongdoing." In *Planned Legacies*, the Commission accepted the principle

> from the Ontario Securities Commission's decision in *Re Limelight Entertainment Inc.* (2008), 31 O.S.C.B. 12030 at para. 53 that Staff bear the initial burden of proving the amount obtained by a respondent through its non-compliance with the Act, with the burden then shifting to the respondent to disprove the reasonableness of that amount. We also note that the relevant amount is that "obtained", not the amount retained, the profit, or any other amount calculated by considering expenses or other possible deductions.
>
> [Emphasis added.]

Both "disgorgement" provisions in the Alberta and Ontario securities legislation (*Securities Act*, R.S.A. 2000, c. S-4, s. 198(1)(i); *Securities Act*, R.S.O. 1990, c. S.5, s. 127(1)(10)) use wording similar to the British Columbia statute (although the Ontario provision uses the word "disgorge"). Like the British Columbia provision, the Alberta and Ontario provisions also do not explicitly have the words "by the respondent [person]" after the words "any amounts obtained".

[103] This interpretation also appears to be understood in academic texts, including David Johnston, Kathleen Rockwell and Cristie Ford, *Canadian Securities Regulation*, 5th ed. (Markham, Ont: LexisNexis Canada, 2014):

> ¶14.31 This power is intended to prevent a person or company from retaining financial benefits that were received by contravening securities laws.
>
> ¶14.32 The legislative provisions refer to "amounts obtained". Therefore, the relevant amount is what a respondent obtained through misconduct, not what the respondent retained or spent inappropriately. …
>
> [Emphasis added.]

[104] In essence, I agree with Vice Chair Cave's analysis at para. 87 of *Streamline*:

> The phrase "the failure to comply" can only refer to the opening phrase of the section "if a person has not complied with the Act". The "amount obtained" referred to in the subsection must be based on that person's failure to comply, not the failure of anyone else.
>
> [Emphasis in original.]

[105] By contrast, the Executive Director relies on the Commission's recent decision in *Re Wong*, 2017 BCSECCOM 57, where the Commission opined:

> [90] The purpose of section 161(1)(g) is to remove from a respondent any amounts obtained through a violation of the Act. Notably, section 161(1)(g)

> does not limit an order to any amount *obtained by a respondent*. In our view, this omission is intentional and makes clear that we can make an order against a respondent with respect to all the money illegally obtained from investors as a result of that respondent's misconduct, and we are not limited to the ill-gotten gains obtained by that specific respondent. The plain wording of section 161(1)(g) supports our interpretation. To hold otherwise would be tantamount to importing into section 161(1)(g) a requirement that payment be limited to benefits, personal gains or some notion of profits enjoyed by a respondent.
>
> [Emphasis in original.]

With respect, I do not agree with that view. First, I do not consider the phrase "omission is intentional and makes clear" supports the Executive Director's position because there is no omission in a real or grammatical sense. Instead, there is simply a grammatical construction in which "the person" against whom the order is made is implied or understood to be the recipient of the "amount obtained", as earlier discussed. Something that is implicit in the plain and ordinary meaning of a phrase cannot be said to be intentionally omitted.

[106] Further, the Commission in *Wong* sidesteps the issue of *who* does the obtaining, and instead addresses *from whom* the amounts are obtained (i.e., investors). I think this analysis is inaccurate. The provision does not limit the persons from whom the moneys may be obtained, and indeed, should not. For example, the wrongdoer may obtain money from investors (e.g., in an illegal distribution), from other innocent market participants (e.g., from someone who buys shares sold by a person committing insider trading), or from other wrongdoers (e.g., a tipper who is paid remuneration by a trader for providing material non-public information). All of these amounts may properly be characterized as "amounts obtained" as a result of a contravention of the *Act* for the purposes of s. 161(1)(g). Indeed, these amounts should all be caught to achieve the goal of deterrence by removing the incentive for non-compliance.

[107] Second, I cannot agree that, "To hold otherwise would be tantamount to importing into section 161(1)(g)…some notion of profits..." The notion of profits is clearly displaced by the express choice of the word "amount", and for the other reasons explained earlier. To require the amount be obtained *by the respondent* only

means that the amount must have been *received* by that respondent. It does not import the notion that there is a "netting" of expenses to arrive at benefits, gains, or profits.

