Commission's Book of Authorities

Frequently Cited Cases

August 2018

OSC ONTARIO SECURITIES COMMISSION

Commission's Book of Authorities
Frequently Cited Cases

The following is a list of cases that have been frequently cited in Ontario Securities Commission decisions. **The inclusion of a case in the Commission's Book of Authorities is not intended in any way to provide legal advice**. The Commission's Book of Authorities will be updated from time to time.

If you are relying on a case listed below, it does not need to be reproduced in its entirety. Please refer to the *Practice Guideline* for details.

The cases are listed alphabetically by proceeding type.

General	**1.** *Cartaway Resources Corp (Re)*, 2004 SCC 26, [2004] 1 SCR 672. **2.** *Committee for the Equal Treatment of Asbestos Minority Shareholders v Ontario (Securities Commission)*, 2001 SCC 37, [2001] 2 SCR 132. **3.** *FH v McDougall*, 2008 SCC 53, [2008] 3 SCR 41. **4.** *Mithras Management Ltd (Re)* (1990), 13 OSCB 1600.
Enforcement Proceedings – Merits	**5.** *Limelight Entertainment Inc (Re),* 2008 ONSEC 4, (2008), 31 OSCB 1727. (Merits Decision)
Enforcement Proceedings – Sanctions and Costs	**6.** *Belteco Holdings Inc (Re)* (1998), 21 OSCB 7743. **7.** *Erikson v Ontario (Securities Commission)* (2003), 26 OSCB 1622, 2003 CanLII 2451 (ON SC). **8.** *Limelight Entertainment Inc (Re),* 2008 ONSEC 28, (2008), 31 OSCB 12030. (Sanctions Decision) **9.** *MCJC Holdings Inc (Re)* (2002), 25 OSCB 1133.
Enforcement Proceedings – Inter-Jurisdictional	**10.** *Euston Capital Corp (Re)*, 2009 ONSEC 23, (2009), 32 OSCB 6313. **11.** *JV Raleigh Superior Holdings Inc (Re)*, 2013 ONSEC 18, (2013), 36 OSCB 4639. **12.** *McLean v British Columbia (Securities Commission)*, 2013 SCC 67, [2013] 3 SCR 895. **13.** *New Futures Trading International Corporation (Re)*, 2013 ONSEC 21, (2013), 36 OSCB 5713.

General

Executive Director of the British Columbia Securities Commission *Appellant*

v.

Robert Arthur Hartvikson and Blayne Barry Johnson *Respondents*

and

Ontario Securities Commission *Intervener*

Directeur général de la British Columbia Securities Commission *Appelant*

c.

Robert Arthur Hartvikson et Blayne Barry Johnson *Intimés*

et

Commission des valeurs mobilières de l'Ontario *Intervenante*

INDEXED AS: CARTAWAY RESOURCES CORP. (RE)

Neutral citation: 2004 SCC 26.

File No.: 29472.

2003: November 7; 2004: April 22.

Present: McLachlin C.J. and Iacobucci, Major, Bastarache, Binnie, Arbour, LeBel, Deschamps and Fish JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Administrative law — Judicial review — Standard of review — Securities Commission — Commission imposing maximum administrative penalty — Standard of review applicable to Commission's decision — Securities Act, R.S.B.C. 1996, c. 418.

Securities — Securities Commission — Enforcement — Administrative penalty — Principles Commission must consider in imposing administrative penalty in public interest — General deterrence — Commission imposing maximum administrative penalty against two securities brokers for breach of prospectus requirement — Whether general deterrence appropriate factor in assessing penalty in public interest — Whether Commission must consider settlement agreements entered into by its Executive Director with other brokers in assessing sanctions — Securities Act, R.S.B.C. 1996, c. 418, s. 162.

Securities — Securities Commission — Appeal of Commission decision — Commission imposing maximum

RÉPERTORIÉ : CARTAWAY RESOURCES CORP. (RE)

Référence neutre : 2004 CSC 26.

N° du greffe : 29472.

2003 : 7 novembre; 2004 : 22 avril.

Présents : La juge en chef McLachlin et les juges Iacobucci, Major, Bastarache, Binnie, Arbour, LeBel, Deschamps et Fish.

EN APPEL DE LA COUR D'APPEL DE LA COLOMBIE-BRITANNIQUE

Droit administratif — Contrôle judiciaire — Norme de contrôle — Commission des valeurs mobilières — Imposition de la sanction administrative maximale par la Commission — Norme de contrôle applicable à la décision de la Commission — Securities Act, R.S.B.C. 1996, ch. 418.

Valeurs mobilières — Commission des valeurs mobilières — Application de la loi — Sanction administrative — Principes à prendre en compte par la Commission pour l'imposition de sanctions administratives d'intérêt public — Dissuasion générale — Imposition par la Commission de la sanction administrative maximale à deux courtiers en valeurs mobilières pour ne pas avoir respecté l'obligation de prospectus — La dissuasion générale constitue-t-elle un facteur pertinent pour la détermination d'une pénalité qui est dans l'intérêt public? — Pour déterminer les sanctions, la Commission doit-elle tenir compte des règlements amiables conclus par son directeur général avec d'autres courtiers? — Securities Act, R.S.B.C. 1996, ch. 418, art. 162.

Valeurs mobilières — Commission des valeurs mobilières — Appel de la décision de la Commission —

administrative penalty against two securities brokers for breach of prospectus requirement — Whether Court of Appeal erred in reducing penalty — Whether penalty matter should have been referred back to Commission — Securities Act, R.S.B.C. 1996, c. 418, s. 167(3).

Practice — Parties — Substitution of party.

The respondents orchestrated the purchase of C Corp. and funnelled some mining claims into it through a shelf company. Without disclosing to investors the material change in C Corp.'s business to a mining exploration firm, they entered into a private placement, which they split among friends and other brokers of a registered investment firm. Following an investigation, a notice of hearing before the B.C. Securities Commission was issued against the respondents, the other brokers involved and the firm with respect to their conduct in relation to C Corp. Prior to the conclusion of the hearing, the firm and the other brokers entered into settlement agreements with the Executive Director, but none was reached with the respondents. The Commission found that the respondents had breached the prospectus requirement of the B.C. *Securities Act* (s. 61) by splitting the private placement, and thereby relying on a prospectus exemption to which they were not entitled. The Commission further found that it was in the public interest to impose the maximum administrative penalty of $100,000 under s. 162 of the Act. The majority of the Court of Appeal held that the imposition of the maximum penalty for the breach of s. 61 was unreasonable in the circumstances and substituted a penalty of $10,000 each for the respondents.

Held: The appeal should be allowed and the Commission's order restored.

The balance of factors in the pragmatic and functional analysis pointed towards the reasonableness standard of review and away from the more exacting standard of correctness. The focus should be on the reasonableness of the decision or the order, not on whether it was a tolerable deviation from a preferred outcome. The reviewing court must ask whether there was a rational basis for the Commission's decision in light of the statutory framework and the circumstances.

The Commission's interpretation of s. 162 of the *Securities Act* was reasonable. Section 162 is triggered

Imposition par la Commission de la sanction administrative maximale à deux courtiers en valeurs mobilières pour ne pas avoir respecté l'obligation de prospectus — La Cour d'appel a-t-elle commis une erreur en réduisant la pénalité? — La question de la pénalité aurait-elle dû être renvoyée à la Commission? — Securities Act, R.S.B.C. 1996, ch. 418, art. 167(3).

Pratique — Parties — Substitution de partie.

Les intimés ont orchestré l'achat de la société C et y ont transféré des claims miniers par l'entremise d'une société commerciale inactive. Sans divulguer aux investisseurs le changement important intervenu dans les activités commerciales de la société C, soit sa transformation en société d'exploration minière, ils ont conclu un placement privé, dont ils se sont partagé les titres avec des amis et d'autres employés d'une société de placement inscrite. Après enquête, un avis d'audience devant la British Columbia Securities Commission a été envoyé aux intimés, aux autres courtiers et à la société au sujet de leur conduite à l'égard de la société C. Avant la fin de l'audience, la société et les autres courtiers ont conclu des règlements amiables avec le directeur général, ce qui n'était pas le cas des intimés. La Commission a conclu que les intimés n'avaient pas respecté l'obligation de prospectus prévue par la *Securities Act* de la Colombie-Britannique (art. 61), en partageant les titres du placement privé, pour se prévaloir ainsi d'une dispense de prospectus à laquelle ils n'avaient pas droit. Elle a en outre conclu que l'intérêt public demandait d'imposer l'amende maximale de 100 000 $ prévue à l'art. 162 de la Loi. Les juges majoritaires de la Cour d'appel ont estimé que l'imposition de la pénalité maximale pour violation de l'art. 61 était déraisonnable eu égard aux circonstances et y ont substitué une pénalité de 10 000 $ chacun pour les intimés.

Arrêt : Le pourvoi est accueilli et l'ordonnance de la Commission est rétablie.

La pondération des divers facteurs de l'analyse pragmatique et fonctionnelle tend à faire conclure à l'application de la norme de contrôle de la décision raisonnable, plutôt que de la norme de contrôle plus exigeante de la décision correcte. Il faut s'attacher à l'examen du caractère raisonnable de la décision ou de l'ordonnance, non à la question de savoir si celle-ci s'écarte de manière acceptable d'un résultat préférable. La cour de révision doit se demander s'il existe un fondement rationnel à la décision de la Commission au regard du cadre législatif et des circonstances de l'espèce.

L'interprétation donnée par la Commission à l'art. 162 de la *Securities Act* est raisonnable. La violation de

by a breach of the Act and, in formulating an order that protects the public interest, the Commission may take into account the context surrounding the breach. General deterrence is an appropriate factor to consider, albeit not the only one, in formulating a penalty in the public interest. Since general deterrence is both prospective and preventative in orientation, it falls squarely within the public interest jurisdiction of securities commissions to maintain investor confidence in the capital markets. The weight given to general deterrence will vary from case to case and is a matter within the discretion of the Commission. Protecting the public interest will require a different remedial emphasis according to the circumstances. Courts should review the order globally to determine whether it is reasonable. No one factor should be considered in isolation because to do so would skew the textured and nuanced evaluation conducted by the Commission in crafting an order in the public interest. Here, the imposition of the maximum penalty was rationally connected to the respondents' conduct globally. The Commission weighed the aggravating and mitigating factors and determined the appropriate penalty. The respondents were the primary movers behind the control group's deceitful conduct. They were the leading players in breaching s. 61 of the Act. It does not appear on the face of the Commission's reasons for making the order under s. 162 that it gave unreasonable weight to general deterrence. While settlement agreements between the Executive Director and the other brokers were a relevant factor, they were not dispositive or binding on the Commission, particularly where the conduct of the respondents and the other brokers is missing the required parity. The respondents' deceitful conduct and leadership roles justified the imposition of a higher penalty than that imposed on their confederates. Accordingly, the Court of Appeal erred in holding that the Commission's order was unreasonable.

Had the Commission's order been unreasonable, it would have been unnecessary for the Court of Appeal to refer the question of appropriate sanctions back to the Commission. Section 167(3) of the Act is permissive and, on an ordinary construction, its wording would permit the Court of Appeal to direct the Commission to order a particular penalty. The Court of Appeal may also itself substitute the appropriate penalty pursuant to s. 9(8)(b) of the *Court of Appeal Act*.

While the Commission itself appeared as a party in the courts below, the Executive Director was properly

la Loi donne lieu à l'application de l'art. 162 et, dans la formulation d'une ordonnance qui protège l'intérêt public, la Commission peut tenir compte du contexte de l'infraction. La dissuasion générale représente un facteur pertinent, parmi d'autres, pour l'établissement d'une pénalité dans l'intérêt public. Comme la dissuasion générale remplit une fonction à la fois prospective et préventive, elle relève clairement de la fonction de protection de l'intérêt public des commissions des valeurs mobilières, qui vise à préserver la confiance des investisseurs dans le fonctionnement des marchés de capitaux. Le poids à donner à la dissuasion générale variera d'une affaire à l'autre et relève du pouvoir discrétionnaire de la Commission. La protection de l'intérêt public exige que l'on privilégie des mesures de réparation susceptibles de varier selon les circonstances. Les tribunaux doivent examiner l'ordonnance dans son ensemble pour vérifier son caractère raisonnable. Aucun facteur ne peut être pris en considération isolément. Une telle méthode fausserait l'évaluation détaillée et nuancée qui s'impose à la Commission pour concevoir une ordonnance qui soit dans l'intérêt public. En l'espèce, il existe un lien rationnel entre l'imposition de la pénalité maximale et la conduite des intimés appréciée globalement. La Commission a mis en balance les facteurs aggravants et les facteurs atténuants et déterminé la peine appropriée. Les intimés ont été les principaux initiateurs du comportement dolosif du groupe de contrôle. Ils ont joué un rôle moteur dans la violation de l'art. 61 de la Loi. Au vu des motifs fondant son ordonnance en vertu de l'art. 162, la Commission ne paraît pas avoir accordé une importance déraisonnable à la dissuasion générale. Malgré leur pertinence, les règlements amiables entre le directeur général et les autres courtiers ne constituent pas des facteurs déterminants et ne lient pas la Commission, particulièrement lorsque la conduite des intimés et celle des autres courtiers ne s'avèrent pas comparables. Le comportement dolosif et le rôle de leader des intimés justifient l'imposition d'une pénalité plus lourde que pour leurs acolytes. Par conséquent, la Cour d'appel a commis une erreur en concluant que l'ordonnance de la Commission est déraisonnable.

Si l'ordonnance de la Commission avait été déraisonnable, il n'aurait pas été nécessaire que la Cour d'appel renvoie à la Commission la question des peines appropriées. Le paragraphe 167(3) est facultatif et, selon une interprétation normale, son libellé permettrait à la Cour d'appel d'enjoindre à la Commission d'infliger une peine en particulier. La Cour d'appel peut aussi, elle-même, substituer la pénalité appropriée en vertu de l'al. 9(8)b) de la *Court of Appeal Act*.

Bien que la Commission elle-même ait comparu comme partie à l'instance, le directeur général est une

substituted as a party in this Court under Rule 18(5) of the *Rules of the Supreme Court of Canada*. The Executive Director merely sought to comply with a recent decision of the B.C. Court of Appeal which held that the Executive Director is the proper party on an interlocutory appeal on the merits of a procedural decision by the Commission. The substitution did not cause the respondents prejudice.

partie dûment substituée sous le régime du par. 18(5) des *Règles de la Cour suprême du Canada*. Il a simplement cherché à se conformer à une décision récente de la Cour d'appel de la C.-B. selon laquelle le directeur général a qualité pour agir comme partie dans un appel interlocutoire quant au bien-fondé d'une décision procédurale de la Commission. Les intimés n'ont subi aucun préjudice du fait de la substitution.

Cases Cited

Considered: *Committee for the Equal Treatment of Asbestos Minority Shareholders v. Ontario (Securities Commission)*, [2001] 2 S.C.R. 132, 2001 SCC 37; **referred to:** *British Columbia (Securities Commission) v. Pacific International Securities Inc.* (2002), 2 B.C.L.R. (4th) 114, 2002 BCCA 421; *Dr. Q v. College of Physicians and Surgeons of British Columbia*, [2003] 1 S.C.R. 226, 2003 SCC 19; *Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557; *National Corn Growers Assn. v. Canada (Import Tribunal)*, [1990] 2 S.C.R. 1324; *Brosseau v. Alberta Securities Commission*, [1989] 1 S.C.R. 301; *Law Society of New Brunswick v. Ryan*, [2003] 1 S.C.R. 247, 2003 SCC 20; *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748; *R. v. M. (C.A.)*, [1996] 1 S.C.R. 500; *R. v. Morrisey*, [2000] 2 S.C.R. 90, 2000 SCC 39; *R. v. Wismayer* (1997), 115 C.C.C. (3d) 18; *United States v. Matthews*, 787 F.2d 38 (1986); *Hretchka v. Attorney General of British Columbia*, [1972] S.C.R. 119.

Jurisprudence

Arrêt examiné : *Comité pour le traitement égal des actionnaires minoritaires de la Société Asbestos Ltée c. Ontario (Commission des valeurs mobilières)*, [2001] 2 R.C.S. 132, 2001 CSC 37; **arrêts mentionnés :** *British Columbia (Securities Commission) c. Pacific International Securities Inc.* (2002), 2 B.C.L.R. (4th) 114, 2002 BCCA 421; *Dr Q c. College of Physicians and Surgeons of British Columbia*, [2003] 1 R.C.S. 226, 2003 CSC 19; *Pezim c. Colombie-Britannique (Superintendent of Brokers)*, [1994] 2 R.C.S. 557; *National Corn Growers Assn. c. Canada (Tribunal des importations)*, [1990] 2 R.C.S. 1324; *Brosseau c. Alberta Securities Commission*, [1989] 1 R.C.S. 301; *Barreau du Nouveau-Brunswick c. Ryan*, [2003] 1 R.C.S. 247, 2003 CSC 20; *Canada (Directeur des enquêtes et recherches) c. Southam Inc.*, [1997] 1 R.C.S. 748; *R. c. M. (C.A.)*, [1996] 1 R.C.S. 500; *R. c. Morrisey*, [2000] 2 R.C.S. 90, 2000 CSC 39; *R. c. Wismayer* (1997), 115 C.C.C. (3d) 18; *United States c. Matthews*, 787 F.2d 38 (1986); *Hretchka c. Procureur général de la Colombie-Britannique*, [1972] R.C.S. 119.

Statutes and Regulations Cited

Court of Appeal Act, R.S.B.C. 1996, c. 77, s. 9(8)(b).
Rules of the Supreme Court of Canada, SOR/2002-156, rr. 8(1), 18(5).
Securities Act, R.S.B.C. 1996, c. 418, ss. 1(1), 61 [rep. & sub. 1999, c. 20, s. 15], 74(2)(*4*), 161 [am. *idem*, s. 29], 162, 167.
Securities Rules, B.C. Reg. 194/97, s. 44(1), 66.

Lois et règlements cités

Court of Appeal Act, R.S.B.C. 1996, ch. 77, art. 9(8)b).
Règles de la Cour suprême du Canada, DORS/2002-156, art. 8(1), 18(5).
Securities Act, R.S.B.C. 1996, ch. 418, art. 1(1), 61 [abr. & rempl. 1999, ch. 20, art. 15], 74(2)(*4*), 161 [mod. *idem*, art. 29], 162, 167.
Securities Rules, B.C. Reg. 194/97, art. 44(1), 66.

Authors Cited

Ashworth, Andrew. *Sentencing and Criminal Justice*, 3rd ed. Markham, Ont.: Butterworths, 2003.
Canada. Canadian Sentencing Commission. Report. *Sentencing Reform: A Canadian Approach*. Ottawa: The Commission, 1987.
Oxford English Dictionary, 2nd ed., vol. XII. Oxford: Clarendon Press, 1989, "preventive".
Posner, Richard A. "An Economic Theory of the Criminal Law" (1985), 85 *Colum. L. Rev.* 1193.
Ruby, Clayton C. *Sentencing*, 5th ed. Toronto: Butterworths, 1999.

Doctrine citée

Ashworth, Andrew. *Sentencing and Criminal Justice*, 3rd ed. Markham, Ont. : Butterworths, 2003.
Canada. Commission canadienne sur la détermination de la peine. Rapport. *Réformer la sentence : une approche canadienne*. Ottawa : La Commission, 1987.
Nouveau Petit Robert : Dictionnaire alphabétique et analogique de la langue française. Paris : Dictionnaires Le Robert, 2003, « préventif ».
Posner, Richard A. « An Economic Theory of the Criminal Law » (1985), 85 *Colum. L. Rev.* 1193.

Ryan, Russell G. "Securities Enforcement: Civil Penalties in SEC Enforcement Cases: A Rising Tide" (2003), 17 *Insights* 17.

APPEAL from a judgment of the British Columbia Court of Appeal (2002), 218 D.L.R. (4th) 470, 173 B.C.A.C. 235, [2002] B.C.J. No. 2115 (QL), 2002 BCCA 461, varying a decision of the British Columbia Securities Commission. Appeal allowed.

James A. Angus, *Patricia A. Taylor* and *Joseph A. Bernardo*, for the appellant.

Mark L. Skwarok and *Stephen M. Zolnay*, for the respondents.

Jay L. Naster, for the intervener.

The judgment of the Court was delivered by

LeBel J. —

I. Background

1 In the autumn of 1994, a group of securities brokers, including Robert Hartvikson and Blayne Johnson, banded together to make a quick profit. They orchestrated the purchase of Cartaway Resources Corporation ("Cartaway") and funnelled some mining claims into Cartaway through a shelf company. Without disclosing to investors the material change in Cartaway's business to a mining exploration firm, they entered into a private placement, which they split among friends and other employees of First Marathon Securities Limited ("First Marathon").

2 The British Columbia Securities Commission (the "Commission") found that Hartvikson and Johnson had breached s. 61 of the *Securities Act*, R.S.B.C. 1996, c. 418 (the "Act") — the prospectus requirement — by splitting the private placement, and thereby relying on a prospectus exemption to which they were not entitled. The Commission

Ruby, Clayton C. *Sentencing*, 5th ed. Toronto : Butterworths, 1999.
Ryan, Russell G. « Securities Enforcement : Civil Penalties in SEC Enforcement Cases : A Rising Tide » (2003), 17 *Insights* 17.

POURVOI contre un arrêt de la Cour d'appel de la Colombie-Britannique (2002), 218 D.L.R. (4th) 470, 173 B.C.A.C. 235, [2002] B.C.J. No. 2115 (QL), 2002 BCCA 461, qui a modifié une décision de la British Columbia Securities Commission. Pourvoi accueilli.

James A. Angus, *Patricia A. Taylor* et *Joseph A. Bernardo*, pour l'appelant.

Mark L. Skwarok et *Stephen M. Zolnay*, pour les intimés.

Jay L. Naster, pour l'intervenante.

Version française du jugement de la Cour rendu par

Le juge LeBel —

I. Le contexte

À l'automne 1994, un groupe de courtiers en valeurs mobilières, parmi lesquels se trouvaient MM. Robert Hartvikson et Blayne Johnson, se forma en vue de réaliser un bénéfice rapide. Les membres de ce groupe ont orchestré l'achat de Cartaway Resources Corporation (« Cartaway ») et y ont transféré des claims miniers par l'entremise d'une société commerciale inactive. Sans divulguer aux investisseurs le changement important intervenu dans les activités commerciales de Cartaway, soit sa transformation en société d'exploration minière, ils ont conclu un placement privé dont ils se sont partagé les titres avec des amis et d'autres employés de la Société de valeurs First Marathon Limitée (« First Marathon »).

La Commission des valeurs mobilières de la Colombie-Britannique (la « Commission ») a conclu que MM. Hartvikson et Johnson avaient violé l'art. 61 de la *Securities Act*, R.S.B.C. 1996, ch. 418 (la « Loi ») — l'obligation de prospectus —, en partageant de cette manière les titres du placement privé, pour se prévaloir ainsi d'une dispense

further found that it was in the public interest to impose the maximum financial penalty of $100,000 under s. 162 of the Act. On this appeal, we are not concerned with Hartvikson and Johnson's other dealings.

de prospectus à laquelle ils n'avaient pas droit. Elle a en outre conclu que l'intérêt public demandait d'imposer l'amende maximale de 100 000 $ prévue à l'art. 162 de la Loi. Le présent pourvoi ne porte pas sur les autres opérations de MM. Hartvikson et Johnson.

3 The Executive Director of the Commission appeals a decision of the British Columbia Court of Appeal that reduced the amount of an administrative penalty imposed by the Commission under s. 162 of the Act. The principal issues on appeal were: (1) what is the correct standard of review of the Commission's interpretation of s. 162 of the Act and its order; (2) whether general deterrence is an appropriate factor in assessing a penalty that is in the public interest; and (3) whether the Commission must consider settlement agreements entered into by the Executive Director in assessing sanctions under the Act.

3 Le directeur général de la Commission se pourvoit contre la décision de la Cour d'appel de la Colombie-Britannique de réduire le montant de l'amende imposée par la Commission en vertu de l'art. 162 de la Loi. Cet appel soulève principalement les questions suivantes : (1) quelle norme de contrôle s'applique à l'ordonnance de la Commission et à son interprétation de l'art. 162 de la Loi? (2) la dissuasion générale constitue-t-elle un facteur pertinent pour la détermination d'une pénalité qui est dans l'intérêt public? (3) pour déterminer la sanction applicable en vertu de la Loi, la Commission doit-elle tenir compte des règlements amiables conclus par le directeur général?

4 The correct standard of review in this case is reasonableness. In my opinion, general deterrence is an appropriate factor in formulating a penalty in the public interest. General deterrence is both prospective and preventative in orientation. As such, it falls squarely within the public interest jurisdiction of securities commissions to maintain investor confidence in the capital markets.

4 La norme de contrôle de la décision raisonnable s'applique en l'espèce. À mon avis, la dissuasion générale représente un facteur pertinent pour l'établissement d'une pénalité dans l'intérêt public. La dissuasion générale remplit une fonction à la fois prospective et préventive. À ce titre, elle relève clairement de la fonction de protection de l'intérêt public des commissions des valeurs mobilières, qui vise à préserver la confiance des investisseurs dans le fonctionnement des marchés de capitaux.

5 On the facts of this case, the imposition of the maximum penalty is rationally connected to the conduct of Hartvikson and Johnson globally. Section 162 of the Act is triggered by a breach of the Act, but in formulating an order that protects the public interest, the Commission may take into account the context surrounding the breach. While settlement agreements between the Executive Director and the other brokers are a relevant factor, they are not dispositive or binding on the Commission, particularly where the conduct of the respondents and the other brokers is missing the required parity. In this case, Hartvikson and Johnson's deceitful conduct and leadership roles justified the imposition of a higher penalty than that imposed on their confederates. I

5 D'après les faits de l'espèce, il existe un lien rationnel entre l'imposition de la pénalité maximale et la conduite de MM. Hartvikson et Johnson appréciée globalement. Si la violation de la loi donne lieu à l'application de l'art. 162, dans la formulation d'une ordonnance qui protège l'intérêt public, la Commission peut toutefois tenir compte du contexte de l'infraction. Malgré leur pertinence, les règlements amiables entre le directeur général et les autres courtiers ne constituent pas des facteurs déterminants et ne lient pas la Commission, particulièrement lorsque la conduite des intimés et celle des autres courtiers ne s'avèrent pas comparables. En l'espèce, le comportement dolosif et le rôle de leader de MM. Hartvikson et Johnson justifient

therefore conclude that the $100,000 fine was reasonable in all the circumstances.

6 Consequently, I would allow the appeal with costs, and reinstate the Commission's order.

II. Facts

7 In the summer of 1994, Christopher Stuart and Larry Birchall were seeking to purchase a shell company trading on the Vancouver stock exchange. Both were employees of First Marathon — a member of the Vancouver, Alberta and Toronto stock exchanges, and a registered investment dealer under the Act. A shell company would be used to vend in other businesses, allowing them access to the capital markets without having to go through the slower process of an initial public offering.

8 In October 1994, Hartvikson and Johnson, with six other brokers from First Marathon, acquired a controlling block of shares in Cartaway, which was then a small company in the business of licensing garbage containers in Kelowna, British Columbia. The control group included Hartvikson, Johnson, Robert Disbrow, David Lyall, Eric Savics, and Stuart. This control group acquired Cartaway.

9 In the spring of 1995, Voisey's Bay in Labrador was the location of a staking rush resulting from the discovery of considerable nickel, cobalt and copper deposits. In April 1995, the respondents were presented with an opportunity to purchase some mining claims in the Voisey's Bay area. The vendor wanted $300,000 and 1.2 million free-trading shares in exchange for the claims. On April 5, an oral agreement to purchase the claims was reached. The respondents used a shelf company, 489895 B.C. Ltd., for the purpose of warehousing the various mining claims they were pursuing.

10 In the meantime, after the oral agreement was made, and without disclosing to the market the

l'imposition d'une pénalité plus lourde que pour leurs acolytes. Je conclus donc que l'amende de 100 000 $ est raisonnable compte tenu de l'ensemble des circonstances.

Par conséquent, je suis d'avis d'accueillir le pourvoi avec dépens et de rétablir l'ordonnance de la Commission.

II. Les faits

À l'été 1994, Christopher Stuart et Larry Birchall cherchaient à acquérir une société inactive cotée à la Bourse de Vancouver. Tous deux travaillaient pour First Marathon, qui appartenait elle-même aux bourses de Vancouver, de l'Alberta et de Toronto, et était inscrite à titre de maison de courtage de valeurs mobilières sous le régime de la Loi. Grâce à l'utilisation du véhicule d'une société inactive pour y transférer d'autres entreprises, ils pouvaient accéder aux marchés de capitaux, en évitant la procédure plus lente exigée à l'égard d'un premier appel public à l'épargne.

En octobre 1994, MM. Hartvikson et Johnson, avec six autres courtiers de First Marathon, se sont portés acquéreurs d'un bloc de contrôle d'actions de Cartaway, qui était à l'époque une petite entreprise de concession de licences de bennes à ordures à Kelowna, en Colombie-Britannique. Le groupe de contrôle, formé de MM. Hartvikson, Johnson, Robert Disbrow, David Lyall, Eric Savics et M. Stuart, a donc réalisé l'acquisition de Cartaway.

Au printemps 1995, Voisey's Bay, au Labrador, a fait l'objet d'une ruée au jalonnement après la découverte d'importants gisements de nickel, de cobalt et de cuivre. En avril 1995, les intimés se sont vu offrir la possibilité d'acquérir des claims miniers dans la région de Voisey's Bay. Le vendeur demandait pour ces claims 300 000 $ et 1,2 million d'actions librement négociables. Le 5 avril, une entente verbale d'acquisition des claims est intervenue. Les intimés ont utilisé une société inactive, 489895 B.C. Ltd., à titre de détentrice des claims miniers qui les intéressaient.

Entre-temps, après l'entente verbale, sans divulguer au marché l'acquisition des claims et

effective acquisition of the claims and the change in business of the company, Cartaway raised money to finance the acquisition through a brokered private placement on May 5, 1995. First Marathon acted as agent for the offering. Over 82 per cent of the units were placed with the control group or with their friends. The seven million unit placement was priced at $0.125 per unit. When Cartaway announced the closing of the placement it indicated that $875,000 had been raised, and would go towards undetermined future acquisitions.

le changement dans les activités de la société, Cartaway a réuni des fonds pour financer l'acquisition au moyen d'un placement privé par l'intermédiaire d'un courtier, le 5 mai 1995. First Marathon a agi comme mandataire à l'égard de la notice d'offre. Plus de 82 pour 100 des unités ont été placées auprès du groupe de contrôle ou de ses amis. Les sept millions d'unités du placement ont été offertes en vente sur le marché au prix de 0,125 $ chacune. Lorsque Cartaway a annoncé la clôture du placement, elle a indiqué que 875 000 $ avaient été recueillis et que cette somme servirait à des acquisitions futures indéterminées.

The purchasers of the units under the private placement relied on an exemption from the normal prospectus requirements provided by s. 74(2)(*4*) of the Act, which allows a person to purchase as principal more than $97,000 worth of shares. The respondents, along with some of the other members of the control group, split the exemption by purchasing shares for other employees who did not individually meet the $97,000 requirement. The respondents relied on a legal opinion that this splitting was acceptable.

11 Les acquéreurs des unités du placement privé se sont prévalus de la dispense du prospectus normalement exigé qui est prévue au par. 74(2)(*4*) de la Loi. Cette disposition autorise, en effet, l'acquisition pour son propre compte d'actions d'une valeur supérieure à 97 000 $. Les intimés, ainsi que d'autres membres du groupe de contrôle, ont en fait réparti la dispense en acquérant des actions pour le compte d'autres employés qui, individuellement, ne remplissaient pas la condition relative à la valeur minimale de 97 000 $. Les intimés se sont appuyés sur un avis juridique qui estimait acceptable cette division des titres.

In June 1995, Cartaway completed the purchase of the Voisey's Bay claims through the acquisition of all the outstanding shares of the shelf company, 489895 B.C. Ltd., and became the owner of the claims. On June 29, 1995, Cartaway announced the change in its business to a natural resource exploration firm, and that it was making an "arm's length" acquisition of the Voisey's Bay claims. Cartaway then proceeded with another private placement for $1 per share purchase warrant, which closed on July 11, 1995. The offering memorandum for this private placement failed to disclose the respondents' acquisition of the mining claims, the extent of the control group's holdings or any conflicts of interest.

12 En juin 1995, Cartaway a terminé l'achat des claims de Voisey's Bay en acquérant toutes les actions en circulation de la société inactive, 489895 B.C. Ltd., devenant ainsi propriétaire des claims. Le 29 juin 1995, elle a annoncé qu'elle modifiait ses activités pour devenir une firme d'exploration de ressources naturelles et qu'elle acquérait « sans lien de dépendance » les claims de Voisey's Bay. Cartaway a ensuite effectué un autre placement privé, au prix de 1 $ le bon de souscription d'actions, dont la clôture a eu lieu le 11 juillet 1995. La notice d'offre établie à l'égard de ce placement privé ne mentionnait pas l'acquisition des claims miniers par les intimés, de l'étendue du portefeuille du groupe de contrôle ou de l'existence de conflits d'intérêts.

The investigation into Cartaway was triggered by events that took place almost a year later. On May 8, 1996, Cartaway announced that it had found significant mineralization on the Voisey's Bay

13 L'enquête visant Cartaway a été déclenchée par des événements survenus presque un an plus tard. Le 8 mai 1996, se fondant sur une inspection visuelle d'échantillons de forage, Cartaway

claims based on a visual inspection of drilling samples. The share price jumped dramatically to $23, but later fell below $1 when an analysis of the samples failed to confirm these findings. Hartvikson and Johnson reaped in total $5.1 million in profits by trading Cartaway shares.

14 The proceedings against Hartvikson, Johnson, Disbrow, Savics, Lyall, Stuart and First Marathon were commenced on July 17, 1998 when a notice of hearing was issued against them with respect to their conduct in relation to Cartaway.

A. *The Role Played by Hartvikson and Johnson*

15 The Commission found that Hartvikson and Johnson were "control persons" of Cartaway under s. 1(1) of the Act. They and the six other First Marathon brokers constituted a combination of persons who acted in concert, by virtue of an agreement, and who held a sufficient number of shares to affect materially control of Cartaway.

16 The First Marathon brokers acquired a 45.6 per cent stake in Cartaway from the existing control group for $294,000 under a share purchase agreement on October 3, 1994. This agreement provided that all current directors and officers of Cartaway would resign and would vote to appoint new directors and officers designated by the new control group. Following the acquisition of a control block of Cartaway shares, the control group's common purpose was to change Cartaway's business by vending a new business venture into the company, replace its management, and finance the operation through First Marathon. Hartvikson and Johnson breached s. 61 of the Act — the prospectus requirement — when they purchased Cartaway shares in the $0.125 private placement by splitting these shares with other First Marathon employees who did not individually qualify for the $97,000 prospectus exemption.

a annoncé qu'elle avait découvert une importante minéralisation sur les claims de Voisey's Bay. Le prix de l'action a bondi de façon spectaculaire pour s'établir à 23 $, mais il est ensuite retombé à moins de 1 $ lorsqu'une analyse des échantillons n'a pas permis de confirmer ces conclusions. MM. Hartvikson et Johnson ont réalisé au total un profit de 5,1 millions de dollars en négociant les actions de Cartaway.

Les poursuites contre MM. Hartvikson, Johnson, Disbrow, Savics, Lyall, Stuart et First Marathon ont été intentées le 17 juillet 1998 par l'envoi d'un avis les informant de la tenue d'une audience portant sur leur rôle à l'égard de Cartaway.

A. *Le rôle joué par MM. Hartvikson et Johnson*

La Commission a conclu que MM. Hartvikson et Johnson étaient les [TRADUCTION] « personnes qui ont le contrôle » de Cartaway aux termes du par. 1(1) de la Loi. Avec les six autres courtiers de First Marathon, ils formaient un groupe de personnes qui, agissant de concert aux termes d'une entente, détenait un nombre suffisant d'actions pour exercer une influence significative sur le contrôle de Cartaway.

Le 3 octobre 1994, aux termes d'une convention d'achat d'actions, les courtiers de First Marathon ont acquis du groupe de contrôle existant une participation de 45,6 pour 100 dans Cartaway pour 294 000 $. Selon cette convention, tous les administrateurs et dirigeants de Cartaway en poste démissionneraient et éliraient de nouveaux administrateurs et dirigeants désignés par le nouveau groupe de contrôle. Après l'acquisition d'un bloc de contrôle d'actions de Cartaway, le groupe de contrôle avait pour objectif commun de modifier les activités de Cartaway en lui faisant acquérir une nouvelle entreprise, de remplacer ses gestionnaires et de financer l'opération par l'intermédiaire de First Marathon. MM. Hartvikson et Johnson ont violé l'art. 61 de la Loi — l'obligation de prospectus — lorsqu'ils ont acquis les actions de Cartaway dans le cadre du placement privé de 0,125 $ en les partageant avec d'autres employés de First Marathon qui, individuellement, ne remplissaient pas la condition relative à la valeur minimale de 97 000 $, qui donnait droit à la dispense de prospectus.

When Hartvikson and Johnson were presented with an opportunity to acquire mineral claims on April 4, 1995, the control group's common purpose became to acquire these and other Voisey's Bay claims, and to vend these claims into Cartaway and to conduct a large area plan. The control group would acquire a substantial number of shares prior to the public disclosure of Cartaway's acquisition of the claim, and before the $1 private placement was announced.

By buying control of Cartaway and then continuing to act as brokers and principals in the sale of Cartaway's shares, they put themselves in a conflict of interest with their duties to their clients and Cartaway. Hartvikson and Johnson did nothing to resolve these conflicts. They acted in their own interests contrary to the interest of their clients and Cartaway. Further, by purchasing the shares in a private placement prior to the disclosure of the acquisition of mineral claims, and then selling the shares to their clients at a higher price after the announcement of the acquisition of the claims, they acted contrary to the interests of their clients. They ensured that the investors in the private placement, and not their clients, would earn a higher return on the investment in Cartaway. They took unfair advantage of their positions as registrants, and engaged in conduct that seriously undermined the public confidence in the fairness of the capital markets. Consequently, they acted contrary to the public interest.

The Commission found that Hartvikson and Johnson were the driving force behind the reorganization of Cartaway. Consequently, as control persons, they were undisclosed promoters under s. 1(1) of the Act and acted as undisclosed *de facto* directors of Cartaway. The Commission held that they should have disclosed their status as directors in the June 23, 1995 offering memorandum and the November 3, 1995 prospectus.

Hartvikson and Johnson were the primary movers in achieving the control group's unlawful purpose. They targeted Cartaway. They decided to pursue the Voisey's Bay claims. They made the deal with

17 Lorsque MM. Hartvikson et Johnson se sont vu offrir la possibilité d'acheter des claims miniers, le 4 avril 1995, l'objectif commun du groupe de contrôle a été d'acheter ces claims et d'autres claims de Voisey's Bay, de les vendre à Cartaway et de planifier des activités sur un plus grand territoire. Le groupe de contrôle voulait acquérir un nombre important d'actions avant que l'acquisition des claims par Cartaway ne soit divulguée publiquement et que le placement privé de 1 $ ne soit annoncé.

18 En prenant le contrôle de Cartaway et en continuant d'agir comme courtiers et mandants dans la vente des actions de Cartaway, MM. Hartvikson et Johnson se sont eux-mêmes placés en situation de conflit d'intérêts à l'égard de leurs obligations envers leurs clients et Cartaway. Ils n'ont rien fait pour résoudre ces conflits. Ils ont agi dans leur propre intérêt et à l'encontre de celui de leurs clients et de Cartaway. En outre, en acquérant les actions dans le cadre d'un placement privé avant la divulgation de l'acquisition des claims miniers pour ensuite les vendre plus cher à leurs clients après l'annonce de l'acquisition des claims, ils ont agi à l'encontre des intérêts de ceux-ci. De cette façon, ils ont fait en sorte que les investisseurs dans le placement privé, et non leurs clients, obtiennent un meilleur rendement sur leur investissement dans Cartaway. Ils ont tiré un avantage indû de leur position de courtier inscrit, et leur conduite a gravement miné la confiance du public dans l'équité des marchés de capitaux. Ils ont donc agi de façon contraire à l'intérêt public.

19 La Commission a estimé que MM. Hartvikson et Johnson étaient les âmes dirigeantes de la réorganisation de Cartaway. Par conséquent, en tant que personnes ayant le contrôle, ils devenaient des promoteurs anonymes au sens du par. 1(1) de la Loi et agissaient à titre d'administrateurs de fait anonymes de Cartaway. La Commission a conclu qu'ils auraient dû divulguer leur statut d'administrateur dans la notice d'offre du 23 juin 1995 et dans le prospectus du 3 novembre 1995.

