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Citation: Techocan International Co. Ltd. (Re), 2017 ONSEC 44
Date: 2017-12-18

IN THE MATTER OF
TECHOCAN INTERNATIONAL CO. LTD.
and HAIYAN (HELEN) GAO JORDAN

REASONS AND DECISION ON AN APPLICATION
(Section 144 of the *Securities Act*, RSO 1990, c S.5)

Hearing:	November 17, 2017	
Decision:	December 18, 2017	
Panel:	Timothy Moseley	Commissioner and Chair of the Panel
	Philip Anisman	Commissioner
	Frances Kordyback	Commissioner
Appearances:	Jay Naster	For the applicants Techocan International Co. Ltd. and Haiyan (Helen) Gao Jordan
	Linda Fuerst Gavin Smyth	For Staff of the Ontario Securities Commission

TABLE OF CONTENTS

I. OVERVIEW 1

II. BACKGROUND FACTS 2

III. LEGAL FRAMEWORK 3

IV. ISSUES 3

V. ANALYSIS 4

A. Under what circumstances generally should the Commission revoke or vary a settlement that has already concluded? 4

B. When comparing the two settlements in this case, what weight, if any, ought we to give to the contents of the Statement of Allegations? 7

C. When comparing the two settlements, is the Commission confined to the facts admitted in the agreements, or may the Commission consider other facts relating to the substance of Staff's allegations and submitted by the Applicants on this application? 8

1. Introduction 8

2. Information the Applicants say that the Commission ought now to consider 8

3. Analysis of the Applicants' submission 9

D. Do the relevant facts disclose a gross and unjustified disparity, as claimed by The Applicants? 10

E. What obligation, if any, did Staff have to disclose to the Applicants the status of settlement discussions with, or Staff's settlement position regarding, the parties to the MM Café Settlement? 13

F. To grant the requested relief, is it necessary to conclude that if Staff had made the disclosure suggested by the Applicants, the outcome of the proceeding against them would likely have been different? If so, do the facts in this case support that conclusion? 14

G. Would it be prejudicial to the public interest to grant relief under section 144 of the Act, and if so, should the Commission vary the terms of the Techocan Settlement as requested? 15

1. Would it be prejudicial to the public interest to grant relief under section 144 of the Act? 15

2. What would have been the appropriate relief? 16

VI. DISPOSITION 16

REASONS AND DECISION

I. OVERVIEW

[1] In March of 2017, Techocan International Co. Ltd. (**Techocan**) and Haiyan (Helen) Gao Jordan (**Ms. Jordan**) settled an enforcement proceeding that Staff of the Ontario Securities Commission (**Staff** of the **Commission**) had brought against them and other respondents. Staff alleged that Techocan and Ms. Jordan had engaged in unregistered trading and illegal distributions.

[2] Techocan and Ms. Jordan (in these reasons, the **Applicants**) now apply to the Commission under section 144 of the *Securities Act* (the **Act**)[1] for an order varying the decision that approved their settlement (the **Techocan Settlement**). They base this application on a second settlement (the **MM Café Settlement**), approved by the Commission one month later, against three other respondents in that same enforcement proceeding:

a. MM Café Franchise Inc. (**MM Café**);

b. Marianne Godwin (**Ms. Godwin**), who was alleged to be a director of MM Café, as well as its Chief Executive Officer; and

c. Dave Garnet Craig (**Mr. Craig**), who was alleged to be a director of MM Café, as well as its Chief Development Officer.

who were alleged to have engaged in unregistered trading, illegal distributions and fraud.

[3] The Applicants point to what they describe as a gross and unjustified disparity between the terms of the two settlements. The Applicants note in particular that they paid monetary sanctions and costs totaling $165,000, while the MM Café Settlement involved no monetary sanctions, and a costs order of only $1,000 against each of the two individual respondents. The Applicants say that this disparity and the manner in which they were treated warrant the requested variation, which would reduce the severity of the sanctions and costs order against them.

[4] The Commission has set aside settlements before, in very limited circumstances, but has not previously varied the terms of a settlement, as the Applicants request in this case. Staff of the Commission submits that this is not a proper case for an order that either revokes or varies the terms of the Techocan Settlement. Staff asserts that this is so for a number of reasons, including that the sanctions in the two settlements are not disproportionate because, among other things:

a. the Applicants received $110,000 in commissions from MM Café in connection with the investments made in shares of MM Café;

b. the Applicants admitted to breaches of two sections of the Act, while the parties to the MM Café Settlement admitted to only one; and

c. the Applicant Ms. Jordan was previously registered with the Commission, whereas none of the parties to the MM Café Settlement had ever been registered.

[1] RSO 1990, c S.5.

[5] We conclude that it would be prejudicial to the public interest to grant the relief requested by the Applicants. As we explain more fully below, we find that the Commission should grant relief on an application like this one only in the rarest of circumstances. For the Commission to make an order under section 144 of the Act, relating to a settlement, there must be a compelling interest that does not undermine the public interest in the promotion of settlements and the certainty that results from approval of a settlement agreement. In this case, we are not persuaded that there is an unfair disparity between the outcomes of the two settlements, or any other overriding interest that warrants the Commission's intervention. Finally, even if we concluded that some relief under section 144 were justified, it would be inappropriate to vary the terms of the Techocan Settlement based on the record before us. The application is therefore dismissed.