[108] I recognize the Commission's concern, as expressed in *Wong,* that a requirement the amount be obtained *by the respondent* would insert a restriction that would impair the effectiveness of s. 161(1)(g) in capturing *all* ill-gotten amounts because of the complexity and opacity of certain schemes. However, in my view, that concern is answered by the use of the words "or indirectly" in s. 161(1)(g). This enlarges the scope of the "amount obtained by a respondent" to include amounts other than amounts that arrived directly into his or her pocket. It could include and even overlap with, in an appropriate case, moneys obtained by a co-respondent, where that co-respondent is essentially receiving the amount for the contravener (i.e., the contravener obtained the amount *indirectly* through the co-respondent). I will return to the role of "indirectly" later in this judgment.

[109] This practical concern of the Commission is also addressed by the burden of proof in such cases, a point to which I will also return.

[110] In my view, the ordinary grammatical reading is that the "amount obtained" is the amount obtained by *the* person who failed to comply or committed the contravention, and the provision captures amounts so obtained, *directly or indirectly*.

[111] This reading is also consistent with the purpose of the provision: to deter persons from non-compliance by removing the prospect of receiving and retaining moneys from non-compliance. It is also consistent with what is *not* the primary purpose of the provision: it is not to punish or compensate.

[112] Section 161(1)(g) must be read in the context of its neighbours in ss. 161 and 162. As Stratas J.A. put it in *Burchill v. Canada*, 2010 FCA 145 at para. 11, referring to the *Income Tax Act,* R.S.C., 1985, c. 1 (5th Supp.), "Subsection 56(1)(a)(i) does not stand in splendid isolation in the Act; rather, it is part of an interconnected web of provisions." Section 161(1)(g) must be recognized as one in a list of enforcement

tools open to the Commission. The Commission has a broad arsenal of sanctions to enable it to discharge its public interest mandate. Each tool, however, takes a specific form to achieve a specific purpose. Disgorgement is a specific tool, and the Commission must not, in the name of the public interest, use that tool in such a way as to extend it beyond its specific, permissible purpose. Its purpose is to prevent wrongdoers from retaining amounts obtained from their wrongdoing. It is not to punish or compensate, although those aims are achievable by other means in the *Act,* or in conjunction with other sections of the *Act*.

[113] In my view, the suggestion that limiting the scope of s. 161(1)(g) conflicts with the *Act's* overarching protective goal erroneously conflates the discrete and recognized purposes of a s.161(1)(g) "disgorgement" order with the general purposes of the *Act* overall, which are achieved by the availability of the vast array of different enforcement tools employable in concert. This interpretation is not disharmonious with the remedial and protective nature of the *Act*. Instead, it recognizes that the *Act's* overarching goals are achieved by a host of specific measures, which themselves may have different purposes and be informed by different principles (e.g., punishment, compensation, specific and general deterrence, removal of incentives for non-compliance, etc.). Indeed, the Commission's public interest jurisdiction is not punitive, as the Court noted in *Committee for the Equal Treatment of Asbestos Minority Shareholders v. Ontario (Securities Commission)*, 2001 SCC 37:

> [42] … I agree with Laskin J.A. [(1999), 43 O.R. (3d) 257] 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). … 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…

[114] I agree with Vice Chair Cave that where a s. 161(1)(g) order is made to require someone to pay an amount to the Commission that person did not obtain, the only purpose of such a payment is punishment or compensation. It is not to surrender ill-gotten amounts because the amounts surrendered were not obtained in

the first place. See also *Limelight* at para. 63, where the Ontario Securities Commission recognized that "it would be unfair and inconsistent with the principles underlying the disgorgement remedy for the aggregate amount ordered to be disgorged by Canadian securities regulators or courts to exceed the amounts obtained by [the respondents] from investors."

[115] Finally, I turn to whether s. 161(1)(g) permits a joint and several order.