20 MM. Hartvikson et Johnson ont été les principaux initiateurs de la réalisation de l'objectif illicite du groupe de contrôle. Ils ont ciblé Cartaway, planifié l'acquisition des claims de Voisey's Bay, conclu

the vendor of the claims. They funded the expenses related to the claims. They arranged the share swap with the vendor of the claims. From April 5, 1995 onward, Hartvikson and Johnson, with Stuart's approval, made all of Cartaway's business decisions. They gave notice to the Exchange to set the price for the $0.125 private placement. They found new management for Cartaway. With Lyall, they placed most of the $1 private placement. Hartvikson and Johnson decided when Cartaway disclosed material information. They gave instructions on draft agreements, news releases and Cartaway's name change.

l'entente avec le vendeur des claims, financé les dépenses relatives à ces derniers et pris les dispositions nécessaires pour l'échange des actions avec le vendeur des claims. À compter du 5 avril 1995, avec le consentement de M. Stuart, ils ont pris toutes les décisions d'affaires concernant Cartaway. Ils ont demandé à la Bourse de fixer le prix du placement privé de 0,125 $. Ils ont trouvé une nouvelle équipe de direction pour Cartaway. Ils ont placé auprès de M. Lyall la majorité des actions du placement privé de 1 $. Ils ont décidé du moment où Cartaway divulguerait les renseignements importants. Ils ont donné des directives quant aux projets d'accord, aux communiqués et au changement de nom de Cartaway.

B. *The Settlement Agreements*

B. *Les règlements amiables*

21 First Marathon, Disbrow, Savics, Lyall and Stuart entered into settlement agreements with the Executive Director prior to the conclusion of the hearing.

First Marathon et MM. Disbrow, Savics, Lyall et Stuart ont conclu des règlements amiables avec le directeur général avant la fin de l'audience.

22 First Marathon settled with the Executive Director on January 29, 1999. It admitted to contravening s. 44(1) of the *Securities Rules*, B.C. Reg. 194/97 (the "Rules"). It also admitted that it failed to ensure the proper supervision of its employees, and that it inadequately addressed the conflict of interests among its Vancouver brokers. Consequently, First Marathon agreed to pay $50,000 in costs to the Commission, and to donate $450,000 to the Mineral Deposit Research Fund at the University of British Columbia. First Marathon had settled earlier with the Toronto Stock Exchange ("TSE") for $3.5 million in fines.

First Marathon est parvenue à un règlement amiable avec le directeur général le 29 janvier 1999. Elle a admis avoir violé le par. 44(1) des *Securities Rules*, B.C. Reg. 194/97 (le « Règlement »). Elle a aussi reconnu ne pas avoir surveillé ses employés de manière satisfaisante et ne pas avoir réglé adéquatement la situation de conflit d'intérêts dans laquelle se trouvaient ses courtiers de Vancouver. Elle a donc consenti à verser des frais de 50 000 $ à la Commission et à effectuer un don de 450 000 $ au Mineral Deposit Research Fund de l'Université de la Colombie-Britannique. First Marathon s'était antérieurement entendue avec la Bourse de Toronto sur le versement d'une amende de 3,5 millions de dollars.

23 Disbrow also settled with the Executive Director on January 29, 1999. He admitted to breaching s. 66 of the Rules by inadequately supervising Hartvikson, Johnson, Lyall and Savics. Disbrow had earlier agreed with the TSE to a permanent suspension in certain supervisory capacities as an exchange member, a three-month suspension from employment in any capacity by a TSE member, and the payment of a $110,000 fine.

M. Disbrow est aussi parvenu à une entente avec le directeur général le 29 janvier 1999. Il a admis avoir violé l'art. 66 du Règlement en ne surveillant pas adéquatement MM. Hartvikson, Johnson, Lyall et Savics. M. Disbrow s'était antérieurement entendu avec la Bourse de Toronto sur la suppression permanente de certains de ses pouvoirs de surveillance en tant que membre de la Bourse, l'impossibilité d'occuper un emploi, quel qu'il soit, chez un membre de la Bourse de Toronto pendant trois mois et le versement d'une amende de 110 000 $.

Both Lyall and Savics agreed to settle with the Executive Director on April 9, 1999. They admitted to facilitating a breach of s. 61 of the Act by splitting the $0.125 private placement with persons who did not qualify under the claimed exemption. They admitted that they ought to have known that Hartvikson and Johnson's involvement as Cartaway promoters was a conflict of interest that they failed to bring to the attention of the appropriate First Marathon personnel. They each undertook to pay $25,000 to the Commission and to comply with the Act and Rules, and with First Marathon's Employee Investment Policy.

Finally, Stuart agreed with the Executive Director on May 8, 1999, that any order of the Alberta Securities Commission in this matter would be imposed on a concurrent basis by the British Columbia Securities Commission. Stuart came to a final settlement with the Executive Director on September 10, 1999. He agreed not to act as a director for any issuer for five years, and not to act in any designated compliance or supervisory position with a member of the Alberta Exchange. Further, he agreed to pay the Commission $5,000 in costs. In settling with the Alberta Commission, Stuart paid a fine of $100,000 and $25,000 in costs. He also agreed to pay the TSE $130,000 plus $20,000 in costs, in addition to a lifetime ban on acting in any designated compliance capacity, and a four-month suspension from employment in any capacity with a TSE member.

C. *The Sanctions Imposed by the Commission*

In imposing sanctions on Hartvikson and Johnson under ss. 161 and 162 of the Act, the Commission weighed several important factors, including general deterrence, protecting the securities market, the settlement agreements and the circumstances of the case.

24 MM. Lyall et Savics ont tous deux accepté de conclure une entente avec le directeur général le 9 avril 1999. Ils ont admis avoir contribué à la violation de l'art. 61 de la Loi en partageant le placement privé de 0,125 $ avec des personnes qui ne remplissaient pas les conditions donnant droit à la dispense réclamée. Ils ont reconnu qu'ils auraient dû savoir que la participation de MM. Hartvikson et Johnson comme promoteurs de Cartaway constituait un conflit d'intérêts qu'ils n'ont pas porté à l'attention du personnel concerné de First Marathon. Chacun d'eux s'est engagé à verser 25 000 $ à la Commission et à se conformer à la Loi et au Règlement, de même qu'à la politique établie par First Marathon au sujet des investissements de ses employés.

25 Enfin, M. Stuart a convenu avec le directeur général, le 8 mai 1999, que toute ordonnance de la Commission des valeurs mobilières de l'Alberta en l'espèce serait appliquée concurremment par la Commission des valeurs mobilières de la Colombie-Britannique. M. Stuart a conclu un règlement définitif avec le directeur général le 10 septembre 1999. Il a accepté de ne pas agir comme administrateur de tout émetteur de valeurs pendant cinq ans et de s'abstenir d'occuper un poste désigné de supervision ou de vérification de la conformité chez un membre de la Bourse de l'Alberta. En outre, il s'est engagé à verser à la Commission des frais de 5 000 $. En exécution de l'entente intervenue avec la Commission des valeurs mobilières de l'Alberta, M. Stuart a payé une amende de 100 000 $ et des frais de 25 000 $. Il a aussi accepté de verser à la Bourse de Toronto 130 000 $, plus 20 000 $ en frais, d'être suspendu à vie de tout poste désigné de vérification de la conformité et de n'occuper aucun emploi pendant quatre mois, à quelque titre que ce soit, chez un membre de la Bourse de Toronto.

C. *Les sanctions infligées par la Commission*

26 En infligeant à MM. Hartvikson et à Johnson les sanctions prévues aux art. 161 et 162 de la Loi, la Commission a tenu compte de plusieurs facteurs importants, dont la dissuasion générale, la protection des marchés des valeurs mobilières, les règlements amiables et les circonstances de l'espèce.

27 On one hand, the Commission considered the need to send a clear message that would deter inappropriate conduct by other participants in British Columbia's capital markets. It took into account the settlement agreements reached in proceedings against other First Marathon brokers. But in doing so, it compared the role of those individuals against Hartvikson and Johnson's leadership in perpetrating the illegal transaction and their deceitful conduct. Although deceit was not explicitly alleged in the notice of appeal, the respondents' credibility and misleading conduct was the focus of the proceedings from the outset. The Commission also took note of the $5.1 million in trading profits earned by Hartvikson and Johnson.

D'une part, la Commission a pris en compte la nécessité d'envoyer un message clair qui dissuaderait les autres participants aux marchés de capitaux de la Colombie-Britannique d'adopter une conduite inappropriée. Elle a étudié les règlements amiables conclus dans le cadre des poursuites intentées contre d'autres courtiers de First Marathon. Mais ce faisant, elle a comparé le rôle de ces personnes avec celui de leader que MM. Hartvikson et Johnson avaient joué dans l'opération illégale et avec leur comportement dolosif. Le dol n'a pas été explicitement allégué dans l'avis d'appel, mais la crédibilité des intimés et leur conduite trompeuse se sont situées dès le départ au centre des poursuites. La Commission a aussi pris acte du profit de 5,1 millions de dollars réalisé par MM. Hartvikson et Johnson.

28 On the other hand, the Commission took into account Hartvikson and Johnson's previously untarnished records and their positive contribution to the capital markets. Moreover, both respondents voluntarily surrendered their licences as registered trading representatives in 1996, and repented their actions. The Commission accepted that Hartvikson and Johnson would continue to make a positive contribution to British Columbia's capital markets, if permitted to do so. It is also notable that both offered to pay $100,000 towards a university foundation or program about business ethics.

D'autre part, la Commission a retenu le fait que MM. Hartvikson et Johnson avaient jusque-là des dossiers sans tache et qu'ils avaient contribué de façon positive à la vie des marchés de capitaux. De plus, les deux intimés ont volontairement remis en 1996 leur permis de négociateur inscrit et ont dit regretter leur geste. La Commission reconnaissait qu'ils continueraient d'apporter une contribution positive aux marchés de capitaux de la Colombie-Britannique si on le leur permettait. Il convient aussi de noter que tous deux ont offert de verser 100 000 $ à une fondation universitaire ou à un programme d'éthique des affaires.

29 After weighing these considerations, the Commission decided that a lengthy ban was unnecessary to protect the public interest. The Commission held that a limited suspension and the imposition of a financial penalty would be sufficient to protect the public interest. Under s. 161(1)(c) of the Act, it ordered that exemptions under ss. 44 to 47, 74, 75, 98, and 99 did not apply to the respondents for one year, except that each could trade only through a registered dealer and only on his own account under s. 45(2)(*7*) of the Act. Under s. 161(1)(d)(ii) of the Act, it ordered that the respondents were prohibited from acting as directors or officers of any reporting issuer for a period of one year and until they each successfully completed a remedial course concerning the

Après avoir soupesé ces facteurs, la Commission a décidé que la protection de l'intérêt public ne nécessitait pas une suspension de longue durée, mais seulement une suspension limitée et l'imposition d'une amende. En vertu de l'al. 161(1)c) de la Loi, elle a ordonné que les dispenses prévues aux art. 44 à 47, 74, 75, 98 et 99 ne s'appliquaient pas aux intimés pendant un an, sauf que chacun d'eux ne pouvait négocier que par l'entremise d'un courtier inscrit et que pour son propre compte conformément au par. 45(2)(*7*) de la Loi. En vertu du sous-al. 161(1)d)(ii) de la Loi, elle a interdit aux intimés d'agir comme administrateur ou comme dirigeant d'un émetteur assujetti pendant un an ou jusqu'à ce que chacun d'eux ait terminé avec succès un cours de rattrapage sur les devoirs et responsabilités des

duties and responsibilities of directors and officers, whichever was later.

Finally, under s. 162 of the Act, the Commission ordered Hartvikson and Johnson each to pay an administrative penalty of $100,000. In determining an appropriate order, the Commission did not take into account its findings that Hartvikson and Johnson were *de facto* directors and officers of Cartaway because this was not alleged in the notice of hearing.

III. Procedural History

Court of Appeal for British Columbia (2002), 218 D.L.R. (4th) 470, 2002 BCCA 461

Hartvikson and Johnson appealed the Commission's findings and order directly to the Court of Appeal for British Columbia under s. 167(1) of the Act. Hartvikson and Johnson raised several grounds of appeal. First, the Commission erred in finding that on April 5, 1995, they acted on behalf of Cartaway to make a legally binding deal to acquire the Voisey's Bay claims. Second, the Commission erred in finding that they were *de facto* directors. Third, the Commission erred in imposing the maximum administrative penalty available under s. 162 of the Act. Finally, the Commission created a reasonable apprehension of bias when its spokesperson made certain public statements. This ground was not pressed on appeal and was not, in the Court of Appeal's view, a sufficient ground to overturn the decision of the Commission.

(1) Braidwood J.A. for the Majority

Braidwood J.A. held that the standard of review of the Commission's findings and order was reasonableness *simpliciter*. Based on a review of the evidence as a whole, Braidwood J.A. held that the Commission reasonably concluded that Hartvikson and Johnson, with Stuart's approval, acted on behalf of Cartaway to acquire the Voisey's Bay claims on April 5, 1995. Similarly, the court upheld the

administrateurs et dirigeants, si cette éventualité est postérieure.

30 Enfin, en vertu de l'art. 162 de la Loi, la Commission a ordonné à MM. Hartvikson et Johnson de verser chacun une amende de 100 000 $. En établissant l'ordonnance appropriée, la Commission n'a pas tenu compte de ses conclusions selon lesquelles ils étaient administrateurs et dirigeants de fait de Cartaway, ce facteur n'ayant pas été allégué dans l'avis d'audience.

III. Historique des procédures judiciaires

Cour d'appel de la Colombie-Britannique (2002), 218 D.L.R. (4th) 470, 2002 BCCA 461

31 MM. Hartvikson et Johnson ont interjeté appel des conclusions et de l'ordonnance de la Commission directement à la Cour d'appel de la Colombie-Britannique en application du par. 167(1) de la Loi. Ils ont soulevé plusieurs moyens d'appel. Premièrement, la Commission aurait commis une erreur en concluant que, le 5 avril 1995, ils ont agi au nom de Cartaway pour conclure une entente juridiquement contraignante visant l'acquisition des claims de Voisey's Bay. Deuxièmement, la Commission se serait trompée en concluant qu'ils étaient des administrateurs de fait. Troisièmement, la Commission aurait infligé à tort l'amende maximale prévue à l'art. 162 de la Loi. Enfin, la Commission aurait suscité une crainte raisonnable de partialité lorsque son porte-parole a fait des déclarations publiques. En appel, on n'a pas insisté sur ce dernier moyen, qui, de l'avis de la Cour d'appel, n'était pas suffisant pour infirmer la décision de la Commission.

(1) Le juge Braidwood, au nom de la majorité

32 Le juge Braidwood a statué que la norme de contrôle applicable aux conclusions et à l'ordonnance de la Commission était celle de la décision raisonnable *simpliciter*. Après avoir examiné l'ensemble de la preuve, le juge Braidwood a estimé que la Commission avait raisonnablement conclu que MM. Hartvikson et Johnson avaient, avec le consentement de M. Stuart, agi au nom de Cartaway

Commission's findings with respect to Cartaway's control group, and the role played by Hartvikson and Johnson.

pour acquérir les claims de Voisey's Bay le 5 avril 1995. De même, la cour a confirmé les conclusions de la Commission quant au groupe de contrôle de Cartaway et au rôle joué par MM. Hartvikson et Johnson.

33 Braidwood J.A. held that, although the Commission's findings that Hartvikson and Johnson were *de facto* directors were probably necessary in the Commission's reconstruction of the facts, the Commission should not have then criticized them for the breach of their duties in the absence of giving adequate notice to the respondents and hearing evidence on this issue. In the court's view, the Commission did not appear to rely on this finding in imposing a penalty.

D'après le juge Braidwood, le constat de la Commission que MM. Hartvikson et Johnson sont administrateurs de fait lui est probablement nécessaire pour la reconstitution des faits, mais elle n'aurait pas dû ensuite leur reprocher d'avoir manqué à leurs devoirs sans leur donner un préavis suffisant et sans entendre la preuve sur ce point. De l'avis de la cour, la Commission ne paraît pas s'être fondée sur ce constat pour infliger une pénalité.

34 With regard to the penalty, the majority held that the imposition of the maximum penalty was too severe and unreasonable in all the circumstances. It substituted a penalty of $10,000 each for Hartvikson and Johnson. Braidwood J.A. viewed Hartvikson and Johnson's culpability as relatively minor with respect to the breach of s. 61 of the Act by illegally splitting the $0.125 private placement. Braidwood J.A. found that the public had not been harmed by this splitting. The learned appellate judge also took into account the settlements by the other brokers, which he viewed as significantly less onerous.

Passant ensuite à l'examen de la pénalité, les juges majoritaires ont estimé que l'imposition de la pénalité maximale était trop sévère et déraisonnable eu égard à l'ensemble des circonstances. Pour ces raisons, ils y ont substitué une pénalité de 10 000 $ chacun pour MM. Hartvikson et Johnson. Selon le juge Braidwood, leur culpabilité était relativement mineure pour ce qui est de la violation de l'art. 61 de la Loi, qui se limitait à une division illégale du placement privé de 0,125 $. De plus, le public n'avait pas été lésé par cette division. Le juge d'appel a aussi tenu compte des règlements amiables conclus par les autres courtiers, beaucoup moins sévères à ses yeux.

35 Based on his reading of this Court's decision in *Committee for the Equal Treatment of Asbestos Minority Shareholders v. Ontario (Securities Commission)*, [2001] 2 S.C.R. 132, 2001 SCC 37, Braidwood J.A. held that the Commission did not have the authority to consider general deterrence under s. 162, and that only the specific conduct in relation to the breach of the Act could be considered. Braidwood J.A. believed this Court's opinion in *Asbestos* that the Ontario Securities Commission's public interest jurisdiction is prospective and preventative, rather than remedial or punitive, restricted the Commission's public interest jurisdiction to restraining future conduct of Hartvikson and

Selon son interprétation de l'arrêt de la Cour *Comité pour le traitement égal des actionnaires minoritaires de la Société Asbestos ltée c. Ontario (Commission des valeurs mobilières)*, [2001] 2 R.C.S. 132, 2001 CSC 37, le juge Braidwood a conclu que, sous le régime de l'art. 162, la Commission n'était pas autorisée à prendre en considération la dissuasion générale, mais devait uniquement examiner la conduite particulière liée à la violation de la Loi. Selon lui, l'opinion de la Cour dans *Asbestos* selon laquelle la compétence de la Commission des valeurs mobilières de l'Ontario en matière d'intérêt public est de nature prospective et préventive, et non réparatrice ou punitive,

Johnson that would likely prejudice the public interest.

(2) Ryan J.A. (Dissenting in Part)

Ryan J.A. dissented on the penalty issue. She read *Asbestos*, *supra*, differently. In Ryan J.A.'s opinion, *Asbestos* dealt with the jurisdiction of the Ontario Securities Commission to prosecute or take action against a party whose actions were prejudicial to the public interest. In Ryan J.A.'s view, this Court did not address the principles a commission must consider in imposing administrative penalties.

Further, Ryan J.A. reasoned that general deterrence is neither punitive nor remedial. General deterrence is designed to discourage similar behaviour in others. Ryan J.A. concluded that the Commission — as part of its protective and preventative jurisdiction — may consider general deterrence in fashioning an appropriate penalty. Nevertheless, Ryan J.A. agreed with the majority of the court that the penalty was flawed in other ways, and would have reduced the penalties to $50,000 each.

IV. Relevant Statutory Provisions

Securities Act, R.S.B.C. 1996, c. 418

61 (1) Unless exempted under this Act or the regulations, a person must not distribute a security unless

(a) a preliminary prospectus and a prospectus respecting the security have been filed with the executive director, and

(b) the executive director has issued receipts for the preliminary prospectus and prospectus.

(2) A preliminary prospectus and a prospectus must be in the required form.

. . .

impliquait que la compétence relative à l'intérêt public de la Commission se limitait à empêcher qu'à l'avenir MM. Hartvikson et à Johnson tiennent une conduite susceptible de nuire à l'intérêt public.

(2) La juge Ryan (dissidente en partie)

36 La juge Ryan a exprimé sa dissidence sur la question de la pénalité. Elle a interprété différemment l'arrêt *Asbestos*, précité. Selon elle, ce jugement portait sur la compétence de la Commission des valeurs mobilières de l'Ontario pour poursuivre une partie dont les actes ont porté atteinte à l'intérêt public ou pour prendre des mesures contre elle. À son avis, notre Cour n'avait pas traité alors des principes qu'une commission doit prendre en compte lorsqu'elle inflige des sanctions administratives.

37 De plus, la juge Ryan a estimé que la dissuasion générale n'est ni punitive ni réparatrice. La dissuasion générale vise à décourager les autres d'agir de façon semblable. La juge Ryan a donc conclu que la Commission — dans le cadre de sa compétence de nature protectrice et préventive — peut prendre en considération la dissuasion générale pour fixer la pénalité qui s'impose. Elle a néanmoins reconnu avec les juges majoritaires de la cour que la sanction était mal fondée à d'autres égards; elle aurait réduit les amendes à 50 000 $ chacune.

IV. Dispositions législatives pertinentes

38 *Securities Act*, R.S.B.C. 1996, ch. 418

[TRADUCTION]

61 (1) Sauf dispense prévue par la présente loi ou son règlement d'application, nul ne peut procéder au placement d'une valeur mobilière sauf si :

a) un prospectus provisoire et un prospectus sur la valeur mobilière ont été déposés auprès du directeur général;

b) le directeur général en a accusé réception.

(2) Le prospectus provisoire et le prospectus doivent respecter la forme prescrite.

. . .

161 (1) If the commission or the executive director considers it to be in the public interest, the commission or the executive director, after a hearing, may order one or more of the following:

(a) that a person comply with or cease contravening, and that the directors and senior officers of the person cause the person to comply with or cease contravening,

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

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

(iii) a bylaw, rule, or other regulatory instrument or policy or a direction, decision, order or ruling made under a bylaw, rule or other regulatory instrument or policy of a self regulatory body or exchange, as the case may be, that has been recognized by the commission under section 24;

(b) that

(i) all persons,

(ii) the person or persons named in the order, or

(iii) one or more classes of persons

cease trading in or be prohibited from purchasing, any securities or exchange contracts, a specified security or exchange contract or a specified class of securities or class of exchange contracts;

(c) that any or all of the exemptions described in any of sections 44 to 47, 74, 75, 98 or 99 do not apply to a person;

(d) that a person

(i) resign any position that the person holds as a director or officer of an issuer,

(ii) is prohibited from becoming or acting as a director or officer of any issuer, or

161 (1) Lorsqu'ils estiment dans l'intérêt public de le faire, la Commission ou le directeur général peuvent, après audience, ordonner :

a) qu'une personne se conforme ou cesse de contrevenir, et que ses administrateurs et cadres dirigeants prennent des mesures pour qu'elle se conforme ou cesse de contrevenir :

(i) une disposition de la présente loi ou de son règlement d'application,

(ii) à une décision, déposée ou non, sous le régime de l'article 163,

(iii) à un règlement administratif, une règle ou un autre instrument ou politique de réglementation, ou une directive, décision ou ordonnance prises en vertu d'un règlement administratif, d'une règle ou d'un autre instrument ou politique de réglementation d'un organisme autonome, d'une bourse, d'un système de cotation et de déclaration des opérations, selon le cas, que la Commission a reconnu en vertu de l'article 24;

b) que :

(i) toute personne,

(ii) les personnes nommées dans l'ordonnance,

(iii) une ou plusieurs catégories de personnes

cessent de faire des opérations sur des valeurs mobilières ou d'acquérir des valeurs mobilières ou contrats de change, une valeur mobilière donnée ou un contrat de change donné, ou une catégorie précise de valeurs mobilières ou de contrats de change;

c) qu'une ou l'ensemble des dispenses visées aux articles 44 à 47, 74, 75, 98 ou 99 ne s'appliquent pas à une personne;

d) qu'une personne :

(i) démissionne du poste qu'elle occupe comme administrateur ou dirigeant d'un émetteur,

(ii) ne puisse plus devenir administrateur ou dirigeant d'un émetteur ou agir à ce titre,

(iii) is prohibited from engaging in investor relations activities;

(e) that a registrant, issuer or person engaged in investor relations activities

(i) is prohibited from disseminating to the public, or authorizing the dissemination to the public, of any information or record of any kind that is described in the order,

(ii) is required to disseminate to the public, by the method described in the order, any information or record relating to the affairs of the registrant or issuer that the commission or the superintendent considers must be disseminated, or

(iii) is required to amend, in the manner specified in the order, any information or record of any kind described in the order before disseminating the information or record to the public or authorizing its dissemination to the public;

(f) that a registrant be reprimanded, that a person's registration be suspended, cancelled or restricted or that conditions be imposed on a registrant.

(2) If the commission or the executive director considers that the length of time required to hold a hearing under subsection (1), other than under subsection (1) (e) (ii) or (iii), could be prejudicial to the public interest, the commission or the executive director may make a temporary order, without a hearing, to have effect for not longer than 15 days after the date the temporary order is made.

(3) If the commission or the executive director considers it necessary and in the public interest, the commission or the executive director may, without a hearing, make an order extending a temporary order until a hearing is held and a decision is rendered.

(4) The commission or the executive director, as the case may be, must send written notice of every order made under this section to any person that is directly affected by the order.

(5) If notice of a temporary order is sent under subsection (4), the notice must be accompanied by a notice of hearing.

(iii) ne puisse plus participer à des activités de relations avec les investisseurs;

e) qu'une personne inscrite, un émetteur ou une personne participant à des activités de relations avec les investisseurs :

(i) ne puisse plus diffuser, ou permettre que soit diffusé, tout renseignement ou document, quel qu'il soit, décrit dans l'ordonnance,

(ii) diffuse, selon la méthode prescrite dans l'ordonnance, tout renseignement ou document relatif aux affaires de la personne inscrite ou de l'émetteur que la Commission ou le surintendant estiment nécessaire de diffuser,

(iii) modifie, de la manière indiquée dans l'ordonnance, tout renseignement ou document, quel qu'il soit, décrit dans l'ordonnance, avant de le diffuser ou d'autoriser sa diffusion;

f) qu'une personne inscrite soit réprimandée ou que son inscription soit suspendue, retirée, limitée ou assujettie à certaines conditions.

(2) Si, de l'avis de la Commission ou du directeur général, le délai nécessaire pour la tenue de l'audience prévue au paragraphe (1), autre que celle prévue aux sous-alinéas (1)e)(ii) ou (iii), risque d'être préjudiciable à l'intérêt public, ils peuvent, sans audience, prononcer une ordonnance provisoire qui reste en vigueur pendant un délai maximal de 15 jours suivant la date du prononcé.

(3) Si la Commission ou le directeur général l'estiment nécessaire et dans l'intérêt public, ils peuvent, sans audience, proroger l'ordonnance provisoire jusqu'à ce que la décision soit rendue, après audience.

(4) La Commission ou le directeur général, selon le cas, transmet par écrit un avis de chaque ordonnance prononcée en vertu de la présente disposition à toute personne directement visée par l'ordonnance.

(5) L'avis d'ordonnance provisoire visé au paragraphe (4) est accompagné d'un avis d'audience.

162 If the commission, after a hearing,

(a) determines that a person has contravened

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

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

(b) considers it to be in the public interest to make the order

the commission may order the person to pay the commission an administrative penalty of not more than $100 000.

167 . . .

(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.

162 Si, après audience, la Commission :

a) conclut qu'une personne a contrevenu :

(i) à une disposition de la présente loi ou de son règlement d'application,

(ii) à une décision, déposée ou non, sous le régime de l'article 163;

b) estime qu'il est dans l'intérêt public de le faire,

elle peut rendre une ordonnance enjoignant à la personne de verser une amende d'au plus 100 000 $.

167 . . .

(3) S'il est interjeté appel en vertu de la présente disposition, la Cour d'appel peut ordonner à la Commission de prendre toute décision ou autre mesure que la Commission a le pouvoir de prendre.

V. Issues

39 The following issues are raised on this appeal:

1. Whether the Executive Director has standing to bring this appeal.

2. Whether the Commission may consider general deterrence when ordering sanctions under s. 162 of the Act.

3. Whether the Commission must consider settlement agreements entered into by the Executive Director in assessing sanctions under the Act.

4. Whether the Court of Appeal should have referred the question of appropriate sanctions back to the Commission under s. 167(3) of the Act.

VI. Analysis

A. *Standing*

40 The Executive Director was granted leave to appeal by the Court on April 10, 2003. At the time of the leave application, Hartvikson and Johnson did not challenge the standing of the Executive Director to bring this appeal. They did so only in their submissions on the merits.

V. Les questions en litige

Voici les questions soulevées en l'espèce :

1. Le directeur général a-t-il qualité pour former le présent pourvoi?

2. La Commission peut-elle prendre en considération la dissuasion générale lorsqu'elle ordonne des sanctions en vertu de l'art. 162 de la Loi?

3. La Commission doit-elle tenir compte des règlements amiables conclus par le directeur général pour déterminer les sanctions applicables sous le régime de la Loi?

4. La Cour d'appel aurait-elle dû renvoyer à la Commission la question de la sanction appropriée en application du par. 167(3) de la Loi?

VI. Analyse

A. *Qualité*

La Cour a autorisé le directeur général à former un pourvoi le 10 avril 2003. Au moment de la demande d'autorisation, MM. Hartvikson et Johnson n'ont pas contesté la qualité du directeur général pour former le présent pourvoi. Ils l'ont fait seulement dans leurs observations sur le fond.

During enforcement proceedings before the Commission, the Executive Director acts as an administrative prosecutor, while the Commission is the impartial arbiter. In the court below, the Executive Director did not appear as a party. Rather, the Commission itself was the named respondent because the Commission is designated as a party to an appeal to the Court of Appeal under s. 167(5) of the Act. However, between the time of the hearing before the court below and the appeal to this Court, the Court of Appeal released its decision in *British Columbia (Securities Commission) v. Pacific International Securities Inc.* (2002), 2 B.C.L.R. (4th) 114, 2002 BCCA 421, which held that the Executive Director is the proper party on an interlocutory appeal on the merits of a procedural decision by the Commission. Without commenting on the correctness of *Pacific International*, I observe that the Executive Director merely sought to comply with this decision.

41 Dans une procédure d'exécution devant la Commission, le directeur général agit à titre de poursuivant administratif, alors que la Commission remplit la fonction d'arbitre impartial. En cour d'appel, le directeur général n'a pas comparu comme partie à l'instance. C'est plutôt la Commission elle-même qui était l'intimée désignée parce que c'est elle qui, selon le par. 167(5) de la Loi, est désignée comme partie à l'instance devant la Cour d'appel. Cependant, entre le moment de l'audience devant l'instance inférieure et le pourvoi devant la Cour, la Cour d'appel a rendu l'arrêt *British Columbia (Securities Commission) c. Pacific International Securities Inc.* (2002), 2 B.C.L.R. (4th) 114, 2002 BCCA 421, selon lequel le directeur général a qualité pour agir comme partie dans un appel interlocutoire quant au bien-fondé d'une décision procédurale de la Commission. Sans commenter la justesse de *Pacific International*, je note que le directeur général a simplement cherché à se conformer à cette décision.

In our Court, given the nature of its functions in the enforcement of the law, the Executive Director is properly substituted as a party under Rule 18(5) of the *Rules of the Supreme Court of Canada*, SOR/2002-156. If there is any procedural irregularity in this case, it may be cured under Rule 8(1). Moreover, the respondents did not suffer any prejudice from the substitution.

42 Devant la Cour, étant donné la nature de ses fonctions dans l'application de la loi, le directeur général est une partie dûment substituée sous le régime du par. 18(5) des *Règles de la Cour suprême du Canada*, DORS/2002-156. S'il existe quelque irrégularité de procédure en l'espèce, le par. 8(1) permet d'y remédier. De plus, les intimés n'ont subi aucun préjudice du fait de la substitution.

B. *Standard of Review*

The first step in the analysis of the Commission's interpretation of s. 162 is to determine the appropriate standard of review according to the pragmatic and functional analysis. While a pigeonhole approach should be eschewed by reviewing courts, past judicial decisions may be helpful in determining the appropriate standard of review: *Dr. Q v. College of Physicians and Surgeons of British Columbia*, [2003] 1 S.C.R. 226, 2003 SCC 19, at paras. 24-25. This Court applied the pragmatic and functional analysis to the Commission's interpretation of a similar provision, s. 144 (now s. 161), in *Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557.

B. *Norme de contrôle*

43 Dans l'analyse de l'interprétation donnée par la Commission à l'art. 162, la première étape consiste à déterminer la norme de contrôle applicable selon l'analyse pragmatique et fonctionnelle. Bien que les cours de révision doivent éviter d'adopter une approche de compartimentation, il peut être utile de recourir aux décisions judiciaires antérieures pour déterminer la norme de contrôle applicable : *Dr Q c. College of Physicians and Surgeons of British Columbia*, [2003] 1 R.C.S. 226, 2003 CSC 19, par. 24-25. Dans *Pezim c. Colombie-Britannique (Superintendent of Brokers)*, [1994] 2 R.C.S. 557, la Cour a appliqué l'analyse pragmatique et fonctionnelle à l'interprétation que la Commission avait donnée d'une disposition semblable, l'art. 144 (maintenant l'art. 161).

44 The pragmatic and functional analysis involves the weighing of four factors: (1) the presence or absence of a privative clause or statutory right of appeal; (2) the expertise of the administrative tribunal relative to the reviewing court regarding the question at issue; (3) the purpose of the legislation and the provision in particular; and (4) the nature of the question — law, fact, or mixed law and fact: *Dr. Q*, *supra*, at para. 26. No one factor is dispositive.

45 Section 167(1) of the Act provides that an appeal of a decision of the Commission under s. 162 lies to the Court of Appeal, with leave of a justice of that court. Decisions of the Commission are thus not protected by a privative clause. This militates against deference. Nevertheless, this Court has held that deference is due to matters falling squarely within the expertise of the Commission even where there is a right of appeal: *Pezim*, *supra*, at p. 591. This Court recognized in *Pezim*, at pp. 593-94, that the Commission has special expertise regarding securities matters. The core of this expertise lies in interpreting and applying the provisions of the Act, and in determining what orders are in the public interest with respect to capital markets. In this case, the question of whether general deterrence is an appropriate consideration in formulating a penalty in the public interest falls squarely within the expertise of the Commission.

46 Although courts are regularly called on to interpret and apply general questions of law and engage in statutory interpretation, courts have less expertise relative to securities commissions in determining what is in the public interest in the regulation of financial markets. The courts also have less expertise than securities commissions in interpreting their constituent statutes given the broad policy context within which securities commissions operate: *National Corn Growers Assn. v. Canada (Import Tribunal)*, [1990] 2 S.C.R. 1324, at p. 1336.

L'analyse pragmatique et fonctionnelle nécessite l'appréciation de quatre facteurs : (1) la présence ou l'absence dans la loi d'une clause privative ou d'un droit d'appel; (2) l'expertise du tribunal relativement à celle de la cour de révision sur la question en litige; (3) l'objet de la loi et de la disposition particulière; (4) la nature de la question — de droit, de fait ou mixte de fait et de droit : *Dr Q*, précité, par. 26. Aucun de ces facteurs n'est déterminant.

Le paragraphe 167(1) de la Loi prévoit qu'une décision rendue par la Commission sous le régime de l'art. 162 peut faire l'objet d'un appel devant la Cour d'appel, avec l'autorisation d'un juge de cette cour. Aucune clause privative ne protège donc les décisions de la Commission. Cette absence de protection milite contre la déférence. Néanmoins, la Cour a statué que, même en présence d'un droit d'appel, on doit faire preuve de déférence à l'égard des questions qui relèvent carrément du champ d'expertise de la Commission : *Pezim*, précité, p. 591. La Cour a reconnu dans *Pezim*, p. 593-594, l'expertise particulière de la Commission en matière de valeurs mobilières. Cette expertise réside essentiellement dans l'interprétation et l'application des dispositions de la Loi, ainsi que dans la détermination des ordonnances qui sont dans l'intérêt public relativement aux marchés de capitaux. En l'espèce, la question de savoir si la dissuasion générale est un facteur pertinent pour l'établissement d'une peine d'intérêt public relève clairement du champ d'expertise de la Commission.

Bien que les tribunaux soient régulièrement appelés à interpréter et à appliquer des questions de droit générales, ainsi qu'à interpréter des textes législatifs, ils sont moins qualifiés que les commissions des valeurs mobilières pour définir la nature de l'intérêt public dans la réglementation des marchés financiers. Ils sont aussi moins compétents que les commissions des valeurs mobilières pour interpréter les lois constitutives de ces organismes, compte tenu de l'importance de grandes questions de politique générale dans le contexte de leurs activités : *National Corn Growers Assn. c. Canada (Tribunal des importations)*, [1990] 2 R.C.S. 1324, p. 1336.

A reviewing court must consider the general purpose of the statute and the particular provision under consideration with an eye to discerning the intent of the legislature: *Dr. Q*, *supra*, at para. 30. The adjudicative function of the Commission in enforcement proceedings under s. 162 would generally call for less deference. In the present case the Commission is called upon to adjudicate a bipolar dispute rather than exercise a pure policy decision. Nevertheless, the Commission also plays a principal role in policy development, in the management of a complex securities regulation scheme and in reconciling the interests of a number of different groups and in protecting the public: *Brosseau v. Alberta Securities Commission*, [1989] 1 S.C.R. 301, at pp. 313-14. This calls for some deference by the reviewing court: *Pezim*, *supra*, at p. 591.

47 Le tribunal saisi d'une demande de révision judiciaire doit examiner l'objet général du texte législatif et de la disposition en cause en vue de saisir l'intention du législateur : *Dr Q*, précité, par. 30. La fonction juridictionnelle de la Commission dans le cadre de la procédure d'application prévue à l'art. 162 commanderait en général une déférence moindre. En l'espèce, la Commission est appelée à trancher un conflit bipolaire plutôt qu'à exercer une décision de pure politique. Néanmoins, elle joue aussi un rôle de premier plan dans l'établissement des politiques générales, dans la gestion du régime complexe de réglementation des valeurs mobilières, ainsi que dans la conciliation des intérêts de divers groupes et dans la protection du public : *Brosseau c. Alberta Securities Commission*, [1989] 1 R.C.S. 301, p. 313-314. Ce rôle commande une certaine déférence de la part des cours de révision : *Pezim*, précité, p. 591.

The interpretation of s. 162 is a question of statutory construction of the Commission's enabling statute. As I stated above, the application of s. 162 requires the determination of when an order is in the public interest, and this calls for the Commission to apply its expertise. Although the Commission's interpretation of s. 162 is not binding on future Commission decisions, once the Commission finds that it can take general deterrence into account, it is unlikely to break from this practice in the future. It therefore has some precedential value. On the whole, the nature of the question militates in favour of deference.

48 L'interprétation de l'art. 162 représente une question d'interprétation de la loi habilitante de la Commission. Comme je l'ai mentionné précédemment, l'application de l'art. 162 exige de déterminer dans quel cas une ordonnance relève de l'intérêt public et, pour ce faire, la Commission doit faire appel à son expertise. Même si la Commission n'est pas liée par son interprétation de l'art. 162 quant à ses décisions futures, une fois qu'elle conclut qu'elle peut prendre en considération la dissuasion générale, il est peu probable qu'elle cesse de le faire dans l'avenir. Cette interprétation acquiert une valeur de précédent. Dans l'ensemble, la nature de la question milite en faveur de la déférence.

The balance of factors in the pragmatic and functional analysis point towards the standard of review of reasonableness and away from the more exacting standard of correctness. The reviewing court must therefore ask whether there is a rational basis for the decision of the Commission in light of the statutory framework and the circumstances of the case. Do the reasons as a whole support the decision (*Law Society of New Brunswick v. Ryan*, [2003] 1 S.C.R. 247, 2003 SCC 20, at para. 56)? Specifically, is it reasonable for the Commission

49 La pondération des divers facteurs de l'analyse pragmatique et fonctionnelle tend à faire conclure à l'application de la norme de contrôle de la décision raisonnable, plutôt que de la norme de contrôle plus exigeante de la décision correcte. La cour de révision doit donc se demander s'il existe un fondement rationnel à la décision de la Commission au regard du cadre législatif et des circonstances de l'espèce. Les motifs, considérés dans leur ensemble, étayent-ils la décision (*Barreau du Nouveau-Brunswick c. Ryan*, [2003]

to consider general deterrence in determining whether a sanction under s. 162 would be in the public interest?

50 In applying the standard of reasonableness, the reviewing court should not determine whether it agrees with the determination of the tribunal. Such a conclusion is irrelevant: *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748, at para. 80. The focus should be on the reasonableness of the decision or the order, not on whether it was a tolerable deviation from a preferred outcome.

51 In my view, the Commission's interpretation of s. 162 was reasonable.

C. *General Deterrence*

52 Deterrent penalties work on two levels. They may target society generally, including potential wrongdoers, in an effort to demonstrate the negative consequences of wrongdoing. They may also target the individual wrongdoer in an attempt to show the unprofitability of repeated wrongdoing. The first is general deterrence; the second is specific or individual deterrence: see C. C. Ruby, *Sentencing* (5th ed. 1999). In both cases deterrence is prospective in orientation and aims at preventing future conduct.

53 General deterrence as an aim of sentencing in criminal law is well established: see *R. v. M. (C.A.)*, [1996] 1 S.C.R. 500, at para. 56; *R. v. Morrisey*, [2000] 2 S.C.R. 90, 2000 SCC 39, at paras. 44 and 46. One of its earliest proponents was Jeremy Bentham. In his view, where the same result cannot be achieved through other modes of punishment and the net benefit to society outweighs the harm imposed on the offender, a deterrent penalty should be imposed and tailored in order to discourage others from committing the same offence. He assumes that citizens are rational actors, who will adjust their conduct according to the disincentives

1 R.C.S. 247, 2003 CSC 20, par. 56)? Plus précisément, est-il raisonnable que la Commission prenne en considération la dissuasion générale pour déterminer s'il est dans l'intérêt public d'imposer la sanction prévue à l'art. 162?

