3.1.2 Imagin Diagnostic Centres Inc. et al.

IN THE MATTER OF
THE SECURITIES ACT,
R.S.O. 1990, c. S.5, AS AMENDED

AND

IN THE MATTER OF
IMAGIN DIAGNOSTIC CENTRES INC., PATRICK J. ROONEY,
CYNTHIA JORDAN, ALLAN McCAFFREY, MICHAEL SHUMACHER,
CHRISTOPHER SMITH, MELVYN HARRIS AND MICHAEL ZELYONY

HEARING HELD PURSUANT TO SECTIONS 127 AND 127.1 OF THE ACT

SETTLEMENT HEARING RE: CYNTHIA JORDAN, ALLAN McCAFFREY,
MICHAEL SHUMACHER, CHRISTOPHER SMITH, AND MICHAEL ZELYONY

HEARING:	Friday, January 16, 2009		
PANEL:	Suresh Thakrar	-	Commissioner and Chair of the Panel
	Kevin J. Kelly	-	Commissioner
APPEARANCES:	Hugh Craig Jonathon Feasby	-	for Staff of the Ontario Securities Commission
	Robert Brush Jane Patterson	- –	for Allan McCaffrey, Michael Shumacher, Christopher Smith and Michael Zelyony
	Shawna Fattal	–	for Cynthia Jordan

ORAL RULING AND REASONS

The following text has been prepared for the purpose of publication in the Ontario Securities Commission Bulletin and is based on excerpts of the transcript of the hearing. The excerpts have been edited and supplemented and the text has been approved by the Chair of the Panel for the purpose of providing a public record of the decision.

Chair:

[1] This was a hearing under sections 127 and 127.1 of the Securities Act, R.S.O. 1990, c. S.5, as amended, (the "Act") for the Ontario Securities Commission (the "Commission") to consider whether it is in the public interest to approve five separate proposed Settlement Agreements between Staff of the Commission ("Staff") and the respondents:

1. Cynthia Jordan ("Jordan");
2. Allan McCaffrey ("McCaffrey");
3. Michael Shumacher ("Shumacher");
4. Christopher Smith ("Smith"); and
5. Michael Zelyony ("Zelyony").

[2] We have read Staff's written submissions, and heard the oral submissions and we have decided to approve all five Settlement Agreements as being in the public interest. These are our oral reasons in this matter.

[3] The facts and circumstances agreed to by Staff and the five respondents are set out in the five separate Settlement Agreements. These facts are not findings of fact by this Panel, rather, they are facts agreed to by Staff and the respondents for the purposes of the Settlement Agreements. In approving all five Settlement Agreements, we relied solely on the facts set out in the agreements and those facts represented to us at the hearing (see: *Re Rankin* (2008), 31 O.S.C.B. 3303 at para. 5).

[4] All five respondents were named in the Notice of Hearing issued on September 28, 2007. Each of the respondents is not currently registered with the Commission, nor were they registered with the Commission during the relevant time of the conduct at issue in this proceeding.

[5] The misconduct of all five respondents relates to their roles in the trading activities in securities of Imagin Diagnostic Centres Inc. ("Imagin") in the period between March 2003 and February 2007.

[6] Imagin is a corporation incorporated pursuant to the laws of Canada with its head office previously located in Toronto, Ontario. Imagin is not registered in any capacity with the Commission, nor is it a reporting issuer in Ontario.

[7] Imagin started selling its securities in 2003, and as of July 13, 2006, Imagin had raised $14 million, of which approximately $3.5 million was raised from Ontario investors. These securities have not been qualified by a prospectus filed with the Commission. Further, the sales of securities were from Imagin's offices in Toronto to investors including residents in Ontario.

[8] Prior to February 2006, a significant portion of Imagin's Staff in Toronto assisted in the sales of its securities to investors both inside and outside of Ontario. Imagin's head office moved to Vancouver, British Columbia in February 2006. After February 2006, Toronto employees of Imagin continued to contact or qualify potential investors and any sales leads gathered were then forwarded to Vancouver for further sales action by Imagin.

[9] As stated in each of their respective Settlement Agreements, the role of each of the respondents can be described as follows:

- From December 3, 2002 to January 23, 2003, Jordan was President of Imagin. Thereafter, she remained as an officer and director of Imagin during the material time. She authorized, permitted or acquiesced to the sale of Imagin securities by employees of Imagin to members of the public from December 2002 until October 2006. Some of these sales of securities were from Imagin's office in Toronto to investors, including residents of Ontario.