II. BACKGROUND FACTS

[6] On March 23, 2016, Staff filed a Statement of Allegations, and the Commission issued a Notice of Hearing, to commence the enforcement proceeding against the Applicants. Staff made various allegations against six corporate respondents (including Techocan) and five individual respondents (including Ms. Jordan).

[7] The impugned distributions were of shares of four of the corporate respondents to investors in Ontario and China. Staff alleged that individuals invested on the strength of representations that they could qualify for permanent resident status in Canada, through the Ontario Provincial Nominee Program.

[8] On July 26, 2016, Staff withdrew its allegations against some respondents, and filed an Amended Amended Statement of Allegations (referred to hereinafter as the **Statement of Allegations**). Instead of referring to distributions of the shares of four issuers, the amended allegations were confined to the distribution of shares of only one issuer; namely, MM Café. The following respondents remained:

a. Ms. Jordan, who was also alleged to have engaged in unregistered trading in shares of MM Café and the three other issuers;

b. Techocan, of which Ms. Jordan was alleged to be the President and directing mind;

c. a numbered company, of which Ms. Jordan was alleged to be a director;

d. MM Café;

e. Ms. Godwin; and

f. Mr. Craig.

[9] On March 24, 2017, the Commission approved the Techocan Settlement. In that settlement agreement, the Applicants admitted that they had engaged in unregistered trading in, and an illegal distribution of, the shares of MM Café. They agreed to the following:

a. disgorgement of $110,000;

b. an administrative penalty of $40,000;

c. costs of $15,000;

d. a five-year market ban, subject to specified exceptions;

e. Ms. Jordan would cooperate with Staff in its investigation and would testify for Staff in the continuing proceeding against the remaining respondents; and

f. Staff would withdraw its allegations against the numbered company associated with Ms. Jordan.

[10] On April 24, 2017, the Commission approved the MM Café Settlement. In that settlement agreement, MM Café admitted that it had carried out an illegal distribution. Ms. Godwin and Mr. Craig admitted that as officers and directors of MM Café, they had authorized, permitted or acquiesced in the breach by MM Café. They agreed to:

a. a permanent ban on any trading in securities by MM Café;

b. a five-year market ban on trading by Ms. Godwin and Mr. Craig, which could be reduced to two years under certain specified circumstances; and

c. costs of $1,000 to be paid by each of Ms. Godwin and Mr. Craig.

[11] On April 25, 2017, the day after approval of the MM Café Settlement, counsel for the Applicants wrote to the Director of Enforcement at the Commission. Counsel asserted that there was a "gross discrepancy in the manner in which Staff and the [Commission] dealt with" the parties to the two settlements, that it was "impossible to reconcile the disparity in the sanctions", and that this was unfair to the Applicants.

III. LEGAL FRAMEWORK

[12] Section 144 of the Act provides that the Commission "may make an order revoking or varying a decision of the Commission… if in the Commission's opinion the order would not be prejudicial to the public interest." The "public interest" is not defined in this context, but as the Commission has consistently held, we are guided by the purposes of the Act as set out in section 1.1: "to provide protection to investors from unfair, improper or fraudulent practices" and "to foster fair and efficient capital markets and confidence in capital markets".

[13] It is not disputed that the Commission has the jurisdiction to make the order sought by the Applicants on this application. The question is whether the Commission should exercise that jurisdiction, and if so, how.

[14] It is also undisputed that the Applicants bear the burden of demonstrating that it would not be prejudicial to the public interest for the Commission to grant the requested relief.

IV. ISSUES

[15] The concerns raised by the Applicants fall into three categories. The Applicants allege that:

a. Under all the circumstances, the disparity between the two settlements cannot be justified and is manifestly unfair to Techocan and to Ms. Jordan.

b. The facts admitted in the MM Café Settlement misrepresent the role of Ms. Godwin and Mr. Craig in the illegal distribution of MM Café shares, by unreasonably minimizing the degree of their responsibility. Further, significant allegations against those parties, as set out in the Statement of Allegations, were not pursued.

c. At the time that the Applicants were negotiating the Techocan Settlement, Staff failed to disclose to them the status of settlement discussions with, or Staff's settlement position regarding, the parties to the MM Café Settlement. The Applicants assert in their Notice of Application that had Staff made the necessary disclosure, the Applicants "never would have agreed" to the settlement as it was concluded.

[16] Staff rejects each of these concerns. It submits that no relief is warranted under section 144 of the Act, but if relief is warranted, the appropriate result is for the Commission to revoke the decision approving the settlement and not to vary the terms of that settlement as requested.

[17] The Applicants make no other complaint about the settlement process. They were represented by experienced counsel throughout, they freely entered into the Techocan Settlement, and they accept that the terms of each settlement are appropriate if the settlements are viewed in isolation.