Lorsqu'elle applique la norme de la décision raisonnable, la cour de révision ne doit pas rechercher si elle est d'accord avec la décision du tribunal. Une telle conclusion n'est pas pertinente : *Canada (Directeur des enquêtes et recherches) c. Southam Inc.*, [1997] 1 R.C.S. 748, par. 80. Elle doit s'attacher à l'examen du caractère raisonnable de la décision ou de l'ordonnance, non à la question de savoir si celle-ci s'écarte de manière acceptable d'un résultat préférable.

À mon avis, l'interprétation donnée par la Commission à l'art. 162 était raisonnable.

C. *Dissuasion générale*

Les peines dissuasives fonctionnent à deux niveaux. Elles peuvent cibler la société en général, y compris les contrevenants potentiels, dans le but d'illustrer les conséquences négatives d'un comportement fautif. Elles peuvent aussi cibler le contrevenant particulier afin de démontrer que la récidive ne profite pas. Il s'agit, dans le premier cas, de dissuasion générale et, dans le second, de dissuasion spécifique ou individuelle : voir C. C. Ruby, *Sentencing* (5e éd. 1999). Dans les deux cas, la dissuasion est prospective et vise à prévenir des comportements futurs.

Il est bien établi que la dissuasion générale constitue l'un des objectifs de la détermination de la peine en droit pénal : voir *R. c. M. (C.A.)*, [1996] 1 R.C.S. 500, par. 56; *R. c. Morrisey*, [2000] 2 R.C.S. 90, 2003 CSC 39, par. 44 et 46. Jeremy Bentham a été l'un des premiers partisans de la dissuasion générale. Selon lui, s'il est impossible d'arriver au même résultat par d'autres modes de sanction et que l'avantage net qu'en retire la société l'emporte sur le préjudice que subit le contrevenant, il convient d'infliger une peine dissuasive, qui soit conçue de telle manière qu'elle dissuade les autres de commettre la même infraction. Bentham présume que les citoyens

of deterrent penalties: A. Ashworth, *Sentencing and Criminal Justice* (3rd ed. 2003), at p. 64. Similarly, law and economic theorists such as R. A. Posner view deterrent penalties as a kind of pricing system: "An Economic Theory of the Criminal Law" (1985), 85 *Colum. L. Rev.* 1193.

However, general deterrence is not without its critics. In the criminal context, commentators and courts have expressed doubts as to the effectiveness of imprisonment as a general deterrent: *R. v. Wismayer* (1997), 115 C.C.C. (3d) 18 (Ont. C.A.), at p. 36; Canadian Sentencing Commission, *Sentencing Reform: A Canadian Approach* (1987) (Archambault Report), at pp. 136-37.

In this appeal we are asked whether it is reasonable to decide that general deterrence has a role to play in the policing of capital markets. The conventional view is that participants in capital markets are rational actors. This is probably more true of market systems than it is of social behaviour. It is therefore reasonable to assume, particularly with reference to the expertise of the Commission in regulating capital markets, that general deterrence has a proper role to play in determining whether to make orders in the public interest and, if they choose to do so, the severity of those orders.

This approach is consonant with United States securities jurisprudence, which accepts that general deterrence may be a consideration in imposing penalties for fraudulent behaviour. The rationale is that the public interest demands appropriate sanctions to secure compliance with the rules, regulations and policies of the Securities and Exchange Commission ("SEC"): see, e.g., *United States v. Matthews*, 787 F.2d 38 (2d Cir. 1986), at p. 47. Civil penalties are increasingly important to the SEC for a number of reasons, including general deterrence: see R. G. Ryan, "Securities

sont des acteurs rationnels qui régleront leur conduite selon la rigueur des peines dissuasives : A. Ashworth, *Sentencing and Criminal Justice* (3e éd. 2003), p. 64. De même, les théoriciens du droit et de l'économie, tel que R. A. Posner, conçoivent les peines dissuasives comme une sorte de système de tarification : « An Economic Theory of the Criminal Law » (1985), 85 *Colum. L. Rev*. 1193.

54 La dissuasion générale ne fait toutefois pas l'unanimité. Dans le contexte pénal, les commentateurs et les tribunaux ont exprimé des doutes quant à l'efficacité de l'emprisonnement comme mesure de dissuasion générale : *R. c. Wismayer* (1997), 115 C.C.C. (3d) 18 (C.A. Ont.), p. 36; Commission canadienne sur la détermination de la peine, *Réformer la sentence : une approche canadienne* (1987) (rapport Archambault), p. 150-151.

55 En l'espèce, on nous demande s'il est raisonnable de conclure que la dissuasion générale a un rôle à jouer dans la réglementation des marchés de capitaux. Selon l'opinion courante, les participants aux marchés de capitaux demeurent des acteurs rationnels. Cette théorie vaut probablement davantage pour les systèmes de marchés que pour les comportements sociaux. Il est donc raisonnable de présumer, surtout du fait de l'expertise de la Commission dans la réglementation des marchés de capitaux, que la dissuasion générale conserve un rôle légitime dans la décision de prononcer ou non des ordonnances dans l'intérêt public et, le cas échéant, quant à la sévérité de ces ordonnances.

56 Cette approche s'accorde avec la jurisprudence américaine en matière de valeurs mobilières. Cette dernière accepte que la dissuasion générale puisse être un facteur pertinent dans l'imposition des pénalités pour sanctionner une conduite frauduleuse. En effet, l'intérêt public commande l'application de sanctions appropriées pour assurer l'observation des règles, des règlements et des politiques de la Securities and Exchange Commission (« SEC ») : voir p. ex. *United States c. Matthews*, 787 F.2d 38 (2d Cir. 1986), p. 47. L'importance des peines civiles ne cesse de croître pour la SEC

Enforcement: Civil Penalties in SEC Enforcement Cases: A Rising Tide" (2003), 17 *Insights* 17.

57 The Commission imposed the financial penalty on Hartvikson and Johnson under s. 162 of the Act, which provides that if the Commission finds after a hearing that a person has acted contrary to the Act, regulations or a decision of the Commission, and it is in the public interest to make such an order, it may impose a fine of no more than $100,000:

162 If the commission, after a hearing,

(a) determines that a person has contravened

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

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

(b) considers it to be in the public interest to make the order

the commission may order the person to pay the commission an administrative penalty of not more than $100 000.

The Commission considered it to be in the public interest to levy the maximum fine for Hartvikson and Johnson's breach of s. 61.

58 "Public interest" is not defined in the Act. This Court considered the scope of a securities commission's public interest jurisdiction in *Asbestos*, *supra*. At issue in *Asbestos* was the Ontario Securities Commission's jurisdiction to intervene in Ontario's capital markets, for purposes of protection and prevention, if it is in the public interest to do so pursuant to s. 127(1) of the *Securities Act*, R.S.O. 1990, c. S.5. This Court held that the discretion to act in the public interest is not unlimited. In exercising its discretion the Commission should consider "the protection of investors and the efficiency of, and public confidence in, capital markets generally" (*Asbestos*, *supra*, at para. 45). Because s. 127 is regulatory, its sanctions are not remedial or punitive, but rather are preventative in nature and prospective in application. As a result, this Court held that s. 127 could not be used to redress misconduct alleged to have caused

et ce, pour des motifs divers, dont la nécessité de la dissuasion générale : voir R. G. Ryan, « Securities Enforcement : Civil Penalties in SEC Enforcement Cases : A Rising Tide » (2003), 17 *Insights* 17.

La Commission a imposé à MM. Hartvikson et Johnson la peine pécuniaire prévue à l'art. 162 de la Loi. Selon celui-ci, si la Commission conclut, après audience, qu'une personne a contrevenu à la Loi, à son règlement d'application ou à une décision de la Commission, et qu'il est dans l'intérêt public de le faire, elle peut imposer une amende d'au plus 100 000 $:

162 Si, après audience, la Commission :

a) conclut qu'une personne a contrevenu :

(i) à une disposition de la présente loi ou de son règlement d'application,

(ii) à une décision, déposée ou non, sous le régime de l'article 163;

b) estime qu'il est dans l'intérêt public de le faire,

elle peut rendre une ordonnance enjoignant à la personne de verser une amende d'au plus 100 000 $.

La Commission a jugé que l'imposition de l'amende maximale à MM. Hartvikson et Johnson pour avoir violé l'art. 61 était dans l'intérêt public.

La Loi ne définit pas l'« intérêt public ». Dans *Asbestos*, précité, notre Cour a examiné l'étendue de la compétence relative à l'intérêt public d'une commission des valeurs mobilières. Dans cette affaire, il fallait décider si la Commission des valeurs mobilières de l'Ontario a compétence pour intervenir sur les marchés de capitaux de l'Ontario pour des finalités de protection et de prévention s'il est dans l'intérêt public qu'elle le fasse en application du par. 127(1) de la *Loi sur les valeurs mobilières*, L.R.O. 1990, ch. S.5. Selon notre Cour, le pouvoir discrétionnaire d'agir dans l'intérêt public n'avait pas un caractère illimité. Lorsqu'elle est appelée à exercer son pouvoir discrétionnaire, la Commission doit prendre en considération « la protection des investisseurs et l'efficacité des marchés financiers ainsi que la confiance du public en ceux-ci en général » (*Asbestos*, précité, par. 45).

harm to private parties or individuals: *Asbestos*, *supra*, at paras. 41-45. It should be observed that our Court was not considering the function of general deterrence in the exercise of the jurisdiction of a securities commission to impose fines and administrative penalties nor denying that general deterrence might play a role in this respect.

En raison de la nature réglementaire de l'art. 127, les sanctions prévues par cette disposition ne sont pas réparatrices ou punitives, mais plutôt de nature préventive et prospective. Par conséquent, notre Cour a conclu qu'une partie privée ou un particulier ne pouvait invoquer l'art. 127 pour réparer un acte d'inconduite qui lui aurait causé un préjudice : *Asbestos*, précité, par. 41-45. Il convient de noter que notre Cour n'examinait pas alors la fonction de dissuasion générale dans l'exercice de la compétence d'une commission des valeurs mobilières pour imposer des amendes et des sanctions administratives et reconnaissait que la dissuasion générale peut jouer un rôle à cet égard.

Braidwood J.A. understood *Asbestos*, *supra*, to foreclose the imposition of public interest penalties for the purpose of general deterrence. With respect, Braidwood J.A.'s interpretation was mistaken.

59 Selon le juge Braidwood, l'arrêt *Asbestos*, précité, interdit d'imposer des pénalités d'intérêt public aux fins de dissuasion générale. Avec égards, cette interprétation du juge Braidwood est erronée.

In my view, nothing inherent in the Commission's public interest jurisdiction, as it was considered by this Court in *Asbestos*, *supra*, prevents the Commission from considering general deterrence in making an order. To the contrary, it is reasonable to view general deterrence as an appropriate, and perhaps necessary, consideration in making orders that are both protective and preventative. Ryan J.A. recognized this in her dissent: "The notion of general deterrence is neither punitive nor remedial. A penalty that is meant to generally deter is a penalty designed to discourage or hinder like behaviour in others" (para. 125).

60 À mon avis, rien dans la compétence relative à l'intérêt public de la Commission que notre Cour a examinée dans *Asbestos*, précité, ne l'empêche de tenir compte de la dissuasion générale lorsqu'elle prononce une ordonnance. Au contraire, il est raisonnable de considérer qu'il s'agit d'un facteur pertinent, voire nécessaire, dans l'établissement d'ordonnances de nature à la fois protectrice et préventive. La juge Ryan l'a d'ailleurs reconnu dans sa dissidence : [TRADUCTION] « La notion de dissuasion générale n'est ni punitive ni réparatrice. Une pénalité qui se veut généralement dissuasive est celle qui vise à décourager ou à empêcher les autres de se livrer à de tels comportements » (par. 125).

The *Oxford English Dictionary* (2nd ed. 1989), vol. XII, defines "preventive" as "[t]hat anticipates in order to ward against; precautionary; that keeps from coming or taking place; that acts as a hindrance or obstacle". A penalty that is meant to deter generally is a penalty that is designed to keep an occurrence from happening; it discourages similar wrongdoing in others. In a word, a general deterrent is preventative. It is therefore reasonable to consider general deterrence as a factor, albeit not the only one, in imposing a sanction under s. 162. The respective importance of general deterrence as

61 Le *Nouveau Petit Robert* (2003) définit ainsi le mot « préventif » : « [q]ui tend à empêcher (une chose fâcheuse) de se produire ». Une pénalité qui se veut généralement dissuasive est celle qui vise à empêcher une chose de survenir; elle décourage les autres de se livrer à des actes fautifs semblables. En un mot, une mesure de dissuasion générale constitue une mesure préventive. On peut donc raisonnablement reconnaître la dissuasion générale comme un facteur pertinent, parmi d'autres, dans l'infliction d'une peine sous le régime de l'art. 162. L'importance respective du facteur de la dissuasion

a factor will vary according to the breach of the Act and the circumstances of the person charged with breaching the Act.

62 It may well be that the regulation of market behaviour only works effectively when securities commissions impose *ex post* sanctions that deter forward-looking market participants from engaging in similar wrongdoing. That is a matter that falls squarely within the expertise of securities commissions, which have a special responsibility in protecting the public from being defrauded and preserving confidence in our capital markets.

D. *The Commission's Order Was Reasonable*

63 Further, it was reasonable in all the circumstances for the Commission to conclude that general deterrence applies in respect of Hartvikson and Johnson's conduct. While a specific breach of the Act is required to trigger the application of s. 162, unlike s. 161, the penalty that the Commission ultimately imposes should take into account the entire context, as well as the preservation of the public interest. The public interest must be satisfied under both ss. 161 and 162, and is not restricted to situations where the Commission imposes a ban on market participation under s. 161. Where conduct could be addressed under the two sections, the Commission may use both provisions to craft the order that is most in the public interest.

64 The weight given to general deterrence will vary from case to case and is a matter within the discretion of the Commission. Protecting the public interest will require a different remedial emphasis according to the circumstances. Courts should review the order globally to determine whether it is reasonable. No one factor should be considered in isolation because to do so would skew the textured and nuanced evaluation conducted by the Commission in crafting an order in the public interest. Nevertheless, unreasonable weight given to a particular factor, including general deterrence, will

générale variera selon l'infraction à la Loi et la situation de la personne accusée de l'avoir commise.

Il se peut fort bien que la réglementation des comportements sur les marchés ne donne des résultats valables que si les commissions des valeurs mobilières infligent après coup des peines qui dissuadent les participants au marché prudents de se livrer à de tels actes fautifs. Une semblable question relève clairement du champ d'expertise des commissions des valeurs mobilières, dans leur responsabilité particulière de protéger le public contre la fraude et de maintenir la confiance dans nos marchés de capitaux.

D. *L'ordonnance de la Commission était raisonnable*

En outre, eu égard à l'ensemble des circonstances, la Commission pouvait raisonnablement conclure que la dissuasion générale s'applique à la conduite de MM. Hartvikson et Johnson. Même si, contrairement au cas de l'art. 161, une violation précise de la loi est nécessaire pour mettre en application l'art. 162, la Commission doit tenir compte du contexte global et de la protection de l'intérêt public pour déterminer en fin de compte la peine à infliger. L'intérêt public doit être pris en compte selon les art. 161 et 162, mais il ne se limite pas aux cas où la Commission prononce une interdiction de participer au marché sous le régime de l'art. 161. Lorsque la conduite en cause est visée par ces deux dispositions, la Commission peut s'appuyer sur les deux textes pour élaborer une ordonnance qui respecte le mieux possible l'intérêt public.

Le poids à donner à la dissuasion générale variera d'une affaire à l'autre et relève du pouvoir discrétionnaire de la Commission. La protection de l'intérêt public exige que l'on privilégie des mesures de réparation susceptibles de varier selon les circonstances. Les tribunaux doivent examiner l'ordonnance dans son ensemble pour vérifier son caractère raisonnable. Aucun facteur ne peut être pris en considération isolément. Une telle méthode fausserait l'évaluation détaillée et nuancée qui s'impose à la Commission pour concevoir une ordonnance qui soit dans l'intérêt public. Cependant, l'attribution d'un

render the order itself unreasonable. Iacobucci J. in *Pezim*, *supra*, at p. 607, suggested that an example of such unreasonableness would be the exercise of the Commission's discretion in a manner that was capricious or vexatious.

In my opinion, increasing the amount of the fine is not a "vexatious or capricious" exercise of the Commission's discretion but sends a clear message to other actors in the British Columbia securities market that a breach of s. 61 will be dealt with severely, and it is rational to assume that this conduct will accordingly be deterred. The Commission stressed the seriousness of the respondents' conduct and the damage done to the integrity of the capital markets, and found that when making an order that is in the public interest, "[w]e are obliged to take whatever remedial steps we determine are appropriate to maintain the public's confidence in the fairness of our markets" (para. 14).

The Commission's order was also a reasonable one globally. The Commission weighed the aggravating and mitigating factors and determined the appropriate penalty. Hartvikson and Johnson were the primary movers behind the control group's deceitful conduct. They were the leading players in breaching s. 61 of the Act. It does not appear on the face of the Commission's reasons for making the order under s. 162 that it gave unreasonable weight to general deterrence.

The respondents argued that the Commission erred in not giving appropriate weight to the settlements reached by the other members of the control group. I disagree.

In my view, settlement agreements arrived at by co-respondents and the Executive Director are not binding on the Commission in determining the appropriate penalty for other co-respondents, although such settlements are among the relevant factors in assessing the appropriate penalty under s. 162. There is no support in the Act to find that

trop grand poids à un facteur particulier, y compris la dissuasion générale, rendrait l'ordonnance déraisonnable. Le juge Iacobucci, dans l'arrêt *Pezim*, précité, p. 607, laisse d'ailleurs entendre que l'exercice du pouvoir discrétionnaire de la Commission d'une manière arbitraire ou vexatoire constituerait un cas de décision à caractère déraisonnable.

65 À mon avis, l'augmentation du montant de l'amende ne constitue pas un exercice « arbitraire ou vexatoire » du pouvoir discrétionnaire de la Commission, mais transmet un message clair aux autres acteurs du marché des valeurs mobilières de la Colombie-Britannique, selon lequel toute violation de l'art. 61 sera sévèrement sanctionnée. Il est donc rationnel de présumer qu'une telle conduite sera ainsi découragée. La Commission a souligné la gravité de la conduite des intimés et du préjudice porté à l'intégrité des marchés de capitaux. Selon elle, pour rendre une ordonnance qui soit dans l'intérêt public, [TRADUCTION] « [i]l nous faut prendre toutes les mesures réparatrices que nous estimons nécessaires pour maintenir la confiance du public dans l'équité de nos marchés » (par. 14).

66 L'ordonnance de la Commission était également raisonnable dans l'ensemble. La Commission a mis en balance les facteurs aggravants et les facteurs atténuants et déterminé la peine appropriée. MM. Hartvikson et Johnson ont été les principaux initiateurs du comportement dolosif du groupe de contrôle. Ils ont joué un rôle moteur dans la violation de l'art. 61 de la Loi. Au vu des motifs fondant son ordonnance en vertu de l'art. 162, la Commission ne paraît pas avoir accordé une importance déraisonnable à la dissuasion générale.

67 Les intimés ont plaidé que la Commission avait commis une erreur en n'accordant pas l'importance voulue aux ententes conclues par les autres membres du groupe de contrôle. Je ne suis pas d'accord.

68 À mon avis, les règlements amiables conclus par les coïntimés et le directeur général ne lient pas la Commission lorsqu'il s'agit de déterminer la pénalité applicable aux autres coïntimés, bien que ces ententes fassent partie des facteurs pertinents dans l'évaluation de la pénalité appropriée en vertu de l'art. 162. Rien dans la Loi ne permet de conclure

settlements between a party against whom enforcement proceedings are brought and the Executive Director are binding as precedent upon the Commission. Indeed, such an approach would unduly fetter the Commission's mandate to make orders in the public interest. Nor, in light of the discount accorded settlements, do they necessarily reflect the appropriate penalty in all cases.

69 Moreover, there appear to have been reasonable grounds for the Commission to impose a heavier penalty pursuant to s. 162 upon Hartvikson and Johnson than upon their co-respondents. The Commission's sanction of Hartvikson and Johnson appears to be reasonable in comparison to the settlement agreements in light of the finding by the Commission that Hartvikson and Johnson were the driving force responsible for the events described in the notice of hearing. Parity with the settlement agreements is not necessary because the Commission concluded that the respondents were more culpable than the other brokers.

70 Accordingly, the Court of Appeal erred by disregarding the Commission's findings as well as the weight the Commission gave them. The weight that the Commission attributed to general deterrence and the settlement agreements is reasonable in all the circumstances and should not be disturbed by this Court.

E. *The Court of Appeal May Substitute a Sanction*

71 The Executive Director argued that the Court of Appeal ought to have referred the question of the appropriate sanction back to the Commission once it had found its decision to be unreasonable. I conclude, however, that it would have been unnecessary under s. 167(3) for the Court of Appeal to refer the question of appropriate sanctions back to the Commission.

72 Section 167(3) of the Act provides that "[i]f 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 authorised and empowered to do". Section 167(3) is

que les ententes entre une partie visée par une procédure d'exécution et le directeur général constituent un précédent susceptible de lier la Commission. D'ailleurs, une telle conclusion limiterait indûment le mandat de la Commission, qui consiste à rendre des ordonnances dans l'intérêt public. Compte tenu de la réduction de la peine du fait du règlement, les ententes ne reflètent pas non plus nécessairement la pénalité applicable dans tous les cas.

En outre, la Commission paraît avoir eu des motifs raisonnables pour infliger une pénalité plus lourde à MM. Hartvikson et Johnson qu'à leurs coïntimés sous le régime de l'art. 162. La peine prononcée par la Commission à leur égard paraît raisonnable par rapport aux règlements amiables, compte tenu de sa conclusion qu'ils étaient les âmes dirigeantes responsables des événements décrits dans l'avis d'audience. La parité avec les règlements amiables ne s'impose pas, car la Commission a conclu que la culpabilité des intimés était plus grande que celle des autres courtiers.

Par conséquent, la Cour d'appel a commis une erreur en ne tenant pas compte des conclusions de la Commission et du poids que cette dernière leur a accordé. Le poids que la Commission a attribué à la dissuasion générale et aux règlements amiables est raisonnable eu égard à l'ensemble des circonstances, et la Cour ne devrait pas le modifier.

E. *La Cour d'appel peut substituer une peine*

Le directeur général a fait valoir que la Cour d'appel aurait dû renvoyer à la Commission la question de la peine appropriée dès qu'elle avait conclu que la décision de cette dernière était déraisonnable. J'estime toutefois qu'il n'aurait pas été nécessaire, selon le par. 167(3), que la Cour d'appel renvoie à la Commission la question des peines appropriées.

Le paragraphe 167(3) de la Loi prévoit que, [TRADUCTION] « [s]'il est interjeté appel en vertu de la présente disposition, la Cour d'appel peut ordonner à la Commission de prendre toute décision ou toute autre mesure que la Commission a le pouvoir

permissive and does not mandate that the Court of Appeal direct the Commission to reassess the appropriate penalty. To the contrary, on an ordinary construction, the wording of s. 167(3) would permit the Court of Appeal to direct the Commission to order a particular penalty.

This Court has interpreted a similar provision as empowering the Court of Appeal to direct the Commission to make an order; it did not require the question of penalty to be remitted to the Commission: *Hretchka v. Attorney General of British Columbia*, [1972] S.C.R. 119, at pp. 126 and 129-30. The provision at issue in *Hretchka* was s. 31(5) of the *Securities Act, 1967*, S.B.C. 1967, c. 45, as amended by S.B.C. 1968, c. 50, which is very similar to s. 167(3) of the current Act. Martland J. held that the provision did not prohibit the Court from varying the order of the Commission. Consequently, it is within the Court of Appeal's jurisdiction to order the Commission to substitute a penalty.

The Court of Appeal may itself substitute the appropriate penalty pursuant to s. 9(8)(b) of the *Court of Appeal Act*, R.S.B.C. 1996, c. 77, which provides that "if the appeal is not from the Supreme Court, the Court of Appeal has the power, authority and jurisdiction vested in the court or tribunal from which the appeal was brought".

VII. Disposition

In the result, I would allow the appeal with costs, and reinstate the Commission's order.

Appeal allowed with costs.

Solicitor for the appellant: British Columbia Securities Commission, Vancouver.

Solicitors for the respondents: Lang Michener, Vancouver.

Solicitor for the intervener: Ontario Securities Commission, Toronto.

de prendre ». Le paragraphe 167(3) est facultatif : il n'exige pas que la Cour d'appel ordonne à la Commission de réévaluer le caractère approprié de la peine. Au contraire, selon une interprétation normale, le libellé du par. 167(3) permettrait à la Cour d'appel d'enjoindre à la Commission d'infliger une peine en particulier.

73 La Cour a interprété une disposition semblable comme autorisant la Cour d'appel à enjoindre à la Commission de prononcer une ordonnance; elle n'a pas exigé que la question de la peine soit renvoyée à la Commission : *Hretchka c. Procureur général de la Colombie-Britannique*, [1972] R.C.S. 119, p. 126 et p. 129-130. La disposition en litige dans *Hretchka* est le par. 31(5) de la *Securities Act, 1967*, S.B.C. 1967, ch. 45, modifiée par S.B.C. 1968, ch. 50, qui demeure très semblable au par. 167(3) de la Loi actuelle. Le juge Martland a conclu que cette disposition n'interdisait pas à la Cour de modifier l'ordonnance de la Commission. La Cour d'appel a donc compétence pour enjoindre à la Commission de substituer une peine.

74 La Cour d'appel peut elle-même substituer la pénalité appropriée en vertu de l'al. 9(8)b) de la *Court of Appeal Act*, R.S.B.C. 1996, ch. 77, lequel dispose que [TRADUCTION] « si l'appel ne vise pas une décision de la Cour suprême, la Cour d'appel a le pouvoir, l'autorité et la compétence qui sont dévolus à la cour ou au tribunal administratif dont appel est interjeté ».

VII. Dispositif

75 Par conséquent, je suis d'avis d'accueillir le pourvoi avec dépens et de rétablir l'ordonnance de la Commission.

Pourvoi accueilli avec dépens.

Procureur de l'appelant : British Columbia Securities Commission, Vancouver.

Procureurs des intimés : Lang Michener, Vancouver.

Procureur de l'intervenante : Commission des valeurs mobilières de l'Ontario, Toronto.

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

v.

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

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

Neutral citation: 2001 SCC 37.

File No.: 27252.

2000: December 15; 2001: June 7.

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

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

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

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

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

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

c.

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

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

Référence neutre : 2001 CSC 37.

N° du greffe : 27252.

2000 : 15 décembre; 2001 : 7 juin.

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

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

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

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

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

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

Held: The appeal should be dismissed.

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

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

Arrêt : Le pourvoi est rejeté.

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

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

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

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

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

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

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

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

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

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

Cases Cited

Referred to: *Re Canadian Tire Corp.* (1987), 10 O.S.C.B. 857, aff'd (1987), 59 O.R. (2d) 79, leave to appeal to C.A. denied (1987), 35 B.L.R. xx; *Re H.E.R.O. Industries Ltd.* (1990), 13 O.S.C.B. 3775; *Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557; *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748; *R. v. Wholesale Travel Group Inc.*, [1991] 3 S.C.R. 154; *Re Albino* (1991), 14 O.S.C.B. 365; *Re Mithras Management Ltd.* (1990), 13 O.S.C.B. 1600; *U.E.S., Local 298 v. Bibeault*, [1988] 2 S.C.R. 1048; *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982; *Trinity Western University v. British Columbia College of Teachers*, [2001] 1 S.C.R. 772, 2001 SCC 31; *Re Atco Ltd.* (1980), 15 O.S.C.B. 412; *Re Electra Investments (Canada) Ltd.* (1983), 6 O.S.C.B. 417; *Re Turbo Resources Ltd.* (1982), 4 O.S.C.B. 403C; *Re Genstar Corp.* (1982), 4 O.S.C.B. 326C; *Global Securities Corp. v. British Columbia (Securities Commission)*, [2000] 1 S.C.R. 494, 2000 SCC 21.

Statutes and Regulations Cited

Securities Act, R.S.O. 1980, c. 466, s. 124(1).

Securities Act, R.S.O. 1990, c. S.5, ss. 1.1 [ad. 1994, c. 33, s. 2], 2.1, para. 5 [*idem*], 122 [rep. & sub. 1994, c. 11, s. 373], 127 [*idem*, s. 375], 128 [*idem*], Part XXIII.

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

Jurisprudence

Arrêts mentionnés : *Re Canadian Tire Corp.* (1987), 10 O.S.C.B. 857, conf. par (1987), 59 O.R. (2d) 79, autorisation de pourvoi à la C.A. refusée (1987), 35 B.L.R. xx; *Re H.E.R.O. Industries Ltd.* (1990), 13 O.S.C.B. 3775; *Pezim c. Colombie-Britannique (Superintendent of Brokers)*, [1994] 2 R.C.S. 557; *Canada (Directeur des enquêtes et recherches) c. Southam Inc.*, [1997] 1 R.C.S. 748; *R. c. Wholesale Travel Group Inc.*, [1991] 3 R.C.S. 154; *Re Albino* (1991), 14 O.S.C.B. 365; *Re Mithras Management Ltd.* (1990), 13 O.S.C.B. 1600; *U.E.S., Local 298 c. Bibeault*, [1988] 2 R.C.S. 1048; *Pushpanathan c. Canada (Ministre de la Citoyenneté et de l'Immigration)*, [1998] 1 R.C.S. 982; *Université Trinity Western c. British Columbia College of Teachers*, [2001] 1 R.C.S. 772, 2001 CSC 31; *Re Atco Ltd.* (1980), 15 O.S.C.B. 412; *Re Electra Investments (Canada) Ltd.* (1983), 6 O.S.C.B. 417; *Re Turbo Resources Ltd.* (1982), 4 O.S.C.B. 403C; *Re Genstar Corp.* (1982), 4 O.S.C.B. 326C; *Global Securities Corp. c. Colombie-Britannique (Securities Commission)*, [2000] 1 R.C.S. 494, 2000 CSC 21.

Lois et règlements cités

Loi sur les valeurs mobilières, L.R.O. 1990, ch. S.5, art. 1.1 [aj. 1994, ch. 33, art. 2], 2.1, par. 5 [*idem*], 122 [abr. & rempl. 1994, ch. 11, art. 373], 127 [*idem*, art. 375], 128 [*idem*], partie XXIII.

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

Authors Cited

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

APPEAL from a judgment of the Ontario Court of Appeal (1999), 43 O.R. (3d) 257, 169 D.L.R. (4th) 612, 117 O.A.C. 224, [1999] O.J. No. 388 (QL), setting aside a decision of the Divisional Court (1997), 33 O.R. (3d) 651, 146 D.L.R. (4th) 721, 100 O.A.C. 46, 46 Admin. L.R. (2d) 128, 34 B.L.R. (2d) 103, 13 C.C.L.S. 50, [1997] O.J. No. 1872 (QL). Appeal dismissed.

David W. Scott, Q.C., *Barry H. Bresner* and *Ira Nishisato*, for the appellant.

Sheila R. Block, *James C. Tory*, *Michel Jolin* and *Claude G. Rioux*, for the respondent Her Majesty in Right of Quebec.

Tim Moseley, for the respondent Ontario Securities Commission.

Glenn F. Leslie and *Matthew J. Halpin*, for the respondent Société nationale de l'amiante.

The judgment of the Court was delivered by

1 IACOBUCCI J. — This appeal arises out of a series of transactions in the course of which Société nationale de l'amiante ("SNA"), a crown corporation wholly owned by Her Majesty in right of Quebec (the "Quebec Government" or "Quebec"), acquired effective control of the federally incorporated, Asbestos Corporation Limited ("Asbestos"). The acquisition of control of Asbestos by SNA was achieved without a follow-up offer to the minority shareholders of Asbestos. Subsequent to SNA taking control, the market value of Asbestos shares fell. A group of the minority shareholders of Asbestos formed an unincorporated association to represent the interests of all the minority shareholders. That association, called the Committee for the Equal Treatment of Asbestos Minority Shareholders, sought redress pursuant to s. 127 of the Ontario *Securities Act*, R.S.O. 1990, c. S.5 (the "Act") (formerly R.S.O.

Doctrine citée

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

POURVOI contre un arrêt de la Cour d'appel de l'Ontario (1999), 43 O.R. (3d) 257, 169 D.L.R. (4th) 612, 117 O.A.C. 224, [1999] O.J. No. 388 (QL), qui a infirmé un jugement de la Cour divisionnaire (1997), 33 O.R. (3d) 651, 146 D.L.R. (4th) 721, 100 O.A.C. 46, 46 Admin. L.R. (2d) 128, 34 B.L.R. (2d) 103, 13 C.C.L.S. 50, [1997] O.J. No. 1872 (QL). Pourvoi rejeté.

David W. Scott, c.r., *Barry H. Bresner* et *Ira Nishisato*, pour l'appelant.

Sheila R. Block, *James C. Tory*, *Michel Jolin* et *Claude G. Rioux*, pour l'intimée Sa Majesté du chef du Québec.

Tim Moseley, pour l'intimée la Commission des valeurs mobilières de l'Ontario.

Glenn F. Leslie et *Matthew J. Halpin*, pour l'intimée la Société nationale de l'amiante.

Version française du jugement de la Cour rendu par

LE JUGE IACOBUCCI — Le présent pourvoi découle d'une série d'opérations au cours desquelles la Société nationale de l'amiante (« SNA »), société d'État possédée en propriété exclusive par Sa Majesté du chef du Québec (le « gouvernement du Québec » ou le « Québec »), a acquis le contrôle effectif d'Asbestos Corporation Limited (« Asbestos »), société constituée en vertu d'une loi fédérale. L'acquisition du contrôle d'Asbestos par la SNA s'est faite sans la présentation d'une offre complémentaire aux actionnaires minoritaires d'Asbestos. Après la prise de contrôle par la SNA, la valeur des titres d'Asbestos a chuté. Un groupe d'actionnaires minoritaires d'Asbestos s'est formé en association non constituée en personne morale pour représenter les intérêts de tous les actionnaires minoritaires. Cette association, appelée le Comité pour le traitement égal des actionnaires minoritaires de la Société Asbestos

1980, c. 466, s. 124). Specifically, the association sought an order under s. 127(1), para. 3, removing the trading exemptions of SNA and/or the province of Quebec.

Ltée, a demandé réparation sous le régime de l'art. 127 de la *Loi sur les valeurs mobilières* de l'Ontario, L.R.O. 1990, ch. S.5 (la « Loi ») (auparavant R.S.O. 1980, ch. 466, art. 124). Plus particulièrement, l'association a demandé que soit rendue, sous le régime de la disposition 3 du par. 127(1), une ordonnance retirant à la SNA et/ou au Québec les dispenses relatives aux opérations sur valeurs mobilières.

The basic question raised by this appeal is whether the Court should intervene in the refusal of the Ontario Securities Commission ("OSC") to grant a remedy to the aggrieved minority shareholders through the exercise of its jurisdiction to act in the public interest under s. 127(1) of the Act.

2 La question fondamentale soulevée dans le pourvoi est celle de savoir si la Cour devrait intervenir à l'égard du refus de la Commission des valeurs mobilières de l'Ontario (« CVMO ») d'accorder réparation aux actionnaires minoritaires lésés en exerçant sa compétence pour agir dans l'intérêt public en vertu du par. 127(1) de la Loi.

I. Facts

I. Les faits

There do not appear to be any substantive factual issues in dispute on this appeal. A comprehensive review of the background to this case, the agreed upon facts, the details of the transactions at issue, and the other evidence before the OSC is available in the reasons of the Commission in *Re Asbestos Corp.* (1994), 17 O.S.C.B. 3537. The following is intended to be a synopsis only of the salient factual matters in this appeal.

3 Il ne semble y avoir aucune question de fait substantielle en litige dans le pourvoi. Un examen complet du contexte de la présente espèce, des faits convenus par les parties, des détails des opérations en cause et des autres éléments de preuve produits devant la CVMO figure dans les motifs de la CVMO dans *Re Asbestos Corp.* (1994), 17 O.S.C.B. 3537. Les paragraphes qui suivent visent à présenter seulement un bref exposé des faits saillants du pourvoi.

In the fall of 1977, the province of Quebec was the largest asbestos producer in the Western world, accounting for perhaps 29 percent of annual world asbestos production. However, it had virtually no secondary asbestos industry in that approximately 95 percent of the raw product was shipped elsewhere for manufacture.

4 À l'automne de 1977, la province de Québec était le plus gros producteur d'amiante en occident, fournissant près de 29 pour 100 de la production mondiale annuelle d'amiante. Elle ne possédait toutefois pratiquement pas d'industrie secondaire de l'amiante, environ 95 pour 100 du produit brut étant exporté ailleurs pour y être transformé.

During that same time period, Quebec's newly elected Parti québécois Government pursued a policy of creating an asbestos manufacturing industry in Quebec to complement the asbestos mining industry. To accomplish its objective, the Quebec Government decided to take control of Asbestos, a leading asbestos producer in the province.

5 À l'époque, le gouvernement du Québec, composé du Parti québécois nouvellement élu, menait une politique de création d'un secteur industriel de l'amiante au Québec, qui serait complémentaire au secteur d'extraction de l'amiante. À cette fin, le gouvernement du Québec a décidé de prendre le contrôle d'Asbestos, un chef de file de la production d'amiante dans la province.

6 The common shares of Asbestos traded on the Toronto Stock Exchange and the Montreal Stock Exchange. Approximately 30 percent of the Asbestos common shares were held by minority shareholders resident in Ontario. General Dynamics Corporation (Canada) Limited ("GD Canada") held the controlling interest of 54.6 percent of the common shares of Asbestos. However, ultimate control of Asbestos resided in GD Canada's parent company, General Dynamics Corporation ("GD U.S."), a Delaware corporation with its head office in Missouri. GD Canada was a wholly owned subsidiary of GD U.S.

Les actions ordinaires d'Asbestos étaient négociées à la Bourse de Toronto et à la Bourse de Montréal. Environ 30 pour 100 des actions ordinaires d'Asbestos étaient détenues par des actionnaires minoritaires résidant en Ontario. General Dynamics Corporation (Canada) Limited (« GD Canada ») détenait une participation majoritaire de 54,6 pour 100 des actions ordinaires d'Asbestos. Toutefois, le contrôle d'Asbestos appartenait en bout de ligne à la société mère de GD Canada, General Dynamics Corporation (« GD U.S. »), une société du Delaware ayant son siège social au Missouri. GD Canada était une filiale en propriété exclusive de GD U.S.

7 On October 22, 1977, Premier Lévesque announced the Quebec Government's intention to take control of Asbestos. He was quoted in the press as saying that other shareholders would be "uncomfortable" if they were minority shareholders while the Government held control as the Quebec Government must take positions and achieve objectives that are not always those of ordinary shareholders. At the same time, the press quoted Quebec's Finance Minister, Mr. Parizeau, as saying, "we will in any case make a bid for all public shares" and that a public offer for Asbestos Corp. shares would be at "an equivalent price" to that paid for the General Dynamics block.

Le 22 octobre 1977, le premier ministre Lévesque a annoncé l'intention du gouvernement du Québec de prendre le contrôle d'Asbestos. Selon ses propos rapportés dans la presse, les autres actionnaires ne seraient [TRADUCTION] « pas à l'aise » s'ils étaient des actionnaires minoritaires, alors que le gouvernement détiendrait le contrôle, car le gouvernement du Québec doit prendre des positions et atteindre des objectifs qui ne correspondent pas toujours à ceux des actionnaires ordinaires. À la même époque, le ministre des Finances du Québec, M. Parizeau, a tenu les propos suivants, rapportés par les médias : [TRADUCTION] « nous allons de toute façon présenter une offre visant toutes les actions publiques » et une offre publique d'achat des actions d'Asbestos Corp. serait à [TRADUCTION] « un prix équivalant » à celui qui sera payé pour le bloc de General Dynamics.

8 In May 1978, Quebec incorporated the SNA as a vehicle to take control of Asbestos. All of SNA's shares were allotted to Quebec's Minister of Finance.

En mai 1978, le Québec a constitué la SNA comme moyen de prendre le contrôle d'Asbestos. Toutes les actions de la SNA ont été attribuées au ministre des Finances du Québec.

9 In September 1979, SNA made its first bid to acquire control of Asbestos. SNA offered to purchase all of GD Canada's shares in Asbestos for $42 per share. The offer stated that, once it acquired the shares held by GD Canada, the Quebec Government would offer to purchase the remaining Asbestos shares at the same price. This offer was rejected by GD U.S., as parent of GD Canada. Their valuation came in at $99 per share.