- During the material time, McCaffrey was employed by Imagin from March 2003 until February 2007, and during almost all of this time period he was in charge, in an overseer capacity, of those employees of Imagin engaged in the sale of securities of Imagin to members of the public. Some of these sales made by McCaffrey were from Imagin's offices in Toronto to investors, including residents of Ontario.

- During the material time, Shumacher was employed by Imagin and was engaged in the sale of securities to members of the public from March 2003 to January 2006. Some of these sales made by Shumacher were from Imagin's offices in Toronto to investors, including residents of Ontario.

- During the material time, Smith was employed by Imagin and was engaged in the sale of securities to members of the public from September 2003 to June 2006. Some of these sales made by Smith were from Imagin's offices in Toronto to investors, including residents of Ontario.

- During the material time, Zelyony was employed by Imagin and was engaged in the sale of securities to members of the public from November 2005 to October 2006. Some of these sales made by Zelyony were from Imagin's offices in Toronto to investors, including residents of Ontario.

[10] Through these acts, all five respondents engaged in the business of trading in securities in Ontario. They all acted as a market intermediary, as defined in section 204(1) of the Regulations to the Act. As confirmed in the Commission's decision in *Re Momentas Corp.* (2006), 29 O.S.C.B. 7408, a market intermediary includes those persons hired by an issuer primarily to engage in the sale of securities of that issuer to members of the public. Accordingly, each respondent was acting as a market intermediary while employed at Imagin to sell securities of Imagin.

[11] As stated in *Re Allen* (2005), 28 O.S.C.B. 8541, Ontario Securities Commission Rule 45-501 provides certain exemptions from registration requirements for trading in securities. However, section 3.4 of that rule removes the registration exemption for market intermediaries.

[12] Therefore, in this matter, as a market intermediary, each of the five respondents was required to be registered with the Commission pursuant to section 25 of the Act. Accordingly, each respondent traded in securities without being registered as required by subsection 25(1) of the Act and this was contrary to the public interest.

[13] By entering into the Settlement Agreements, all five respondents have recognized the seriousness of their misconduct and admit that individually they engaged in conduct that was contrary to the public interest.

[14] The Commission's mandate in upholding the purposes of the Act, as set out in section 1.1 of the Act, is:

(a) to provide protection to investors from unfair, improper or fraudulent practices; and

(b) to foster fair and efficient capital markets and confidence in the capital markets.

[15] Further, in accordance with paragraph 2.1(2)(iii) of the Act, the Commission is guided by certain fundamental principles in pursuing the purposes of the Act, including the "maintenance of high standards of fitness and business conduct to ensure honest and responsible conduct by market participants".

[16] It is important that all market participants in the business of selling or promoting securities must meet the registration, qualification and conduct requirements of the Act. This has also been affirmed in the Commission's decision in *Re Momentas Corp.*, *supra* at para. 46.

[17] The role of the Commission in exercising its public interest jurisdiction is set out in *Re Mithras Management Ltd.* (1990), 13 O.S.C.B. 1600 at 1610-1611.

[18] Before we go to our order, we would like to briefly refer to the law as it applies to the consideration of the Settlement Agreements before the Commission.

[19] We are guided by the sanctioning factors listed in *Re M.C.J.C. Holdings and Michael Cowpland* (2002), 25 O.S.C.B. 1133 and *Re Belteco Holdings Inc.* (1998), 21 O.S.C.B. 7743, which Staff referred us to in their written submissions.

[20] In addition, appropriate sanctions need to take into account the specific circumstances of each case as stated in *Re M.C.J.C. Holdings and Michael Cowpland*, *supra* at 1134-1135.

[21] In this respect, higher sanctions are imposed against McCaffrey as he had a more significant role in the scheme.

[22] Jordan was, for a short period of time, the President of Imagin and then an officer and director of Imagin; however, it is the Panel's understanding that Jordan did not have an active role in the day-to-day management of the company. Staff explained that she was only a "figure head". Notwithstanding her limited activity in the company, we note that officers and directors have obligations that must be fulfilled.

[23] On the other hand, the other respondents, Smith, Shumacher and Zelyony were engaged in sales and did not have the same responsibility or involvement as McCaffrey.

[24] We also took into consideration the mitigating factors that existed for each respondent.

[25] With respect to Jordan, she cooperated with Staff's investigation, provided a voluntary statement, expressed extreme remorse at the settlement hearing, and stated that she has no intention to return to work in the securities industry.