Joint and Several Orders

[116] The appellants rely on *Cinar Corporation v. Robinson*, 2013 SCC 73, which addressed disgorgement of profits under s. 35 of the *Copyright Act*, R.S.C. 1985, c. C-42, the relevant part of which reads:

> 35 (1) Where a person infringes copyright, the person is liable to pay…such part of the profits that the infringer has made from the infringement and that were not taken into account in calculating the damages as the court considers just.

[117] The appellants submit that *Cinar* stands for the proposition that disgorgement orders, which are not intended to compensate, cannot be made on a "solidary" or "joint and several" basis. They rely on the following passage from *Cinar*:

> [86] … Disgorgement of profits under s. 35 is designed mainly to prevent unjust enrichment, although it can also serve a secondary purpose of deterrence: *Vaver* [*Intellectual Property Law: Copyright, Patents, Trade-marks*, 2d ed. (Toronto: Irwin Law, 2011)], at p. 650. It is not intended to compensate the plaintiff. This remedy is not subject to the principles that govern general damages awarded under Quebec's law of extra-contractual liability, whose aim is compensatory. Consequently, solidarity of profits ordered disgorged under s. 35 of the *Copyright Act* cannot be inferred from art. 1526 of the *CCQ* [*Civil Code of Québec*, S.Q. 1991, c. 64], which makes co-authors of a fault solidarily liable for the "obligation to make reparation for injury caused to another".
>
> [87] Disgorgement under s. 35 of the *Copyright Act* goes no further than is necessary to prevent each individual defendant from retaining a wrongful gain. Defendants cannot be held liable for the gains of co-defendants by imposing liability for disgorgement on a solidary basis.
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> [Emphasis in original.]

[118] The Executive Director argues *Cinar* is distinguishable because s. 35 of the *Copyright Act* includes the clause "profits that the infringer has made", whereas

s. 161(1)(g) does not expressly state *who* obtained the amounts. Further, the Executive Director argues s. 35 deals with civil liability in the copyright context, where, unlike the securities context, there is no public interest concern.

[119] In my view, the Executive Director reads too narrowly the Supreme Court's reasoning in *Cinar.* I consider the decision in *Cinar* to be authoritative on this issue. While s. 35 of the *Copyright Act* expressly refers to "profits", the reasoning applies with necessary modifications to "amounts obtained". Further, although s. 35 uses the express words "that the infringer has made", as discussed above, it is clear and grammatically understood by the wording of s. 161(1)(g) that the amounts were obtained *by the person* who has failed to comply with or contravened the Act (in other words, the person who has "infringed" the Act).

[120] More importantly, I read *Cinar* as standing for broader principles on the nature of the disgorgement remedy. That a wrongdoer may not benefit from wrongdoing (a theme first developed in equitable jurisprudence on unjust enrichment) is a basic legal principle. It is one of fairness and justice. The Executive Director argues the copyright context does not admit of "any public interest" consideration. However, while the presence of public interest informs the Commission's decisions, it cannot expand the *Act's* permissible scope of what the Commission may do. The public interest is not unlimited. In my opinion, disgorgement may not go further than required to prevent each wrongdoer from retaining an amount obtained, directly or indirectly, as a result of the wrongdoing. Nor does deterrence require more.

[121] The Executive Director submits that a person who contravenes the *Act* ought not to benefit from the complexity and sophistication of their illicit schemes, and cites *Re Samji*, 2015 BCSECCOM 29 at para. 42, where the Commission said, "respondents always bear responsibility for any uncertainty with respect to the amount retained by them. It is not in the public interest that they benefit from any such uncertainty."

[122] The Executive Director also notes the comment of the United States Court of Appeal for the District of Columbia Circuit that "you can't reward complicated

byzantine frauds that by their very nature conceal paper and money trails": *SEC v. Whittemore*, 659 F.3d 1 at 6; 198 U.S. App. D.C. 67; 2011 U.S. App. LEXIS 21907.

[123] I agree with these observations. As noted earlier, securities regulation statutes are remedial and protective in nature, and therefore should be construed in a manner sensitive to economic reality. The economic reality is that the increased complexity of schemes and transactions – and the Executive Director points to a few examples – may make it difficult, if not impossible, to trace exact funds from a contravention into the pockets of the wrongdoer. But tracing is not required: *Re Manna Trading Corp Ltd.,* 2009 BCSECCOM 595 at para. 43.