En septembre 1979, la SNA a présenté sa première offre en vue d'acquérir le contrôle d'Asbestos. La SNA a offert d'acheter toutes les actions d'Asbestos détenues par GD Canada au prix de 42 $ l'action. L'offre précisait que, dès qu'il aurait acquis les actions détenues par GD Canada, le gouvernement du Québec offrirait d'acheter le reste des actions d'Asbestos au même prix. Cette offre a été rejetée par GD U.S. en sa

The difference in share price arose from the parties' projections for the future asbestos market.

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

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

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

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

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

10 En juin 1979, la loi constitutive de la SNA a été modifiée afin de permettre au Québec d'exproprier les biens d'Asbestos. Toutefois, dans les débats portant sur cette modification, le premier ministre Lévesque et le ministre des Finances Parizeau ont tous deux souligné leur préférence pour l'acquisition du contrôle d'Asbestos de gré à gré avec GD U.S. et leur intention de procéder à l'expropriation uniquement en cas d'échec des négociations.

11 Les négociations ont été suspendues pendant les procédures engagées par Asbestos pour contester la constitutionnalité de la Loi permettant à Québec de l'exproprier. Au printemps de 1981, la Cour d'appel du Québec a rejeté l'attaque constitutionnelle ([1981] C.A. 43, conf. [1980] C.S. 331) et notre Cour a refusé l'autorisation de pourvoi ([1981] 1 R.C.S. v). Le Québec a alors imposé la date limite du 30 novembre 1981 pour la conclusion d'une entente négociée avec GD U.S., faute de quoi il procéderait à l'expropriation.

12 Le 9 novembre 1981, le Québec et GD U.S. ont conclu une entente prévoyant l'acquisition par la SNA du contrôle des voix de GD Canada et, par conséquent, du contrôle indirect d'Asbestos. En vertu de cette entente, la SNA a acquis le contrôle de GD Canada, mais le paiement de la SNA pour GD Canada a été reporté au moyen d'une entente d'achat-vente. Cette forme d'opération visait à avantager GD U.S. sur le plan fiscal et à lui donner un moyen de tirer profit de toute amélioration subséquente du marché de l'amiante.

13 L'opération de 1981 différait sensiblement de l'offre rejetée par GD U.S. en 1979. Aux termes de l'opération de 1981, la SNA se portait acquéreur des actions de GD Canada plutôt que des actions d'Asbestos comme le prévoyait l'offre de 1979. De plus, l'opération de 1981 n'était pas accompagnée d'un engagement à acquérir les actions des actionnaires minoritaires d'Asbestos. Le 11 novembre

after the agreement was reached, Quebec announced that it did not intend to make a follow-up offer to the minority shareholders. Instead, the Finance Minister said in a press release, [TRANSLATION] "it will be up to GD Canada to evaluate over the course of the years the advantage of increasing eventually its interest in [Asbestos Corp.]." In response to that statement, the shares of Asbestos fell to a four-year low. Six days later the Finance Minister was quoted by the press as saying: "[b]ut at the present time, I'm not buying the shares of General Dynamics . . . but if I force them out . . . then obviously I should do something with the minority shareholders".

1981, deux jours après la conclusion de l'entente, le Québec a annoncé qu'il n'entendait pas faire d'offre complémentaire aux actionnaires minoritaires. Le ministre des Finances a plutôt déclaré dans un communiqué qu'« il reviendra à G.D. Canada d'évaluer au cours des années l'avantage de majorer éventuellement sa participation dans la [Société Asbestos Limitée] ». Par suite de cette déclaration, les titres d'Asbestos sont tombés à leur niveau le plus bas en quatre ans. Six jours plus tard, les journaux rapportaient les propos suivants du ministre des Finances : [TRADUCTION] « [m]ais en ce moment, je ne me porte pas acquéreur des actions de General Dynamics . . . mais si je les force à se retirer . . . alors, évidemment, je devrais faire quelque chose à l'égard des actionnaires minoritaires ».

14 On February 12, 1982, the agreement among Quebec, SNA, and GD U.S. was formalized. GD Canada's name was changed to Mines SNA Inc. and its registered office was moved from Ottawa, Ontario, to Thetford Mines, Quebec. In November 1986, GD U.S. exercised its put option and, on December 9, 1986, SNA purchased the remaining common shares of GD Canada held by GD U.S. No follow-up offer was ever made to the minority shareholders of Asbestos.

Le 12 février 1982, l'entente entre Québec, la SNA et GD U.S. a été officialisée. Le nom de GD Canada a été remplacé par la dénomination Mines SNA Inc. et son siège social a été transporté d'Ottawa (Ontario) à Thetford Mines (Québec). En novembre 1986, GD U.S. a levé son option de vente et, le 9 décembre 1986, la SNA a acheté les actions ordinaires restantes de GD Canada détenues par GD U.S. Aucune offre complémentaire n'a été faite aux actionnaires minoritaires d'Asbestos à quelque moment que ce soit.

15 In April 1988, the OSC issued a notice of hearing to determine two questions: (i) whether the transaction amounted to a take-over bid in Ontario, requiring SNA to make a follow-up offer to the minority shareholders of Asbestos, and (ii) whether the OSC should exercise its public interest jurisdiction under s. 124(1) (now s. 127(1), para. 3) of the *Securities Act* and take away Quebec's trading exemptions in the Ontario capital markets.

En avril 1988, la CVMO a notifié la tenue d'une audience visant à trancher deux questions, à savoir : (i) si l'opération équivalait à une offre d'achat visant à la mainmise en Ontario, ce qui obligerait la SNA à présenter une offre complémentaire aux actionnaires minoritaires d'Asbestos, et (ii) si la CVMO devait exercer la compétence relative à l'intérêt public que lui confère le par. 124(1) (maintenant la disposition 3 du par. 127(1)) de la *Loi sur les valeurs mobilières*, et retirer au Québec les dispenses relatives aux opérations sur valeurs mobilières dont il bénéficie sur les marchés financiers de l'Ontario.

16 In addition to the details of the negotiations and transaction, the evidence before the OSC included press reports of the statements made by members of the Quebec Government, noted above, as well as other articles quoting analysts as recommending

Outre des renseignements détaillés sur les négociations et l'opération, les éléments de preuve produits devant la CVMO comprenaient des reportages sur les déclarations susmentionnées des membres du gouvernement du Québec, de même

caution and warning against the speculative nature of an investment in Asbestos. The OSC also examined the market performance of Asbestos shares during the relevant period in light of all of the information about Asbestos and the change of control transaction that was available to the market during the material times. The OSC also considered the testimony of witnesses called by the appellant. The OSC concluded that the statements made by members of the Quebec Government did not constitute a promise to make a follow-up offer, that the minority shareholders and market analysts were aware of the speculative nature of an investment in Asbestos, and that the market was not materially misled by Quebec or SNA.

II. Decisions Below

1. *The 1988 Jurisdictional Proceedings*

Immediately after the OSC issued the notice of hearing in this case, Quebec challenged the jurisdiction of the OSC to inquire into the transaction. In a decision dated August 15, 1988, a majority of the OSC held that it had jurisdiction to decide the issues raised in the notice of hearing: (1988), 11 O.S.C.B. 3419. A combined appeal and judicial review application brought by Quebec was dismissed by the Divisional Court. A further appeal was dismissed by the Court of Appeal: (1992), 10 O.R. (3d) 577, with leave to appeal to this Court denied, [1993] 2 S.C.R. x.

At the Court of Appeal, McKinlay J.A., writing for the court, held that the provisions of the Act raised in the notice of hearing were within the province's legislative competence and that it was neither fair nor reasonable to suggest only Ontario residents are subject to Ontario regulatory rules when operating in Ontario capital markets. She wrote, at p. 595:

que d'autres articles citant les recommandations d'analystes qui incitaient à la prudence et mettaient en garde contre la nature spéculative d'un investissement dans la société Asbestos. La CVMO a aussi examiné le rendement des actions d'Asbestos sur le marché au cours de la période visée, d'après toute l'information sur Asbestos et l'opération de changement de contrôle qui était disponible sur le marché à l'époque des faits. Elle a également noté les dépositions des témoins produits par l'appelant. Elle a conclu que les déclarations des membres du gouvernement du Québec ne constituaient pas une promesse de présenter une offre complémentaire, que les actionnaires minoritaires et les analystes étaient conscients de la nature spéculative d'un investissement dans la société Asbestos et que le Québec ou la SNA n'ont pas substantiellement induit le marché en erreur.

II. Les décisions des tribunaux d'instance inférieure

1. *Les procédures de 1988 sur la question de la compétence*

17 Dès la notification par la CVMO de la tenue d'une audience au sujet de l'affaire, le Québec a contesté la compétence de la CVMO pour examiner l'opération. Dans une décision datée du 15 août 1988, la CVMO a conclu à la majorité qu'elle avait compétence pour trancher les questions soulevées dans l'avis d'audience : (1988), 11 O.S.C.B. 3419. Un recours en appel et en contrôle judiciaire engagé par le Québec a été rejeté par la Cour divisionnaire. La Cour d'appel a rejeté un nouvel appel : (1992), 10 O.R. (3d) 577, et notre Cour a rejeté la demande d'autorisation de pourvoi, [1993] 2 R.C.S. x.

18 Dans les motifs prononcés au nom de la Cour d'appel, Madame le juge McKinlay a conclu que les dispositions de la Loi invoquées dans l'avis d'audience demeuraient dans les limites des pouvoirs législatifs de la province et qu'on ne pouvait équitablement ni raisonnablement prétendre que seuls les résidents de l'Ontario sont assujettis aux dispositions réglementaires de l'Ontario lorsqu'ils procèdent à des opérations sur les marchés financiers en Ontario. Elle a écrit, à la p. 595 :

. . . I am of the view that territorial jurisdiction of the OSC under s. 124 does not depend solely upon the province or country in which relevant transactions may have taken place, but rather upon whether or not persons availing themselves of the benefits of trading in the Ontario capital markets act in a manner consistent with the provisions of the Act.

19 McKinlay J.A. also held the OSC's public interest jurisdiction was not "subject to an implicit precondition" (p. 592) that the conduct in question "must have a 'sufficient Ontario connection'" (p. 593). She wrote at pp. 592-93:

I have difficulty understanding the argument of the appellant that s. 124(1) must be interpreted as being subject to an implicit precondition that the conduct relied upon by the OSC as the basis for the exercise of its discretion must have a "sufficient Ontario connection". The Ontario connection required by the section is "the public interest". I construe "the public interest" in that provision as being not only the interest of residents of Ontario, but the interest of all persons making use of Ontario capital markets. The discretion being contemplated by the OSC is a discretion to withdraw special privileges given, in this case, to the government of another province. I see nothing in the Act, nor do I see any constitutional or policy reason why any limited interpretation should be placed on the clear wording of the section.

20 Following the Court of Appeal's decision, the OSC resumed its hearing into whether the transaction amounted to a take-over bid, or whether it should exercise its public interest jurisdiction to remove Quebec's trading exemptions.

2. *Ontario Securities Commission (Vice Chair Geller, Commissioners Kitts and Carscallen concurring)* (1994), 4 C.C.L.S. 233

21 The OSC considered two questions: (i) whether the transaction amounted to a take-over bid in Ontario, requiring SNA to make a follow-up offer

[TRADUCTION] . . . j'estime que la compétence territoriale de la CVMO sous le régime de l'art. 124 ne dépend pas uniquement de la province ou du pays où les opérations pertinentes peuvent avoir eu lieu, mais plutôt de la question de savoir si des personnes tirant profit d'opérations sur les marchés financiers en Ontario agissent ou non d'une façon qui est conforme aux dispositions de la Loi.

Le juge McKinlay a aussi conclu que la compétence relative à l'intérêt public de la CVMO n'était pas [TRADUCTION] « assujettie à une condition préalable implicite » (p. 592) en vertu de laquelle la conduite en cause [TRADUCTION] « doit avoir un "lien suffisant avec l'Ontario" » (p. 593). Elle a écrit, aux p. 592-593 :

[TRADUCTION] J'ai de la difficulté à comprendre l'argument de l'appelante selon lequel le par. 124(1) doit être interprété comme assujetti à une condition préalable implicite en vertu de laquelle la conduite sur laquelle se fonde la CVMO pour exercer son pouvoir discrétionnaire doit avoir un « lien suffisant avec l'Ontario ». Le lien avec l'Ontario prescrit par cet article est « l'intérêt public ». Mon interprétation de « l'intérêt public » dans cette disposition ne se limite pas au seul intérêt des résidents de l'Ontario, mais comprend aussi l'intérêt de toutes les personnes qui utilisent les marchés financiers en Ontario. Le pouvoir discrétionnaire sur lequel s'est prononcée la CVMO est celui de retirer des privilèges spéciaux consentis, en l'espèce, au gouvernement d'une autre province. Je ne vois aucune disposition dans la Loi ni aucune raison constitutionnelle ou politique qui commanderait une interprétation restrictive du libellé clair de cet article.

À la suite de l'arrêt de la Cour d'appel, la CVMO a repris son audience sur la question de savoir si l'opération constituait une offre d'achat visant à la mainmise, ou si la CVMO devait exercer sa compétence relative à l'intérêt public pour retirer au Québec les dispenses relatives aux opérations sur valeurs mobilières dont il bénéficie.

2. *La Commission des valeurs mobilières de l'Ontario (Vice-président Geller, avec l'appui des membres Kitts et Carscallen)* (1994), 4 C.C.L.S. 233

La CVMO s'est penchée sur deux questions, à savoir : (i) si l'opération équivalait à une offre d'achat visant à la mainmise en Ontario, ce qui

to the minority shareholders of Asbestos; and (ii) whether the OSC should exercise its public interest jurisdiction under s. 124(1) (now s. 127(1), para. 3) of the *Securities Act* and take away Quebec's trading exemptions in the Ontario capital markets.

obligerait la SNA à présenter une offre complémentaire aux actionnaires minoritaires d'Asbestos, et (ii) si la CVMO devrait exercer la compétence relative à l'intérêt public que lui confère le par. 124(1) (maintenant la disposition 3 du par. 127(1)) de la *Loi sur les valeurs mobilières* et retirer les dispenses du Québec sur les marchés financiers de l'Ontario.

First, the OSC panel held that the transaction was not a take-over bid, nor a deemed take-over bid, under the Act. Thus, the transaction was not a breach of the Act and no follow-up offer was required under its express provisions or the regulations thereunder. This finding has not been appealed.

22 La CVMO a d'abord conclu que l'opération n'était pas une offre d'achat visant à la mainmise, ni une opération réputée constituer une telle offre au sens de la Loi. L'opération ne contrevenait donc pas à la Loi et aucune offre complémentaire n'était exigée par quelque disposition expresse de la Loi ou de ses règlements d'application. Cette conclusion n'a pas été portée en appel.

Next, the panel considered whether it should exercise its public interest jurisdiction. In doing so, the panel relied on its previous jurisprudence in *Re Canadian Tire Corp.* (1987), 10 O.S.C.B. 857, and *Re H.E.R.O. Industries Ltd.* (1990), 13 O.S.C.B. 3775. The panel noted that it does not need to find a breach of the Act or of the regulations thereunder in order to exercise its s. 127 jurisdiction. It emphasized, however, that it should be cautious in exercising its s. 127 jurisdiction, and should not use its open-ended nature to correct perceived abuses regardless of a connection with Ontario. Then, the panel went on to consider the following four factors: (i) whether the transaction had been designed to avoid the animating principles behind the legislation and the rules respecting take-over bids, (ii) whether the transaction was manifestly unfair to public minority shareholders, (iii) whether there was a sufficient nexus with Ontario to warrant the OSC's intervention, or whether the transaction was structured to make an Ontario transaction appear to be a non-Ontario one, and (iv) whether the transaction was abusive of the integrity of the capital markets in the province.

23 La CVMO s'est ensuite penchée sur la question de savoir si elle devait exercer sa compétence relative à l'intérêt public. Elle s'est fondée à cet égard sur sa jurisprudence dans les affaires *Re Canadian Tire Corp.* (1987), 10 O.S.C.B. 857, et *Re H.E.R.O. Industries Ltd.* (1990), 13 O.S.C.B. 3775. La CVMO a noté qu'il n'était pas nécessaire qu'elle conclue à l'existence d'une contravention à la Loi ou à ses règlements d'application pour pouvoir exercer sa compétence en vertu de l'art. 127. Toutefois, elle a souligné la nécessité d'user de circonspection dans l'exercice de sa compétence en vertu de l'art. 127 et de s'abstenir d'invoquer sa nature indéterminée pour corriger des abus perçus sans égard à l'existence d'un lien avec l'Ontario. La CVMO a ensuite examiné les quatre facteurs suivants : (i) si l'opération avait été conçue dans le but de contourner les principes directeurs qui sous-tendent la Loi et les règles régissant les offres d'achat visant à la mainmise, (ii) si l'opération était manifestement injuste envers les actionnaires minoritaires publics, (iii) s'il existait un lien suffisant avec l'Ontario pour justifier l'intervention de la CVMO, ou si l'opération était structurée de façon à donner à une opération ontarienne l'apparence d'une opération étrangère, et (iv) si l'opération portait atteinte à l'intégrité des marchés financiers de la province.

24 With regard to the first two factors, the panel held that both Quebec and GD U.S. had a moral obligation to the minority shareholders and that

> the actions of the Quebec Government and SNA failed to comply with the spirit underlying the take-over bid rules of the Act, were abusive of the minority shareholders of Asbestos and were manifestly unfair . . . (para. 71)

25 However, with respect to the third factor, the panel held that a sufficient Ontario nexus had not been established, and that the principal and, so far as the evidence went, the sole purpose for structuring the transaction in its final form was the minimization of taxes on the profit received by GD Canada and GD U.S.

26 Furthermore, the panel found that, although it would have been fairer if the Quebec Government had not equivocated about its plans regarding a follow-up offer, its equivocation did not result in the market being materially misled or investors purchasing shares on the "promise" that there would be a follow-up offer.

27 The OSC concluded that, although the minority shareholders of Asbestos were unfairly and badly dealt with by the Quebec Government, they are unable to look to the Act for a remedy (para. 90).

3. *Ontario Divisional Court (Crane J., O'Driscoll J. concurring; Steele J. dissenting in part)* (1997), 33 O.R. (3d) 651

28 The Divisional Court was unanimous in reversing the decision of the OSC. The court held that the OSC had erred by imposing two jurisdictional prerequisites to its s. 127(1), para. 3 jurisdiction: a "transactional connection" with Ontario, and a conscious motive to avoid the takeover laws in Ontario and abuse minority shareholders. On the first jurisdictional error, the court further held that the OSC had erred in concluding that a sufficient

En ce qui a trait aux deux premiers facteurs, la CVMO a conclu que le Québec et GD U.S. avaient tous deux une obligation morale envers les actionnaires minoritaires et que

> [TRADUCTION] les actes du gouvernement du Québec et de la SNA n'ont pas respecté l'esprit qui sous-tend les règles relatives aux offres d'achat visant à la mainmise édictées dans la Loi, étaient abusifs envers les actionnaires minoritaires d'Asbestos et étaient manifestement injustes . . . (par. 71)

En ce qui a trait au troisième facteur, toutefois, la CVMO a conclu qu'un lien suffisant avec l'Ontario n'avait pas été établi et que le motif principal, voire l'unique motif démontré par la preuve, de la structuration de l'opération dans sa forme finale était la réduction des impôts sur le profit réalisé par GD Canada et GD U.S.

La CVMO a en outre conclu, après avoir constaté que la situation aurait été plus juste si le gouvernement du Québec n'avait pas tergiversé quant à son intention de présenter une offre complémentaire, que ses tergiversations n'avaient néanmoins pas eu pour effet de tromper sensiblement le marché ni d'inciter des investisseurs à acheter des actions sur la foi d'une « promesse » de présentation d'une offre complémentaire.

La CVMO a conclu que les actionnaires minoritaires d'Asbestos, en dépit de la façon injuste et incorrecte dont ils ont été traités par le gouvernement du Québec, ne pouvaient invoquer la Loi pour obtenir réparation (par. 90).

3. *Cour divisionnaire de l'Ontario (le juge Crane, avec l'appui du juge O'Driscoll; le juge Steele étant dissident en partie)* (1997), 33 O.R. (3d) 651

La Cour divisionnaire a infirmé à l'unanimité la décision de la CVMO. Elle a conclu que la CVMO avait commis une erreur en imposant deux conditions préalables à l'exercice de sa compétence sous le régime de la disposition 3 du par. 127(1) : un « lien transactionnel » avec l'Ontario et une motivation consciente consistant à contourner le droit ontarien relatif aux offres d'achat visant à la mainmise et à abuser les actionnaires minoritaires. Au

Ontario nexus had not been established. On the second jurisdictional error, the court held that the OSC must look at the effect of the transaction, not the motivation of the parties.

Based on these findings, a majority of the Divisional Court directed the OSC to order the Quebec Government to make a follow-up offer to the minority shareholders within 90 days, failing which the OSC was to deny the Quebec Government all of the exemptions that allowed it to participate in the Ontario capital market. The OSC was also directed to order the Quebec Government to pay the appellant's costs of the 1994 proceedings before the OSC, as well as present costs at the Divisional Court and the future costs of appearances before the OSC on this matter, if any. Steele J. concurred with the majority's reasons but would have granted a different order. The substance of Steele J.'s order was the same as that of the majority; however Steele J. would have left the "mechanics and details" to be determined by the OSC. In other words, Steele J. would have remitted the matter to the OSC for a determination of the prescribed time period for the follow-up offer to be made, the exemptions to be disallowed, the interest rate to be applied, and the liability for future costs.

4. *Court of Appeal for Ontario (Laskin J.A., Doherty and Rosenberg JJ.A. concurring*) (1999), 43 O.R. (3d) 257

In comprehensive and lucid reasons written by Laskin J.A., the Court of Appeal for Ontario unanimously allowed the appeal and reinstated the OSC's decision. The Court of Appeal concluded that the Divisional Court made four main errors in that it:

(1) applied the wrong standard of review,

(2) mischaracterized what the OSC did,

sujet de la première erreur juridictionnelle, la cour a en outre statué que la CVMO avait commis une erreur en concluant qu'un rapport suffisant avec l'Ontario n'avait pas été établi. Quant à la deuxième erreur juridictionnelle, la cour a conclu que la CVMO doit tenir compte de l'effet de l'opération et non de la motivation des parties.

29 À partir de ces conclusions, la Cour divisionnaire a, à la majorité, prescrit à la CVMO d'ordonner au gouvernement du Québec de présenter une offre complémentaire aux actionnaires minoritaires dans un délai de 90 jours, faute de quoi la CVMO retirerait au gouvernement du Québec toutes les dispenses qu'elle lui avait accordées pour lui permettre de faire des opérations sur le marché financier en Ontario. La CVMO a aussi reçu la directive d'ordonner au gouvernement du Québec de payer à l'appelant ses dépens de la procédure de 1994 devant la CVMO, ceux de l'appel devant la Cour divisionnaire et ceux qui étaient susceptibles de découler de la comparution devant la CVMO sur cette question, le cas échéant. Tout en partageant les motifs des juges majoritaires, le juge Steele aurait rendu une ordonnance différente, qui s'apparentait à celle de la majorité quant au fond, mais qui aurait laissé à la CVMO le soin de régler les [TRADUCTION] « questions d'application concrète et de détail ». En d'autres termes, le juge Steele aurait renvoyé l'affaire devant la CVMO pour qu'elle détermine le délai de présentation d'une offre complémentaire, les dispenses à retirer, le taux d'intérêt à appliquer et la charge des dépens à venir.

4. *Cour d'appel de l'Ontario* (*le juge Laskin, avec l'appui des juges Doherty et Rosenberg*) (1999), 43 O.R. (3d) 257

30 Dans des motifs approfondis et lucides écrits par le juge Laskin, la Cour d'appel de l'Ontario a, à l'unanimité, accueilli l'appel et rétabli la décision de la CVMO. La Cour d'appel a conclu que la Cour divisionnaire avait commis quatre erreurs principales, à savoir :

(1) elle a appliqué la mauvaise norme de contrôle,

(2) elle a mal qualifié ce que la CVMO avait fait,

(3) failed to appreciate that whether the acquisition of control of Asbestos had a sufficient "transactional connection" with Ontario, whether Quebec intended to avoid Ontario law and whether Quebec's public statements misled investors into believing a follow-up offer would be made, were relevant factors for the OSC to consider in exercising its discretion under s. 127(1), para. 3, and

(4) misconceived the purpose of the OSC's public interest jurisdiction by treating it as remedial.

(3) elle a omis de considérer que les questions de savoir si l'acquisition du contrôle d'Asbestos avait un « lien transactionnel » suffisant avec l'Ontario, si le Québec a cherché à éviter la loi de l'Ontario et si les déclarations publiques du Québec ont induit des investisseurs à croire qu'une offre complémentaire serait présentée, constituaient des facteurs pertinents dont la CVMO devait tenir compte dans l'exercice de son pouvoir discrétionnaire sous le régime de la disposition 3 du par. 127(1); et

(4) elle a mal interprété l'objet visé par la compétence relative à l'intérêt public de la CVMO en la traitant comme si elle avait un caractère réparateur.

31 With respect to the first error noted above, the Court of Appeal was of the opinion that the Divisional Court had applied a standard of correctness without first addressing the necessary issue of appropriate standard of review. The Court of Appeal then applied *Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557, and *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748, and concluded that the appropriate standard of review in this case was "reasonableness".

En ce qui a trait à la première erreur susmentionnée, la Cour d'appel a estimé que la Cour divisionnaire avait appliqué la norme de la décision correcte sans s'être penchée au préalable sur l'incontournable question de la norme de contrôle appropriée. La Cour d'appel a ensuite appliqué les arrêts *Pezim c. Colombie-Britannique (Superintendent of Brokers)*, [1994] 2 R.C.S. 557, et *Canada (Directeur des enquêtes et recherches) c. Southam Inc.*, [1997] 1 R.C.S. 748, et elle a conclu que la norme de contrôle appropriée en l'espèce était celle de la décision « raisonnable ».

32 With respect to the second and third errors, in interpreting the reasons of the OSC in this case, Laskin J.A. was of the view that the OSC did not decide it could not make an order under s. 127; rather it decided it would not do so. In his view, the OSC treated the transactional connection to Ontario and the intention to avoid Ontario law as factors relevant to the exercise of its discretion, not as conditions precedent (at p. 273):

. . . the Commission did not set up any jurisdictional preconditions to the exercise of its discretion. Instead, it took into account and indeed gave prominence to factors that were relevant to the exercise of its discretion. It weighed those factors and made findings of fact on them that were reasonably supported by the evidence. Finally, it properly considered whether the abusive and

En ce qui a trait à la deuxième et à la troisième erreur, dans son interprétation des motifs de la CVMO, le juge Laskin était d'avis que la CVMO n'avait pas conclu qu'elle ne pouvait pas rendre une ordonnance sous le régime de l'art. 127, mais plutôt qu'elle ne rendrait pas une telle ordonnance. À son avis, la CVMO a traité le lien transactionnel avec l'Ontario et l'intention de contourner la loi de l'Ontario comme des facteurs pertinents relativement à l'exercice de son pouvoir discrétionnaire, et non comme des conditions préalables (à la p. 273) :

[TRADUCTION] . . . la Commission n'a établi aucune condition juridictionnelle préalable à l'exercice de son pouvoir discrétionnaire. Elle a plutôt pris en considération, voire souligné, des facteurs qui étaient pertinents relativement à l'exercice de son pouvoir discrétionnaire. Elle a apprécié ces facteurs et tiré à leur égard des conclusions de fait qui étaient raisonnablement étayées par la

unfair conduct that it found to have been established warranted an order under s. 127(1)3 of the Act, removing Québec's trading exemptions. In refusing to make such an order, I am not persuaded that the Commission exercised its discretion unreasonably or, to use the familiar language of review of discretionary orders, committed an error in principle, or acted capriciously, arbitrarily or unjustly.

preuve. Enfin, elle s'est penchée adéquatement sur la question de savoir si la conduite abusive et injuste qu'elle a constatée justifiait la délivrance, sous le régime de la disposition 3 du par. 127(1) de la Loi, d'une ordonnance retirant les dispenses du Québec. Je ne suis pas convaincu qu'en refusant de rendre une telle ordonnance, la Commission ait exercé son pouvoir discrétionnaire de façon déraisonnable ou, pour reprendre les termes usuels du contrôle des ordonnances discrétionnaires, qu'elle ait commis une erreur de principe, ou ait agi de façon capricieuse, arbitraire ou injuste.

Further, Laskin J.A. held that the Divisional Court erred in considering only the effect of the transaction. He stated that this was relevant and was considered by the panel, but it acted reasonably in considering other factors as well. Laskin J.A. was also of the view that it was relevant to consider the motivation of the Quebec Government, and that the panel's findings in this regard were reasonable.

33 Le juge Laskin a conclu que la Cour divisionnaire avait commis une erreur en ne considérant que l'effet de l'opération. Il a déclaré que ce facteur était pertinent et qu'il avait été pris en considération par la CVMO, mais que la CVMO avait agi de façon raisonnable en tenant aussi compte d'autres facteurs. Le juge Laskin estimait aussi qu'il était pertinent de tenir compte de la motivation du gouvernement du Québec et que les conclusions de la CVMO à cet égard étaient raisonnables.

Laskin J.A. held that the panel's finding that there was not a sufficient Ontario connection was reasonably supported by the evidence and therefore not reviewable. Laskin J.A. rejected the appellant's alternative argument that the panel had erred in giving the connection to Ontario and the intention to avoid Ontario law too much weight. According to Laskin J.A., the panel acted reasonably in emphasizing these factors.

34 Le juge Laskin a estimé que la conclusion de la CVMO portant qu'il n'y avait pas de lien suffisant avec l'Ontario était raisonnablement étayée par la preuve et, partant, qu'elle ne donnait pas ouverture au contrôle judiciaire. Le juge Laskin a rejeté l'argument subsidiaire de l'appelant selon lequel la CVMO avait commis une erreur en accordant trop de poids au lien avec l'Ontario et à l'intention de contourner la loi ontarienne. Selon le juge Laskin, la CVMO avait agi raisonnablement en soulignant ces facteurs.

Laskin J.A. also held that the panel's conclusions that the public was not misled and could not have reasonably relied on the statements of Quebec's Minister of Finance were reasonably supported by the record and therefore not reviewable. Furthermore, Laskin J.A. held that the panel had to consider the potential for future harm to the integrity of Ontario's capital markets and the likelihood that Quebec's unfair treatment of investors would be repeated.

35 Le juge Laskin a aussi statué que les conclusions de la CVMO selon lesquelles le public n'avait pas été induit en erreur et ne pouvait raisonnablement pas agir sur la foi des déclarations du ministre des Finances du Québec étaient raisonnablement étayées par la preuve au dossier et ne donnaient donc pas ouverture au contrôle judiciaire. Il a ajouté que la CVMO devait apprécier la possibilité d'une atteinte future à l'intégrité des marchés financiers de l'Ontario et la probabilité qu'un traitement injuste des investisseurs de la part du Québec se répète.

36 With respect to the fourth error noted by the Court of Appeal, Laskin J.A. held that the Divisional Court erred by focussing only on investor abuse and viewing s. 127(1), para. 3 as remedial. It was the opinion of the court that s. 127(1), para. 3 is not remedial (at p. 272):

> The purpose of the Commission's public interest jurisdiction is neither remedial nor punitive; it is protective and preventive, intended to be exercised to prevent likely future harm to Ontario's capital markets. The past conduct of offending market participants is relevant but only to assessing whether their future conduct is likely to harm the integrity of the capital markets.

37 Finally, Laskin J.A. commented on the Divisional Court order. He held that the Divisional Court had no jurisdiction to make the order in respect of future costs. However, he was of the view that the court did have the jurisdiction to include the other aspects of the order, but held that it ought not to have. Rather, it should have remitted the matter back to the OSC to determine what order should be made.

III. Issues on Appeal

38 There are three main issues in this appeal:

1. What is the nature and scope of s. 127 jurisdiction to intervene in the public interest?
2. What is the appropriate standard of review?
3. Did the OSC make a reviewable error?

IV. Analysis

1. *What Is the Nature and Scope of Section 127 Jurisdiction to Intervene in the Public Interest?*

39 Section 127(1) of the Act provides the OSC with the jurisdiction to intervene in activities related to the Ontario capital markets when it is in the public

Quant à la quatrième erreur relevée par la Cour d'appel, le juge Laskin a conclu que la Cour divisionnaire avait commis une erreur en se concentrant uniquement sur l'abus envers les investisseurs et en considérant la disposition 3 du par. 127(1) comme si elle avait un caractère réparateur. La Cour d'appel était d'avis que la disposition 3 du par. 127(1) n'a pas un caractère réparateur (à la p. 272) :

> [TRADUCTION] La fin visée par la compétence relative à l'intérêt public de la Commission n'est ni réparatrice, ni punitive; elle est de nature protectrice et préventive et elle est destinée à être exercée pour prévenir le risque d'un éventuel préjudice aux marchés financiers en Ontario. La conduite passée d'intervenants fautifs dans le marché n'est pertinente qu'en ce qui a trait à l'évaluation de la probabilité que leur conduite future soit préjudiciable à l'intégrité des marchés financiers.

Le juge Laskin a en dernier lieu commenté l'ordonnance de la Cour divisionnaire. Il a conclu que la Cour divisionnaire n'avait pas compétence pour rendre une ordonnance visant les dépens à venir. Il était toutefois d'avis que la cour avait compétence pour inclure les autres aspects de l'ordonnance, mais qu'elle aurait dû s'en abstenir. Elle aurait plutôt dû renvoyer l'affaire devant la CVMO pour que celle-ci détermine quelle ordonnance devrait être rendue.

III. Les questions soulevées par le pourvoi

Le pourvoi soulève trois questions principales :

1. Quelle est la nature et la portée de la compétence pour intervenir en matière d'intérêt public conférée par l'art. 127?
2. Quelle est la norme de contrôle appropriée?
3. La CVMO a-t-elle commis une erreur donnant ouverture au contrôle judiciaire?

IV. Analyse

1. *Quelle est la nature et la portée de la compétence pour intervenir en matière d'intérêt public conférée par l'art. 127?*

Le paragraphe 127(1) de la Loi confère à la CVMO la compétence pour intervenir dans les activités liées aux marchés financiers en Ontario

interest to do so. The legislature clearly intended that the OSC have a very wide discretion in such matters. The permissive language of s. 127(1) expresses an intent to leave it for the OSC to determine whether and how to intervene in a particular case:

127. (1) The Commission may make one or more of the following orders if in its opinion it is in the public interest to make the order or orders . . . . [Emphasis added.]

The breadth of the OSC's discretion to act in the public interest is also evident in the range and potential seriousness of the sanctions it can impose under s. 127(1). Furthermore, pursuant to s. 127(2), the OSC has an unrestricted discretion to attach terms and conditions to any order made under s. 127(1):

(2) An order under this section may be subject to such terms and conditions as the Commission may impose.

However, the public interest jurisdiction of the OSC is not unlimited. Its precise nature and scope should be assessed by considering s. 127 in context. Two aspects of the public interest jurisdiction are of particular importance in this regard. First, it is important to keep in mind that the OSC's public interest jurisdiction is animated in part by both of the purposes of the Act described in s. 1.1, namely "to provide protection to investors from unfair, improper or fraudulent practices" and "to foster fair and efficient capital markets and confidence in capital markets". Therefore, in considering an order in the public interest, it is an error to focus only on the fair treatment of investors. The effect of an intervention in the public interest on capital market efficiencies and public confidence in the capital markets should also be considered.

lorsqu'il est dans l'intérêt public qu'elle le fasse. Le législateur a clairement voulu que la CVMO ait un très vaste pouvoir discrétionnaire en cette matière. Le libellé facultatif du par. 127(1) exprime l'intention de laisser à la CVMO le soin d'apprécier l'opportunité et la manière d'intervenir dans une affaire particulière :

127. (1) La Commission peut, si elle est d'avis qu'il est dans l'intérêt public de le faire, rendre une ou plusieurs des ordonnances suivantes . . . [Je souligne.]

40 La portée du pouvoir discrétionnaire de la CVMO d'agir dans l'intérêt public ressort aussi de façon évidente de la gamme et de la gravité potentielle des sanctions qu'elle est habilitée à imposer en vertu du par. 127(1). De plus, en vertu du par. 127(2), la CVMO dispose sans restriction du pouvoir discrétionnaire d'adjoindre des conditions à toute ordonnance rendue en vertu du par. 127(1) :

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

41 La compétence relative à l'intérêt public de la CVMO n'est toutefois pas illimitée. Sa nature et sa portée précises doivent être appréciées par une analyse de l'art. 127 dans son contexte. Deux aspects de la compétence relative à l'intérêt public revêtent une importance particulière à cet égard. En premier lieu, il importe de se rappeler que la compétence relative à l'intérêt public de la CVMO est fondée en partie sur les deux objets de la Loi, décrits à l'art. 1.1, à savoir « protéger les investisseurs contre les pratiques déloyales, irrégulières ou frauduleuses » et « favoriser des marchés financiers justes et efficaces et la confiance en ceux-ci ». Par conséquent, lorsqu'il s'agit d'examiner une ordonnance rendue dans l'intérêt public, c'est commettre une erreur que de ne se concentrer que sur le traitement équitable des investisseurs. Il faut aussi prendre en considération l'incidence d'une intervention dans l'intérêt public sur l'efficacité des marchés financiers et sur la confiance du public en ces marchés financiers.

42 Second, it is important to recognize that s. 127 is a regulatory provision. In this regard, I agree with Laskin J.A. that "[t]he purpose of the Commission's public interest jurisdiction is neither remedial nor punitive; it is protective and preventive, intended to be exercised to prevent likely future harm to Ontario's capital markets" (p. 272). This interpretation of s. 127 powers is consistent with the previous jurisprudence of the OSC in cases such as *Canadian Tire*, *supra*, aff'd (1987), 59 O.R. (2d) 79 (Div. Ct.); leave to appeal to C.A. denied (1987), 35 B.L.R. xx, in which it was held that no breach of the Act is required to trigger s. 127. It is also consistent with the objective of regulatory legislation in general. The focus of regulatory law is on the protection of societal interests, not punishment of an individual's moral faults: see *R. v. Wholesale Travel Group Inc.*, [1991] 3 S.C.R. 154, at p. 219.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

3. *Did the OSC Make a Reviewable Error?*

(a) The Interpretation of the OSC Decision

The parties to this appeal offer two different interpretations of the OSC reasons for judgment. The proper interpretation depends on how one views the OSC's treatment of the issue of the transactional connection with Ontario and the motive for structuring the transaction as it was done in this case. The appellant argues that the OSC "adopted a transactional nexus as a jurisdictional precondition" and "imposed an alternative prerequisite" by requiring "proof of a conscious motive to evade regulation as a precondition to the exercise of its public interest jurisdiction". The appellant argues that by failing to consider other factors affecting an assessment of the public interest the OSC "failed or refused to carry out the mandate vested in it by the Legislature". In contrast, the respondents argue that the OSC considered the transactional connection as one of many factors relevant to the exercise of its discretion, and that it was appropriate for the OSC to consider motive as a factor in deciding whether it would exercise its public interest jurisdiction in this case.

3. *La CVMO a-t-elle commis une erreur donnant ouverture au contrôle judiciaire?*

(a) L'interprétation de la décision de la CVMO

50 Les parties au pourvoi font valoir deux interprétations différentes des motifs de la décision de la CVMO. L'interprétation juste dépend de notre perception de la façon dont la CVMO a traité la question du lien transactionnel avec l'Ontario et la motivation à l'origine du choix de la structure de l'opération en l'espèce. L'appelant prétend que la CVMO [TRADUCTION] « a adopté un rapport transactionnel comme condition préalable à l'exercice de sa compétence » et « imposé un prérequis subsidiaire » en exigeant « la preuve d'une motivation consciente consistant à contourner la réglementation comme condition préalable à l'exercice de sa compétence relative à l'intérêt public ». L'appelant prétend qu'en omettant d'examiner d'autres facteurs ayant une incidence sur la détermination de ce qui était dans l'intérêt public, la CVMO a [TRADUCTION] « omis ou refusé de s'acquitter de la mission que lui a confiée le législateur ». À l'opposé, les intimées prétendent que la CVMO a examiné le lien transactionnel comme l'un des nombreux facteurs pertinents à l'exercice de son pouvoir discrétionnaire, et que la CVMO était fondée à se pencher sur la motivation comme facteur pour décider s'il y avait lieu d'exercer sa compétence relative à l'intérêt public en l'espèce.

51 I agree with Laskin J.A. that "the Commission did not set up any jurisdictional preconditions to the exercise of its discretion" (p. 273). In my view, the erection of such a jurisdictional barrier by the OSC is inconsistent with its having fought in the earlier proceedings for the recognition of its jurisdiction to hear this matter. Furthermore, in its reasons in the present case, the OSC clearly rejected the idea that the transactional connection factor could act as a jurisdictional barrier to the exercise of its public interest discretion. At para. 63, the OSC quoted the decision of McKinlay J.A. in the earlier proceedings rejecting a transactional connection with Ontario as an implied precondition to the exercise of its s. 127 jurisdiction. The OSC then continued, at para. 64:

> . . . we regard this statement as a refusal to impose a "sufficient Ontario connection" as a jurisdictional requirement which must be satisfied in any clause 127(1)3 proceedings before the Commission's discretion arises, thus leaving it to the Commission to make the necessary discretionary determination unencumbered by any a priori requirement imposed by the court as a matter of interpretation of the statutory provision.