[18] This application therefore presents the following issues:

a. Under what circumstances generally should the Commission revoke or vary a settlement that has already concluded?

b. When comparing the two settlements in this case, what weight, if any, ought we to give to the contents of the Statement of Allegations?

c. When comparing the two settlements, is the Commission confined to the facts admitted in the agreements, or may the Commission consider other facts relating to the substance of Staff's allegations and submitted by the Applicants on this application?

d. Do the relevant facts disclose a gross and unjustified disparity, as claimed by the Applicants?

e. What obligation, if any, did Staff have to disclose to the Applicants the status of settlement discussions with, or Staff's settlement position regarding, the parties to the MM Café Settlement?

f. To grant the requested relief, is it necessary to conclude that if Staff had made the disclosure suggested by the Applicants, the outcome of the proceeding against them would likely have been different? If so, do the facts in this case support that conclusion?

g. Would it be prejudicial to the public interest to grant relief under section 144 of the Act, and if not, should the Commission vary the terms of the Techocan Settlement as requested?

V. ANALYSIS

A. Under what circumstances generally should the Commission revoke or vary a settlement that has already concluded?

[19] In addressing contested section 144 applications generally, the Commission has held that the authority ought to be used only in "the rarest of circumstances".[2]

[20] Instances in which the Commission has set aside a settlement, whether under section 144 or otherwise, are especially rare. We are aware of only two such

[2] *Re Black* (2014), 37 OSCB 9697 at para 13; *Re Khan* (2014), 37 OSCB 1035 at para 21.

cases, both of which involved an admission by one respondent that certain conduct was unlawful, and a later finding that the very same conduct by a co-respondent was lawful. We begin with a review of those two cases, followed by consideration of two other decisions that help to define the relevant principles. We conclude that none of these authorities establishes a basis on which to grant the Applicants' requested order. If we are to grant relief in this case, we will be charting new territory.

[21] The first case in which the Commission set aside a settlement based on a later finding that the underlying conduct was lawful is *Re AIT Advanced Information Technologies Corp.* (***AIT***).[3] Two of three respondents to an enforcement proceeding had settled with Staff, on the basis that their conduct had contravened a section of the Act that required disclosure of a material change. The third respondent contested Staff's allegations and after a merits hearing, the Commission concluded that the alleged conduct did not contravene the Act, as there was not a material change that had to be disclosed at the relevant time. The factual basis of the allegations was identical with respect to all three respondents.

[22] Significantly, the section 144 application in that case was brought by Staff, who submitted that it would be unfair to leave undisturbed the respondents' admission that they had contravened the Act, when the Commission later found that the very same conduct did not contravene the Act. In granting the order to revoke the settlement, the Commission held that "it is absolutely not contrary to the public interest and, in fact, it is very strongly in the public interest that the order go as requested."[4]

[23] The second such decision is *Re McQuillen*,[5] which involved circumstances similar to those in *AIT*. Mr. McQuillen settled an enforcement proceeding brought by Market Regulation Services Inc. (**RS**), admitting that his trading for another registrant, for whom Mr. McQuillen was the administrative assistant, had breached certain of the Universal Market Integrity Rules (**UMIR**). Some years later, a contested hearing proceeded before IIROC (RS's successor organization) against the registrant whom Mr. McQuillen assisted, based on the same trading. The IIROC panel concluded that the trading did not contravene UMIR.

[24] Mr. McQuillen applied to the Commission to set aside the RS settlement. The Commission panel found that the matter was "on all fours" with the *AIT* case,[6] that had both respondents proceeded to the merits hearing, there was no basis on which the panel could have reached different results for the two individuals,[7] and that it would be "manifestly unfair" to Mr. McQuillen to allow his settlement to stand.[8]

[25] We note that the determining factor in *AIT* and in *McQuillen*, *i.e.*, that conduct admitted to be unlawful is later found to be lawful, is not present in this case. We turn to consider two other decisions that may be of assistance.

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[3] (2008), 31 OSCB 10027.
[4] *AIT* at para 4.
[5] (2014), 37 OSCB 8580 (***McQuillen***).
[6] *McQuillen* at para 50.
[7] *McQuillen* at para 86.
[8] *McQuillen* at paras 88, 97.

[26] In 2011, the Commission issued a decision in *Re Rankin*,[9] denying Mr. Rankin's application to revoke the Commission's approval of a settlement agreement he had entered into with Staff. Mr. Rankin claimed that Staff had failed to comply with its obligation to disclose to him certain facts which, Mr. Rankin asserted, would undermine the credibility of a principal witness against him. Staff had disclosed that information to Mr. Rankin's counsel, but Mr. Rankin's counsel did not convey the information to Mr. Rankin. Mr. Rankin said that he would not have entered into the settlement agreement had the information been disclosed to him.