[26] With respect to McCaffrey, Shumacher, Smith and Zelyony, each states in their respective Settlement Agreement that he:

- cooperated with Staff's investigation and provided a voluntary statement;
- unknowingly breached the Act; and
- asserts that after he became aware of Staff's inquiries about the sale of Imagin securities, he was provided a legal opinion that had been previously provided to Imagin stating that the conduct above did not breach the Act.

[27] We also note that the respondents cooperated with Staff at the earliest possible stage. The respondents have indicated their willingness to continue to cooperate and to testify in the ongoing Commission proceeding against the remaining respondents in this matter.

[28] It was established in *Re Sohan Singh Koonar et al.* (2002), 25 O.S.C.B. 2691, that the role of the Commission Panel in reviewing a settlement agreement is not to substitute its own sanctions for what is proposed in the settlement agreement. Instead, the Commission should ensure that the agreed sanctions in the settlement agreement are within acceptable parameters.

[29] This is what we as a Panel have done in approving each of the five Settlement Agreements. We are of the view that the sanctions set out in the five Settlement Agreements are within acceptable parameters. Therefore, we make the following Orders:

[30] With respect to Jordan:

(a) It is hereby ordered, pursuant to section 127 of the Act, that:

i. The Settlement Agreement dated January 15, 2009, between Staff of the Commission and Cynthia Jordan is approved;

ii. The Respondent is prohibited for five years from becoming or acting as a director or officer of any issuer, registrant or investment fund manager commencing on the date of this order; and,

iii. The Respondent is prohibited for five years from becoming or acting as a registrant commencing on the date of this order.

[31] With respect to McCaffrey:

(a) It is hereby ordered, pursuant to section 127 of the Act, that:

i. The Settlement Agreement dated January 15, 2009, between Staff of the Commission and Allan McCaffrey is approved;

ii. The Respondent is prohibited for ten years from becoming or acting as a director or officer of any issuer, registrant or investment fund manager commencing on the date of this order;

iii. The Respondent is prohibited for ten years from becoming or acting as a registrant commencing on the date of this order; and,

iv. The Respondent is to pay an administrative penalty of $15,000 to be allocated under s. 3.4(2)(b) of the Act to or for the benefit of third parties.

[32] With respect to Shumacher:

(a) It is hereby ordered, pursuant to section 127 of the Act, that:

i. The Settlement Agreement dated January 15, 2009, between Staff of the Commission and Michael Shumacher is approved;

ii. The Respondent is prohibited for five years from becoming or acting as a director or officer of any issuer, registrant or investment fund manager commencing on the date of this order; and,

iii. The Respondent is prohibited for five years from becoming or acting as a registrant commencing on the date of this order.

[33] With respect to Smith:

(a) It is hereby ordered, pursuant to section 127 of the Act, that:

i. The Settlement Agreement dated January 15, 2009, between Staff of the Commission and Christopher Smith is approved;

ii. The Respondent is prohibited for five years from becoming or acting as a director or officer of any issuer, registrant or investment fund manager commencing on the date of this order; and,

iii. The Respondent is prohibited for five years from becoming or acting as a registrant commencing on the date of this order.

[34] With respect to Zelyony:

(a) It is hereby ordered, pursuant to section 127 of the Act, that:

i. The Settlement Agreement dated January 15, 2009, between Staff of the Commission and Michael Zelyony is approved;

ii. The Respondent is prohibited for five years from becoming or acting as a director or officer of any issuer, registrant or investment fund manager commencing on the date of this order; and,

iii. The Respondent is prohibited for five years from becoming or acting as a registrant commencing on the date of this order.

[35] In conclusion, we find that together, all the sanctions imposed in this matter provide adequate specific and general deterrence, which the Supreme Court of Canada has established is an important regulatory objective for securities commissions (*Re Cartaway Resources Corp.*, [2004] 1 S.C.R. 672).

[36] From the Panel's view, although the regulatory sanctions agreed to in the Settlement Agreements may be below what we might have imposed after a hearing on the merits, we note that this was not a hearing on the merits and there is no certainty as to what the outcome of any such hearing would have been. We also note that the respondents should be given credit for their cooperation with Staff and that by settling, Commission resources have been conserved. In this case the respondents cooperated with Staff at the earliest stage and we recognize their willingness to cooperate, settle issues, participate in future hearings and streamline the process in this proceeding. Therefore, we find that the agreed sanctions in this case are acceptable and fall within acceptable parameters.

[37] Therefore, we approve the Settlement Agreements as being in the public interest.

Approved by the Chair of the Panel on February 5, 2009.

"Suresh Thakrar"