[124] The Commission's decisions on this point often refer to *Limelight* as an articulation of seminal propositions. In that case, a joint and several disgorgement order was ultimately made against two of the individuals (Da Silva and Campbell) and the corporation they directed and controlled. In particular, the Ontario Securities Commission found the two individual respondents were the directing minds of the corporation (Limelight) and commented:

> [59] Da Silva and Campbell were the directing minds of Limelight; they were directly involved in breaches of the Act by Limelight and its salespersons … and they were aware of and authorized, permitted or acquiesced in all such breaches. Da Silva and Campbell were also the principal shareholders of Limelight. In our view, individuals should not be protected or sheltered from administrative sanctions by the fact that the illegal actions they orchestrated were carried out through a corporation which they directed and controlled. In this case, Limelight, Da Silva and Campbell acted in concert with a common purpose in breaching key provisions of the Act.

[125] The Executive Director here, for example, submits the Poonians and Sihotas were each found to have been "directly involved in and contributed to" the market manipulation scheme (*Poonian Sanctions* at paras. 82-83). This finding is not challenged on appeal. Therefore, the Executive Director contends they all acted in concert with the common purpose of perpetrating the manipulation scheme, which supports the propriety of a joint and several disgorgement order against them, as was the case in *Limelight*.

[126] I cannot agree. In my view, the result reached in *Limelight* was driven by the finding that the two individuals *directed and controlled* the corporate entity. This distinction is buttressed by the fact the third individual respondent, who had no such role in the corporation, was not part of the joint and several disgorgement order. Respondents cannot be held jointly and severally liable for a s. 161(1)(g) order purely on the basis they acted in concert with the common purpose of breaching the Act. This is because the language of s. 161(1)(g) requires the disgorged amount to be obtained, directly or indirectly, by the person. Acting jointly is not synonymous with obtaining amounts, directly or indirectly. As I will explain below, however, having direction and control over another respondent or entity may constitute indirect obtainment.

[127] The Executive Director also urges this Court to follow the Ontario Divisional Court's recent decision in *Phillips v. Ontario Securities Commission*, 2016 ONSC 7901. In that case, the appellants had argued that it was not open to the Ontario Securities Commission to order disgorgement on a joint and several basis against individuals who did not obtain the funds ordered to be disgorged where the corporate entity that actually obtained those funds was not named as a respondent before the Ontario Securities Commission. In discussing the Commission's decision, the court said this:

> [65] The Appellants submit that it was unreasonable for the Commission to have ordered the Appellants to disgorge amounts that were not obtained by them personally and were obtained by entities that were not named as respondents in the proceeding. In this case, the amounts were invested with FLG entities and the FLG entities in question were not named respondents in the proceeding. In its Sanctions Decision, the Commission accepted that Commission staff chose not to name these entities as they were all parties to a court-supervised *CCAA* wind-up and staff wished to avoid depleting these entities' assets.
>
> [66] In its Sanctions Decision, the Commission addressed the Appellants' argument and rejected it. Relying on several past decisions, the Commission found that "the Commission's authority to order disgorgement is not limited to ordering an individual respondent to disgorge amounts he or she obtained personally" (Commission Sanctions Decision, at para. 29) and that the Commission had the authority to order the Appellants "to disgorge the funds obtained in contravention of the Act in circumstances where the FLG entities that ultimately received the funds are not respondents in [the] proceedings" (at para. 30). The Commission concluded (at para. 54) that a disgorgement

> order was "appropriate in these circumstances because ascertainable amounts have been obtained as a result of the non-compliance of the [Appellants] with Ontario securities law and such an order will deter the Respondents and other market participants from similar conduct."

After reviewing certain cases, the court concluded:

> [78] What this review establishes is that the Commission's decision that it had the authority to order disgorgement was consistent with the plain wording of the legislation, the purpose of the legislation and prior case law.
>
> [79] As already noted, the Commission concluded that Mr. Phillips should disgorge $16,587,254, representing the full amounts raised by him and others under his supervision and direction, and that Mr. Wilson should disgorge $7,817,739, representing the amounts Mr. Wilson personally raised from investors. Both amounts factor in the paid and pending distributions to investors from the court-supervised wind-up. In making these orders, the Commission considered the following facts:
>
> …
>
> [80] The Commission's decision fell "within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" and the reasons given were justifiable, transparent and intelligible (*Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, at para. 47).