[27] The Commission held that "it is not generally in the public interest for the Commission to re-open settlements previously entered into and approved", but that the Commission should revoke or vary a previous sanctions order where there is "manifest unfairness to a respondent", or where "the facts and circumstances clearly demonstrate that the… order cannot be permitted to stand (such as in [*AIT*])".[10]

[28] In dismissing Mr. Rankin's application, the Commission found that Mr. Rankin fully appreciated the strengths and weaknesses of the case against him,[11] that Staff was precluded by applicable rules of professional conduct from communicating directly with Mr. Rankin,[12] and that the subject information was not crucial in connection with his negotiation of the settlement agreement.[13] As a result, the Commission concluded that the failure to disclose was not manifestly unfair to Mr. Rankin.[14]

[29] Staff also referred us to the 2011 decision of the Saskatchewan Court of Appeal in *R v Omoth*,[15] which bears similarities to the present case. We review the case, although in doing so we note the caution expressed by the Divisional Court in its review of *Rankin*: "…it is important to remember that [Commission] proceedings [are] not criminal or quasi-criminal in nature."[16]

[30] Mr. Omoth pled guilty to three counts, and was sentenced in accordance with a joint submission by the Crown and Mr. Omoth's counsel. Mr. Omoth's sentence included a weapons prohibition order. At a later date, Mr. Omoth's co-accused pled guilty to four counts, and was sentenced. His sentence did not include a weapons prohibition order.

[31] Mr. Omoth appealed his sentence solely on the ground of parity. He asserted that his sentence, like that of his co-accused, should not have included a weapons prohibition order. Mr. Omoth relied on s. 718.2(b) of the *Criminal Code*,[17] which provides that "a sentence should be similar to sentences imposed on similar defenders for similar offences committed in similar circumstances".

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[9] (2011), 34 OSCB 11797 (***Rankin***).
[10] *Rankin* at para 84.
[11] *Rankin* at para 94.
[12] *Rankin* at para 102.
[13] *Rankin* at para 112.
[14] *Rankin* at para 114.
[15] [2011] SJ No 214.
[16] *Re Rankin*, 2013 ONSC 112 (DivCt) at para 37.
[17] RSC, 1985, c C-46.

[32] In dismissing Mr. Omoth's appeal, a majority of the court held that:

a. the *Criminal Code*'s requirement for similar sentences "must be significantly conditioned" by the fact that Mr. Omoth's sentence was the subject of a joint submission;[18]

b. once the sentence contemplated by the joint submission is imposed, both the offender and the prosecutor must accept that a trial might have resulted in a more favourable outcome to either side;[19]

c. it should reject Mr. Omoth's proposed approach, which if adopted would allow an offender to reach a plea agreement and thereby "lock in" a maximum sentence, but then claim a right to have the sentence reduced on appeal if a co-accused later receives a lesser sentence;[20] and

d. the plea discussion process will be undermined, and the likelihood of plea agreements reduced, if the parties lack confidence that a plea agreement will stand once the sentence is imposed.[21]

[33] As noted above in paragraph [12], we must determine the meaning of "the public interest" in section 144 in accordance with the purposes of the Act. In our view, the effectiveness of the Commission's enforcement processes, and confidence in them, are necessary for the Commission to further the purposes of the Act. This requires that any party against whom Staff brings an enforcement proceeding can try to resolve it. As the Commission has observed on numerous occasions, the settlement process advances the interests of administrative efficiency, conservation of resources, finality of proceedings, certainty, and fairness; the resolution of proceedings through settlements benefits the Commission, the regulatory process, investors and the securities markets generally, as well as respondents.[22]

[34] As noted above, the Applicants' case rests on a foundation not reflected in the above authorities. In considering whether we should accept the Applicants' submission that the circumstances of this case give rise to a further basis for section 144 relief, we turn to a review of those circumstances in light of the principles set out above.

B. When comparing the two settlements in this case, what weight, if any, ought we to give to the contents of the Statement of Allegations?

[35] The Applicants submit that the allegations contained in the Statement of Allegations inform a party's "reasonable expectations" as to how matters will proceed, and that we should draw conclusions from the allegations that were not admitted in the settlement agreements.

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[18] *R v Omoth* at para 12.
[19] *R v Omoth* at para 17.
[20] *R v Omoth* at para 20.
[21] *R v Omoth* at para 18.
[22] See, *e.g.*, *Re Sentry Investments Inc.* (2017), 40 OSCB 3435 (***Sentry***) at paras 6-7.

[36] We reject this submission. A Statement of Allegations represents the case that Staff believes, at the time the allegations are made, and with reasonable but not absolute certainty, can be proven against the respondents. Events often intervene to change Staff's view. For example:

a. potential witnesses may change what they have to say, or they may turn out for other reasons to become less reliable than Staff originally believed, or they may become unavailable;

b. Staff may continue its investigation, leading to the discovery of additional evidence that affects Staff's perception of the likely outcome; and

c. opposing counsel or a mediator may persuade Staff that part or all of its case is weak.

[37] Even outside the context of settlements, it is not uncommon for Staff to withdraw allegations against a respondent. Staff's election to do so may, in any given case, be driven by Staff's ongoing duty to pursue only those allegations that it concludes it has a reasonable likelihood of success of establishing.

[38] In our view, therefore, no reliable inference may be drawn from a comparison of the allegations contained in the Statement of Allegations with those admitted to in a settlement agreement.

[39] We note in any event that in the case of both the Techocan Settlement and the MM Café Settlement, substantial allegations contained in the Statement of Allegations did not appear in the relevant agreement. Staff did not proceed with allegations of fraud against the MM Café Settlement respondents, nor with allegations against the Applicants relating to the three additional issuers.

C. When comparing the two settlements, is the Commission confined to the facts admitted in the agreements, or may the Commission consider other facts relating to the substance of Staff's allegations and submitted by the Applicants on this application?