Je partage l'avis du juge Laskin selon lequel [TRADUCTION] « la Commission n'a établi aucune condition juridictionnelle préalable à l'exercice de son pouvoir discrétionnaire » (p. 273). Selon moi, l'établissement d'une telle barrière à l'exercice de sa compétence serait en contradiction avec la fermeté avec laquelle la CVMO a lutté, au cours des procédures antérieures, afin de faire reconnaître sa compétence pour connaître de cette matière. De plus, dans ses motifs en l'espèce, la CVMO a clairement rejeté l'idée selon laquelle le facteur du lien transactionnel pouvait agir comme une entrave juridictionnelle à l'exercice de son pouvoir discrétionnaire relatif à l'intérêt public. Au paragraphe 63, la CVMO cite la décision rendue par le juge McKinlay de la Cour d'appel, dans les procédures antérieures, rejetant l'hypothèse selon laquelle un lien transactionnel avec l'Ontario serait une condition préalable implicite à l'exercice de sa compétence en vertu de l'art. 127. Et la CVMO de poursuivre en ces termes, au par. 64 :

> [TRADUCTION] . . . nous voyons dans cette déclaration un refus d'imposer un « lien suffisant avec l'Ontario » comme exigence relative à la compétence à laquelle il faut satisfaire dans toute poursuite fondée sur la disposition 3 du par. 127(1) pour que le pouvoir discrétionnaire de la Commission soit applicable, de sorte qu'il appartient à la Commission de décider d'exercer son pouvoir discrétionnaire lorsque cela est nécessaire, sans être entravée par une exigence préliminaire que lui imposerait un tribunal par suite de son interprétation de cette disposition législative.

52 Moreover, at para. 68 of its reasons, rather than raising "transactional connection" as a jurisdictional barrier, the OSC identified the transactional connection with Ontario as one of several relevant factors to be considered in determining whether to exercise its public interest discretion, including, *inter alia*, the motive behind the structure of the transaction at issue:

> Were the transactions before us "clearly abusive of investors and of the capital markets," to quote *Canadian Tire*? Were they "clearly designed to avoid the animating principles behind [the take-over bid] legislation and rules," to quote the same decision? Were they "clearly abusive of the integrity of the capital markets, which have every right to expect that market participants . . .

De plus, au par. 68 de ses motifs, plutôt que de soulever le « lien transactionnel » avec l'Ontario comme une entrave juridictionnelle, la CVMO l'a identifié comme un facteur parmi plusieurs facteurs pertinents sur lesquels elle doit se pencher lorsqu'elle est appelée à déterminer s'il y a lieu d'exercer son pouvoir discrétionnaire relatif à l'intérêt public, y compris la motivation qui sous-tend la structuration de l'opération en cause :

> [TRADUCTION] Les opérations dénoncées étaient-elles « clairement abusives envers les investisseurs et les marchés financiers », pour reprendre les termes de la décision *Canadian Tire*? Étaient-elles « clairement conçues de façon à contourner les principes directeurs qui sous-tendent la Loi et les règles [régissant les offres d'achat visant à la mainmise] », pour citer la même

will adhere to both the letter and the spirit of the rules that are intended to guarantee equal treatment of offerees in the course of a take-over bid, no matter by whom the bid is made" and is the result "manifestly unfair to the public minority shareholders . . . who lose the opportunity to tender their shares . . . at a substantial premium" to quote *H.E.R.O.*? And finally, does "the transaction in question [have] a sufficient Ontario connection or 'nexus' to warrant intervention to protect the integrity of the capital markets in the province", to quote that decision?

Although in its reasoning, the OSC placed significant weight on the transactional connection factor, it did not, as alleged by the appellant, stop the inquiry upon finding there was an insufficient transactional connection with Ontario. Furthermore, in this respect, it was appropriate for the OSC to consider, as a factor relevant to the determination of whether to exercise its public interest jurisdiction in this case, the presence or absence of a motivation to structure the transaction so as to make what was essentially an Ontario transaction appear to be a non-Ontario transaction. In effect, the OSC found that what could otherwise appear to be the absence of an Ontario connection might be overcome by a finding that a transaction was improperly and deliberately structured so as to give such an appearance.

The Court of Appeal correctly confirmed that it was appropriate for the OSC to consider motive as a factor in deciding whether it would exercise its public interest jurisdiction (at p. 277):

> The Commission also reasonably considered whether Québec and SNA intended to avoid Ontario law as relevant to the exercise of its discretion under s. 127(1)3. As I have already said, the purpose of an order under that section is to protect the Ontario capital markets by removing a participant who, based on past misconduct, represents a continuing or future threat to the integrity of these markets. Therefore, the Commission could not focus only on the effect of the transaction. This transaction was lawful. The Commission had to consider

décision? Portaient-elles « clairement atteinte à l'intégrité des marchés financiers, qui ont absolument le droit de s'attendre à ce que les personnes qui participent aux marchés . . . respectent l'esprit tout autant que la lettre des règles cherchant à garantir un traitement égal aux sollicités dans le cadre d'une offre d'achat visant à la mainmise, quelle que soit la personne qui présente l'offre », et le résultat est-il « manifestement injuste envers les actionnaires minoritaires publics . . . qui perdent l'occasion d'offrir leurs actions . . . à un prix substantiel », pour reprendre la décision *H.E.R.O.*? Enfin, « l'opération en cause a-t-elle un lien ou un "rapport" suffisant avec l'Ontario pour justifier une intervention visant à protéger l'intégrité des marchés financiers dans la province », pour citer cette décision?

53 Même si, dans son raisonnement, la CVMO a accordé un poids significatif au facteur du lien transactionnel, elle n'a pas, ainsi que le prétend l'appelant, mis fin au processus d'examen immédiatement après avoir conclu au caractère insuffisant du lien transactionnel avec l'Ontario. De plus, à cet égard, la CVMO était fondée à considérer, comme facteur pertinent pour décider s'il y a lieu d'exercer sa compétence relative à l'intérêt public en l'espèce, l'existence ou l'absence d'une volonté de structurer l'opération de façon à donner à une opération essentiellement ontarienne l'apparence d'une opération étrangère. En fait, la CVMO a conclu qu'il est possible de réfuter ce qui pourrait autrement paraître une absence de lien avec l'Ontario par une conclusion portant qu'une opération a été structurée de façon irrégulière et intentionnelle pour créer une telle apparence.

54 La Cour d'appel a confirmé à bon droit que la CVMO était fondée à considérer la motivation comme un facteur pour décider s'il y avait lieu d'exercer sa compétence relative à l'intérêt public (à la p. 277) :

> [TRADUCTION] La Commission a aussi raisonnablement considéré la question de savoir si le Québec et la SNA cherchaient intentionnellement à éviter le droit de l'Ontario comme un facteur pertinent à l'exercice de son pouvoir discrétionnaire en vertu de la disposition 3 du par. 127(1). Ainsi qu'il a été mentionné plus haut, l'objet visé par une ordonnance rendue en vertu de cet article est de protéger les marchés financiers en Ontario en retirant tout participant qui, par son inconduite passée, présente une menace continue ou future pour l'intégrité

whether the Québec Government deliberately attempted to avoid the requirements of the Act . . . .

de ces marchés. Par conséquent, la Commission ne peut limiter son examen au seul effet de l'opération. Cette opération était légale. La Commission était tenue d'examiner la question de savoir si le gouvernement du Québec a tenté délibérément d'échapper aux exigences de la Loi . . .

Therefore, Québec's intention was relevant.

L'intention du Québec était donc pertinente.

55 The OSC did not identify motive as a precondition to the exercise of its public interest jurisdiction. On the contrary, the OSC held that it could consider motive as a factor in deciding whether to exercise the jurisdiction that it clearly had. Indeed, the OSC saw motive as a factor that might prompt it to make an order that it may not otherwise have made. Rather than a limitation on jurisdiction, the OSC considered motive as enlarging the circumstances under which the public interest would warrant intervention.

La CVMO n'a pas considéré la motivation comme une condition préalable à l'exercice de sa compétence relative à l'intérêt public. Au contraire, la CVMO a statué qu'elle pouvait considérer la motivation comme un facteur lui permettant de décider s'il y avait lieu d'exercer la compétence qu'elle avait clairement. En fait, la CVMO a perçu la motivation comme un facteur qui pourrait la convaincre de rendre une ordonnance qu'autrement elle n'aurait peut-être pas rendue. Plutôt qu'une entrave à sa compétence, la CVMO a considéré la motivation comme un moyen d'étendre la gamme des circonstances dans lesquelles l'intérêt public pourrait justifier son intervention.

56 In summary, I agree with Laskin J.A. that "[the OSC] did not consider a transactional connection and an intention to avoid Ontario law to be, as the Divisional Court contended, jurisdictional barriers or preconditions to an order under s. 127(1)3 of the Act" (pp. 277-78). The OSC clearly and properly rejected the argument that its public interest jurisdiction was subject to an implicit precondition. In analyzing the appellant's application for a remedy under s. 127(1), para. 3, the OSC proceeded by identifying and considering several factors relevant to the exercise of its discretion under that provision. The transactional connection with Ontario and the motive behind the structure of the transaction were two of several factors considered. I also agree with Laskin J.A. that the OSC "took into account and indeed gave prominence to factors that were relevant to the exercise of its discretion. It weighed those factors and made findings of fact on them . . . " (p. 273). Therefore, properly interpreted, the OSC decision did not adopt any jurisdictional preconditions, but instead exercised the

En résumé, je partage l'avis du juge Laskin selon lequel [TRADUCTION] « [la CVMO] n'a pas considéré un lien transactionnel et une intention d'échapper au droit de l'Ontario, ainsi que l'a prétendu la Cour divisionnaire, comme des entraves ou des conditions préalables juridictionnelles à la délivrance d'une ordonnance en vertu de la disposition 3 du par. 127(1) de la Loi » (p. 277-278). La CVMO a clairement et à bon droit rejeté l'argument selon lequel sa compétence relative à l'intérêt public était assujettie à une condition préalable implicite. Dans son analyse de la demande de réparation présentée par l'appelant sous le régime de la disposition 3 du par. 127(1), la CVMO a identifié et examiné plusieurs facteurs pertinents relativement à l'exercice du pouvoir discrétionnaire que lui confère cette disposition. Le lien transactionnel avec l'Ontario et la motivation sous-tendant la structuration de l'opération constituaient deux des nombreux facteurs examinés. Je partage aussi l'avis du juge Laskin selon lequel la CVMO a [TRADUCTION] « pris en considération, voire souligné, des facteurs qui étaient pertinents relativement à l'exercice de son pouvoir discrétionnaire. Elle a apprécié ces facteurs et tiré à leur égard des

discretion that is incidental to its public interest jurisdiction.

(b) Was the OSC Decision Reasonable?

The OSC was cautious in the application of its public interest jurisdiction in this case. This approach was informed by the OSC's previous jurisprudence and by four legitimate considerations inherent in s. 127 itself: (i) the seriousness and severity of the sanction applied for, (ii) the effect of imposing such a sanction on the efficiency of, and public confidence in Ontario capital markets, (iii) a reluctance to use the open-ended nature of the public interest jurisdiction to police out-of-province activities, and (iv) a recognition that s. 127 powers are preventive in nature, not remedial.

As noted above, in reaching its decision in this case, the OSC relied on its previous jurisprudence in *Canadian Tire*, *supra*, and *H.E.R.O.*, *supra*, to identify the relevant factors to be considered. The OSC found that "the actions of the Quebec Government and SNA failed to comply with the spirit underlying the take-over bid rules of the Act . . . " (para. 71). However, the OSC did not, on the evidence, conclude that the transaction in this case was intentionally structured to avoid Ontario law (at para. 73):

We were not presented with any evidence that the transaction which finally occurred was structured so as to make an Ontario transaction appear to be a non-Ontario one. This is not the case, like *Canadian Tire*, of "transactions that are clearly designed to avoid the animating principles behind" Ontario's take-over bid legislation and rules. The evidence was clear that the principal (and so far as the evidence went, the sole) purpose for structuring the transaction in its final form was the

conclusions de fait . . . » (p. 273). Par conséquent, une interprétation juste de sa décision révèle que la CVMO n'a pas adopté de conditions préalables juridictionnelles, mais a plutôt exercé le pouvoir discrétionnaire accessoire à sa compétence relative à l'intérêt public.

(b) La décision de la CVMO était-elle raisonnable?

57 La CVMO a fait preuve de circonspection dans l'application de sa compétence relative à l'intérêt public en l'espèce. Cette méthode s'inspirait de la jurisprudence de la CVMO ainsi que de quatre considérations légitimes inhérentes à l'art. 127 lui-même : (i) la gravité et la rigueur de la sanction demandée, (ii) l'effet qu'aurait l'application d'une telle sanction sur l'efficacité des marchés financiers en Ontario ainsi que sur la confiance du public en ceux-ci, (iii) une réticence à invoquer la nature indéterminée de la compétence relative à l'intérêt public pour réglementer des activités qui se déroulent hors de la province, et (iv) la reconnaissance du fait que les pouvoirs conférés par l'art. 127 sont de nature préventive et non réparatrice.

58 Ainsi qu'il a été mentionné plus haut, pour trancher la présente espèce, la CVMO s'est fondée sur sa jurisprudence dans les affaires *Canadian Tire* et *H.E.R.O.*, précitées, pour identifier les facteurs pertinents à examiner. Elle a conclu que [TRADUCTION] « les actes du gouvernement du Québec et de la SNA n'ont pas respecté l'esprit qui sous-tend les règles relatives aux offres d'achat visant à la mainmise édictées dans la Loi . . . » (par. 71). La CVMO n'a toutefois pas conclu, à la lumière de la preuve, que l'opération en cause avait été structurée intentionnellement de façon à contourner le droit ontarien (au par. 73) :

[TRADUCTION] On ne nous a présenté aucune preuve établissant que l'opération qui a finalement eu lieu était structurée de façon à donner à une opération ontarienne l'apparence d'une opération étrangère. Il ne s'agit pas, comme c'était le cas dans l'affaire *Canadian Tire*, « d'opérations qui sont clairement conçues de façon à éviter les principes directeurs qui sous-tendent » la législation et les règles de l'Ontario régissant les offres d'achat visant à la mainmise. La preuve a établi claire-

minimisation of taxes on the profit received by GD Canada and GD U.S. In our view, the structuring of the transaction was not abusive of the integrity of the capital markets of this province, and cannot be relied on to provide the required nexus.

ment que le motif principal (voire l'unique motif démontré par la preuve) de la structuration de l'opération dans sa forme finale était la réduction des impôts sur le profit réalisé par GD Canada et GD U.S. À notre avis, la structuration de l'opération n'a pas porté atteinte à l'intégrité des marchés financiers de cette province, et elle ne peut être invoquée pour établir le rapport nécessaire.

This finding of fact is reasonable and supported by the evidence.

Cette conclusion de fait est raisonnable et elle est étayée par la preuve.

59 Granted, the OSC did find that "the actions of the Quebec Government and SNA . . . were abusive of the minority shareholders of Asbestos and were manifestly unfair to them" (para. 71). However, whether a s. 127(1) sanction is warranted depends on a consideration of all of the relevant factors together. In this case, the OSC also found that the capital markets in general, and the minority shareholders of Asbestos in particular, were not materially misled by the statements of Quebec's Minister of Finance respecting the prospect of a follow-up offer. This finding is supported by the evidence, including the several published reports that recommended caution and characterized an investment in Asbestos as speculative. In this case, such a finding can and did properly inform the OSC's discretion under s. 127.

La CVMO a, il est vrai, conclu que [TRADUCTION] « les actes du gouvernement du Québec et de la SNA . . . étaient abusifs envers les actionnaires minoritaires d'Asbestos et étaient manifestement injustes à leur égard » (par. 71). Toutefois, la question de savoir s'il y a lieu d'appliquer une sanction sous le régime du par. 127(1) exige un examen de tous les facteurs pertinents ensemble. Dans la présente espèce, la CVMO a aussi conclu que les marchés financiers en général et les actionnaires minoritaires d'Asbestos en particulier n'avaient pas été sensiblement induits en erreur par les déclarations du ministre des Finances du Québec au sujet de la présentation éventuelle d'une offre complémentaire. Cette conclusion est étayée par la preuve, y compris plusieurs rapports publiés recommandant la prudence et caractérisant un investissement dans la société Asbestos comme de nature spéculative. En l'espèce, une telle conclusion pouvait orienter et a effectivement orienté, à bon droit, l'exercice du pouvoir discrétionnaire dont la CVMO est investie par l'art. 127.

60 In addition, consistent with the two purposes of the Act described in s. 1.1 and because s. 127(1) sanctions are preventive in nature, it was open to the OSC to give weight to the fact that there has been no abuse of investors or other misconduct by the province of Quebec or SNA in the 13 years since the transaction at issue in this appeal. The OSC was also entitled to give weight to the fact that the removal of the province's exemptions is a very serious response that could have negative repercussions on other investors and the Ontario capital markets in general.

De plus, conformément aux deux objets de la Loi décrits à l'art. 1.1 et en raison de la nature préventive des sanctions visées au par. 127(1), il était loisible à la CVMO d'accorder du poids au fait que les 13 ans qui ont suivi l'opération en cause n'ont donné lieu à aucune conduite abusive à l'endroit des investisseurs ni à quelque autre conduite incorrecte de la part de la province de Québec ou de la SNA. La CVMO pouvait aussi accorder du poids au fait que le retrait des dispenses de la province est une mesure très grave qui pourrait avoir des incidences négatives sur d'autres investisseurs et sur les marchés financiers en Ontario en général.

Furthermore, the OSC did not find that there was no transactional connection with Ontario in this case, but that the transactional connection was insufficient to justify its intervening in the public interest. As noted by Chairman Beck in his dissenting opinion in *Re Asbestos Corp.* (1988), 11 O.S.C.B. 3419, a review of the OSC decisions on s. 124 (now s. 127) indicates that there has been careful use of the public interest jurisdiction and that in each case there was a clear and direct transactional connection with Ontario, contrary to the facts here: see *H.E.R.O.*, *supra*; *Re Atco Ltd.* (1980), 15 O.S.C.B. 412; *Re Electra Investments (Canada) Ltd.* (1983), 6 O.S.C.B. 417; *Re Turbo Resources Ltd.* (1982), 4 O.S.C.B. 403C; *Re Genstar Corp.* (1982), 4 O.S.C.B. 326C.

61 Par ailleurs, la CVMO n'a pas conclu qu'il n'existait aucun lien transactionnel avec l'Ontario en l'espèce, mais plutôt que le lien transactionnel n'était pas suffisant pour justifier qu'elle intervienne dans l'intérêt public. Ainsi que l'a mentionné le président Beck dans ses motifs de dissidence dans la décision *Re Asbestos Corp.* (1988), 11 O.S.C.B. 3419, il ressort d'une revue des décisions de la CVMO relatives à l'art. 124 (maintenant l'art. 127) que la CVMO a appliqué judicieusement sa compétence relative à l'intérêt public et que, dans chaque affaire, il y avait un lien transactionnel clair et direct avec l'Ontario, ce qui n'est pas le cas en l'espèce : voir *H.E.R.O.*, précité; *Re Atco Ltd.* (1980), 15 O.S.C.B. 412; *Re Electra Investments (Canada) Ltd.* (1983), 6 O.S.C.B. 417; *Re Turbo Resources Ltd.* (1982), 4 O.S.C.B. 403C; *Re Genstar Corp.* (1982), 4 O.S.C.B. 326C.

It is true that the OSC placed significant emphasis on the transactional connection factor. However, it was entitled to do so in order to avoid using the open-ended nature of s. 127 powers as a means to police too broadly out-of-province transactions. Capital markets and securities transactions are becoming increasingly international: see *Global Securities Corp. v. British Columbia (Securities Commission)*, [2000] 1 S.C.R. 494, 2000 SCC 21, at paras. 27-28. There are a myriad of overlapping regulatory jurisdictions governing securities transactions. Under s. 2.1, para. 5 of the Act, one of the fundamental principles that the OSC has to consider is that "[t]he integration of capital markets is supported and promoted by the sound and responsible harmonization and co-ordination of securities regulation regimes". A transaction that is contrary to the policy of the Ontario *Securities Act* may be acceptable under another regulatory regime. Thus, the OSC's insistence on a more clear and direct connection with Ontario in this case reflects a sound and responsible approach to long-arm regulation and the potential for con-

62 Il est vrai que la CVMO a particulièrement mis l'accent sur le facteur du lien transactionnel. Il lui était toutefois loisible de le faire afin d'éviter de se servir de la nature indéterminée des pouvoirs conférés par l'art. 127 comme moyen de réglementer, démesurément, des opérations qui ont lieu à l'extérieur de la province. Les marchés financiers et les opérations boursières deviennent de plus en plus internationaux : voir l'arrêt *Global Securities Corp. c. Colombie-Britannique (Securities Commission)*, [2000] 1 R.C.S. 494, 2000 CSC 21, par. 27-28. Il existe une myriade de compétences concurrentes en matière de réglementation des opérations sur valeurs mobilières. Aux termes de la disposition 5 de l'art. 2.1 de la Loi, l'un des principes fondamentaux dont la CVMO doit tenir compte est que « [l]'harmonisation et la coordination saines et responsables des régimes de réglementation des valeurs mobilières favorisent l'intégration des marchés financiers ». Une opération qui est contraire à la politique de la *Loi sur les valeurs mobilières* de l'Ontario peut être acceptable dans un autre régime de réglementation. Par conséquent, l'insistance de la CVMO pour qu'il y ait un lien plus clair et direct avec l'Ontario reflète une approche juste et responsable à l'égard de la réglementation à longue portée et des possibilités de conflits entre les différents régimes de régle-

flict amongst the different regulatory regimes that govern the capital markets in the global economy.

63 In summary, the reasons of the OSC in this case were informed by the legitimate and relevant considerations inherent in s. 127(1) and in the OSC's previous jurisprudence on public interest jurisdiction. The findings of fact made by the OSC were reasonable and supported by the evidence. I conclude that the decision of the OSC in this case was reasonable and therefore should not be disturbed.

64 For the foregoing reasons, I would dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitors for the appellant: Borden Ladner Gervais, Ottawa.

Solicitors for the respondent Her Majesty in Right of Quebec: Torys, Toronto.

Solicitor for the respondent Ontario Securities Commission: The Ontario Securities Commission, Toronto.

Solicitors for the respondent Société nationale de l'amiante: Blake, Cassels & Graydon, Toronto.

mentation régissant les marchés financiers dans l'économie mondiale.

En résumé, les motifs de la CVMO dans la présente espèce étaient inspirés par les considérations légitimes et pertinentes inhérentes au par. 127(1) et à la jurisprudence de la CVMO portant sur la compétence relative à l'intérêt public. Les conclusions de fait tirées par la CVMO étaient raisonnables et étayées par la preuve. Je conclus que la décision de la CVMO en l'espèce était raisonnable et qu'elle ne devrait donc pas être réformée.

Pour les motifs qui précèdent, je rejetterais le pourvoi avec dépens.

Pourvoi rejeté avec dépens.

Procureurs de l'appelant : Borden Ladner Gervais, Ottawa.

Procureurs de l'intimée Sa Majesté du chef du Québec : Torys, Toronto.

Procureur de l'intimée la Commission des valeurs mobilières de l'Ontario : La Commission des valeurs mobilières de l'Ontario, Toronto.

Procureurs de l'intimée la Société nationale de l'amiante : Blake, Cassels & Graydon, Toronto.

F.H. *Appellant*

v.

Ian Hugh McDougall *Respondent*

- and -

F.H. *Appellant*

v.

The Order of the Oblates of Mary Immaculate in the Province of British Columbia *Respondent*

- and -

F.H. *Appellant*

v.

Her Majesty The Queen in Right of Canada as represented by the Minister of Indian Affairs and Northern Development *Respondent*

F.H. *Appelant*

c.

Ian Hugh McDougall *Intimé*

- et -

F.H. *Appelant*

c.

The Order of the Oblates of Mary Immaculate in the Province of British Columbia *Intimé*

- et -

F.H. *Appelant*

c.

Sa Majesté la Reine du chef du Canada, représentée par le ministre des Affaires indiennes et du Nord canadien *Intimée*

Indexed as: F.H. *v.* McDougall

Neutral citation: 2008 SCC 53.

File No.: 32085.

2008: May 15; 2008: October 2.

Present: McLachlin C.J. and LeBel, Deschamps, Fish, Abella, Charron and Rothstein JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Evidence — Standard of proof — Allegations of sexual assault in a civil case — Inconsistencies in complainant's testimony — Whether Court of Appeal erred in holding trial judge to standard of proof higher than balance of probabilities.

Répertorié : F.H. *c.* McDougall

Référence neutre : 2008 CSC 53.

N^{o} du greffe : 32085.

2008 : 15 mai; 2008 : 2 octobre.

Présents : La juge en chef McLachlin et les juges LeBel, Deschamps, Fish, Abella, Charron et Rothstein.

EN APPEL DE LA COUR D'APPEL DE LA COLOMBIE-BRITANNIQUE

Preuve — Norme de preuve — Allégations d'agression sexuelle formulées dans une instance civile — Contradictions dans le témoignage du demandeur — La Cour d'appel a-t-elle eu tort de conclure que la juge du procès aurait dû appliquer une norme de preuve plus stricte que celle de la prépondérance des probabilités?

Evidence — Corroborative evidence — Allegations of sexual assault in a civil case — Whether victim must provide independent corroborating evidence.

Appeals — Standard of review — Applicable standard of appellate review on questions of fact and credibility.

From 1966 to 1974, H was a resident of the Sechelt Indian Residential School in British Columbia, an institution operated by the Oblates of Mary Immaculate and funded by the Canadian government. M was an Oblate Brother at the school and also the junior and intermediate boys' supervisor from 1965 to 1969. H claimed to have been sexually assaulted by M in the supervisors' washroom when he was approximately 10 years of age. These assaults were alleged to have occurred when the children were lined up and brought, one by one, into the washroom to be inspected by the supervisors for cleanliness. H told no one about the assaults until 2000, when he confided in his wife. He then commenced this action against the respondents. Despite inconsistencies in his testimony as to the frequency and gravity of the sexual assaults, the trial judge found that H was a credible witness and concluded that he had been anally raped by M on four occasions during the 1968-69 school year. In addition, she found that M had physically assaulted H by strapping him on numerous occasions. A majority of the Court of Appeal overturned the decision with respect to the sexual assaults on the grounds that the trial judge had failed to consider the serious inconsistencies in H's testimony in determining whether the alleged sexual assaults had been proven to the standard of proof that was "commensurate with the allegation", and had failed to scrutinize the evidence in the manner required.

Held: The appeal should be allowed and the trial judge's decision restored.

There is only one standard of proof in a civil case and that is proof on a balance of probabilities. Although there has been some suggestion in the case law that the criminal burden applies or that there is a shifting standard of proof, where, as here, criminal or morally blameworthy conduct is alleged, in Canada, there are no degrees of probability within that civil standard. If a trial judge expressly states the correct standard of proof, or does not express one at all, it will be presumed that the correct standard was applied unless it can be demonstrated that an incorrect standard was applied. Further, the appellate court must ensure that it does not substitute its own view of the facts with that of the trial judge in determining whether the correct standard was

Preuve — Corroboration — Allégations d'agression sexuelle formulées dans une instance civile — Le témoignage de la victime doit-il faire l'objet d'une corroboration indépendante?

Appels — Norme de contrôle — Norme de contrôle applicable en appel aux questions de fait et de crédibilité.

De 1966 à 1974, H a été pensionnaire au Pensionnat indien de Sechelt, en Colombie-Britannique, un établissement dirigé par les Oblats de Marie Immaculée et financé par l'État canadien. Frère oblat au pensionnat, M a été surveillant des garçons les plus jeunes et de ceux d'âge intermédiaire de 1965 à 1969. H a prétendu qu'à l'âge d'environ 10 ans, M l'avait agressé sexuellement dans les toilettes des surveillants. Selon son témoignage, les enfants formaient des rangs et étaient emmenés à tour de rôle dans les toilettes pour que le surveillant s'assure de leur propreté : c'est alors qu'ils étaient agressés sexuellement. H n'a révélé les agressions subies qu'en 2000, se confiant alors à son épouse. Il a ensuite intenté son action contre les intimés. Malgré les contradictions de son témoignage quant à la fréquence et à la gravité des agressions sexuelles, la juge du procès a conclu à sa crédibilité en tant que témoin et déterminé que M l'avait sodomisé quatre fois pendant l'année scolaire 1968-1969. Elle a par ailleurs conclu que M avait agressé H physiquement en le frappant avec une lanière en cuir à de nombreuses occasions. Les juges majoritaires de la Cour d'appel ont infirmé sa décision quant aux agressions sexuelles au motif qu'elle avait omis de prendre en compte les contradictions importantes du témoignage de H pour déterminer si les agressions sexuelles avaient été prouvées suivant la norme de preuve « proportionnée à l'allégation » et qu'elle n'avait pas examiné la preuve aussi attentivement qu'elle l'aurait dû.

Arrêt : Le pourvoi est accueilli et la décision de la juge de première instance est rétablie.

Dans une instance civile, une seule norme de preuve s'applique, celle de la prépondérance des probabilités. Bien que la jurisprudence ait donné à penser que la norme pénale ou une norme variable s'applique lorsque, comme en l'espèce, un comportement criminel ou moralement répréhensible est allégué, au Canada, la norme de preuve civile ne comporte pas de degrés de probabilité. Lorsque le juge du procès énonce expressément la bonne norme de preuve ou qu'il ne renvoie à aucune, il est présumé avoir appliqué la bonne, sauf preuve du contraire. Aussi, lorsqu'elle détermine si la bonne norme a été appliquée, la cour d'appel doit veiller à ne pas substituer sa propre interprétation des faits à celle du juge du procès. Dans toute instance civile, le

applied. In every civil case, a judge should be mindful of, and, depending on the circumstances, may take into account, the seriousness of the allegations or consequences or inherent improbabilities, but these considerations do not alter the standard of proof. One legal rule applies in all cases and that is that the evidence must be scrutinized with care by the trial judge in deciding whether it is more likely than not that an alleged event has occurred. Further, the evidence must always be clear, convincing and cogent in order to satisfy the balance of probabilities test. In serious cases such as this one, where there is little other evidence than that of the plaintiff and the defendant, and the alleged events took place long ago, the judge is required to make a decision, even though this may be difficult. Appellate courts must accept that if a responsible trial judge finds for the plaintiff, the evidence was sufficiently clear, convincing and cogent to that judge that the plaintiff satisfied the balance of probabilities test. In this case, the Court of Appeal erred in holding the trial judge to a higher standard of proof. This is sufficient to decide the appeal. [30] [40] [44-46] [49] [53-54]

In finding that the trial judge failed to scrutinize H's evidence in the manner required by law, in light of the inconsistencies in his evidence and the lack of support from the surrounding circumstances, the Court of Appeal also incorrectly substituted its credibility assessment for that of the trial judge. Assessing credibility is clearly in the bailiwick of the trial judge for which he or she must be accorded a heightened degree of deference. Where proof is on a balance of probabilities, there is no rule as to when inconsistencies in the evidence of a plaintiff will cause a trial judge to conclude that the plaintiff's evidence is not credible or reliable. The trial judge must not consider the plaintiff's evidence in isolation, but should consider the totality of the evidence in the case, and assess the impact of any inconsistencies on questions of credibility and reliability pertaining to the core issue in the case. It is apparent from her reasons that the trial judge recognized this obligation upon her, and while she did not deal with every inconsistency, she did address in a general way the arguments put forward by the defence. Despite significant inconsistencies in his testimony concerning the frequency and severity of the sexual assaults, and the differences between his trial evidence and answers on previous occasions, the trial judge found that H was nevertheless a credible witness. Where a trial judge demonstrates that he or she is alive to the inconsistencies but still concludes that the witness was nonetheless credible, in the absence of palpable and overriding error, there is no basis for interference by the appellate court. Here, the Court of Appeal

juge doit avoir présentes à l'esprit — et, selon les circonstances, il peut les prendre en compte — la gravité des allégations ou de leurs conséquences, ou encore, l'improbabilité intrinsèque, mais ces considérations ne modifient pas la norme de preuve. Une seule règle de droit vaut dans tous les cas : le juge du procès doit examiner attentivement la preuve pour décider si, selon toute vraisemblance, l'événement allégué a eu lieu. En outre, la preuve doit toujours être claire et convaincante pour satisfaire au critère de la prépondérance des probabilités. Dans le cas d'une allégation grave comme celle considérée en l'espèce, lorsque la preuve consiste essentiellement dans les témoignages du demandeur et du défendeur, et que les faits allégués se sont produits longtemps auparavant, aussi difficile que puisse être sa tâche, le juge doit trancher. Lorsqu'un juge consciencieux ajoute foi à la thèse du demandeur, la cour d'appel doit tenir pour acquis que la preuve était suffisamment claire et convaincante pour qu'il conclue au respect du critère de la prépondérance des probabilités. En l'espèce, la Cour d'appel a statué à tort que la juge du procès aurait dû appliquer une norme plus stricte. Cette conclusion suffit pour statuer sur le présent pourvoi. [30] [40] [44-46] [49] [53-54]

En concluant que la juge du procès avait omis d'examiner le témoignage de H aussi attentivement qu'elle l'aurait dû légalement, à la lumière des contradictions du témoignage et de l'absence d'élément circonstanciel le corroborant, la Cour d'appel a également substitué à tort son appréciation de la crédibilité à celle de la juge du procès. Il incombe clairement au juge du procès d'apprécier la crédibilité d'un témoin, de sorte que sa décision à cet égard justifie une grande déférence. Lorsque la norme de preuve applicable est celle de la prépondérance des probabilités, il n'y a pas de règle quant aux circonstances dans lesquelles les contradictions relevées dans le témoignage du demandeur amèneront le juge du procès à conclure que le témoignage n'est pas crédible ou digne de foi. En première instance, le juge ne doit pas considérer le témoignage du demandeur en vase clos. Il doit plutôt examiner l'ensemble de la preuve et déterminer l'incidence des contradictions sur les questions de crédibilité touchant au cœur du litige. Il appert de ses motifs que la juge du procès a reconnu cette obligation, et bien qu'elle n'ait pas considéré chacune des contradictions, elle a examiné de façon générale les arguments de la défense. Malgré les contradictions importantes du témoignage de H sur la fréquence et la gravité des agressions sexuelles, ainsi que les divergences entre son témoignage au procès et les réponses données précédemment, la juge du procès a estimé que H était un témoin digne de foi. Lorsque le juge du procès est conscient des contradictions, mais qu'il arrive quand même à la conclusion que le témoin

identified no such error. [52] [58-59] [70] [72-73] [75-76]

In addition, while it is helpful and strengthens the evidence of the party relying on it, as a matter of law, in cases of oath against oath, there is no requirement that a sexual assault victim must provide independent corroborating evidence. Such evidence may not be available, especially where the alleged incidents took place decades earlier. Also, incidents of sexual assault normally occur in private. Requiring corroboration would elevate the evidentiary requirement in a civil case above that in a criminal case. Trial judges faced with allegations of sexual assault may find that they are required to make a decision on the basis of whether they believe the plaintiff or the defendant and as difficult as that may be, they are required to assess the evidence and make their determination without imposing a legal requirement for corroboration. In civil cases in which there is conflicting testimony, the judge must decide whether a fact occurred on a balance of probabilities, and provided the judge has not ignored evidence, finding the evidence of one party credible may well be conclusive of the result on an important issue because that evidence is inconsistent with that of the other party. In such cases, believing one party will mean explicitly or implicitly that the other party was not believed on an important issue. That may be especially true where a plaintiff makes allegations that are altogether denied by the defendant, as in this case. Here, the Court of Appeal was correct in finding that the trial judge did not ignore M's evidence or marginalize him, but simply believed H on essential matters rather than M. [77] [80-81] [86] [96]

Finally, an unsuccessful party may well be dissatisfied with the reasons of a trial judge, especially where he or she was not believed. Where findings of credibility must be made, it must be recognized that it may be very difficult for the trial judge to put into words the process by which the decision is arrived at, but that does not make the reasons inadequate. Nor are reasons inadequate because in hindsight, it may be possible to say that the reasons were not as clear and comprehensive as they might have been. The Court of Appeal found that the trial judge's reasons showed why she arrived at her conclusion that H had been sexually assaulted by M. Its conclusion that the trial judge's reasons were adequate should not be disturbed. [100-101]

Cases Cited

Applied: *Hanes v. Wawanesa Mutual Insurance Co.*, [1963] S.C.R. 154; *R. v. Lifchus*, [1997] 3 S.C.R. 320;

était digne de foi, sauf erreur manifeste et dominante, rien ne justifie l'intervention de la cour d'appel. En l'espèce, la Cour d'appel n'a pas relevé pareille erreur. [52] [58-59] [70] [72-73] [75-76]

Par ailleurs, même si la corroboration indépendante est utile et étoffe la preuve offerte, elle ne s'impose pas légalement lorsque, dans une affaire d'agression sexuelle, c'est la parole de la victime contre celle du défendeur. Il est possible qu'il ne puisse y avoir de corroboration, surtout lorsque les faits allégués se sont produits quelques décennies auparavant. Sans compter que les agressions sexuelles ont généralement lieu en privé. Exiger la corroboration rendrait la norme de preuve en matière civile plus stricte que celle appliquée en matière pénale. Dans une affaire d'agression sexuelle, la décision du juge du procès peut dépendre du fait qu'il ajoute foi au témoignage du demandeur ou à celui du défendeur, mais malgré ce dilemme, le juge doit apprécier la preuve et se prononcer sans exiger de corroboration. Au civil, lorsque les témoignages sont contradictoires, le juge est appelé à se prononcer sur la véracité du fait allégué selon la prépondérance des probabilités. S'il tient compte de tous les éléments de preuve, sa conclusion que le témoignage d'une partie est crédible peut fort bien être décisive, ce témoignage étant incompatible avec celui de l'autre partie. Croire une partie suppose alors explicitement ou non que l'on ne croit pas l'autre sur le point important en litige. C'est particulièrement le cas lorsque, comme en l'espèce, le demandeur formule des allégations que le défendeur nie en bloc. La Cour d'appel a eu raison de conclure que la juge du procès n'avait pas ignoré le témoignage de M ni marginalisé ce dernier, mais qu'elle avait simplement cru H plutôt que M sur des points importants. [77] [80-81] [86] [96]

Enfin, la partie qui n'a pas gain de cause peut juger insuffisants les motifs du juge du procès, surtout s'il ne l'a pas crue. Il faut reconnaître qu'il peut être très difficile au juge appelé à tirer des conclusions sur la crédibilité des témoins de préciser le raisonnement qui est à l'origine de sa décision, mais ses motifs ne sont pas insuffisants pour autant. Les motifs ne sont pas non plus insuffisants parce que, avec le recul, on peut dire qu'ils ne sont pas aussi clairs et exhaustifs qu'ils auraient pu l'être. La Cour d'appel a conclu que les motifs de la juge du procès expliquaient les raisons pour lesquelles elle avait conclu que H avait été agressé sexuellement par M. Les motifs de la juge du procès étaient suffisants et ils ne doivent pas être modifiés. [100-101]

Jurisprudence

Arrêts appliqués : *Hanes c. Wawanesa Mutual Insurance Co.*, [1963] R.C.S. 154; *R. c. Lifchus*, [1997]

H.L. v. Canada (Attorney General), [2005] 1 S.C.R. 401, 2005 SCC 25; *R. v. Gagnon*, [2006] 1 S.C.R. 621, 2006 SCC 17; *R. v. Sheppard*, [2002] 1 S.C.R. 869, 2002 SCC 26; *R. v. Walker*, [2008] 2 S.C.R. 245, 2008 SCC 34; *R. v. R.E.M.*, [2008] 3 S.C.R. 3, 2008 SCC 51; **referred to:** *H.F. v. Canada (Attorney General)*, [2002] B.C.J. No. 436 (QL), 2002 BCSC 325; *R. v. W. (D.)*, [1991] 1 S.C.R. 742; *Bater v. Bater*, [1950] 2 All E.R. 458; *R. v. Oakes*, [1986] 1 S.C.R. 103; *Continental Insurance Co. v. Dalton Cartage Co.*, [1982] 1 S.C.R. 164; *Heath v. College of Physicians & Surgeons (Ontario)* (1997), 6 Admin. L.R. (3d) 304; *R (McCann) v. Crown Court at Manchester*, [2003] 1 A.C. 787, [2002] UKHL 39; *In re H. (Minors) (Sexual Abuse: Standard of Proof)*, [1996] A.C. 563; *In re B (Children)*, [2008] 3 W.L.R. 1, [2008] UKHL 35; *R. v. Burns*, [1994] 1 S.C.R. 656; *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235, 2002 SCC 33; *R. v. R.W.B.* (1993), 24 B.C.A.C. 1; *R. v. J.H.S.*, [2008] 2 S.C.R. 152, 2008 SCC 30; *Faryna v. Chorny*, [1952] 2 D.L.R. 354.

Statutes and Regulations Cited

Act to amend the Criminal Code in relation to sexual offences and other offences against the person and to amend certain other Acts in relation thereto or in consequence thereof, S.C. 1980-81-82-83, c. 125.
Criminal Code, R.S.C. 1970, c. C-34, s. 139(1).
Criminal Code, R.S.C. 1985, c. C-46, s. 274.
Limitation Act, R.S.B.C. 1996, c. 266, s. 3(4)(l).