Given my determination of the applicable standard of review in the three appeals before us, I do not consider *Phillips* helpful.

[128] In my view, the practical difficulty posed by a complex scheme is addressed in two ways. First, the Legislature chose to modify the words "any amount obtained" by the adverbs "directly or indirectly" (these words are absent from the Ontario statute's corresponding section).

[129] Secondly, securities jurisprudence has applied s. 161(1)(g) to require the Executive Director only to prove on a balance of probabilities a "reasonable approximation" of the amount obtained by the wrongdoer as a result of that wrongdoer's contravention or failure to comply. Once that onus is met, the burden shifts to the wrongdoer to disprove the reasonableness of the amount. Importantly, ambiguity or uncertainty in the calculations is resolved in favour of the Executive Director: see *Limelight* at para. 48; *SPYru* at paras. 139–140; *Re Zhong,* 2015 BCSECCOM 383 at paras. 51–52; *Schmidt* at para. 66; *Streamline* at paras. 99-100

(Vice Chair Cave in dissent). I will discuss both of the ways in which more complicated schemes are addressed, turning first to "directly or indirectly".

"Directly or indirectly"

[130] In establishing the link between the "amount obtained" and the person subject to the order by using the words "directly or indirectly", the Legislature ensured the purpose of s. 161(1)(g) was not frustrated by difficulties presented by complex schemes. As stated, "directly or indirectly" modifies "obtain".

[131] In my view, the use of these explicit words indicates that the amount need not be obtained directly by the person who has contravened the *Act* (who is also the person against whom the order to pay is made). In addition, it could be obtained *indirectly*. By using those words, the Legislature intended "amount obtained" to capture amounts the wrongdoer obtained through indirect means (e.g., through agents, nominees, *alter egos)*, as opposed to direct means (i.e., where the money is received directly into that wrongdoer's "pockets" or accounts). This is especially operative in certain types of wrongdoing such as illegal distributions (e.g., non-exempt trading without prospectus or registration) where, by the nature of the activity (fundraising), the money flows not to the wrongdoer (e.g., the promoter), but to some other entity (e.g., the corporate issuer of securities). If s. 161(1)(g) is to function properly and achieve its goal of deterrence by the divesting of ill-gotten amounts, then the amounts obtained by the issuer must also be capable of being disgorged.

[132] The Commission's decision in *Michaels* is an example of where the amount obtained was obtained indirectly. Michaels obtained amounts through a corporate entity that was, as stated by Vice Chair Cave in *Streamline*, Michaels' corporate *alter ego*. It was the vehicle Michaels used to receive (obtain) the funds from his wrongdoing.

[133] The interposition of the corporate vehicle did not prevent s. 161(1)(g) from operating to require Michaels to disgorge the amount he and his *alter ego* obtained. In essence, I agree with Vice Chair Cave's comment in *Streamline* that they were

effectively one person. That conclusion is not based only on a finding of "effective personhood". Such an order is supportable by the express language of s. 161(1)(g) and, in particular, the adverbs "directly or indirectly", as well as the purpose of s. 161(1)(g), the *Act*, and the requirement that statutory construction be sensitive to economic reality.

[134] Using a corporate *alter ego* is but one example of a mechanism a wrongdoer may employ to indirectly obtain funds from wrongdoing. It is impossible to imagine and enumerate the wide variety of tactics wrongdoers may use to do so. The critical element is that the wrongdoer and the person with whom he or she is held jointly and severally liable were, in effect, acting as one person. This may occur, in another example, where one wrongdoer directs and controls the accounts of numerous other persons, and effectively has direction and control over the activity and assets in those accounts (e.g., using nominee accounts).