1. Introduction

[40] The Applicants submit that if the Commission limits itself to the facts contained in the settlement agreements, there is a risk that it could be "led down a path" by Staff because it was not "fairly informed of the facts". While the Applicants were careful to note that they do not allege any bad faith in this case, they do say that the facts contained in the MM Café Settlement agreement present a "grossly distorted picture of… the truth".

[41] In support of this submission, the Applicants referred to two examples that they say highlight the alleged unfairness and disparity in treatment. In the following paragraphs, we review those examples and conclude that it would be inappropriate for us to consider additional facts that the Applicants say relate to the merits of the allegations against the various respondents.

2. Information the Applicants say that the Commission ought now to consider

[42] The Applicants' two examples of relevant facts are drawn from the disclosure they received from Staff, early in the proceeding, which information was not part of the record in either settlement approval hearing.

[43] The first example comprised more than thirty pages of promotional materials that were, according to the Applicants, created by Ms. Godwin and Mr. Craig in connection with the distribution of securities of MM Café. It also included the transcript of an interview that Staff conducted of Ms. Godwin, under oath, in January of 2015. One page of the promotional materials lists the company's Global Leadership Team, including Ms. Godwin and Mr. Craig, and includes what purports to be a description of their roles and of their professional histories. In the Applicants' view, the promotional materials and Ms. Godwin's answers in the interview transcript are fundamentally inconsistent with how she was characterized in the MM Café Settlement, as they indicate substantial experience in securities markets.

[44] The Applicants submit that it was unfair for the Commission to have before it, on one hand, a settlement agreement that referred to Ms. Jordan's registration history, and on the other hand, a settlement agreement that failed to refer to Ms. Godwin's long involvement in the securities business.

[45] The second example was a statement of anticipated evidence of a Staff Senior Forensic Accountant that described an analysis of the source and use of funds by the parties to the MM Café Settlement. The Applicants submitted that the statement showed that significant sums obtained as a result of the illegal distribution had been received by Ms. Godwin and Mr. Craig. The Applicants noted that despite this, the MM Café Settlement contained no such reference, and no disgorgement order was agreed to by any of the parties to that settlement agreement.

3. Analysis of the Applicants' submission

[46] In both instances, it would be unwise to conclude here that different facts ought to be found.

[47] When parties disagree about a fact, the Commission must typically weigh conflicting evidence and determine, on a balance of probabilities, whether the fact is true. Testimony of witnesses, cross-examination of those witnesses, and counsel's submissions all enable the Commission to carry out its obligation to determine the facts. In a contested merits hearing, evidence might be qualified, explained, characterized differently, or even found to be unreliable.

[48] Without that testimony and that cross-examination, the Commission is ill-equipped to resolve a factual dispute. The Applicants' two examples give rise to this difficulty; because they were drawn from pre-hearing disclosure delivered by Staff, they are untested. The problem associated with trying to make factual findings on the basis of such untested information was highlighted in the hearing before us, when the Applicants referred to Ms. Godwin's interview. That reference sparked a discussion in which we heard differing submissions as to what inferences could be drawn from Ms. Godwin's answers in light of other parts of Ms. Godwin's interview and whether additional evidence would be necessary or appropriate. Similarly, the anticipated evidence of the Staff accountant about funds allegedly received by Ms. Godwin and Mr. Craig did not provide a sufficient basis from which to reach factual conclusions.

[49] We agree with Staff's submission that the record on this application amounts to the Applicants "cherry-picking" from the disclosure, and that it is insufficient for us to resolve the factual dispute. The second-guessing that the Applicants ask of

us would effectively require us to hold a merits hearing that never occurred, a result that would undermine the settlement process and its attendant benefits.

[50] While we cannot rule out the possibility that in another case an applicant might point to circumstances, such as Staff conduct that was abusive, sufficient to warrant the Commission looking behind the admitted facts, the bar for doing so would be high. The Applicants in this case allege no such abuse. The examples offered by the Applicants, about Staff's choices as to the facts put before the settlement approval panels, do not approach the standard that would be required.

[51] In response to the Applicants' concern, cited above in paragraph [40], that such an approach leaves unchecked Staff's ability to tailor the facts put before a panel considering a settlement, Staff made two submissions.

[52] First, Staff noted that rules 32 and 33 of the Commission's *Rules of Procedure and Forms*[23] require a confidential settlement conference at which a panel has an opportunity to review a settlement agreement. At that conference, the panel may ask questions, test admissions, and express any concerns. If, at the conclusion of the confidential settlement conference, the panel is satisfied that the proposed settlement (as amended, where applicable) would be in the public interest, the matter proceeds to a public hearing at which a panel may formally approve the settlement and issue any resulting order. In Staff's submission, this process allows the Commission to minimize the risk that a proposed settlement is improper. We agree.

[53] Secondly, Staff emphasizes that the nature of prosecutorial discretion is such that the tribunal's oversight role is limited. As the Supreme Court of Canada has observed in the criminal context, the "functions of prosecutors and of judges must not be blurred."[24] We agree with the submission that the Commission should be loath to inquire into Staff's exercise of discretion after a settlement has been approved, absent evidence of an abuse of process.