Authors Cited

Rothstein, Linda R., Robert A. Centa and Eric Adams. "Balancing Probabilities: The Overlooked Complexity of the Civil Standard of Proof", in *Special Lectures of the Law Society of Upper Canada 2003: The Law of Evidence*. Toronto: Irwin Law, 2004, 455.
Sopinka, John, Sidney N. Lederman, and Alan W. Bryant. *The Law of Evidence in Canada*, 2nd ed. Toronto: Butterworths, 1999.

APPEAL from a judgment of the British Columbia Court of Appeal (Southin, Rowles and Ryan JJ.) (2007), 68 B.C.L.R. (4th) 203 (*sub nom. C. (R.) v. McDougall*), [2007] 9 W.W.R. 256, 41 C.P.C. (6th) 213, 239 B.C.A.C. 222, 396 W.A.C. 222, [2007] B.C.J. No. 721 (QL), 2007 CarswellBC 723, 2007 BCCA 212, allowing the appeal against Gill J.'s decision in the case of sexual assault but dismissing the appeal from her finding of physical assault, [2005] B.C.J. No. 2358 (QL) (*sub nom. R.C. v. McDougall*), 2005 CarswellBC 2578, 2005 BCSC 1518. Appeal allowed.

3 R.C.S. 320; *H.L. c. Canada (Procureur général)*, [2005] 1 R.C.S. 401, 2005 CSC 25; *R. c. Gagnon*, [2006] 1 R.C.S. 621, 2006 CSC 17; *R. c. Sheppard*, [2002] 1 R.C.S. 869, 2002 CSC 26; *R. c. Walker*, [2008] 2 R.C.S. 245, 2008 CSC 34; *R. c. R.E.M.*, [2008] 3 R.C.S. 3, 2008 CSC 51; **arrêts mentionnés :** *H.F. c. Canada (Attorney General)*, [2002] B.C.J. No. 436 (QL), 2002 BCSC 325; *R. c. W. (D.)*, [1991] 1 R.C.S. 742; *Bater c. Bater*, [1950] 2 All E.R. 458; *R. c. Oakes*, [1986] 1 R.C.S. 103; *Continental Insurance Co. c. Dalton Cartage Co.*, [1982] 1 R.C.S. 164; *Heath c. College of Physicians & Surgeons (Ontario)* (1997), 6 Admin. L.R. (3d) 304; *R (McCann) c. Crown Court at Manchester*, [2003] 1 A.C. 787, [2002] UKHL 39; *In re H. (Minors) (Sexual Abuse : Standard of Proof)*, [1996] A.C. 563; *In re B (Children)*, [2008] 3 W.L.R. 1, [2008] UKHL 35; *R. c. Burns*, [1994] 1 R.C.S. 656; *Housen c. Nikolaisen*, [2002] 2 R.C.S. 235, 2002 CSC 33; *R. c. R.W.B.* (1993), 24 B.C.A.C. 1; *R. c. J.H.S.*, [2008] 2 R.C.S. 152, 2008 CSC 30; *Faryna c. Chorny*, [1952] 2 D.L.R. 354.

Lois et règlements cités

Code criminel, L.R.C. 1985, ch. C-46, art. 274.
Code criminel, S.R.C. 1970, ch. C-34, art. 139(1).
Limitation Act, R.S.B.C. 1996, ch. 266, art. 3(4)(l).
Loi modifiant le Code criminel en matière d'infractions sexuelles et d'autres infractions contre la personne et apportant des modifications corrélatives à d'autres lois, S.C. 1980-81-82-83, ch. 125.

Doctrine citée

Rothstein, Linda R., Robert A. Centa and Eric Adams. « Balancing Probabilities : The Overlooked Complexity of the Civil Standard of Proof », in *Special Lectures of the Law Society of Upper Canada 2003 : The Law of Evidence*. Toronto : Irwin Law, 2004, 455.
Sopinka, John, Sidney N. Lederman, and Alan W. Bryant. *The Law of Evidence in Canada*, 2nd ed. Toronto : Butterworths, 1999.

POURVOI contre un arrêt de la Cour d'appel de la Colombie-Britannique (les juges Southin, Rowles et Ryan) (2007), 68 B.C.L.R. (4th) 203 (*sub nom. C. (R.) c. McDougall*), [2007] 9 W.W.R. 256, 41 C.P.C. (6th) 213, 239 B.C.A.C. 222, 396 W.A.C. 222, [2007] B.C.J. No. 721 (QL), 2007 CarswellBC 723, 2007 BCCA 212, accueillant l'appel contre la décision de la juge Gill quant à l'allégation d'agression sexuelle, mais le rejetant quant à l'allégation d'agression physique, [2005] B.C.J. No. 2358 (QL) (*sub nom. R.C. c. McDougall*), 2005 CarswellBC 2578, 2005 BCSC 1518. Pourvoi accueilli.

Allan Donovan, *Karim Ramji* and *Niki Sharma*, for the appellant.

Bronson Toy, for the respondent Ian Hugh McDougall.

F. Mark Rowan, for the respondent The Order of the Oblates of Mary Immaculate in the Province of British Columbia.

Peter Southey and *Christine Mohr*, for the respondent Her Majesty the Queen in Right of Canada.

The judgment of the Court was delivered by

[1] ROTHSTEIN J. — The Supreme Court of British Columbia found in a civil action that the respondent, Ian Hugh McDougall, a supervisor at the Sechelt Indian Residential School, had sexually assaulted the appellant, F.H., while he was a student during the 1968-69 school year. A majority of the British Columbia Court of Appeal allowed the respondent's appeal in part, and reversed the decision of the trial judge. I would allow the appeal to this Court and restore the judgment of the trial judge.

I. Facts

[2] The Sechelt Indian Residential School was established in 1904 in British Columbia. It was funded by the Canadian government and operated by the Oblates of Mary Immaculate. F.H. was a resident student at the school from September 1966 to March 1967 and again from September 1968 to June 1974. Ian Hugh McDougall was an Oblate Brother until 1970 and was the junior and intermediate boys' supervisor at the school from 1965 to 1969.

[3] The school building had three stories. Dormitories for junior and senior boys were located on the top floor. A supervisors' washroom was also located on the top floor and was accessible through a washroom for the boys. The intermediate boys' dormitory was on the second floor. McDougall had a room in the corner of that dormitory.

Allan Donovan, *Karim Ramji* et *Niki Sharma*, pour l'appelant.

Bronson Toy, pour l'intimé Ian Hugh McDougall.

F. Mark Rowan, pour l'intimé The Order of the Oblates of Mary Immaculate in the Province of British Columbia.

Peter Southey et *Christine Mohr*, pour l'intimée Sa Majesté la Reine du chef du Canada.

Version française du jugement de la Cour rendu par

[1] LE JUGE ROTHSTEIN — Dans le cadre d'une poursuite au civil, la Cour suprême de la Colombie-Britannique a conclu que pendant l'année scolaire 1968-1969, l'intimé Ian Hugh McDougall, surveillant au Pensionnat indien de Sechelt, avait agressé sexuellement l'appelant, F.H., un ancien élève de l'établissement. Les juges majoritaires de la Cour d'appel de la Colombie-Britannique ont accueilli en partie l'appel de l'intimé et infirmé la décision de la juge du procès. Je suis d'avis d'accueillir le pourvoi et de rétablir le jugement de première instance.

I. Faits

[2] Le Pensionnat indien de Sechelt a vu le jour en Colombie-Britannique en 1904. Son financement était assuré par l'État canadien, et sa direction, par les Oblats de Marie Immaculée. F.H. y a séjourné de septembre 1966 à mars 1967, ainsi que de septembre 1968 à juin 1974. Frère Oblat jusqu'en 1970, Ian Hugh McDougall y a été surveillant des garçons les plus jeunes et de ceux d'âge intermédiaire de 1965 à 1969.

[3] L'établissement comptait trois étages. Les dortoirs des garçons les plus jeunes et des plus âgés étaient situés à l'étage supérieur. Les toilettes des surveillants se trouvaient également à l'étage supérieur et on pouvait y avoir accès par les toilettes des pensionnaires. Le dortoir des garçons d'âge intermédiaire était situé au deuxième étage, et la chambre de M. McDougall s'y trouvait dans un angle.

[4] F.H. claims to have been sexually assaulted by McDougall in the supervisors' washroom when he was approximately 10 years of age. At trial, he testified that McDougall sexually abused him on four occasions. The trial judge set out his evidence of these incidents at paras. 34-38 of her reasons:

As to the first occasion, F.H. had been in the dormitory with others. The defendant asked four boys to go upstairs to the main washroom where they were to wait before going to the supervisors' washroom for an examination. F.H. was the last to go into the washroom to be examined. When he went in, he was asked to remove his pyjamas and while facing the defendant, he was checked from head to toe. His penis was fondled. The defendant then turned him around, asked him to bend over and put his finger in his anus. He removed his clothing, grabbed F.H. around the waist, pulled him onto his lap and raped him. The defendant had put the cover of the toilet down and was using it as a seat. After the defendant ejaculated, he told the plaintiff to put on his pyjamas and leave the room.

F.H. was shocked. He did not cry or scream, nor did he say anything. When he went to the main communal washroom, he could see that he was bleeding. The next morning, he noticed blood in his pyjamas. He went downstairs to the boys' washroom and changed. The bloody pyjamas were rinsed and placed in his locker.

The second incident was approximately two weeks after the first. F.H. was in the dormitory getting ready for bed when the defendant asked him to go to the supervisors' washroom so he could do an examination. There were no other boys present. F.H. was asked to remove his pyjamas and again, he was raped. He went to the communal washroom to clean himself up. In the morning, he realized that his pyjamas were bloody. As it was laundry day, he threw his pyjamas in the laundry bin with the sheets.

The third incident occurred approximately one month later. F.H. testified that once again he was asked to go to the supervisors' washroom, remove his pyjamas and turn around. Again, the defendant grabbed him by the waist and raped him. He was bleeding, but could not recall whether there was blood on his pyjamas.

The fourth incident occurred approximately one month after the third. As he was getting ready for bed, the defendant grabbed him by the shoulder and took

[4] F.H. prétend qu'à l'âge d'environ 10 ans, M. McDougall l'a agressé sexuellement dans les toilettes des surveillants. Au procès, il a dit avoir subi quatre agressions. La juge du procès relate son témoignage aux par. 34-38 de ses motifs :

[TRADUCTION] La première fois, F.H. se trouvait dans le dortoir avec d'autres garçons. Le défendeur a demandé à quatre d'entre eux de se rendre aux toilettes principales à l'étage supérieur et d'attendre avant d'aller dans les toilettes des surveillants pour un examen. F.H. a été le dernier à s'y présenter. Le défendeur lui a demandé de retirer son pyjama et, alors que F.H. était de face, il l'a examiné des pieds à la tête. Il a caressé son pénis. Le défendeur l'a ensuite retourné, lui a demandé de se pencher et a inséré son doigt dans son anus. Le défendeur a enlevé ses vêtements, a empoigné F.H. par la taille, l'a mis sur ses genoux et l'a violé. Il avait rabattu le couvercle de la toilette, sur lequel il s'était assis. Après avoir éjaculé, il a dit au demandeur de remettre son pyjama et de quitter la pièce.

F.H. était sous le choc. Il n'a ni pleuré ni crié; il est demeuré silencieux. Lorsqu'il s'est rendu aux toilettes communes principales, il a constaté qu'il saignait. Le lendemain matin, il a remarqué la présence de sang dans son pyjama. Il est descendu aux toilettes des garçons et il s'est changé. Il a rincé son pyjama et l'a rangé dans son casier.

La deuxième agression s'est produite environ deux semaines plus tard. F.H. se trouvait dans le dortoir et se préparait à aller au lit lorsque le défendeur lui a dit de se rendre aux toilettes des surveillants pour un examen. Aucun autre garçon n'était présent. Il a demandé à F.H. d'enlever son pyjama, puis il l'a encore une fois violé. F.H. s'est rendu aux toilettes communes pour se laver. Le lendemain matin, il a constaté que son pyjama était taché de sang. Comme c'était jour de lessive, il a déposé son pyjama dans le panier à linge avec les draps.

La troisième agression a eu lieu environ un mois plus tard. Dans son témoignage, F.H. a dit qu'on lui avait une fois de plus demandé d'aller dans les toilettes des surveillants, d'enlever son pyjama et de se retourner. Encore une fois, le défendeur l'avait empoigné par la taille et l'avait violé. Il avait saigné, mais il ne se souvient pas s'il y avait des taches de sang sur son pyjama.

La quatrième agression est survenue environ un mois après la troisième. Alors que F.H. se préparait à aller au lit, le défendeur l'a saisi par les épaules et l'a emmené à

him upstairs to the supervisors' washroom. Another rape occurred.

([2005] B.C.J. No. 2358 (QL), 2005 BCSC 1518)

[5] F.H. did not tell anyone about the assaults until approximately the year 2000. He and his wife were having marital difficulties. She had learned of his extra-marital affair. He testified that because of the problems in his marriage he felt he had to tell his wife about his childhood experience. At his wife's recommendation, he sought counselling.

[6] F.H. commenced his action against the respondents on December 7, 2000, approximately 31 years after the alleged sexual assaults. In British Columbia there is no limitation period applicable to a cause of action based on sexual assault and the action may be brought at any time (see *Limitation Act*, R.S.B.C. 1996, c. 266, s. 3(4)(l)).

II. Judgments Below

A. *British Columbia Supreme Court*, [2005] B.C.J. No. 2358 (QL), 2005 BCSC 1518

[7] F.H.'s action was joined with the action of R.C., another former resident of the school who made similar claims against the same parties. The parties agreed to have a trial on the following discrete issues of fact:

(1) Was either plaintiff physically or sexually abused while he attended the school?

(2) If the plaintiff was abused

(a) by whom was he abused?

(b) when did the abuse occur? and

(c) what are the particulars of the abuse?

[8] The trial judge, Gill J., began her reasons by noting that the answer to the questions agreed to by the parties depended on findings as to credibility and reliability. Few issues of law were raised. She referred to *H.F. v. Canada (Attorney General)*, [2002] B.C.J. No. 436 (QL), 2002 BCSC 325, in

l'étage supérieur dans les toilettes des surveillants. Un autre viol a été commis.

([2005] B.C.J. No. 2358 (QL), 2005 BCSC 1518)

[5] F.H. n'a révélé les agressions subies que vers l'année 2000. Il vivait à ce moment des difficultés conjugales après que son épouse eut appris son infidélité. Il a témoigné qu'il avait alors ressenti le besoin de confier ce qu'il avait vécu enfant. Sur les conseils de son épouse, il a consulté une thérapeute.

[6] F.H. a intenté son action contre les intimés le 7 décembre 2000, soit environ 31 ans après les agressions sexuelles alléguées. En Colombie-Britannique, aucun délai de prescription ne s'applique à la poursuite pour agression sexuelle, et celle-ci peut être intentée à tout moment (voir la *Limitation Act*, R.S.B.C. 1996, ch. 266, al. 3(4)(l)).

II. Les décisions des juridictions inférieures

A. *Cour suprême de la Colombie-Britannique*, [2005] B.C.J. No. 2358 (QL), 2005 BCSC 1518

[7] L'action de F.H. et celle de R.C., un autre ancien pensionnaire ayant formulé des allégations apparentées contre les mêmes parties, ont été réunies. Les parties ont convenu que l'instruction porterait sur les questions de fait suivantes :

[TRADUCTION]

(1) L'un ou l'autre des demandeurs a-t-il été agressé physiquement ou sexuellement alors qu'il était pensionnaire?

(2) Dans l'affirmative,

a) qui l'a agressé,

b) à quel moment et

c) dans quelles circonstances?

[8] Après avoir présidé le procès, la juge Gill a d'abord fait remarquer dans ses motifs que la réponse à ces questions dépendait de la crédibilité attribuée aux témoignages. Peu de questions de droit étaient en cause. Elle a cité la décision *H.F. c. Canada (Attorney General)*, [2002] B.C.J.

which the court stated that in cases involving serious allegations and grave consequences, the civil standard of proof that is "commensurate with the occasion" applied (para. 4).

[9] The trial judge then went on to review the testimony of each plaintiff, McDougall and others who worked at the school or were former students. McDougall denied the allegations of sexual abuse and testified that he could not recall ever strapping F.H. He also denied ever conducting physical examinations of the boys and gave evidence that boys were not taken into the supervisors' washroom.

[10] In determining whether F.H. was sexually assaulted, the trial judge dealt with the arguments of the defence that F.H.'s evidence was neither reliable nor credible. Gill J. rejected the defence's position that F.H.'s inability to respond to certain questions should lead to an adverse conclusion regarding the reliability of his evidence. She found F.H.'s testimony credible while acknowledging that the commission of the assaults in the manner described by F.H. would have carried with it a risk of detection. Gill J. also rejected the contention of defence counsel that F.H.'s motive to lie must weigh heavily against his credibility. Rather she agreed with counsel for F.H. that the circumstances surrounding his disclosure were not suggestive of concoction.

[11] The trial judge pointed out areas of consistency and inconsistency between F.H.'s testimony and that of the other students at the school. She also noted that there were significant discrepancies in the evidence given by F.H. as to the frequency of the abuse. At trial, F.H. said there were four incidents. On previous occasions, he said the abuse occurred every two weeks or ten days. Despite these inconsistencies, the trial judge concluded F.H. was a credible witness and stated that his evidence about "the nature of the assaults, the location and the times they occurred" had been consistent (para. 112). She concluded that F.H. had been sexually abused by McDougall, the sexual assaults

No. 436 (QL), 2002 BCSC 325, établissant que dans un cas d'allégations graves aux conséquences sérieuses, il y avait lieu d'appliquer la norme de preuve civile qui est [TRADUCTION] « proportionnée aux circonstances » (par. 4).

[9] La juge du procès a ensuite considéré le témoignage de chacun des demandeurs, celui de M. McDougall et ceux d'autres personnes ayant travaillé au pensionnat ou y ayant séjourné. M. McDougall a nié les allégations d'agression sexuelle et dit ne pas se rappeler avoir même frappé F.H. une seule fois avec une lanière en cuir. Il a aussi nié avoir jamais procédé à des examens corporels et il a déclaré que les garçons n'étaient pas emmenés dans les toilettes des surveillants.

[10] Pour déterminer si F.H. avait été agressé sexuellement, la juge Gill a soupesé la prétention de la défense selon laquelle le témoignage de F.H. n'était ni fiable ni crédible. Elle a rejeté la thèse voulant que le tribunal doive conclure à la non-fiabilité du témoignage de F.H. en raison de l'incapacité de ce dernier de répondre à certaines questions. Elle a tenu le témoignage de F.H. pour digne de foi tout en reconnaissant que la perpétration des agressions de la manière décrite par F.H. était susceptible de détection. Elle a par ailleurs rejeté la prétention de la défense selon laquelle l'intérêt de F.H. à mentir minait grandement sa crédibilité. Elle a plutôt convenu avec le demandeur que les circonstances de la révélation des agressions ne suggéraient pas la fabrication.

[11] La juge a relevé les éléments de concordance et de divergence entre les témoignages de F.H. et ceux des autres pensionnaires. Elle a aussi noté des contradictions importantes dans le témoignage de F.H. sur la fréquence des agressions. Au procès, F.H. avait fait état de quatre agressions, alors qu'il avait dit auparavant qu'elles avaient eu lieu toutes les deux semaines ou tous les dix jours. La juge a néanmoins conclu à sa crédibilité en tant que témoin et à la constance de son témoignage concernant [TRADUCTION] « la nature des agressions ainsi que le lieu et les moments où elles se sont produites » (par. 112). À son avis, il y avait eu agressions sexuelles, M. McDougall ayant sodomisé F.H.

being four incidents of anal intercourse committed during the 1968-69 school year.

[12] In relation to the issue of physical abuse, the trial judge limited herself to deciding whether the plaintiffs had proved that they were strapped while at school. To answer this question, the trial judge reviewed the evidence of McDougall and the testimony of another Brother employed at the school as well as the testimony of several of F.H.'s fellow students. She concluded that strapping was a common form of discipline and that it was not used only in response to serious infractions. She concluded that F.H. was strapped by McDougall an undetermined number of times while at the school.

[13] With respect to the claims made by R.C., the trial judge found that he had not proven that he had been sexually assaulted, but found that he had been strapped by a person other than McDougall.

B. *British Columbia Court of Appeal* (2007), 68 B.C.L.R. (4th) 203, 2007 BCCA 212

[14] The decision of the Court of Appeal was delivered by Rowles J.A., with Southin J.A. concurring. Ryan J.A. dissented.

(1) Reasons of Rowles J.A.

[15] Rowles J.A. concluded that McDougall's appeal from that part of the order finding that he had sexually assaulted F.H. should be allowed; however his appeal from that part of the order finding that he had strapped F.H. should be dismissed.

[16] Rowles J.A. found that it was obvious that the trial judge was aware of the case authorities that have considered the standard of proof to be applied in cases where allegations of morally blameworthy conduct have been made, i.e. proof that is "commensurate with the occasion". However, in her view, the trial judge was bound to consider the serious inconsistencies in the evidence of F.H. in determining whether the alleged sexual assaults had been proven to the standard "commensurate with the allegation". She found that the trial judge did

à quatre reprises pendant l'année scolaire 1968-1969.

[12] Pour ce qui est des sévices physiques, la juge du procès s'est seulement demandé si les demandeurs avaient prouvé les coups infligés avec une lanière en cuir pendant leur séjour au pensionnat. Elle a considéré le témoignage de M. McDougall, celui d'un autre frère employé au pensionnat, ainsi que ceux d'autres anciens pensionnaires. Elle a conclu qu'il s'agissait d'un châtiment courant au pensionnat, qu'il n'était pas réservé aux auteurs de manquements graves et que M. McDougall l'avait infligé à F.H. un nombre indéterminé de fois.

[13] En ce qui concerne R.C., la juge du procès a conclu qu'il n'avait pas prouvé les agressions sexuelles alléguées et qu'une autre personne que M. McDougall l'avait frappé avec une lanière en cuir.

B. *Cour d'appel de la Colombie-Britannique* (2007), 68 B.C.L.R. (4th) 203, 2007 BCCA 212

[14] La décision de la Cour d'appel a été rendue par la juge Rowles, avec l'appui de la juge Southin, la juge Ryan inscrivant sa dissidence.

(1) Motifs de la juge Rowles

[15] La juge Rowles a conclu qu'il y avait lieu d'accueillir l'appel interjeté par M. McDougall quant à la conclusion qu'il avait agressé sexuellement F.H., mais non quant à celle qu'il l'avait frappé avec une lanière en cuir.

[16] Selon elle, la juge du procès connaissait manifestement la jurisprudence sur la norme de preuve applicable dans une affaire d'allégations d'actes moralement répréhensibles, à savoir une norme « proportionnée aux circonstances ». Toutefois, à son avis, elle aurait dû prendre en compte les contradictions importantes du témoignage de F.H. pour déterminer si les agressions sexuelles alléguées avaient été prouvées suivant la norme de preuve « proportionnée à l'allégation ». Elle a conclu que la juge du procès n'avait pas examiné la

not scrutinize the evidence in the manner required and thereby erred in law.

[17] In allowing the appeal in respect of the sexual assaults alleged by F.H., Rowles J.A. was of the opinion that in view of the state of the evidence on that issue, no practical purpose would be served by ordering a new trial.

(2) Concurring Reasons of Southin J.A.

[18] In her concurring reasons, Southin J.A. discussed the "troubling aspect" of the case — "how, in a civil case, is the evidence to be evaluated when it is oath against oath, and what is the relationship of the evaluation of the evidence to the burden of proof?" (para. 84).

[19] Southin J.A. held that it was of central importance that the gravity of the allegations be forefront in the trier of fact's approach to the evidence. It was not enough, in her view, to choose the testimony of the plaintiff over that of the defendant. Instead, "[t]o choose one over the other . . . requires . . . an articulated reason founded in evidence other than that of the plaintiff" (para. 106). Moreover, Southin J.A. found that Cory J.'s rejection in *R. v. W. (D.)*, [1991] 1 S.C.R. 742, of the "either/or" approach to evaluating evidence of the Crown and the accused as to the conduct of the accused in criminal cases also applied to civil cases.

[20] In the end, she could not find in the trial judge's reasons a "legally acceptable articulated reason for accepting the plaintiff's evidence and rejecting the defendants' evidence" (para. 112).

(3) Dissenting Reasons of Ryan J.A.

[21] While sharing the concerns of the majority about "the perils of assigning liability in cases where the events have occurred so long ago", Ryan J.A. disagreed with the conclusion that the trial judge did not apply the proper standard of proof to her assessment of the evidence (para. 115).

preuve aussi attentivement qu'elle l'aurait dû, d'où l'erreur de droit.

[17] En accueillant l'appel quant aux agressions sexuelles alléguées, la juge Rowles a estimé qu'il n'était pas utile d'ordonner la tenue d'un nouveau procès étant donné la teneur de la preuve offerte à cet égard.

(2) Motifs concordants de la juge Southin

[18] Dans ses motifs concordants, la juge Southin se penche sur l'[TRADUCTION] « aspect préoccupant » de l'affaire : « dans une instance civile, comment doit-on apprécier la preuve constituée de témoignages opposés et quelle relation doit s'établir entre l'appréciation de la preuve et le fardeau de la preuve? » (par. 84).

[19] Selon la juge Southin, il importait au plus haut point que le juge appelé à apprécier la preuve demeure conscient de la gravité des allégations. Il ne suffisait pas de préférer le témoignage du demandeur à celui du défendeur, car [TRADUCTION] « préférer [ce] témoignage à [l']autre [. . .] exige [. . .] qu'un motif convaincant fondé sur un autre élément de preuve que le témoignage du demandeur le justifie » (par. 106). De plus, elle a statué que dans l'arrêt *R. c. W. (D.)*, [1991] 1 R.C.S. 742, la conclusion du juge Cory selon laquelle il n'y avait pas d'obligation de choisir entre la preuve de la poursuite et celle de l'accusé s'appliquait également en matière civile.

[20] Finalement, elle n'a pas relevé dans les motifs de la juge du procès [TRADUCTION] « de motif convaincant et valable en droit d'ajouter foi au témoignage du demandeur et d'écarter ceux des défendeurs » (par. 112).

(3) Motifs dissidents de la juge Ryan

[21] Même si elle partage les préoccupations des juges majoritaires concernant [TRADUCTION] « le risque d'imputer une responsabilité pour des faits survenus il y a aussi longtemps », la juge Ryan se refuse à conclure que la juge du procès n'a pas appliqué la bonne norme de preuve (par. 115).

[22] Ryan J.A. noted that the trial judge set out the test — a standard of proof commensurate with the occasion — early in her reasons. "Having set out the proper test, we must assume that she properly applied it, unless her reasons demonstrate otherwise" (para. 116).

[23] In the view of Ryan J.A., alleging that the trial judge misapplied the standard of proof to her assessment of the evidence was to say that the trial judge erred in her findings of fact. To overturn the trial judge's findings of fact, the appellate court must find that the trial judge made a manifest error, ignored conclusive or relevant evidence or drew unreasonable conclusions from it.

[24] Ryan J.A. was of the view that the trial judge had made no such error. The trial judge had acknowledged the most troubling aspect of F.H.'s testimony — that it was not consistent with earlier descriptions of the abuse — and decided that at its core, the testimony was consistent and truthful. The inconsistencies were not overlooked by the trial judge.

[25] Having found no error in the reasons for judgment, Ryan J.A. was of the view that the Court of Appeal should have deferred to the conclusions of the trial judge. Accordingly, she would have dismissed the appeal.

III. Analysis

A. *The Standard of Proof*

(1) Canadian Jurisprudence

[26] Much has been written as judges have attempted to reconcile the tension between the civil standard of proof on a balance of probabilities and cases in which allegations made against a defendant are particularly grave. Such cases include allegations of fraud, professional misconduct, and criminal conduct, particularly sexual assault against minors. As explained by L. R. Rothstein, R. A. Centa and E. Adams, in "Balancing Probabilities: The Overlooked Complexity of the Civil Standard

[22] Elle signale qu'au début de ses motifs, la juge du procès énonce le critère applicable, celui de la norme de preuve proportionnée aux circonstances : [TRADUCTION] « une fois le bon critère établi, il faut supposer qu'elle l'a correctement appliqué, à moins que ses motifs n'indiquent le contraire » (par. 116).

[23] Selon elle, prétendre que la juge du procès a mal appliqué la norme aux faits mis en preuve revient à dire qu'elle a tiré des conclusions de fait erronées. Or, pour infirmer des conclusions de fait, une cour d'appel doit constater qu'une erreur manifeste a été commise, qu'un élément de preuve déterminant ou pertinent n'a pas été pris en compte ou que des conclusions déraisonnables ont été tirées de la preuve.

[24] La juge Ryan estime que la juge du procès n'a pas commis de telles erreurs. Cette dernière a reconnu l'aspect le plus préoccupant du témoignage de F.H. — sa divergence avec les descriptions antérieures des agressions — et elle a conclu que, pour l'essentiel, le témoignage était constant et digne de foi. Elle n'a donc pas fait abstraction des contradictions.

[25] À défaut d'erreur entachant les motifs de la décision contestée, la juge Ryan a conclu que la Cour d'appel aurait dû respecter les conclusions de la juge du procès. Elle était donc d'avis de rejeter l'appel.

III. Analyse

A. *La norme de preuve*

(1) La jurisprudence canadienne

[26] Les efforts des tribunaux pour résoudre les difficultés que pose l'application de la norme de preuve civile de la prépondérance des probabilités dans une affaire où les faits reprochés au défendeur sont particulièrement graves — comme la fraude, la faute professionnelle ou le comportement criminel, en particulier l'agression sexuelle d'un mineur — ont suscité de nombreux commentaires. Comme l'expliquent L. R. Rothstein, R. A. Centa et E. Adams dans leur article intitulé « Balancing

of Proof" in *Special Lectures of the Law Society of Upper Canada 2003: The Law of Evidence* (2004), 455, at p. 456:

These types of allegations are considered unique because they carry a moral stigma that will continue to have an impact on the individual after the completion of the case.

[27] Courts in British Columbia have tended to follow the approach of Lord Denning in *Bater v. Bater*, [1950] 2 All E.R. 458 (C.A.). Lord Denning was of the view that within the civil standard of proof on a balance of probabilities "there may be degrees of probability within that standard" (p. 459), depending upon the subject matter. He stated:

It does not adopt so high a degree as a criminal court, even when it is considering a charge of a criminal nature, but still it does require a degree of probability which is commensurate with the occasion. [p. 459]

[28] In the present case the trial judge referred to *H.F. v. Canada (Attorney General)*, at para. 154, in which Neilson J. stated:

The court is justified in imposing a higher degree of probability which is "commensurate with the occasion": . . . .

[29] In the constitutional context, Dickson C.J. adopted the *Bater* approach in *R. v. Oakes*, [1986] 1 S.C.R. 103. In his view a "very high degree of probability" required that the evidence be cogent and persuasive and make clear the consequences of the decision one way or the other. He wrote at p. 138:

Having regard to the fact that s. 1 is being invoked for the purpose of justifying a violation of the constitutional rights and freedoms the *Charter* was designed to protect, a very high degree of probability will be, in the words of Lord Denning, "commensurate with the occasion". Where evidence is required in order to prove the constituent elements of a s. 1 inquiry, and this will generally be the case, it should be cogent and persuasive and make clear to the Court the consequences of imposing or not imposing the limit.

Probabilities : The Overlooked Complexity of the Civil Standard of Proof », dans *Special Lectures of the Law Society of Upper Canada 2003 : The Law of Evidence* (2004), 455, p. 456 :

[TRADUCTION] Les allégations de cette nature sont jugées uniques parce qu'elles continuent de frapper l'intéressé d'un opprobre moral même après le dénouement de l'instance.

[27] Les tribunaux de la Colombie-Britannique se sont généralement rangés à l'avis exprimé par lord Denning dans l'arrêt *Bater c. Bater*, [1950] 2 All E.R. 458 (C.A.), à savoir que la norme civile de la prépondérance des probabilités [TRADUCTION] « peut comporter des degrés de probabilité » (p. 459), selon l'objet du litige. Voici ce qu'il a dit :

[TRADUCTION] [Une cour civile] n'adopte pas une norme aussi sévère que le ferait une cour criminelle, même en examinant une accusation de nature criminelle, mais il reste qu'elle exige un degré de probabilité proportionné aux circonstances. [p. 459]

[28] En l'espèce, la juge du procès a cité les propos suivants de la juge Neilson dans la décision *H.F. c. Canada (Attorney General)*, par. 154 :

[TRADUCTION] La cour est justifiée d'exiger un degré de probabilité plus élevé qui soit « proportionné aux circonstances » : . . .

[29] Dans l'arrêt *R. c. Oakes*, [1986] 1 R.C.S. 103, portant sur une question d'ordre constitutionnel, le juge en chef Dickson s'est rallié à l'approche formulée dans l'arrêt *Bater*. À son avis, un « degré très élevé de probabilité » exigeait que la preuve soit forte et persuasive et qu'elle fasse ressortir nettement les conséquences de la décision quelle qu'elle soit (p. 138) :

Compte tenu du fait que l'article premier est invoqué afin de justifier une violation des droits et libertés constitutionnels que la *Charte* vise à protéger, un degré très élevé de probabilité sera, pour reprendre l'expression de lord Denning, « proportionné aux circonstances ». Lorsqu'une preuve est nécessaire pour établir les éléments constitutifs d'une analyse en vertu de l'article premier, ce qui est généralement le cas, elle doit être forte et persuasive et faire ressortir nettement à la cour les conséquences d'une décision d'imposer ou de ne pas imposer la restriction.

[30] However, a "shifting standard" of probability has not been universally accepted. In *Continental Insurance Co. v. Dalton Cartage Co.*, [1982] 1 S.C.R. 164, Laskin C.J. rejected a "shifting standard". Rather, to take account of the seriousness of the allegation, he was of the view that a trial judge should scrutinize the evidence with "greater care". At pp. 169-71 he stated:

> Where there is an allegation of conduct that is morally blameworthy or that could have a criminal or penal aspect and the allegation is made in civil litigation, the relevant burden of proof remains proof on a balance of probabilities. . . .
>
> . . . There is necessarily a matter of judgment involved in weighing evidence that goes to the burden of proof, and a trial judge is justified in scrutinizing evidence with greater care if there are serious allegations to be established by the proof that is offered. . . .
>
> I do not regard such an approach (the *Bater* approach) as a departure from a standard of proof based on a balance of probabilities nor as supporting a shifting standard. The question in all civil cases is what evidence with what weight that is accorded to it will move the court to conclude that proof on a balance of probabilities has been established.

[31] In Ontario Professional Discipline cases, the balance of probabilities requires that proof be "clear and convincing and based upon cogent evidence" (see *Heath v. College of Physicians & Surgeons (Ontario)* (1997), 6 Admin. L.R. (3d) 304 (Ont. Ct. (Gen. Div.)), at para. 53).

(2) Recent United Kingdom Jurisprudence

[32] In the United Kingdom some decisions have indicated that depending upon the seriousness of the matters involved, even in civil cases, the criminal standard of proof should apply. In *R (McCann) v. Crown Court at Manchester*, [2003] 1 A.C. 787, [2002] UKHL 39, Lord Steyn said at para. 37:

> . . . I agree that, given the seriousness of matters involved, at least some reference to the heightened civil

[30] Une « norme variable » de probabilité n'a toutefois pas fait l'unanimité. Dans l'arrêt *Continental Insurance Co. c. Dalton Cartage Co.*, [1982] 1 R.C.S. 164, le juge en chef Laskin l'a en effet écartée. À son avis, pour tenir compte de la gravité de l'allégation, le juge du procès devait plutôt examiner la preuve « plus attentivement » (p. 169-171) :

> Chaque fois qu'il y a une allégation de conduite moralement blâmable ou qui peut revêtir un aspect criminel ou pénal et que l'allégation se présente dans le cadre d'un litige civil, le fardeau de la preuve qui s'applique est toujours celui de la preuve suivant la prépondérance des probabilités. . .
>
> . . . L'appréciation des éléments de preuve se rapportant au fardeau de la preuve implique nécessairement une question de jugement, et un juge de première instance est fondé à examiner la preuve plus attentivement si la preuve offerte doit établir des allégations sérieuses. . .
>
> Je n'estime pas que ce point de vue [celui de l'arrêt *Bater*] s'écarte du principe d'une norme de preuve fondée sur la prépondérance des probabilités ni qu'il appuie une norme variable. La question dans toutes les affaires civiles est de savoir quelle preuve il faut apporter et quel poids lui accorder pour que la cour conclue qu'on a fait la preuve suivant la prépondérance des probabilités.

[31] Suivant les décisions ontariennes rendues en matière de discipline professionnelle, la norme de la prépondérance des probabilités exige que la preuve soit [TRADUCTION] « claire et persuasive et qu'elle se fonde sur des éléments solides » (voir *Heath c. College of Physicians & Surgeons (Ontario)* (1997), 6 Admin. L.R. (3d) 304 (C. Ont. (Div. gén.)), par. 53).

(2) La jurisprudence britannique récente

[32] Au Royaume-Uni, il appert de certaines décisions que, selon la gravité des questions en jeu, la norme de preuve pénale s'applique même dans une affaire civile. Dans l'arrêt *R (McCann) c. Crown Court at Manchester*, [2003] 1 A.C. 787, [2002] UKHL 39, lord Steyn s'exprime comme suit au par. 37 :

> [TRADUCTION] . . . je conviens qu'en raison de la gravité des questions en jeu, il serait normalement nécessaire

standard would usually be necessary: *In re H (Minors) (Sexual Abuse: Standard of Proof)* [1996] AC 563, 586 D-H, per Lord Nicholls of Birkenhead. For essentially practical reasons, the Recorder of Manchester decided to apply the criminal standard. The Court of Appeal said that would usually be the right course to adopt. Lord Bingham of Cornhill has observed that the heightened civil standard and the criminal standard are virtually indistinguishable. I do not disagree with any of these views. But in my view pragmatism dictates that the task of magistrates should be made more straightforward by ruling that they must in all cases under section 1 apply the criminal standard.

[33] Yet another consideration, that of "inherent probability or improbability of an event" was discussed by Lord Nicholls in *In re H. (Minors) (Sexual Abuse: Standard of Proof)*, [1996] A.C. 563 (H.L.), at p. 586:

> . . . the inherent probability or improbability of an event is itself a matter to be taken into account when weighing the probabilities and deciding whether, on balance, the event occurred. The more improbable the event, the stronger must be the evidence that it did occur before, on the balance of probability, its occurrence will be established.

[34] Most recently in *In re B (Children)*, [2008] 3 W.L.R. 1, [2008] UKHL 35, a June 11, 2008 decision, the U.K. House of Lords again canvassed the issue of standard of proof. Subsequent to the hearing of the appeal, Mr. Southey, counsel for the Attorney General of Canada, with no objection from other counsel, brought this case to the attention of the Court.

[35] Lord Hoffmann addressed the "confusion" in the United Kingdom courts over this issue. He stated at para. 5:

> Some confusion has however been caused by dicta which suggest that the standard of proof may vary with the gravity of the misconduct alleged or even the seriousness of the consequences for the person concerned. The cases in which such statements have been made fall into three categories. First, there are cases in which the court has for one purpose classified the proceedings as civil (for example, for the purposes of article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms) but nevertheless thought that, because of the serious consequences of the

de faire appel, dans une certaine mesure, à la norme de preuve civile plus stricte : *In re H (Minors) (Sexual Abuse : Standard of Proof)* [1996] AC 563, 586 D-H, lord Nicholls of Birkenhead. Essentiellement pour des raisons d'ordre pratique, le recorder de Manchester a décidé d'appliquer la norme pénale. La Cour d'appel a indiqué que ce choix est opportun dans la plupart des cas. Lord Bingham of Cornhill a fait remarquer que la norme civile plus stricte est presque identique à la norme appliquée au pénal. Je ne rejette aucun de ces points de vue. Mais à mon avis, le pragmatisme commande de faciliter la tâche des tribunaux en leur enjoignant d'appliquer la norme pénale dans toute affaire relative à l'article premier.

[33] Dans l'arrêt *In re H. (Minors) (Sexual Abuse : Standard of Proof)*, [1996] A.C. 563 (H.L.), lord Nicholls aborde un autre aspect, celui de [TRADUCTION] « la probabilité ou [de] l'improbabilité intrinsèque d'un événement » (p. 586) :

> [TRADUCTION] . . . la probabilité ou l'improbabilité intrinsèque d'un événement est un élément à prendre en compte pour soupeser les probabilités et décider si, tout bien considéré, l'événement a eu lieu. Plus l'événement est improbable, plus la preuve offerte doit être forte pour l'établir suivant la prépondérance des probabilités.

[34] Plus récemment, dans l'arrêt *In re B (Children)*, [2008] 3 W.L.R. 1, [2008] UKHL 35, rendu le 11 juin 2008, la Chambre des lords s'est de nouveau penchée sur la question de la norme de preuve. Après l'audition du présent pourvoi, l'avocat du procureur général du Canada, M^e^ Southey, a porté cet arrêt à l'attention de notre Cour sans que les avocats des autres parties ne s'y opposent.