[135] Yet another example may arise where the wrongdoer instructs the person providing the amount to pay the amount to someone else instead of to the wrongdoer, with that "nominee recipient" essentially holding the amounts for the wrongdoer. This may especially be the case where the recipient is closely related to the wrongdoer, such as a spouse or partner: see e.g., *Zhong* at paras. 16–17; see also, *Streamline* at para. 91 (Vice Chair Cave in dissent). Whether someone is acting just as a "nominee" or as an active participant in the scheme depends on the nature and degree of the person's direction and control, and culpability, which are properly matters of fact for determination by the Commission.

[136] The Commission adopted similar reasoning in *Re Sabourin*:

> [70] Having considered the relevant factors, we will order that Sabourin and the Corporate Respondents disgorge $27,900,000, on a joint and several basis. That amount represents the up to $33.9 million obtained by Sabourin and the Corporate Respondents from investors less the amount of $6 million that appears to have been returned to investors (paragraphs 176 and 177 of the Merits Decision). We impose joint and several liability on Sabourin and the Corporate Respondents because, as stated in the Merits Decision, Sabourin was the directing and controlling mind of the Corporate Respondents and it would be impossible to treat them separately (paragraph 187 of the Merits Decision). As stated at paragraph 370 of the Merits

> Decision, Sabourin concocted and orchestrated the investment schemes. Because of our view that the Individual Respondents are less culpable than Sabourin and the Corporate Respondents and played distinct roles in the investment schemes, we will not order that any of the Individual Respondents pay, on a joint and several basis, the amounts we order disgorged by Sabourin and the Corporate Respondents.
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> [Emphasis added.]

[137] I recognize it is not the role of this Court to lay down rigid rules on how to identify or capture illicit financial behaviour and transactions. That expertise lies with the Commission. If the Commission is inclined to make a s. 161(1)(g) order jointly and severally, it is for the Commission to inquire into and determine, as a matter of fact, whether there is sufficient direction and control between, or of, the two or more persons or entities, such that a joint and several order is essentially only requiring the person who failed to comply to pay amounts he or she obtained, albeit indirectly.

[138] The Commission may also decide what amount to order under s. 161(1)(g), and in certain circumstances, may order an amount different from the total amount obtained. This was expressed in *Michaels*:

> [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.
>
> [Emphasis added.]

Ordering an amount less than the full amount obtained is, of course, permissible on a plain reading of s. 161(1)(g). The amount does not need to be the total, but it may be "any" amount obtained. The passage from *Michaels* also confirms "control" as a relevant consideration.

"Reasonable approximation" and Shifting Burden of Proof

[139] The limits on joint and several orders that I have described also do not unduly hinder the Commission's ability to carry out its public interest mandate and ensure wrongdoers do not retain any ill-gotten amounts from complex or opaque schemes. While the onus of proof is on the Commission to establish the wrongdoer has obtained an amount, and that the amount was obtained as a result of the contravention, the required standard of proof is not certainty. Instead, the Executive Director is required to prove a "reasonable approximation" of the amount obtained; then the burden shifts to the wrongdoer to disprove the reasonableness of that amount: *SPYru* at paras. 139–140; *Zhong* at paras. 51–52. I agree with Vice Chair Cave's analysis at paras. 99–100 of *Streamline* (in dissent):

> [99] Both the ASC and OSC have adopted the US approach that the [*sic*] once the executive director provides evidence, consistent with the principles described above, of an "approximate" amount of disgorgement then the burden shifts to the respondent to disprove the reasonableness of the number: *Limelight*, paragraph 48; *Schmidt (Re)*, paragraph 66. I agree with this approach.
>
> [100] In order to assess the reasonableness of the number, it is necessary to assess whether the proceeds of an illegal distribution were generally used to the benefit of the investors (i.e. in furtherance of their investment objectives) or whether they were used to the benefit of the respondents (i.e. ill-gotten benefits). Where funds were used for the benefit of investors it would be inappropriate to make a disgorgement order for those funds.

[140] This approach goes a significant distance to ensure that a sanction is not frustrated by the complexity of the wrongdoing or the wrongdoer's intentional masking of their activities. It also permits flexibility for the Commission. The degree of latitude in determining whether an approximation is "reasonable" would depend on the circumstances, including the complexity or opacity of the scheme. As noted above, any ambiguity or uncertainty in calculations would be resolved against the wrongdoer whose wrongdoing created the uncertainty. Thus, the latitude or scope of what is reasonable would expand with the degree of complexity of the scheme. Most importantly, this approach respects the wording of the statute, which, for the reasons

explained above, requires proof that the amount was obtained by the person who contravened the *Act*.