D. Do the relevant facts disclose a gross and unjustified disparity, as claimed by The Applicants?

[54] The Commission's authority under section 127 of the Act to impose sanctions in the public interest is protective. That section provides a wide array of tools that the Commission can tailor to the particular circumstances in order to a reach a result that will achieve the purposes of the Act. Sanctions must reflect and be proportionate to those circumstances, and must also be proportionate to past decisions of the Commission and to the responsibilities of the particular respondent.[25]

[55] In this case, the Applicants do not claim that either of the two settlements was unreasonable or contrary to the public interest, based on the facts contained in the relevant settlement agreement. They admit that viewed in isolation, each can stand. Rather, the Applicants contend that the Techocan Settlement is not proportionate to the MM Café Settlement, particularly when consideration is

[23] (2017), 40 OSCB 8988. The two settlements were approved under the rules of procedure then in force, which were replaced by the current rules on October 31, 2017. For the purposes of this decision, there are no consequential differences between the two versions.
[24] *R v T.(V.)*, [1992] 1 SCR 749 at 761.
[25] *Re Goldpoint Resources Corp.* (2013), 36 OSCB 1464 at para 42.

given to the additional facts as the Applicants understand them to be from the disclosure provided to them in the course of the proceeding.

[56] As the Supreme Court of Canada has held in the context of criminal sentencing, the "principle of parity does not preclude disparity where *warranted by the circumstances* [emphasis in the original]".[26] This statement is equally true in the context of Commission enforcement proceedings, especially in the context of settlements of those proceedings. Any sanctions order must be a product of all of the relevant circumstances, whether it is imposed following a settlement or at the conclusion of a contested hearing. However, unlike an order following a contested hearing, a settlement agreement and the resulting order reflect not just the nature of the factual and legal admissions that a party is willing to make. The agreement also reflects the parties' assessment of the likely outcome of a contested hearing. Finally, the agreement reflects factors, unique to the parties, that affect the parties' priorities and choices.

[57] The two settlements are different in a number of respects:

a. The settlements involved different breaches of the Act. The parties to the Techocan Settlement admit that they contravened two sections of the Act: (i) section 25 of the Act, by engaging in the business of, or holding themselves out as being engaged in the business of, trading in securities without being registered; and (ii) section 53 of the Act, by distributing securities of MM Café in circumstances where no preliminary prospectus and prospectus had been filed, and receipts obtained. The parties to the MM Café Settlement admitted only to contravening the latter, and not the former. Specifically, MM Café admitted that it had carried out an illegal distribution, and Ms. Godwin and Mr. Craig admitted that as directors and officers of MM Café, they had authorized, permitted or acquiesced in the breach by MM Café.

b. Ms. Jordan had previously been registered for six months as a scholarship plan dealing representative; none of the parties to the MM Café Settlement had previously been registered.

c. Ms. Godwin and Mr. Craig relied on a third-party advisor to manage investor relations.

d. The Applicants admitted that they had received $110,000 in commissions from MM Café, of which approximately half was retained by them.

e. Ms. Jordan agreed to cooperate with Staff and to testify for Staff in any proceeding relating to the matters set out in the Techocan Settlement agreement.

f. Staff agreed with Ms. Godwin's and Mr. Craig's assertions that they had limited financial resources. No such assertion was made by Ms. Jordan.

g. The parties to both settlements agreed to the imposition of five-year bans from trading or acquiring securities and from being a director or officer of an issuer. Different exceptions were made, however:

    i. the prohibition against Ms. Jordan trading or acquiring securities allows for trading in managed accounts, and trades in securities of

[26] *R v L.M.*, 2008 SCC 31 (CanLII) at para 36.

a private company, while no such exception was made for Ms. Godwin or Mr. Craig;

ii. the prohibition against Ms. Jordan acting as an officer or director is limited to issuers that are not private companies, while that against Ms. Godwin or Mr. Craig extends to all issuers; and

iii. Staff will, under certain specified circumstances, consent to an order reducing from five years to two years the period of the various bans against Ms. Godwin and Mr. Craig, while no such provision applied to Ms. Jordan.

h. Techocan and Ms. Jordan agreed, jointly and severally, to:

i. pay a $40,000 administrative penalty, while the MM Café Settlement did not provide for an administrative penalty;

ii. disgorge to the Commission the amount of $110,000, while the MM Café Settlement did not include a disgorgement order; and

iii. pay $15,000 in costs; while each of Ms. Godwin and Mr. Craig agreed to pay $1,000 in costs.

[58] As the Commission often notes when it approves settlements, and as the panels in each of the Techocan Settlement and the MM Café Settlement expressly stated, the Commission accords significant deference to the resolution reached by the parties. In determining whether a proposed settlement is in the public interest, the Commission must consider whether "the sanctions agreed to by the parties are within a reasonable range of appropriateness in light of the admitted facts",[27] or "within acceptable parameters", not whether the proposed sanctions are those that the Commission would impose after a contested hearing.[28]

[59] Therefore, even where two settlements are based on substantially similar facts and admitted contraventions, it does not follow that the results must be identical or substantially similar. The nature of the settlement process, the particular risk assessment that would be made by each respondent, and the latitude inherent in the Commission's assessment of a "reasonable range" can lead to different results that are in the public interest.