[35] Lord Hoffmann y fait état de la « confusion » qui règne au sein des tribunaux britanniques sur le sujet (par. 5) :

> [TRADUCTION] Une certaine confusion a toutefois été créée par des décisions donnant à penser que la norme de preuve peut varier selon la gravité de la faute alléguée, voire celle des conséquences pour l'intéressé. Ces décisions appartiennent à trois catégories. Dans la première, le tribunal qualifie l'affaire de civile à une fin donnée (p. ex., pour l'application de l'article 6 de la Convention européenne des droits de l'homme et des libertés fondamentales), mais il estime néanmoins, vu la gravité des conséquences de l'instance, que la norme de preuve pénale ou l'équivalent devrait s'appliquer. Dans

proceedings, the criminal standard of proof or something like it should be applied. Secondly, there are cases in which it has been observed that when some event is inherently improbable, strong evidence may be needed to persuade a tribunal that it more probably happened than not. Thirdly, there are cases in which judges are simply confused about whether they are talking about the standard of proof or about the role of inherent probabilities in deciding whether the burden of proving a fact to a given standard has been discharged.

[36] The unanimous conclusion of the House of Lords was that there is only one civil standard of proof. At para. 13, Lord Hoffmann states:

I think that the time has come to say, once and for all, that there is only one civil standard of proof and that is proof that the fact in issue more probably occurred than not.

However, Lord Hoffmann did not disapprove of application of the criminal standard depending upon the issue involved. Following his very clear statement that there is only one civil standard of proof, he somewhat enigmatically wrote, still in para. 13:

I do not intend to disapprove any of the cases in what I have called the first category, but I agree with the observation of Lord Steyn in *McCann's* case, at p. 812, that clarity would be greatly enhanced if the courts said simply that although the proceedings were civil, the nature of the particular issue involved made it appropriate to apply the criminal standard.

[37] Lord Hoffmann went on to express the view that taking account of inherent probabilities was not a rule of law. At para. 15 he stated:

I wish to lay some stress upon the words I have italicised ["to whatever extent is appropriate in the particular case"]. Lord Nicholls [*In re H*] was not laying down any rule of law. There is only one rule of law, namely that the occurrence of the fact in issue must be proved to have been more probable than not. Common sense, not law, requires that in deciding this question, regard should be had, to whatever extent appropriate, to inherent probabilities.

[38] *In re B* is a child case under the United Kingdom *Children Act 1989*. While her comments on standard of proof are confined to the 1989 Act, Baroness Hale explained that neither the seriousness of the allegation nor the seriousness of the

la deuxième catégorie, le tribunal opine que lorsqu'un événement est intrinsèquement improbable, de solides éléments de preuve peuvent être nécessaires pour le convaincre qu'il est plus probable que l'événement se soit produit que le contraire. Dans la troisième catégorie, le juge confond simplement la norme de preuve et le rôle de la probabilité intrinsèque pour décider si une partie s'est acquittée ou non du fardeau de la preuve au regard de la norme applicable.

[36] La Chambre des lords a conclu à l'unanimité à l'existence d'une seule norme de preuve en matière civile. Lord Hoffmann dit au par. 13 :

[TRADUCTION] Je pense que le temps est venu d'affirmer une fois pour toutes qu'il n'y a en matière civile qu'une seule norme de preuve : il doit être plus probable que le fait allégué s'est produit que le contraire.

Or, lord Hoffmann n'a pas désapprouvé l'application de la norme pénale selon la question en jeu. Après avoir très clairement énoncé qu'une seule norme de preuve s'appliquait en matière civile, il poursuit au par. 13 en tenant des propos plutôt énigmatiques :

[TRADUCTION] Je n'entends pas désapprouver l'une ou l'autre des décisions comprises dans la première catégorie, mais je conviens avec lord Steyn dans *McCann's*, p. 812 que ce serait beaucoup plus clair si les tribunaux disaient simplement que, même s'il s'agit d'une instance civile, vu la nature de la question en jeu, il est indiqué d'appliquer la norme pénale.

[37] Lord Hoffmann ajoute que la prise en compte de la probabilité intrinsèque ne constitue pas une règle de droit (par. 15) :

[TRADUCTION] J'insiste sur les mots que j'ai mis en italiques [« dans la mesure où cela est indiqué dans les circonstances »]. Lord Nicholls [dans *In re H*] n'a pas énoncé une règle de droit. Il n'existe qu'une seule règle de droit : il faut prouver qu'il est plus probable que le fait a eu lieu que le contraire. Le sens commun — et non le droit — exige, pour trancher à cet égard, qu'on tienne compte, dans la mesure où cela est indiqué, de la probabilité intrinsèque.

[38] L'arrêt *In re B* a été rendu sous le régime de la *Children Act 1989* du Royaume-Uni. Bien que ses observations sur la norme de preuve applicable ne valent que pour cette loi, la baronne Hale explique que ni la gravité de l'allégation ni celle

consequences should make any difference to the standard of proof to be applied in determining the facts. At paras. 70-72, she stated:

My Lords, for that reason I would go further and announce loud and clear that the standard of proof in finding the facts necessary to establish the threshold under section 31(2) or the welfare considerations in section I of the 1989 Act is the simple balance of probabilities, neither more nor less. Neither the seriousness of the allegation nor the seriousness of the consequences should make any difference to the standard of proof to be applied in determining the facts. The inherent probabilities are simply something to be taken into account, where relevant, in deciding where the truth lies.

As to the seriousness of the consequences, they are serious either way. A child may find her relationship with her family seriously disrupted; or she may find herself still at risk of suffering serious harm. A parent may find his relationship with his child seriously disrupted; or he may find himself still at liberty to maltreat this or other children in the future.

As to the seriousness of the allegation, there is no logical or necessary connection between seriousness and probability. Some seriously harmful behaviour, such as murder, is sufficiently rare to be inherently improbable in most circumstances. Even then there are circumstances, such as a body with its throat cut and no weapon to hand, where it is not at all improbable. Other seriously harmful behaviour, such as alcohol or drug abuse, is regrettably all too common and not at all improbable.

(3) Summary of Various Approaches

[39] I summarize the various approaches in civil cases where criminal or morally blameworthy conduct is alleged as I understand them:

(1) The criminal standard of proof applies in civil cases depending upon the seriousness of the allegation;

(2) An intermediate standard of proof between the civil standard and the criminal standard commensurate with the occasion applies to civil cases;

(3) No heightened standard of proof applies in civil cases, but the evidence must be scrutinized with greater care where the allegation is serious;

des conséquences possibles ne devraient modifier la norme de preuve appliquée pour établir les faits. Voici ce qu'elle dit aux par. 70-72 :

[TRADUCTION] Vos seigneuries, pour cette raison, j'irais plus loin et je clamerais haut et fort que la norme de preuve applicable pour établir les faits nécessaires au respect du critère du par. 31(2) ou à l'application des considérations liées au bien-être de l'article premier de la loi de 1989 est simplement la prépondérance des probabilités, ni plus ni moins. Ni la gravité de l'allégation, ni celle des conséquences ne devraient modifier la norme de preuve appliquée pour établir les faits. La probabilité intrinsèque ne doit être prise en compte, s'il y a lieu, que pour découvrir la vérité.

Pour ce qui est des conséquences, elles sont toujours sérieuses quelle que soit l'issue de l'instance. L'enfant peut voir sa relation avec sa famille sérieusement compromise ou s'exposer encore à un préjudice important. À l'inverse, le père ou la mère peut voir sa relation avec l'enfant sérieusement compromise ou avoir encore la possibilité de maltraiter cet enfant ou un autre.

Pour ce qui est de la gravité de l'allégation, il n'y a pas de lien logique ou nécessaire entre gravité et probabilité. Le comportement gravement préjudiciable — comme le meurtre — est suffisamment rare pour être la plupart du temps intrinsèquement improbable. Malgré cela, lorsque, par exemple, on découvre un corps à la gorge tranchée, mais aucune arme à proximité, le meurtre est loin d'être improbable. D'autres comportements gravement préjudiciables, comme l'alcoolisme ou la toxicomanie, sont malheureusement trop répandus et loin d'être improbables.

(3) Résumé des différentes approches

[39] Voici en résumé quelles sont selon moi les différentes approches possibles dans une affaire civile où un comportement criminel ou moralement répréhensible est allégué :

(1) La norme de preuve pénale s'applique selon la gravité de l'allégation.

(2) Une norme de preuve intermédiaire se situant entre la civile et la pénale, proportionnée aux circonstances, s'applique.

(3) Lorsque l'allégation est grave, la norme de preuve n'est pas plus stricte, mais la preuve doit faire l'objet d'un examen plus attentif.

(4) No heightened standard of proof applies in civil cases, but evidence must be clear, convincing and cogent; and

(5) No heightened standard of proof applies in civil cases, but the more improbable the event, the stronger the evidence is needed to meet the balance of probabilities test.

(4) The Approach Canadian Courts Should Now Adopt

[40] Like the House of Lords, I think it is time to say, once and for all in Canada, that there is only one civil standard of proof at common law and that is proof on a balance of probabilities. Of course, context is all important and a judge should not be unmindful, where appropriate, of inherent probabilities or improbabilities or the seriousness of the allegations or consequences. However, these considerations do not change the standard of proof. I am of the respectful opinion that the alternatives I have listed above should be rejected for the reasons that follow.

[41] Since *Hanes v. Wawanesa Mutual Insurance Co.*, [1963] S.C.R. 154, at pp. 158-64, it has been clear that the criminal standard is not to be applied to civil cases in Canada. The criminal standard of proof beyond a reasonable doubt is linked to the presumption of innocence in criminal trials. The burden of proof always remains with the prosecution. As explained by Cory J. in *R. v. Lifchus*, [1997] 3 S.C.R. 320, at para. 27:

First, it must be made clear to the jury that the standard of proof beyond a reasonable doubt is vitally important since it is inextricably linked to that basic premise which is fundamental to all criminal trials: the presumption of innocence. The two concepts are forever as closely linked as Romeo with Juliet or Oberon with Titania and they must be presented together as a unit. If the presumption of innocence is the golden thread of criminal justice then proof beyond a reasonable doubt is the silver and these two threads are forever intertwined in the fabric of criminal law. Jurors must be reminded that the burden of proving beyond a reasonable doubt

(4) La norme de preuve n'est pas plus stricte, mais la preuve doit être claire et convaincante.

(5) La norme de preuve n'est pas plus stricte, mais plus l'événement est improbable, plus la preuve doit être solide pour satisfaire au critère de la prépondérance des probabilités.

(4) L'approche qui devrait désormais être celle des cours de justice canadiennes

[40] Comme l'a fait la Chambre des lords, notre Cour devrait selon moi affirmer une fois pour toutes qu'il n'existe au Canada, en common law, qu'une seule norme de preuve en matière civile, celle de la prépondérance des probabilités. Le contexte constitue évidemment un élément important et le juge ne doit pas faire abstraction, lorsque les circonstances s'y prêtent, de la probabilité ou de l'improbabilité intrinsèque des faits allégués non plus que de la gravité des allégations ou de leurs conséquences. Toutefois, ces considérations ne modifient en rien la norme de preuve. À mon humble avis, pour les motifs qui suivent, il faut écarter les approches énumérées précédemment.

[41] L'arrêt *Hanes c. Wawanesa Mutual Insurance Co.*, [1963] R.C.S. 154, p. 158-164, a clairement établi que la norme pénale ne s'applique pas en matière civile au Canada. La preuve hors de tout doute raisonnable exigée en matière criminelle est liée à la présomption d'innocence dont bénéficie l'accusé dans un procès pénal. Le fardeau de la preuve incombe toujours à la poursuite. Comme l'a expliqué le juge Cory dans l'arrêt *R. c. Lifchus*, [1997] 3 R.C.S. 320, par. 27 :

Premièrement, il faut indiquer clairement au jury que la norme de la preuve hors de tout doute raisonnable a une importance vitale puisqu'elle est inextricablement liée au principe fondamental de tous les procès pénaux : la présomption d'innocence. Ces deux concepts sont pour toujours intimement liés l'un à l'autre, comme Roméo et Juliette ou Oberon et Titania, et ils doivent être présentés comme formant un tout. Si la présomption d'innocence est le fil d'or de la justice pénale, alors la preuve hors de tout doute raisonnable en est le fil d'argent, et ces deux fils sont pour toujours entrelacés pour former la trame du droit pénal. Il faut

that the accused committed the crime rests with the prosecution throughout the trial and never shifts to the accused.

[42] By contrast, in civil cases, there is no presumption of innocence. As explained by J. Sopinka, S. N. Lederman and A. W. Bryant, *The Law of Evidence in Canada* (2nd ed. 1999), at p. 154:

Since society is indifferent to whether the plaintiff or the defendant wins a particular civil suit, it is unnecessary to protect against an erroneous result by requiring a standard of proof higher than a balance of probabilities.

It is true that there may be serious consequences to a finding of liability in a civil case that continue past the end of the case. However, the civil case does not involve the government's power to penalize or take away the liberty of the individual.

[43] An intermediate standard of proof presents practical problems. As expressed by Rothstein, Centa and Adams, at pp. 466-67:

As well, suggesting that the standard of proof is "higher" than the "mere balance of probabilities" inevitably leads one to inquire: what percentage of probability must be met? This is unhelpful because while the concept of "51 percent probability," or "more likely than not" can be understood by decisionmakers, the concept of 60 percent or 70 percent probability cannot.

[44] Put another way, it would seem incongruous for a judge to conclude that it was more likely than not that an event occurred, but not sufficiently likely to some unspecified standard and therefore that it did not occur. As Lord Hoffmann explained in *In re B* at para. 2:

If a legal rule requires a fact to be proved (a "fact in issue"), a judge or jury must decide whether or not it happened. There is no room for a finding that it might have happened. The law operates a binary system in which the only values are zero and one. The fact either happened or it did not. If the tribunal is left in doubt, the doubt is resolved by a rule that one party or the other

rappeler aux jurés que le fardeau de prouver hors de tout doute raisonnable que l'accusé a commis le crime incombe à la poursuite tout au long du procès, et qu'il ne se déplace jamais sur les épaules de l'accusé.

[42] À l'opposé, dans une affaire civile, nulle présomption d'innocence ne s'applique. L'explication en est donnée dans J. Sopinka, S. N. Lederman et A. W. Bryant, *The Law of Evidence in Canada* (2e éd. 1999), p. 154 :

[TRADUCTION] Comme il importe peu à la société que le demandeur ou le défendeur ait gain de cause dans une instance civile, il n'y a pas lieu de prévenir un jugement erroné en appliquant une norme de preuve plus stricte que celle de la prépondérance des probabilités.

Il est vrai qu'une conclusion de responsabilité tirée dans une affaire civile peut avoir des conséquences sérieuses qui continuent de se faire sentir après l'instance. Mais il demeure qu'une affaire civile ne fait pas intervenir le pouvoir de l'État de punir une personne ou de la priver de sa liberté.

[43] Le recours à une norme de preuve intermédiaire présente des difficultés d'ordre pratique. Comme le disent Rothstein, Centa et Adams (p. 466-467) :

[TRADUCTION] De même, laisser entendre que la norme de preuve applicable est « plus stricte » que la « simple prépondérance des probabilités » soulève nécessairement la question du pourcentage de probabilité à établir? Ce qui n'est d'aucune utilité, car le décideur pourra se représenter une probabilité de « 51 p. 100 » ou une « probabilité plus grande », mais non une probabilité de 60 p. 100 ou de 70 p. 100.

[44] Autrement dit, il semblerait incongru qu'un juge conclue qu'il est probable, mais pas assez probable suivant une norme non précisée, qu'un événement ait eu lieu et, par conséquent, que cet événement ne s'est pas produit. Comme l'explique lord Hoffmann dans l'arrêt *In re B*, par. 2 :

[TRADUCTION] Lorsqu'une règle de droit exige la preuve d'un fait (le « fait en litige »), le juge ou le jury doit déterminer si le fait s'est ou non produit. Il ne saurait conclure qu'il a pu se produire. Le droit est un système binaire, les seules valeurs possibles étant zéro et un. Ou bien le fait s'est produit, ou bien il ne s'est pas produit. Lorsqu'un doute subsiste, la règle selon laquelle

carries the burden of proof. If the party who bears the burden of proof fails to discharge it, a value of zero is returned and the fact is treated as not having happened. If he does discharge it, a value of one is returned and the fact is treated as having happened.

In my view, the only practical way in which to reach a factual conclusion in a civil case is to decide whether it is more likely than not that the event occurred.

[45] To suggest that depending upon the seriousness, the evidence in the civil case must be scrutinized with greater care implies that in less serious cases the evidence need not be scrutinized with such care. I think it is inappropriate to say that there are legally recognized different levels of scrutiny of the evidence depending upon the seriousness of the case. There is only one legal rule and that is that in all cases, evidence must be scrutinized with care by the trial judge.

[46] Similarly, evidence must always be sufficiently clear, convincing and cogent to satisfy the balance of probabilities test. But again, there is no objective standard to measure sufficiency. In serious cases, like the present, judges may be faced with evidence of events that are alleged to have occurred many years before, where there is little other evidence than that of the plaintiff and defendant. As difficult as the task may be, the judge must make a decision. If a responsible judge finds for the plaintiff, it must be accepted that the evidence was sufficiently clear, convincing and cogent to that judge that the plaintiff satisfied the balance of probabilities test.

[47] Finally there may be cases in which there is an inherent improbability that an event occurred. Inherent improbability will always depend upon the circumstances. As Baroness Hale stated in *In re B*, at para. 72:

Consider the famous example of the animal seen in Regent's Park. If it is seen outside the zoo on a stretch of greensward regularly used for walking dogs, then of course it is more likely to be a dog than a lion. If it is

le fardeau de la preuve incombe à l'une ou l'autre des parties permet de trancher. Lorsque la partie à laquelle incombe la preuve ne s'acquitte pas de son obligation, la valeur est de zéro et le fait est réputé ne pas avoir eu lieu. Lorsqu'elle s'en acquitte, la valeur est de un, et le fait est réputé s'être produit.

À mon avis, la seule façon possible d'arriver à une conclusion de fait dans une instance civile consiste à déterminer si, selon toute vraisemblance, l'événement a eu lieu.

[45] Laisser entendre que lorsqu'une allégation formulée dans une affaire civile est grave, la preuve offerte doit être examinée plus attentivement suppose que l'examen peut être moins rigoureux dans le cas d'une allégation moins grave. Je crois qu'il est erroné de dire que notre régime juridique admet différents degrés d'examen de la preuve selon la gravité de l'affaire. Il n'existe qu'une seule règle de droit : le juge du procès doit examiner la preuve attentivement.

[46] De même, la preuve doit toujours être claire et convaincante pour satisfaire au critère de la prépondérance des probabilités. Mais, je le répète, aucune norme objective ne permet de déterminer qu'elle l'est suffisamment. Dans le cas d'une allégation grave comme celle considérée en l'espèce, le juge peut être appelé à apprécier la preuve de faits qui se seraient produits de nombreuses années auparavant, une preuve constituée essentiellement des témoignages du demandeur et du défendeur. Aussi difficile que puisse être sa tâche, le juge doit trancher. Lorsqu'un juge consciencieux ajoute foi à la thèse du demandeur, il faut tenir pour acquis que la preuve était à ses yeux suffisamment claire et convaincante pour conclure au respect du critère de la prépondérance des probabilités.

[47] Enfin, il peut arriver que le fait soit intrinsèquement improbable. L'improbabilité intrinsèque dépend toujours des circonstances. Comme le dit la baronne Hale dans l'arrêt *In re B*, par. 72 :

[TRADUCTION] Prenons l'exemple bien connu de l'animal aperçu dans Regent's Park. S'il est vu à l'extérieur du zoo, dans un lieu où l'on promène habituellement son chien, alors il est plus vraisemblable qu'il s'agisse d'un

seen in the zoo next to the lions' enclosure when the door is open, then it may well be more likely to be a lion than a dog.

[48] Some alleged events may be highly improbable. Others less so. There can be no rule as to when and to what extent inherent improbability must be taken into account by a trial judge. As Lord Hoffmann observed at para. 15 of *In re B*:

Common sense, not law, requires that in deciding this question, regard should be had, to whatever extent appropriate, to inherent probabilities.

It will be for the trial judge to decide to what extent, if any, the circumstances suggest that an allegation is inherently improbable and where appropriate, that may be taken into account in the assessment of whether the evidence establishes that it is more likely than not that the event occurred. However, there can be no rule of law imposing such a formula.

(5) Conclusion on Standard of Proof

[49] In the result, I would reaffirm that in civil cases there is only one standard of proof and that is proof on a balance of probabilities. In all civil cases, the trial judge must scrutinize the relevant evidence with care to determine whether it is more likely than not that an alleged event occurred.

[50] I turn now to the issues particular to this case.

B. *The Concerns of the Court of Appeal Respecting Inconsistency in the Evidence of F.H.*

[51] The level of scrutiny required in cases of sexual assault was central to the analysis of the Court of Appeal. According to Rowles J.A. at para. 72, one of the issues was "whether the trial judge, in light of the standard of proof that had to be applied in a case such as this, failed to consider

chien que d'un lion. S'il est vu à l'intérieur du zoo, près de l'enclos des lions, dont la porte est ouverte, il se peut fort bien qu'il soit plus vraisemblable qu'il s'agisse d'un lion que d'un chien.

[48] Un fait allégué peut être très improbable, un autre moins. Il ne saurait y avoir de règle permettant de déterminer dans quelles circonstances et jusqu'à quel point le juge du procès doit tenir compte de l'improbabilité intrinsèque. Dans l'arrêt *In re B*, lord Hoffmann fait remarquer ce qui suit (par. 15) :

[TRADUCTION] Le sens commun — et non le droit — exige, pour trancher à cet égard, qu'on tienne compte, dans la mesure où cela est indiqué, de la probabilité intrinsèque.

Il revient au juge du procès de décider dans quelle mesure, le cas échéant, les circonstances donnent à penser que le fait allégué est intrinsèquement improbable et, s'il l'estime indiqué, il peut en tenir compte pour déterminer si la preuve établit que, selon toute vraisemblance, l'événement s'est produit. Or, aucune règle de droit ne saurait le lui imposer.

(5) Conclusion sur la norme de preuve

[49] En conséquence, je suis d'avis de confirmer que dans une instance civile, une seule norme de preuve s'applique, celle de la prépondérance des probabilités. Dans toute affaire civile, le juge du procès doit examiner la preuve pertinente attentivement pour déterminer si, selon toute vraisemblance, le fait allégué a eu lieu.

[50] Je passe maintenant aux questions particulières que soulève le présent pourvoi.

B. *Les préoccupations de la Cour d'appel concernant les contradictions relevées dans le témoignage de F.H.*

[51] La rigueur de l'examen qui s'impose dans une affaire d'agression sexuelle est au cœur de l'analyse de la Cour d'appel. Selon la juge Rowles, celle-ci devait notamment déterminer [TRADUCTION] « si la juge du procès, compte tenu de la norme de preuve applicable dans une affaire de cette nature,

the problems or troublesome aspects of [F.H.]'s evidence". The "troublesome aspects" of F.H.'s evidence related to, amongst others, inconsistencies as to the frequency of the alleged sexual assaults as between F.H.'s evidence on discovery and at trial, as well as to an inconsistency between the original statement of claim alleging attempted anal intercourse and the evidence given at trial of actual penetration.

[52] In the absence of support from the surrounding circumstances, when considering the evidence of F.H. on its own, the majority of the Court of Appeal concluded that the trial judge had failed to consider whether the facts had been proven "to the standard commensurate with the allegation" and had failed to "scrutinize the evidence in the manner required and thereby erred in law" (para. 79).

[53] As I have explained, there is only one civil standard of proof — proof on a balance of probabilities. Although understandable in view of the state of the jurisprudence at the time of its decision, the Court of Appeal was in error in holding the trial judge to a higher standard. While that conclusion is sufficient to decide this appeal, nonetheless, I think it is important for future guidance to make some further comments on the approach of the majority of the Court of Appeal.

[54] Rowles J.A. was correct that failure by a trial judge to apply the correct standard of proof in assessing evidence would constitute an error of law. The question is how such failure may be apparent in the reasons of a trial judge. Obviously in the remote example of a trial judge expressly stating an incorrect standard of proof, it will be presumed that the incorrect standard was applied. Where the trial judge expressly states the correct standard of proof, it will be presumed that it was applied. Where the trial judge does not express a particular standard of proof, it will also be presumed that the correct standard was applied:

> Trial judges are presumed to know the law with which they work day in and day out.
>
> (*R. v. Burns*, [1994] 1 S.C.R. 656, at p. 664, *per* McLachlin J. (as she then was))

a omis de prendre en compte les lacunes du témoignage de [F.H.] ou ses aspects préoccupants » (par. 72). Ces « aspects préoccupants » englobaient les déclarations contradictoires de F.H. à l'interrogatoire préalable et au procès concernant la fréquence des agressions sexuelles alléguées, de même que la divergence entre l'allégation initiale de tentative de relation anale et l'affirmation au procès qu'il y avait eu pénétration.

[52] Vu l'absence d'un élément circonstanciel étayant le témoignage de F.H., les juges majoritaires de la Cour d'appel ont conclu que la juge du procès avait omis de se demander si les faits avaient été prouvés [TRADUCTION] « selon la norme proportionnée à l'allégation » et qu'elle n'avait pas « examiné la preuve aussi attentivement qu'elle l'aurait dû, d'où l'erreur de droit » (par. 79).

[53] Je le répète, une seule norme de preuve s'applique en matière civile, celle de la prépondérance des probabilités. Bien que la jurisprudence du moment puisse expliquer sa décision, la Cour d'appel a statué à tort que la juge du procès aurait dû appliquer une norme plus stricte. Cette conclusion suffit pour statuer sur le présent pourvoi, mais j'estime important pour l'avenir de faire quelques observations supplémentaires sur le raisonnement des juges majoritaires de la Cour d'appel.

[54] La juge Rowles a eu raison de conclure que l'omission d'un juge de première instance d'appliquer la bonne norme de preuve constitue une erreur de droit. La question est de savoir dans quelle mesure une telle omission peut ressortir des motifs du juge. Évidemment, dans le cas improbable où le juge du procès formule expressément une norme de preuve incorrecte, il est présumé l'avoir appliquée. Lorsqu'il énonce expressément la bonne norme de preuve, il est présumé l'avoir appliquée. Dans le cas où le juge ne renvoie à aucune norme de preuve particulière, on présume également qu'il a appliqué la bonne :

> Les juges du procès sont censés connaître le droit qu'ils appliquent tous les jours.
>
> (*R. c. Burns*, [1994] 1 R.C.S. 656, p. 664, la juge McLachlin (maintenant Juge en chef))

Whether the correct standard was expressly stated or not, the presumption of correct application will apply unless it can be demonstrated by the analysis conducted that the incorrect standard was applied. However, in determining whether the correct standard has indeed been applied, an appellate court must take care not to substitute its own view of the facts for that of the trial judge.

[55] An appellate court is only permitted to interfere with factual findings when "the trial judge [has] shown to have committed a palpable and overriding error or made findings of fact that are clearly wrong, unreasonable or unsupported by the evidence" (*H.L. v. Canada (Attorney General)*, [2005] 1 S.C.R. 401, 2005 SCC 25, at para. 4 (emphasis deleted), *per* Fish J.). Rowles J.A. correctly acknowledged as much (para. 27). She also recognized that where there is some evidence to support an inference drawn by the trial judge, an appellate court will be hard pressed to find a palpable and overriding error. Indeed, she quoted the now well-known words to this effect in the judgment of Iacobucci and Major JJ. in *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235, 2002 SCC 33, at para. 27 of her reasons (para. 22 of *Housen*).

[56] Rowles J.A. was satisfied that the trial judge was aware of the standard of proof that had heretofore been applied in cases of moral blameworthiness. At para. 35 of her reasons she stated:

> From her reasons it is obvious that the judge was aware of the case authorities that have considered the standard of proof to be applied in cases where allegations of morally blameworthy conduct have been made.

That should have satisfied the Court of Appeal that the trial judge understood and applied the standard of proof they thought to be applicable to this case.

C. *The Inconsistency in the Evidence of F.H.*

[57] At para. 5 of her reasons, the trial judge had regard for the judgment of Rowles J.A. in *R. v. R.W.B.* (1993), 24 B.C.A.C. 1, at paras. 28-29, dealing with the reliability and credibility of witnesses in the case of inconsistencies and an absence of

Que la norme applicable ait été précisée ou non, on présume qu'elle a été appliquée, sauf lorsque l'analyse révèle le contraire. Toutefois, lorsqu'elle détermine si la bonne norme a effectivement été appliquée, la cour d'appel doit prendre garde de ne pas substituer son interprétation des faits à celle du juge du procès.

[55] La cour d'appel ne peut infirmer une conclusion de fait que « lorsqu'il est établi que le juge de première instance a commis une erreur manifeste et dominante ou tiré des conclusions de fait manifestement erronées, déraisonnables ou non étayées par la preuve » (*H.L. c. Canada (Procureur général)*, [2005] 1 R.C.S. 401, 2005 CSC 25, par. 4 (soulignement omis), le juge Fish). La juge Rowles le reconnaît à juste titre (par. 27). Elle ajoute que lorsque le juge du procès s'appuie sur quelque élément de preuve pour tirer une conclusion, la cour d'appel peut difficilement conclure à l'existence d'une erreur manifeste et dominante. D'ailleurs, toujours au par. 27, elle renvoie à l'arrêt *Housen c. Nikolaisen*, [2002] 2 R.C.S. 235, 2002 CSC 33, par. 22, et aux propos maintes fois cités depuis qu'y tiennent à ce sujet les juges Iacobucci et Major.

[56] La juge Rowles était convaincue que la juge du procès savait quelle norme de preuve avait été appliquée jusqu'alors aux allégations d'actes moralement répréhensibles. Elle dit au par. 35 :

> [TRADUCTION] Il appert de ses motifs que la juge était au fait de la jurisprudence sur la norme de preuve applicable à des allégations d'actes moralement répréhensibles.

Cela aurait dû convaincre la Cour d'appel que la juge du procès avait compris et appliqué la norme de preuve qu'elles tenaient pour applicable en l'espèce.

C. *Les contradictions du témoignage de F.H.*

[57] Au paragraphe 5 de ses motifs, la juge du procès tient compte du jugement de la juge Rowles dans l'affaire *R. c. R.W.B.* (1993), 24 B.C.A.C. 1, par. 28-29, portant sur la crédibilité d'un témoignage qui est entaché de contradictions et que la

supporting evidence. Although *R.W.B.* was a criminal case, I, like the trial judge, think the words of Rowles J.A. are apt for the purposes of this case:

> In this case there were a number of inconsistencies in the complainant's own evidence and a number of inconsistencies between the complainant's evidence and the testimony of other witnesses. While it is true that minor inconsistencies may not diminish the credibility of a witness unduly, a series of inconsistencies may become quite significant and cause the trier of fact to have a reasonable doubt about the reliability of the witness' evidence. There is no rule as to when, in the face of inconsistency, such doubt may arise but at the least the trier of fact should look to the totality of the inconsistencies in order to assess whether the witness' evidence is reliable. This is particularly so when there is no supporting evidence on the central issue, which was the case here. [para. 29]

[58] As Rowles J.A. found in the context of the criminal standard of proof, where proof is on a balance of probabilities there is likewise no rule as to when inconsistencies in the evidence of a plaintiff will cause a trial judge to conclude that the plaintiff's evidence is not credible or reliable. The trial judge should not consider the plaintiff's evidence in isolation, but must look at the totality of the evidence to assess the impact of the inconsistencies in that evidence on questions of credibility and reliability pertaining to the core issue in the case.

[59] It is apparent from her reasons that the trial judge recognized the obligation upon her to have regard for the inconsistencies in the evidence of F.H. and to consider them in light of the totality of the evidence to the extent that was possible. While she did not deal with every inconsistency, as she explained at para. 100, she did address in a general way the arguments put forward by the defence.

[60] The trial judge specifically dealt with some of what the Court of Appeal identified as the troublesome aspects of F.H.'s evidence. For example, Rowles J.A. stated at para. 77 that F.H.'s evidence with respect to inspections in the supervisors' washroom was not consistent with the testimony of other witnesses:

preuve n'étaye pas par ailleurs. Même si la juge Rowles se prononçait dans le contexte pénal, à l'instar de la juge du procès, j'estime que ses remarques sont pertinentes dans le cas présent :

> [TRADUCTION] En l'espèce, il existait un certain nombre de contradictions dans le témoignage de la plaignante de même qu'entre son témoignage et celui d'autres témoins. Bien que de légères contradictions n'entachent pas indûment la crédibilité d'un témoin, une suite de contradictions peut constituer un facteur non négligeable et semer un doute raisonnable dans l'esprit du juge des faits quant à la crédibilité du témoignage. Aucune règle ne permet de déterminer dans quels cas des contradictions susciteront un tel doute, mais le juge des faits doit à tout le moins les examiner dans leur ensemble pour déterminer si le témoignage en question est digne de foi. C'est particulièrement vrai en l'absence de corroboration sur la principale question en litige, comme c'était le cas en l'espèce. [par. 29]

[58] Comme l'a estimé la juge Rowles à l'égard de la norme de preuve pénale, lorsque la norme applicable est la prépondérance des probabilités, il n'y a pas non plus de règle quant aux circonstances dans lesquelles les contradictions relevées dans le témoignage du demandeur amèneront le juge du procès à conclure que le témoignage n'est pas crédible ou digne de foi. En première instance, le juge ne doit pas considérer le témoignage du demandeur en vase clos. Il doit plutôt examiner l'ensemble de la preuve pour déterminer l'incidence des contradictions sur les questions de crédibilité touchant au cœur du litige.

[59] Il appert de ses motifs que la juge du procès a reconnu son obligation de tenir compte des contradictions du témoignage de F.H. et de les confronter avec l'ensemble de la preuve dans la mesure du possible. Bien qu'elle n'ait pas considéré chacune des contradictions, elle a examiné de façon générale les arguments de la défense, ce qu'elle explique au par. 100.

[60] La juge du procès se penche expressément sur certains aspects du témoignage de F.H. tenus pour préoccupants par la Cour d'appel. À titre d'exemple, la juge Rowles dit au par. 77 que le témoignage de F.H. concernant les inspections effectuées dans les toilettes des surveillants contredisait celui d'autres témoins :

There was no corroborative evidence from the witnesses who had been students at the School of other boys having lined up and being examined by McDougall in the supervisor[s'] washroom so as to lend support to the respondent's recollection of events. In fact, the defence evidence was to the opposite effect, that is, the boys did not line up outside the staff washroom for any reason or at any time.

[61] However, Gill J. dealt with the washroom inspections as well as the inconsistent recollection of the witnesses regarding these inspections. She also made a finding of fact that inspections were performed and were routine at the school. At para. 106 of her reasons she stated:

> It was argued that the evidence of F.H. was not consistent with the evidence of others. No inspections were done in the supervisors' washroom or in the way that F.H. described. I agree that no other witness described inspections being done in the supervisors' washroom. However, evidence about inspections was given by defence witnesses. I have already referred to the evidence of Mr. Paul. I accept that inspections were done in the manner he described. The boys were sometimes inspected on shower days and supervisors regularly checked to ensure that they had washed themselves thoroughly. Admittedly, Mr. Paul did not say that the defendant had conducted such examinations, but he described the inspections as a routine of the school. In fact, Mr. Paul's evidence is not consistent with the evidence of the defendant, who stated that the only examination of the boys was for head lice and it was done by the nurse.

[62] In this passage of her reasons, the trial judge dealt with the inconsistency between the evidence of F.H. and other witnesses. She also considered McDougall's testimony in light of other evidence given by witnesses for the defence. From the evidence of Mr. Paul she concluded that examinations were routinely carried out. She found that Mr. Paul's evidence about examinations was not consistent with that of McDougall who had testified that examinations were only for head lice and were carried out by the nurse. The necessary inference is that she found McDougall not to be credible on this issue.

[63] The majority of the Court of Appeal was also concerned with the testimony of F.H., that each time he was sexually assaulted by McDougall,

[TRADUCTION] Nul témoin ayant fréquenté le pensionnat n'a confirmé que d'autres garçons avaient formé des rangs puis avaient été examinés par M. McDougall dans les toilettes des surveillants de manière à étayer la version des faits de l'intimé. En fait, la preuve offerte par la défense établissait le contraire, c'est-à-dire que les garçons n'avaient jamais fait la file à l'extérieur des toilettes des surveillants pour quelque raison que ce soit.

[61] Or, la juge Gill traite des inspections dans les toilettes et du fait que les souvenirs des témoins à leur sujet sont contradictoires. Elle tire aussi la conclusion de fait que des inspections avaient lieu périodiquement au pensionnat. Voici ce qu'elle dit au par. 106 :

> [TRADUCTION] On a soutenu que le témoignage de F.H. ne concordait pas avec celui d'autres témoins. Aucune inspection n'avait lieu dans les toilettes des surveillants ou de la façon indiquée par F.H. Je conviens qu'aucun autre témoin n'a fait état d'inspections effectuées dans les toilettes des surveillants; toutefois, des témoins de la défense ont confirmé l'existence d'inspections. J'ai déjà fait référence au témoignage de M. Paul. Je conclus que des inspections ont été effectuées de la manière qu'il a décrite. Les garçons subissaient parfois un examen le jour de la douche et les surveillants s'assuraient régulièrement que les garçons s'étaient bien lavés. Certes, M. Paul n'a pas affirmé que le défendeur avait effectué de tels examens, mais il a dit que ceux-ci étaient courants. En fait, le témoignage de M. Paul ne corrobore pas celui du défendeur selon lequel les inspections visaient seulement la détection de poux et relevaient de l'infirmière.

[62] Dans ce passage de ses motifs, la juge du procès relève la divergence entre le témoignage de F.H. et ceux des autres témoins. Elle examine aussi le témoignage de M. McDougall à la lumière de ceux des autres témoins de la défense. Elle conclut du témoignage de M. Paul que des inspections avaient lieu couramment. Elle constate que son témoignage n'est pas compatible avec celui de M. McDougall selon lequel les inspections visaient seulement la détection de poux et relevaient de l'infirmière. Il s'ensuit nécessairement qu'à son avis, le témoignage de M. McDougall n'était pas digne de foi sur ce point.

[63] Les juges majoritaires de la Cour d'appel se disent également préoccupées par le témoignage de F.H. selon lequel chaque fois qu'il avait été agressé

he would go upstairs from his dorm to the supervisors' washroom. At para. 77 of her reasons, Rowles J.A. stated:

> However, [F.H.] was a junior boy rather than an intermediate one at the relevant time and his dorm would have been on the top floor. Based on the evidence of where the boys slept, [McDougall] could not have taken [F.H.] "upstairs" from his dorm.

Counsel for F.H. points out that in his evidence at trial, F.H. testified that he was an intermediate boy when the sexual assaults occurred and that as an intermediate boy he would have to go upstairs to the supervisors' washroom. Although there was contradictory evidence, there was evidence upon which F.H. could have been believed.

[64] It is true that Gill J. did not deal with F.H.'s inconsistency as to the frequency of the inspections inside the supervisors' washroom as identified by Rowles J.A. at para. 75:

> The respondent also told Ms. Stone that the young boys regularly lined up outside the staff washroom, which they referred to as the "examination room", every second week in order to be examined. At trial he testified this lining up only happened the first time he was sexually assaulted. Again, this is a substantial change in the respondent's recounting of events.

Nor did Gill J. specifically address the change in the allegations of attempted anal intercourse and genital fondling in the original statement of claim and the evidence of F.H. at trial of actual penetration. Rowles J.A. stated at para. 76:

> The respondent's original statement of claim only alleged attempted anal intercourse and genital fondling. There was no allegation about the appellant actually inserting his finger in F.H.'s anus or having forced anal intercourse. The respondent's evidence at trial was of actual penetration. As the trial judge found, the respondent acknowledged that he had reviewed the statement of claim, including the paragraphs which particularized the alleged assaults, and that he was aware of the difference between actually doing something and attempting to do something.

sexuellement par M. McDougall, il s'était rendu aux toilettes des surveillants situées à l'étage supérieur de son dortoir. La juge Rowles dit ce qui suit au par. 77 :

> [TRADUCTION] Or, [F.H.] faisait alors partie des plus jeunes garçons et non de ceux d'âge intermédiaire, de sorte que son dortoir aurait dû se situer à l'étage supérieur. Vu la preuve relative au lieu où dormaient les garçons, [M. McDougall] ne pouvait pas « faire monter » [F.H.].

L'avocat de l'appelant fait observer qu'au procès, F.H. a déclaré qu'il faisait partie des garçons d'âge intermédiaire lors des agressions sexuelles et que, par conséquent, il devait monter pour se rendre aux toilettes des surveillants. Malgré les contradictions, des éléments de preuve permettaient d'ajouter foi au témoignage de F.H.

[64] Il est vrai que la juge Gill ne traite pas de l'incohérence du témoignage de F.H. concernant la fréquence des inspections dans les toilettes des surveillants, contrairement à la juge Rowles qui la relève au par. 75 :

> [TRADUCTION] L'intimé a aussi dit à M^me^ Stone que, toutes les deux semaines, les jeunes garçons se plaçaient à l'extérieur des toilettes des surveillants, qu'ils appelaient la « salle d'examen », pour y être examinés. Au procès, il a témoigné que la mise en rang n'avait eu lieu que lors de la première agression sexuelle. Encore une fois, il s'agit d'une modification importante de sa relation des événements.