[141] The Executive Director has expressed concern that reasonably foreseeable cases may arise where the interpretation described would be unduly restrictive and insufficient to capture complex opaque schemes of wrongdoers acting in concert with a common purpose in breaching the *Act*.

[142] In my opinion, on the language as it is now, the elasticity of the burden of proof is such that it will permit the acquisition of information sufficient to impose a disgorgement order consistent with these reasons. I observe that there remain also an array of other financial and compliance tools available under the *Act* to address schemes of wrongdoing. Ultimately, the Legislature determines the tools available to address non-compliance with the *Act*.

Summary

[143] To summarize, the following principles emerge from the discussion above:

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 use of a corporate *alter ego*, use of other persons' accounts, or use of other persons as nominee recipients.

Application

[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. 131–32:

> [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.

[145] In my view, this approach accords with the words of the provision. Of course, the second step is not at issue here, as the determination of whether it is in the public interest to make an order is a decision for the Commission, with its expertise. The concern here is whether the requirements of the first step are satisfied.

Poonians/Sihotas

[146] The Commission found that the "amount obtained" was the aggregate net trading gain in the accounts of the Poonians, Sihotas, and the Secondary

Participants. The appellants challenge this finding. They argue that the Commission was required to make a finding that each of Mr. and Mrs. Poonian and Mr. and Mrs. Sihota obtained, personally, some amount, directly or indirectly, and that a disgorgement order may only be made against each of them severally for their specific amount.

[147] In my view, the Commission's finding that the aggregate net trading gain is the "amount obtained" is sound. The Commission assessed the evidence before it and concluded the relevant trading accounts were, essentially, enriched (in the aggregate) by approximately $7.3 million. It is also uncontested that this amount resulted from the purchase and sale of OSE shares at prices inflated by the Poonians and Sihotas' manipulation.

[148] Although the Commission made findings as to the degrees of involvement of each of the Poonians and Sihotas, the difficulty is that it made no finding that each of these four individuals obtained amounts *personally*. Furthermore, the Commission found that each of these four individuals participated and contributed to the manipulation scheme in different ways, with varying degrees of culpability, but made no finding as to the existence or degree of direction and control required for a finding as to whether any individual *indirectly* obtained an amount.

[149] The problem is that the order holds all four individuals jointly and severally liable for the full amount. As discussed above, a joint and several order is generally not permitted under s. 161(1)(g), the concern being that a person would be ordered to disgorge an amount that person did not obtain directly or indirectly.

[150] The scheme in question involved controlling and directing trading in a number of accounts to realize the aggregate net trading gain. It involved making payments to others to facilitate some of those sales.

[151] The Commission has before it the trading records of all the relevant accounts. Some accounts belong to the Sihotas or the Poonians. It is clear that portions of the aggregate net trading gain in those accounts were "obtained" by those account

holders. The issue is, what portions of the aggregate net trading gain in accounts of *other* persons can be properly found to have been obtained directly or indirectly by any of the Poonians or Sihotas?

[152] In my view, the Commission must determine whether amounts in those other accounts were, effectively, obtained *indirectly* by one or more of the appellants in that one or all of the Poonians and Sihotas had control and direction over those accounts. If such control and direction were established, there would then be a finding that the portion of the aggregate net trading gain in those accounts was obtained *indirectly* by that person. Therefore, that person could be properly held liable for those amounts. Again, this answers the Commission's concerns expressed in *Wong* (at para. 90), as quoted in para. 105 above. This is a factual finding this Court cannot and should not make.

[153] The Executive Director argues such apportionment is problematic because "[i]f such a determination can be made, it may well be only within the specific and unique knowledge of the respondents themselves." In my view, the fact-finding exercise falls within the Commission's province, and as explained above, the Commission does not have to determine the proportions to a certainty. The amount each person obtained directly or indirectly just needs to be "reasonably approximate". The onus is then on that person to show why such an amount (or apportionment) is not reasonable. Any uncertainty in the calculations is resolved in favour of the Executive Director, since a wrongdoer should not benefit from any ambiguity arising from his or her misconduct. Although not at issue in these appeals, I think it clear that such determinations are factually-driven, within the Commission's expertise, and would attract deference on review: *Walton v. Alberta (Securities Commission)*, 2014 ABCA 273 at para. 23.