[60] This is not a case of settlements based on substantially similar facts. As noted above, there are numerous differences between the Techocan Settlement and the MM Café Settlement. One or more of those differences might reasonably have contributed to different assessments by Staff and by the respondents involved.

[61] For example, Ms. Jordan had previously been registered under the Act, while neither Ms. Godwin nor Mr. Craig had ever been registered. Commission decisions in which sanctions are imposed have routinely noted a respondent's current or previous registration as an aggravating factor. The Applicants submit that Ms. Jordan's registration history cannot be consequential in this case, because she was registered for only six months, and only as a scholarship plan dealer. We do not accept that submission. Objectives of the prerequisites to obtaining registration include an understanding of the need to be registered in

[27] *Sentry* at para 6.
[28] *Re Melnyk* (2007), 30 OSCB 5253 at para 15; *Re Koonar* (2002), 25 OSCB 2691 at 3.

order to conduct certain activities, and of the obligations and responsibilities associated with that status. Registrants are rightly held to a higher standard. This distinguishing fact alone may have played a significant role in the different outcomes in the two settlements.

[62] As a second example, the private company exception to the trading ban imposed against Ms. Jordan (which exception was not provided for in the MM Café Settlement) may have been meaningful to her and may have contributed significantly to her decision to agree to other sanctions.

[63] We cite these examples, although we have no evidence as to the importance of these and other distinguishing features in the minds of Staff and of the various respondents; nor do we have evidence of the basis for each party's assessment of the likely outcome of a contested hearing. This is as it should be. As the Supreme Court of Canada has held, and as the Applicants acknowledge, communications between parties about a possible resolution are protected by a privilege. That privilege promotes settlement by enabling "parties to participate in settlement negotiations without fear that information they disclose will be used against them in litigation."[29]

[64] Further, the Commission's role is not to inquire into the parties' motivations, priorities and risk assessments. As explained above, the Commission's role is to determine whether a particular proposed settlement is within a range of reasonable outcomes and whether it would be in the public interest to approve the settlement.

[65] Because we should not and do not know what the parties' priorities were or how their settlement positions evolved leading up to the agreement, we must base our review of the settlements on what appears in the agreements. In our view, the facts and contraventions agreed to in the two settlements are sufficiently different, in ways that could reasonably be significant enough to a settling party, to make this application quintessentially an "apples to oranges" comparison. Those differences do not permit a meaningful assessment of the sanctions and costs orders in one agreement as against those found in the other agreement. Accordingly, we are unable to accept the Applicants' submission that the two settlements reveal a disparity that is not justified by the circumstances.

E. What obligation, if any, did Staff have to disclose to the Applicants the status of settlement discussions with, or Staff's settlement position regarding, the parties to the MM Café Settlement?

[66] The Applicants submit that their agreement to the terms of the Techocan Settlement was not informed, because they "were never informed of Staff's intention to settle with the co-Respondents Godwin and Craig for only a fraction ($1/165^{th}$) of the monetary sanctions demanded of the Applicants."[30]

[67] That submission requires us to consider two questions:

a. Does Staff have an obligation to disclose matters related to possible settlements with other respondents?

b. If so, what if anything was Staff required to disclose in this case?

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[29] *Bombardier Inc. v Union Carbide Canada Inc.*, [2014] 1 SCR 800 at para 31.
[30] Notice of Application, para 25.

[68] We conclude that:

a. Staff has no general obligation to disclose, to a settling respondent, the status of negotiations with other respondents; and

b. in any event, as the Applicants admitted, there is no evidence as to whether there were any negotiations with the MM Café Settlement respondents, nor was there any evidence about Staff's "intention to settle".

[69] As a result, we reject the Applicants' submission. As noted above, the privilege that attaches to settlement discussions promotes settlements. A party who seeks to pierce that privilege must cite "a competing public interest [that] outweighs the public interest in encouraging settlement."[31] In our view, the Applicants have identified no such overriding public interest.

[70] Even if we were prepared to accede to the Applicants' submission that Staff had an obligation to disclose, there is no evidence as to the truth of the underlying assumption; namely, that when the Techocan Settlement was concluded, Staff intended to settle with Ms. Godwin and Mr. Craig on the terms described, or on any other specific terms. Such an assumption appears to be inconsistent with Ms. Jordan's obligation, in the Techocan Settlement, to cooperate with Staff and to testify against the remaining respondents. That cooperation would not have been needed if Staff were confident that it would soon be settling with Ms. Godwin and Mr. Craig.

[71] Further, even if we do not take the Applicants' submission literally, but interpret it more generously and assume that the Applicants expected Staff to tell them the range of monetary sanctions for which Staff would be prepared to settle with the remaining respondents, we would reject that submission as well. Such an obligation could not reasonably be fulfilled. It is common that a party's acceptable settlement terms are constantly evolving, a reality that applies equally to Staff as it does to a respondent. Would the Applicants expect Staff, in the heat of discussions with a respondent, to update co-respondents in real time? That is an impractical expectation, and one that would jeopardize the confidentiality of settlement discussions. It would significantly undermine the settlement process, and would therefore be prejudicial to the public interest.