Lathigee

[154] Lathigee and Pasquill were held jointly and severally liable, with FIC Group entities, for the amounts raised from the fraudulent offerings.

[155] They argue the amounts were obtained by the corporate entities, not by them personally, and that some funds were used for their intended purpose.

[156] Lathigee and Pasquill distinguish *Michaels*, in part, on the basis that the corporate entity in that case was created specifically for the fraudulent purpose. However, they note their corporate group (FIC) pre-existed the fraudulent transactions and did initially carry on legitimate operations and investments. I do not agree that this is a meaningful distinction.

[157] Whether the corporate entity was initially created for a fraudulent purpose or later became a vehicle for fraud does not change the fact that the corporate entity, controlled and directed by the individual wrongdoers, was a vehicle for fraud. The critical finding is that these entities obtained funds as a result of the fraud, and the individuals controlling and directing them received the funds *indirectly.*

[158] Lathigee and Pasquill also contend that some of the funds fraudulently raised were used for their intended purpose (i.e., invested in the advertised opportunities). I cannot sustain this argument. While some of the funds may have been used for their intended purpose, the fact they were raised by fraudulent misrepresentations or omissions is what constitutes the contravention.

[159] As to the receipt of the funds by the corporate, and not the personal, entities, this argument founders when one considers the economic reality of raising capital. It is the nature of fraudulent fundraising that funds raised are received (obtained) by the corporate vehicle, and not the personal fraudster. Indeed, the entire transaction is the exchange for money of securities of the issuer. The money goes to the issuer, not to the individual. An interpretation sensitive to economic reality would hold jointly and severally liable the fraudster and the vehicle he was found to have directed and controlled for the amounts they received because the fraudster had indirectly received those funds.

[160] The Commission found as a fact that Lathigee and Pasquill had jointly directed and controlled the relevant FIC Group entities that raised (obtained) the

money: *Lathigee Liability* at para. 5. This factual finding is not challenged on appeal, and I see no reason to disturb it.

[161] Therefore, the Commission found that each of Lathigee and Pasquill had "obtained" the offering "amount", albeit indirectly through certain FIC Group entities they directed and controlled. This accords with the decision in *Michaels* because Lathigee and Pasquill and their corporate entities were "effectively one person".

[162] On that basis, I consider it was appropriate and within the scope of s. 161(1)(g) to make the joint and several order for the full offering amount.

Disposition

[163] Subsection 167(3) of the *Act* provides:

> (3) If an appeal is taken under this section, the Court of Appeal may direct the commission to make a decision or to perform an act that the commission is authorized and empowered to do.

[164] For the reasons explained, I would allow the appeals in CA42514 (*Poonian*) and CA42515 (*Sihota*) and set aside the s. 161(1)(g) orders made against those appellants.

[165] Pursuant to s. 167(3), I would remit the Poonians and Sihotas' matter to the Commission to assess the evidence already before it to make the necessary factual findings as to whether a s. 161(1)(g) order should be made against each of them. In my view, it is incumbent on the Commission and properly within its expertise to make determinations as to the conduct of each person, the existence, if any, of each person's direction and control over accounts containing the "amounts obtained", and on balance, what proportion of the amount obtained (aggregate net trading gain) can properly be found as having been directly or indirectly obtained by each person. Of course, it is also for the Commission to determine whether it is in the public interest to make any order under s. 161(1)(g).

[166] To be clear, leave to appeal in all these cases was only granted with respect to the s. 161(1)(g) orders, and only those orders are set aside. All other sanctions imposed on the appellants are not before this Court and remain undisturbed.

[167] I would not disturb the s. 161(1)(g) order made in the Lathigee appeal. I would dismiss that appeal (CA42518).

"The Honourable Madam Justice MacKenzie"

I agree:

"The Honourable Madam Justice Saunders"

I agree:

"The Honourable Mr. Justice Fitch"