F. To grant the requested relief, is it necessary to conclude that if Staff had made the disclosure suggested by the Applicants, the outcome of the proceeding against them would likely have been different? If so, do the facts in this case support that conclusion?

[72] It is undisputed that, as the Divisional Court held in its review of *Rankin*, the applicable test is whether the information, if disclosed, would likely have affected the outcome of the proceeding against the Applicants.[32]

[73] The Applicants adduced no evidence that they would have adopted a different course had they believed that a settlement with Ms. Godwin and Mr. Craig was imminent on terms similar to those in the MM Café Settlement. All that is before us is Applicants' counsel's communication to the Commission's Director of

[31] *Amoco Canada Petroleum Co. v Propak Systems Ltd.*, 2001 ABCA 110 (CanLII), quoted in *Sable Offshore Energy Inc. v. Ameron International Corp.*, 2013 SCC 37 (CanLII) at para 19.
[32] *Re Rankin* (DivCt) at paras 38-39.

Enforcement (referred to in paragraph [11] above), expressing his concern about the MM Café Settlement and a written submission contained in the Notice of Application.

[74] As a result, we see no basis to conclude that the information "would possibly have led a reasonable person to risk a lengthy… administrative proceeding", to use the words of the Divisional Court in *Re Rankin*.[33]

G. Would it be prejudicial to the public interest to grant relief under section 144 of the Act, and if so, should the Commission vary the terms of the Techocan Settlement as requested?

1. Would it be prejudicial to the public interest to grant relief under section 144 of the Act?

[75] Absent exceptional and compelling circumstances, it would be prejudicial to the public interest to permit a respondent to resile from a settlement agreement on the basis that a co-respondent later concludes what the first respondent perceives to be a more favourable, or even a significantly more favourable, result. In this regard, we respectfully agree with the analysis of the majority in *R v Omoth*, discussed beginning at paragraph [29] above. We conclude that the same considerations apply to settlements of Commission proceedings.

[76] In our view, this application presents no exceptional and compelling circumstances.

[77] The *AIT* and *McQuillen* decisions, in which the Commission set aside settlements, do not support the Applicants' request for relief. In each of those cases, the subsequent development was a finding by the Commission that the legal basis for an earlier admission was incorrect. This later finding struck at the core of the earlier settlement, viewed objectively. It directly contradicted the admissions that had provided the legal basis for the approval of the earlier settlement. Allowing both to stand would have been contrary to the public interest.

[78] In this case, there are no contradictory Commission findings. Neither the admissions in, nor the terms of, the MM Café Settlement undermine the legitimacy of the admissions in, or the terms of, the Techocan Settlement. The two agreements are based on different background facts and different admitted contraventions of the Act. Each contains a unique set of agreed-upon terms, tailored to reflect the priorities and risk assessments of the particular parties.

[79] Finally, we conclude that Staff was within its authority to determine the scope of the admissions agreed to by the parties and presented to the Commission. As employees of the Commission, Staff have an obligation to perform their enforcement activities fairly and honestly and not to misrepresent facts to the Commission. We have no basis on which to accept the Applicants' submission that the admissions contained in the MM Café Settlement misrepresent the true facts. We could not accept such a submission without effectively conducting a full merits hearing.

[80] The Applicants have failed to demonstrate any manifest unfairness resulting from the process leading up to the Techocan Settlement, the settlement itself, or the subsequent MM Café Settlement. To grant relief under section 144 of the Act

[33] *Re Rankin* (DivCt) at para 43.

would undermine the settlement process and the important benefits of that process and would therefore be prejudicial to the public interest.

2. What would have been the appropriate relief?

[81] While the Applicants are not entitled to relief under section 144 of the Act, we wish to address the parties' submissions regarding the Applicants' requested remedy.

[82] The Applicants did not request an order revoking the Techocan Settlement; indeed, they expressly declined to make that request. Instead, they submit that on the basis of parity, we ought to vary the terms agreed to in the Techocan Settlement to bring the terms closer to those in the MM Café Settlement. Specifically, they requested that we reduce the administrative penalty from $40,000 to $10,000, the amount of disgorgement from $110,000 to $55,750, and the costs from $15,000 to $5,000.

[83] Staff submitted that if we decided to grant relief under section 144, the only appropriate order would be to revoke the decision approving the Techocan Settlement. We agree. The admitted facts in the Techocan Settlement agreement supported the sanctions imposed by the Commission. We cannot now impose different sanctions, over Staff's objection, without a proper record that supports the requested variations and that is based on evidence that the parties have an opportunity to challenge and contradict. No such foundation has been established on this application. In our view, it would be prejudicial to the public interest to vary the sanctions in the manner requested.

[84] For these reasons, had we decided that the Applicants were entitled to relief on this application, we would have revoked the decision approving the Techocan Settlement.

VI. DISPOSITION

[85] For the reasons set out above, we conclude that it would be prejudicial to the public interest to grant the relief sought. The Applicants have therefore failed to meet the required standard under section 144 of the Act. The application is dismissed.

Dated at Toronto this 18th day of December, 2017.

"Timothy Moseley"
Timothy Moseley

"Philip Anisman"
Philip Anisman

"Frances Kordyback"
Frances Kordyback