La juge Gill ne mentionne pas expressément le fait que les allégations de tentative de relation anale et d'attouchement des organes génitaux figurant dans la déclaration initiale différaient du témoignage de F.H. au procès selon lequel il y avait eu pénétration. La juge Rowles dit au par. 76 :

> [TRADUCTION] Dans sa déclaration initiale, l'intimé alléguait seulement la tentative de relation anale et l'attouchement des organes génitaux, nullement que l'appelant avait inséré son doigt dans son anus ou qu'il l'avait contraint à une relation anale. Au procès, il a affirmé qu'il y avait eu pénétration. Comme l'a dit la juge du procès, l'intimé a reconnu avoir lu la déclaration, y compris les paragraphes détaillant les agressions alléguées, et qu'il était conscient de la différence entre faire quelque chose et tenter de faire quelque chose.

[65] However, at paras. 46 and 48 of her reasons, Gill J. had recounted these inconsistencies as raised in cross-examination. Her reasons indicate she was aware of the inconsistencies.

[66] As for the inconsistency relating to the frequency of the sexual assaults, Rowles J.A. stated at para. 73:

> At his examination for discovery the respondent said that the sexual assaults took place "weekly", "frequently", and "every ten days or so" over the entire time he was at the School. The respondent admitted at trial that he had said on discovery that he had told the counsellor, Ms. Nellie Stone, that the sexual assaults by the appellant had taken place over the entire time he was at the School, while he was between the ages of eight and fourteen years. At trial, the respondent testified that the sexual assaults occurred on only four occasions over a period of two-and-a-half months. [Emphasis added.]

[67] Counsel for F.H. points out that F.H.'s evidence was that he was subjected to physical and sexual abuse while he was at the residential school perpetrated by more than one person, that the question to which he was responding mixed both sexual and physical abuse and that the majority of the Court of Appeal wrongly narrowed F.H.'s statement only to assaults perpetrated by McDougall. Counsel says that F.H. was commenting on all of the physical and sexual abuse he experienced at the school which involved more than McDougall and took place over his six years of attendance.

[68] The Court of Appeal appears to have interpreted his evidence on discovery that he was sexually assaulted by McDougall over the entire time he was at the school, while in his evidence at trial it was only four times over two and a half months. Although the evidence is not without doubt, it is open to be interpreted in the way counsel for F.H. asserts and that there was no inconsistency between F.H.'s evidence on discovery and at trial.

[69] As to the frequency of the alleged sexual assaults by McDougall, the trial judge did not

[65] Or, aux paragraphes 46 et 48 de ses motifs, la juge Gill a fait état de ces contradictions soulevées en contre-interrogatoire. Il s'ensuit donc qu'elle en était consciente.

[66] En ce qui concerne les divergences relatives à la fréquence des agressions sexuelles, la juge Rowles dit ce qui suit au par. 73 :

> [TRADUCTION] À l'interrogatoire préalable, l'intimé a déclaré que les agressions sexuelles s'étaient produites « chaque semaine », « fréquemment » et « environ tous les dix jours » pendant toute la durée de son séjour au pensionnat. Au procès, il a reconnu avoir déclaré à l'interrogatoire préalable qu'il avait dit à sa thérapeute, M^me^ Nellie Stone, que les agressions sexuelles perpétrées par l'appelant avaient eu lieu pendant toute la durée de son séjour au pensionnat, de l'âge de huit à quatorze ans. Or, au procès, il a précisé que les agressions sexuelles ne s'étaient produites qu'à quatre occasions sur une période de deux mois et demi. [Je souligne.]

[67] L'avocat de F.H. fait remarquer que son client a témoigné que plus d'une personne l'avaient agressé physiquement et sexuellement pendant son séjour au pensionnat, que la question à laquelle il a répondu portait à la fois sur les agressions sexuelles et les sévices physiques et que les juges majoritaires de la Cour d'appel ont considéré à tort que sa déclaration ne visait que les agressions perpétrées par M. McDougall. Il fait valoir que les propos de F.H. s'appliquaient à toutes les agressions physiques et sexuelles subies au cours des six années de son séjour au pensionnat, et pas seulement à celles commises par M. McDougall.

[68] La Cour d'appel semble conclure que F.H. a témoigné à l'interrogatoire préalable que M. McDougall l'avait agressé sexuellement pendant toute la période qu'il avait été pensionnaire, alors qu'il a dit au procès qu'il y avait eu quatre agressions sur une période de deux mois et demi. Bien que le témoignage ne soit pas sans soulever de doute, il est possible de l'interpréter de la manière prônée par l'avocat de F.H. et de conclure à l'absence de contradiction entre le témoignage à l'interrogatoire préalable et celui offert au procès.

[69] En ce qui concerne la fréquence des agressions sexuelles qu'aurait perpétrées M. McDougall,

ignore inconsistencies in the evidence of F.H. In spite of the inconsistencies, she found him to be credible. At para. 112 of her reasons, she stated:

> There are, however, some inconsistencies in the evidence of F.H. As the defence has also argued, his evidence about the frequency of the abuse has not been consistent and there are differences between what he admittedly told Ms. Stone, what he said at his examination for discovery and his evidence at trial. At trial, he said there were four incidents. On previous occasions, he said that this occurred every two weeks or ten days. That is a difference of significance. However, his evidence about the nature of the assaults, the location and the times they occurred has been consistent. Despite differences about frequency, it is my view that F.H. was a credible witness.

[70] The trial judge was not obliged to find that F.H. was not credible or that his evidence at trial was unreliable because of inconsistency between his trial evidence and the evidence he gave on prior occasions. Where a trial judge demonstrates that she is alive to the inconsistencies but still concludes that the witness was nonetheless credible, in the absence of palpable and overriding error, there is no basis for interference by the appellate court.

[71] All of this is not to say that the concerns expressed by Rowles J.A. were unfounded. There are troubling aspects of F.H.'s evidence. However, the trial judge was not oblivious to the inconsistencies in his evidence. The events occurred more than 30 years before the trial. Where the trial judge refers to the inconsistencies and deals expressly with a number of them, it must be assumed that she took them into account in assessing the balance of probabilities. Notwithstanding its own misgivings, it was not for the Court of Appeal to second guess the trial judge in the absence of finding a palpable and overriding error.

[72] With respect, I cannot interpret the reasons of the majority of the Court of Appeal other than that it disagreed with the trial judge's credibility assessment of F.H. in light of the inconsistencies in his evidence and the lack of support from the surrounding circumstances. Assessing credibility

la juge du procès tient compte des contradictions dans le témoignage de F.H, mais elle ajoute tout de même foi à celui-ci (par. 112) :

> [TRADUCTION] Des contradictions entachent toutefois le témoignage de F.H. Comme l'a aussi fait valoir la défense, son témoignage sur la fréquence des agressions n'a pas été invariable et il y a des différences entre ce qu'il a reconnu avoir dit à M^me^ Stone, son témoignage en interrogatoire préalable et ce qu'il a affirmé au procès. Pendant le procès, il a déclaré qu'il y avait eu quatre agressions. Auparavant, il avait affirmé que les agressions se produisaient toutes les deux semaines ou tous les dix jours. C'est là une différence importante. Toutefois, son témoignage concernant la nature des agressions, ainsi que le lieu et les moments où elles se sont produites n'a pas varié. Malgré les divergences quant à la fréquence des agressions, je suis d'avis que F.H. était un témoin digne de foi.

[70] La juge du procès n'avait pas à conclure à la non-crédibilité de F.H. ou à la non-fiabilité de son témoignage au procès parce que celui-ci contredisait ses déclarations antérieures. Lorsque le juge du procès est conscient des contradictions, mais qu'il arrive quand même à la conclusion que le témoin était digne de foi, sauf erreur manifeste et dominante, rien ne justifie l'intervention de la cour d'appel.

[71] Il ne s'ensuit pas que les préoccupations de la juge Rowles n'étaient pas fondées. Certains éléments du témoignage de F.H. soulèvent des questions. Or, la juge du procès était consciente des contradictions du témoignage. Les événements sont survenus plus de 30 ans auparavant. Comme la juge du procès renvoie aux contradictions et considère expressément certaines d'entre elles, il faut présumer qu'elle en a tenu compte pour établir la prépondérance des probabilités. Malgré ses réserves, il n'appartenait pas à la Cour d'appel de revenir sur la décision de première instance en l'absence d'une erreur manifeste et dominante.

[72] En toute déférence, je ne peux voir dans les motifs des juges majoritaires de la Cour d'appel qu'un désaccord avec l'appréciation de la crédibilité de F.H. par la juge du procès à la lumière des contradictions et de l'absence d'élément circonstanciel corroborant le témoignage. Il incombe

is clearly in the bailiwick of the trial judge and thus heightened deference must be accorded to the trial judge on matters of credibility. As explained by Bastarache and Abella JJ. in *R. v. Gagnon*, [2006] 1 S.C.R. 621, 2006 SCC 17, at para. 20:

> Assessing credibility is not a science. It is very difficult for a trial judge to articulate with precision the complex intermingling of impressions that emerge after watching and listening to witnesses and attempting to reconcile the various versions of events. That is why this Court decided, most recently in *H.L.*, that in the absence of a palpable and overriding error by the trial judge, his or her perceptions should be respected.

clairement au juge du procès d'apprécier la crédibilité, de sorte que sa décision à cet égard justifie une grande déférence. Comme l'ont expliqué les juges Bastarache et Abella dans l'arrêt *R. c. Gagnon*, [2006] 1 R.C.S. 621, 2006 CSC 17, par. 20 :

> Apprécier la crédibilité ne relève pas de la science exacte. Il est très difficile pour le juge de première instance de décrire avec précision l'enchevêtrement complexe des impressions qui se dégagent de l'observation et de l'audition des témoins, ainsi que des efforts de conciliation des différentes versions des faits. C'est pourquoi notre Cour a statué — la dernière fois dans l'arrêt *H.L.* — qu'il fallait respecter les perceptions du juge de première instance, sauf erreur manifeste et dominante.

[73] As stated above, an appellate court is only permitted to intervene when "the trial judge is shown to have committed a palpable and overriding error or made findings of fact that are clearly wrong, unreasonable or unsupported by the evidence" (*H.L.*, at para. 4 (emphasis deleted)). The Court of Appeal made no such finding. With respect, in finding that the trial judge failed to scrutinize F.H.'s evidence in the manner required by law, it incorrectly substituted its credibility assessment for that of the trial judge.

[73] Je le répète, une cour d'appel ne peut intervenir que « lorsqu'il est établi que le juge de première instance a commis une erreur manifeste et dominante ou tiré des conclusions de fait manifestement erronées, déraisonnables ou non étayées par la preuve » (*H.L.*, par. 4 (soulignement omis)). La Cour d'appel n'a pas opiné en ce sens. En toute déférence, en concluant que la juge du procès avait omis d'examiner le témoignage de F.H. aussi attentivement qu'elle l'aurait dû légalement, la Cour d'appel a substitué à tort son appréciation de la crédibilité à celle de la juge du procès.

D. *Palpable and Overriding Error*

[74] Notwithstanding that the Court of Appeal made no finding of palpable and overriding error, the Attorney General of Canada submits that the trial judge did indeed make such an error. This argument is based entirely on the inconsistencies in the evidence of F.H. The Attorney General says that in light of these inconsistencies, the trial judge was clearly wrong in finding F.H. credible.

D. *Erreur manifeste et dominante*

[74] Bien que la Cour d'appel n'ait pas relevé d'erreur manifeste et dominante, le procureur général du Canada soutient que la juge du procès en a de fait commis une. Sa prétention s'appuie entièrement sur les contradictions du témoignage de F.H. Selon lui, au vu de ces contradictions, la juge du procès aurait clairement eu tort de conclure que F.H. était digne de foi.

[75] I do not minimize the inconsistencies in F.H.'s testimony. They are certainly relevant to an assessment of his credibility. Nonetheless, the trial judge was convinced, despite the inconsistencies, that F.H. was credible and that the four sexual assaults alleged to have been committed by McDougall did occur. From her reasons, it appears that the trial judge's decision on the credibility of the witnesses was made in the context of the evidence as a whole.

[75] Je ne veux pas minimiser les contradictions du témoignage de F.H. Elles sont certainement pertinentes pour l'appréciation de sa crédibilité. Or, malgré ces contradictions, la juge du procès était convaincue de la fiabilité du témoignage de F.H. et de la perpétration des quatre agressions sexuelles par M. McDougall. Il appert de ses motifs que la conclusion sur la crédibilité des témoins a été tirée au regard de l'ensemble de la preuve. La juge a tenu

She considered the layout of the school and the fact that the manner in which F.H. described the assaults as taking place would have carried with it the risk of detection. She also considered whether F.H.'s evidence about inspections taking place in the supervisors' washroom and the availability of sheets and pyjamas was consistent with evidence of other witnesses. She acknowledged that F.H. had a motive to lie to save his marriage and decided that the circumstances surrounding disclosure were not suggestive of concoction. She also factored into her analysis the demeanor of F.H.: that "[he] was not a witness who gave detailed answers, often responding simply with a yes or no, nor did he volunteer much information" (para. 110), and that "[w]hen [he] testified, he displayed no emotion but it was clear that he had few, if any, good memories of the school" (para. 113).

[76] In the end, believing the testimony of one witness and not the other is a matter of judgment. In light of the inconsistencies in F.H.'s testimony with respect to the frequency of the sexual assaults, it is easy to see how another trial judge may not have found F.H. to be a credible witness. However, Gill J. found him to be credible. It is important to bear in mind that the evidence in this case was of matters occurring over 30 years earlier when F.H. was approximately 10 years of age. As a matter of policy, the British Columbia legislature has eliminated the limitation period for claims of sexual assault. This was a policy choice for that legislative assembly. Nonetheless, it must be recognized that the task of trial judges assessing evidence in such cases is very difficult indeed. However, that does not open the door to an appellate court, being removed from the testimony and not seeing the witnesses, to reassess the credibility of the witnesses.

E. *Corroboration*

[77] The reasons of the majority of the Court of Appeal may be read as requiring, as a matter of law, that in cases of oath against oath in the context of sexual assault allegations, that a sexual assault victim must provide some independent

compte de l'aménagement du pensionnat et du fait que la perpétration des agressions de la manière décrite par F.H. était susceptible de détection. Elle s'est également demandé si le témoignage de F.H. concernant les inspections effectuées dans les toilettes des surveillants et l'accès aux draps et aux pyjamas concordait avec celui d'autres témoins. Elle a reconnu que F.H. avait intérêt à mentir pour préserver son mariage, mais elle a statué que les circonstances de la révélation ne suggéraient pas la fabrication. Dans son analyse, la juge du procès a aussi pris en considération l'attitude de F.H., à savoir qu'[TRADUCTION] « [il] ne s'agissait pas d'un témoin offrant des réponses détaillées, qu'il répondait souvent par un simple oui ou non, sans devancer les questions » (par. 110) et que « [p]endant son témoignage, il n'a manifesté aucune émotion, mais il était clair qu'il avait peu de bons souvenirs du pensionnat, voire aucun » (par. 113).

[76] En fin de compte, ajouter foi à un témoignage et non à un autre est affaire de jugement. Vu les contradictions du témoignage de F.H. au sujet de la fréquence des agressions sexuelles, on conçoit aisément qu'un autre juge n'aurait peut-être pas conclu que F.H. était un témoin digne de foi. Cependant, la juge Gill l'a trouvé crédible. Il importe de se rappeler que le témoignage portait sur des événements survenus plus de 30 ans auparavant et qu'à l'époque F.H. avait environ 10 ans. Pour des raisons de principe, le législateur de la Colombie-Britannique a cessé d'assujettir à un délai de prescription la poursuite pour agression sexuelle. Il lui était loisible de le faire. Néanmoins, il faut reconnaître que la tâche du juge du procès appelé à apprécier la preuve dans une affaire de cette nature est particulièrement ardue. Mais une cour d'appel qui n'a pas entendu les témoignages ni observé les témoins n'a pas pour autant le droit de réévaluer la fiabilité de ceux-ci.

E. *Corroboration*

[77] Les motifs des juges majoritaires de la Cour d'appel peuvent être interprétés comme établissant qu'une corroboration indépendante s'impose légalement lorsque, dans une affaire où une agression sexuelle est alléguée, c'est la parole de la victime

corroborating evidence. At para. 77 of her reasons, Rowles J.A. observed:

There was no corroborative evidence from the witnesses who had been students at the School of other boys having lined up and being examined by McDougall in the supervisor[s'] washroom so as to lend support to [F.H.]'s recollection of events.

At para. 79 she stated:

No support for [F.H.]'s testimony could be drawn from the surrounding circumstances.

[78] In her concurring reasons at para. 106, Southin J.A. stated:

To choose one over the other in cases of oath against oath requires, in my opinion, an articulated reason founded in evidence other than that of the plaintiff.

[79] The impression these passages may leave is that there is a legal requirement of corroboration in civil cases in which sexual assault is alleged. In an abundance of caution and to provide guidance for the future, I make the following comments.

[80] Corroborative evidence is always helpful and does strengthen the evidence of the party relying on it as I believe Rowles J.A. was implying in her comments. However, it is not a legal requirement and indeed may not be available, especially where the alleged incidents took place decades earlier. Incidents of sexual assault normally occur in private.

[81] Requiring corroboration would elevate the evidentiary requirement in a civil case above that in a criminal case. Modern criminal law has rejected the previous common law and later statutory requirement that allegations of sexual assault be corroborated in order to lead to a conviction (see *Criminal Code*, R.S.C. 1970, c. C-34, s. 139(1), mandating the need for corroboration and its subsequent amendments removing this requirement (*Act to amend the Criminal Code in relation to sexual offences and other offences against the person and to amend certain other Acts in relation thereto or in consequence thereof*, S.C. 1980-81-82-83, c. 125),

contre celle du défendeur. La juge Rowles fait observer au par. 77 :

[TRADUCTION] Nul témoin ayant fréquenté le pensionnat n'a confirmé que d'autres garçons avaient formé des rangs puis avaient été examinés par M. McDougall dans les toilettes des surveillants de manière à étayer la version des faits de [F.H.].

Elle ajoute (par. 79) :

[TRADUCTION] Aucun élément circonstanciel ne corrobore le témoignage de [F.H.].

[78] La juge Southin affirme pour sa part (par. 106, motifs concordants) :

[TRADUCTION] Préférer un témoignage à un autre exige, à mon avis, qu'un motif convaincant fondé sur un autre élément de preuve que le témoignage du demandeur le justifie.

[79] Ces extraits peuvent donner à penser qu'il existe en matière civile une exigence juridique de corroboration dès lorsqu'une agression sexuelle est alléguée. Par surcroît de prudence et afin d'offrir des repères pour l'avenir, j'ajoute les remarques suivantes.

[80] Un élément de corroboration est toujours utile et étoffe la preuve offerte. C'est à mon avis ce que voulait dire la juge Rowles. Or, il ne s'agit pas d'une exigence juridique, car il est possible qu'un tel élément n'existe pas, surtout lorsque les faits se sont produits quelques décennies auparavant. Sans compter que les agressions sexuelles ont généralement lieu en privé.

[81] Exiger la corroboration rendrait la norme de preuve en matière civile plus stricte que celle appliquée en matière pénale. Le droit criminel moderne a écarté l'exigence, d'abord établie par la common law puis par la loi, qu'une allégation d'agression sexuelle soit corroborée pour qu'il puisse y avoir déclaration de culpabilité (voir *Code criminel*, S.R.C. 1970, ch. C-34, par. 139(1), prévoyant la nécessité d'une corroboration et ses modifications subséquentes supprimant cette exigence (*Loi modifiant le Code criminel en matière d'infractions sexuelles et d'autres infractions contre la personne et apportant des modifications corrélatives*

as well as the current *Criminal Code*, R.S.C. 1985, c. C-46, s. 274, stipulating that no corroboration is required for convictions in sexual assault cases). Trial judges faced with allegations of sexual assault may find that they are required to make a decision on the basis of whether they believe the plaintiff or the defendant and as difficult as that may be, they are required to assess the evidence and make their determination without imposing a legal requirement for corroboration.

F. *Is W. (D.) Applicable in Civil Cases in Which Credibility Is in Issue?*

[82] At paras. 107, 108 and 110 of her reasons, Southin J.A. stated:

> It is not enough for the judge to say that I find the plaintiff credible and since he is credible the defendant must be lying.
>
> What I have said so far is, to me, no more than an application to civil cases of *R. v. W. (D.)*, [1991] 1 S.C.R. 742 (S.C.C.).
>
> . . .
>
> I see no logical reason why the rejection of "either/or" in criminal cases is not applicable in civil cases where the allegation is of crime, albeit that the burden of proof on the proponent is not beyond reasonable doubt but on a balance of probabilities.

[83] *W. (D.)* was a decision by this Court in which Cory J., at p. 758, established a three-step charge to the jury to help the jury assess conflicting evidence between the victim and the accused in cases of criminal prosecutions of sexual assaults:

> First, if you believe the evidence of the accused, obviously you must acquit.
>
> Second, if you do not believe the testimony of the accused but you are left in reasonable doubt by it, you must acquit.
>
> Third, even if you are not left in doubt by the evidence of the accused, you must ask yourself whether, on the basis of the evidence which you do accept, you are

à d'autres lois, S.C. 1980-81-82-83, ch. 125), ainsi que la version actuelle du *Code criminel*, L.R.C. 1985, ch. C-46, art. 274, portant que la corroboration n'est pas nécessaire pour déclarer une personne coupable d'agression sexuelle). Dans une affaire d'agression sexuelle, la décision du juge du procès peut dépendre du fait qu'il ajoute foi au témoignage du demandeur ou à celui du défendeur, mais malgré ce dilemme, il doit apprécier la preuve et se prononcer sans exiger de corroboration.

F. *L'arrêt W. (D.) s'applique-t-il au civil en matière de crédibilité?*

[82] La juge Southin dit ce qui suit aux par. 107, 108 et 110 :

> [TRADUCTION] Le juge ne peut se contenter de dire qu'il trouve le demandeur crédible et, de ce fait, que le défendeur ment nécessairement.
>
> Jusqu'ici mes motifs ne font qu'appliquer l'arrêt *R. c. W. (D.)*, [1991] 1 R.C.S. 742 (C.S.C.), au contexte civil.
>
> . . .
>
> Je ne vois aucun motif rationnel de ne pas rejeter l'alternative en matière civile, tout comme en matière pénale, lorsque l'acte reproché constitue un acte criminel, même si la norme de preuve applicable est celle de la prépondérance des probabilités, et non celle de l'absence de tout doute raisonnable.

[83] Dans l'arrêt *W. (D.)*, par la voix du juge Cory, notre Cour a établi un exposé à trois volets afin d'aider le jury à évaluer les témoignages contradictoires de la victime et de l'accusé dans le cadre d'une poursuite criminelle pour agression sexuelle (p. 758) :

> Premièrement, si vous croyez la déposition de l'accusé, manifestement vous devez prononcer l'acquittement.
>
> Deuxièmement, si vous ne croyez pas le témoignage de l'accusé, mais si vous avez un doute raisonnable, vous devez prononcer l'acquittement.
>
> Troisièmement, même si vous n'avez pas de doute à la suite de la déposition de l'accusé, vous devez vous demander si, en vertu de la preuve que vous acceptez,

convinced beyond a reasonable doubt by that evidence of the guilt of the accused.

[84] These charges to the jury are not sacrosanct but were merely put in place as guideposts to the meaning of reasonable doubt, as recently explained by Binnie J. in *R. v. J.H.S.*, [2008] 2 S.C.R. 152, 2008 SCC 30, at paras. 9 and 13:

Essentially, *W. (D.)* simply unpacks for the benefit of the lay jury what reasonable doubt means in the context of evaluating conflicting testimonial accounts. It alerts the jury to the "credibility contest" error. It teaches that trial judges are required to impress on the jury that the burden never shifts from the Crown to prove every element of the offence beyond a reasonable doubt.

. . .

. . . In *R. v. Avetysan*, [2000] 2 S.C.R. 745, 2000 SCC 56, Major J. for the majority pointed out that in any case where credibility is important "[t]he question is really whether, in substance, the trial judge's instructions left the jury with the impression that it had to choose between the two versions of events" (para. 19). The main point is that lack of credibility on the part of the accused does not equate to proof of his or her guilt beyond a reasonable doubt.

[85] The *W. (D.)* steps were developed as an aid to the determination of reasonable doubt in the criminal law context where a jury is faced with conflicting testimonial accounts. Lack of credibility on the part of an accused is not proof of guilt beyond a reasonable doubt.

[86] However, in civil cases in which there is conflicting testimony, the judge is deciding whether a fact occurred on a balance of probabilities. In such cases, provided the judge has not ignored evidence, finding the evidence of one party credible may well be conclusive of the result because that evidence is inconsistent with that of the other party. In such cases, believing one party will mean explicitly or implicitly that the other party was not believed on the important issue in the case. That may be especially true where a plaintiff makes allegations that

vous êtes convaincus hors de tout doute raisonnable par la preuve de la culpabilité de l'accusé.

[84] Cet exposé au jury n'est pas sacré. Il offre simplement des repères pour l'application du doute raisonnable, comme l'a récemment expliqué le juge Binnie dans l'arrêt *R. c. J.H.S.*, [2008] 2 R.C.S. 152, 2008 CSC 30, par. 9 et 13 :

Essentiellement, l'arrêt *W. (D.)* explique tout simplement au bénéfice des jurés profanes en quoi consiste un doute raisonnable dans le contexte de l'évaluation de témoignages contradictoires. Il attire l'attention des jurés sur l'erreur consistant à procéder à un « concours de crédibilité ». Il explique que les juges de première instance sont tenus de bien faire comprendre aux jurés que le ministère public n'est jamais dispensé du fardeau de prouver tous les éléments de l'infraction hors de tout doute raisonnable.

. . .

. . . Dans *R. c. Avetysan*, [2000] 2 R.C.S. 745, 2000 CSC 56, le juge Major qui s'exprimait au nom des juges de la majorité a souligné que, dans toutes les causes où la question de la crédibilité revêt de l'importance, « [c]e qu'il importe vraiment de déterminer, c'est essentiellement si les directives du juge du procès ont donné au jury l'impression qu'il devait choisir entre les deux versions des événements » (par. 19). L'essentiel c'est que le manque de crédibilité de l'accusé n'équivaut pas à une preuve de sa culpabilité hors de tout doute raisonnable.

[85] La démarche proposée dans l'arrêt *W. (D.)* a été conçue pour aider le jury aux prises avec des témoignages contradictoires dans une affaire criminelle à déterminer s'il existe un doute raisonnable. La non-crédibilité de l'accusé ne prouve pas sa culpabilité hors de tout doute raisonnable.

[86] Toutefois, au civil, lorsque les témoignages sont contradictoires, le juge est appelé à se prononcer sur la véracité du fait allégué selon la prépondérance des probabilités. S'il tient compte de tous les éléments de preuve, sa conclusion que le témoignage d'une partie est crédible peut fort bien être décisive, ce témoignage étant incompatible avec celui de l'autre partie. Aussi, croire une partie suppose explicitement ou non que l'on ne croit pas l'autre sur le point important en litige. C'est particulièrement le cas lorsque, comme en l'espèce, le

are altogether denied by the defendant as in this case. *W. (D.)* is not an appropriate tool for evaluating evidence on the balance of probabilities in civil cases.

G. *Did the Trial Judge Ignore the Evidence of McDougall?*

[87] In an argument related to *W. (D.)*, the Attorney General of Canada says, at para. 44 of its factum, that "[s]imply believing the testimony of one witness, without assessing the evidence of the other witness, marginalizes that other witness" since he has no way of knowing whether he was disbelieved or simply ignored.

[88] The Attorney General bases his argument on the well-known passage in *Faryna v. Chorny*, [1952] 2 D.L.R. 354 (B.C.C.A.), which concludes at p. 357:

> . . . a Court of Appeal must be satisfied that the trial Judge's finding of credibility is based not on one element only to the exclusion of others, but is based on all the elements by which it can he tested in the particular case.

[89] Thus, the Attorney General contends, at para. 47 of its factum, that:

> In a civil proceeding alleging a sexual assault, if the trier of fact accepts the plaintiff's evidence and simply ignores the defendant's evidence, that conclusion would breach the requirement described in *Faryna*, that every element of the evidence must be considered.

[90] I agree that it would be an error for the trial judge to ignore the evidence of the defendant and simply concentrate on the evidence submitted by the plaintiff. But that is not the case here.

[91] The trial judge described the testimony given by McDougall with respect to his vocational beliefs, his subsequent marriage, his role at the school, the routine at the school, the laundry procedure and his denials as to having sexually assaulted either R.C. or F.H. She also dealt with the defence arguments

demandeur formule des allégations que le défendeur nie en bloc. La démarche préconisée dans l'arrêt *W. (D.)* ne convient pas pour évaluer la preuve au regard de la prépondérance des probabilités dans une instance civile.

G. *La juge du procès a-t-elle ignoré le témoignage de M. McDougall?*

[87] Dans sa plaidoirie relative à l'arrêt *W. (D.)*, le procureur général du Canada indique au par. 44 de son mémoire que [TRADUCTION] « [l]e simple fait de croire un témoin, sans apprécier le témoignage de l'autre témoin, a pour effet de marginaliser cet autre témoin » puisqu'il n'a aucun moyen de savoir si le juge ne l'a pas cru ou s'il a simplement ignoré son témoignage.

[88] La thèse du procureur général repose sur un extrait souvent cité de l'arrêt *Faryna c. Chorny*, [1952] 2 D.L.R. 354 (C.A.C.-B.), p. 357. La Cour d'appel y conclut :

> [TRADUCTION] . . . une cour d'appel doit être convaincue que la conclusion sur la crédibilité tirée en première instance repose non pas sur un seul élément de preuve, à l'exclusion de tout autre, mais bien sur l'ensemble des éléments permettant d'apprécier la crédibilité dans le cas considéré.

[89] Le procureur général soutient donc au par. 47 de son mémoire :

> [TRADUCTION] Dans une instance civile où une agression sexuelle est alléguée, le juge des faits qui ajoute foi au témoignage du demandeur et ignore simplement celui du défendeur ne satisfait pas à l'exigence, établie dans l'arrêt *Faryna*, que chacun des éléments de la preuve soit examiné.

[90] Je conviens que le juge du procès qui considère le seul témoignage du demandeur, à l'exclusion de celui du défendeur, commet une erreur. Or, ce n'est pas ce qui s'est passé en l'espèce.

[91] La juge du procès a relaté le témoignage de M. McDougall concernant sa foi et sa vocation, son mariage subséquent, sa fonction au pensionnat, la vie quotidienne dans l'établissement, l'entretien des vêtements et de la literie et sa dénégation des allégations d'agression sexuelle formulées par

with respect to the credibility and reliability of the testimony of R.C. and F.H. regarding the sexual assaults. Indeed, she found that R.C. did not prove he was sexually assaulted by McDougall.

[92] In determining whether McDougall had ever strapped R.C. or F.H., she summarized McDougall's evidence as follows at para. 131:

> As stated, it was the defendant's evidence that during his years at the school, he administered the strap to only five or six intermediate boys. He did so as punishment for behaviour such as fighting or swearing. It was always to the hand and was always done in the dorm. He denied the evidence of Mr. Jeffries that he had frequently disciplined him for the reasons Mr. Jeffries described. He denied going to his grandmother's home or mocking him about wanting to visit his grandmother. He denied the evidence of F.H.

[93] She also highlighted a contradiction in McDougall's testimony at para. 135:

> It is also my view that the defendant minimized his use of the strap as a form of discipline. Further, while he testified that no child was ever strapped in his room, when testifying about one specific incident, he said that he brought the boy "upstairs to my room and I administered the strap three times to his right hand".

Although McDougall later "corrected himself" to say that he had strapped the boy in the dorm and not in his room, it was open to the trial judge to believe his first statement and not his "correction".

[94] And as earlier discussed, at para. 106 of her reasons, she pointed out inconsistency between the evidence of McDougall and one of the defence witnesses, Mr. Paul, on the issue of routine physical inspections of the students.

[95] At para. 66 of her reasons for the majority of the Court of Appeal, Rowles J.A. stated:

R.C. et F.H. Elle s'est également penchée sur les prétentions de la défense au sujet de la crédibilité des témoignages de R.C. et de F.H. concernant les agressions sexuelles. Elle a d'ailleurs conclu que R.C. n'avait pas prouvé que M. McDougall l'avait agressé sexuellement.

[92] Pour déterminer si M. McDougall avait jamais frappé R.C. ou F.H. avec une lanière en cuir, elle a résumé son témoignage comme suit (par. 131) :

> [TRADUCTION] Ainsi, selon le témoignage du défendeur, pendant les années qu'il a passées au pensionnat, il n'aurait frappé avec une lanière en cuir que cinq ou six garçons d'âge intermédiaire. Il l'aurait fait parce qu'ils s'étaient battus ou qu'ils avaient blasphémé. Il visait toujours les mains et la correction était toujours administrée dans le dortoir. Il a rejeté le témoignage de M. Jeffries selon lequel il l'avait fréquemment puni pour les motifs précisés par M. Jeffries. Il a nié être allé chez la grand-mère de M. Jeffries ou s'être moqué de lui parce qu'il voulait rendre visite à sa grand-mère. Il a nié les allégations de F.H.

[93] Elle a par ailleurs relevé une contradiction dans le témoignage de M. McDougall (par. 135) :

> [TRADUCTION] Je suis aussi d'avis que le défendeur a minimisé son recours à la lanière en cuir pour corriger les pensionnaires. Par ailleurs, bien qu'il ait déclaré n'avoir jamais infligé ce châtiment dans sa chambre, lorsqu'il a témoigné sur un incident en particulier, il a dit avoir « fait monté le garçon dans [sa] chambre et l'avoir frappé à la main droite trois fois avec une lanière en cuir ».

M. McDougall avait ensuite rectifié les faits : il avait dit avoir frappé le garçon dans le dortoir, et non dans sa chambre. Or, il était loisible à la juge du procès d'ajouter foi à la première version plutôt qu'à la seconde.

[94] Et, je le rappelle, la juge du procès relève au par. 106 la divergence entre les propos de M. McDougall et ceux d'un témoin de la défense, M. Paul, au sujet des inspections corporelles périodiques des garçons.

[95] Au nom des juges majoritaires de la Cour d'appel, la juge Rowles indique ce qui suit (par. 66) :

From the reasons the trial judge gave for finding that the appellant had strapped the respondent, one can infer that the judge did not accept the appellant's evidence on that issue. Disbelief of a witness's evidence on one issue may well taint the witness's evidence on other issues but an unfavourable credibility finding against a witness does not, of itself, constitute evidence that can be used to prove a fact in issue.

[96] I agree with Rowles J.A. However, the trial judge's unfavourable credibility findings with respect to McDougall's strapping evidence together with her belief in Paul's evidence in preference to that of McDougall with respect to routine physical inspections, indicates that she did not ignore McDougall's evidence or marginalize him. She simply believed F.H. on essential matters rather than McDougall.

H. *Were the Reasons of the Trial Judge Adequate?*

[97] The Attorney General alleges that the reasons of the trial judge are inadequate. The same argument was not accepted by the Court of Appeal. At para. 61, Rowles J.A. stated:

Generally speaking, if a judge's reasons reveal the path the judge took to reach a conclusion on the matter in dispute, the reasons are adequate for the purposes of appellate review. To succeed in an argument that the trial judge did not give adequate reasons, an appellant does not have to demonstrate that there is a flaw in the reasoning that led to the result. In this case, the judge's reasons are adequate to show how she arrived at her conclusion that the respondent had been sexually assaulted.

Where the Court of Appeal expresses itself as being satisfied that it can discern why the trial judge arrived at her conclusion, a party faces a serious obstacle to convince this Court that the reasons are nonetheless inadequate.

[98] The meaning of adequacy of reasons is explained in *R. v. Sheppard*, [2002] 1 S.C.R. 869, 2002 SCC 26. In *R. v. Walker*, [2008] 2 S.C.R. 245, 2008 SCC 34, Binnie J. summarized the duty to give adequate reasons:

[TRADUCTION] On peut inférer des motifs qu'elle invoque pour conclure que l'appelant a frappé l'intimé avec une lanière en cuir que la juge du procès n'a pas ajouté foi au témoignage de l'appelant sur ce point. Le fait de ne pas croire un témoin sur un point peut bien ternir son témoignage sur un autre sujet, mais une conclusion sur la crédibilité qui est défavorable à un témoin ne saurait à elle seule établir un fait en litige.

[96] Je suis d'accord avec la juge Rowles. Toutefois, les conclusions défavorables tirées par la juge du procès sur la crédibilité du témoignage de M. McDougall au sujet du recours à la lanière en cuir et le fait qu'elle a ajouté foi au témoignage de M. Paul plutôt qu'à celui de M. McDougall au sujet des inspections corporelles périodiques montrent qu'elle n'a pas ignoré le témoignage de M. McDougall et qu'elle ne l'a pas marginalisé. Elle a simplement cru F.H. plutôt que M. McDougall sur des points importants.

H. *Les motifs de la juge du procès étaient-ils suffisants?*

[97] Le procureur général soutient que les motifs de la juge du procès ne sont pas suffisants. La Cour d'appel a rejeté cette prétention (par. 61, la juge Rowles) :

[TRADUCTION] De façon générale, lorsque le juge précise le raisonnement à l'issue duquel il a tiré sa conclusion sur la question en litige, ses motifs sont suffisants aux fins d'un examen en appel. Pour qu'ils soient jugés insuffisants, point n'est besoin d'établir qu'un vice entache le raisonnement ayant mené à la conclusion. En l'espèce, les motifs de la juge permettent de comprendre comment elle est arrivée à la conclusion que l'intimé avait été agressé sexuellement.

Dans la mesure où la Cour d'appel dit pouvoir discerner les raisons pour lesquelles la juge du procès a tiré sa conclusion, la partie qui souhaite convaincre notre Cour que les motifs sont néanmoins insuffisants doit surmonter un obstacle de taille.

[98] Dans l'arrêt *R. c. Sheppard*, [2002] 1 R.C.S. 869, 2002 CSC 26, notre Cour explique la notion de suffisance des motifs. Dans l'arrêt *R. c. Walker*, [2008] 2 R.C.S. 245, 2008 CSC 34, le juge Binnie résume comme suit la teneur de l'obligation de motiver une décision :

(1) To justify and explain the result;

(2) To tell the losing party why he or she lost;

(3) To provide for informed consideration of the grounds of appeal; and

(4) To satisfy the public that justice has been done.

[99] However, an appeal court cannot intervene merely because it believes the trial judge did a poor job of expressing herself. Nor, is a failure to give adequate reasons a free standing basis for appeal. At para. 20 of *Walker*, Binnie J. states:

> Equally, however, *Sheppard* holds that "[t]he appellate court is not given the power to intervene simply because it thinks the trial court did a poor job of expressing itself" (para. 26). Reasons are sufficient if they are responsive to the case's live issues and the parties' key arguments. Their sufficiency should be measured not in the abstract, but as they respond to the substance of what was in issue. . . . The duty to give reasons "should be given a functional and purposeful interpretation" and the failure to live up to the duty does not provide "a free-standing right of appeal" or "in itself confe[r] entitlement to appellate intervention" (para. 53).

[100] An unsuccessful party may well be dissatisfied with the reasons of a trial judge, especially where he or she was not believed. Where findings of credibility must be made, it must be recognized that it may be very difficult for the trial judge to put into words the process by which the decision is arrived at (see *Gagnon*). But that does not make the reasons inadequate. In *R. v. R.E.M.*, [2008] 3 S.C.R. 3, 2008 SCC 51, released at the same time as this decision, McLachlin C.J. has explained that credibility findings may involve factors that are difficult to verbalize:

> While it is useful for a judge to attempt to articulate the reasons for believing a witness and disbelieving another in general or on a particular point, the fact remains that the exercise may not be purely intellectual and may involve factors that are difficult to verbalize. Furthermore, embellishing why a particular witness's evidence is rejected may involve the judge in saying

(1) justifier et expliquer le résultat;

(2) indiquer à la partie qui n'a pas gain de cause pourquoi elle a perdu;

(3) permettre un examen éclairé des moyens d'appel;

(4) convaincre le public que justice a été rendue.

[99] Cependant, une cour d'appel n'est pas admise à intervenir au seul motif que le juge du procès s'est mal exprimé. L'omission de fournir des motifs suffisants ne constitue pas non plus un motif d'appel distinct. Au par. 20 de l'arrêt *Walker*, le juge Binnie dit ce qui suit :

> L'arrêt *Sheppard* établit toutefois que « [l]a cour d'appel n'est pas habilitée à intervenir simplement parce qu'elle estime que le juge du procès s'est mal exprimé » (par. 26). Les motifs sont suffisants s'ils répondent aux questions en litige et aux principaux arguments des parties. Leur suffisance doit être mesurée non pas dans l'abstrait, mais d'après la réponse qu'ils apportent aux éléments essentiels du litige. [. . .] L'obligation de fournir des motifs « devrait recevoir une interprétation fonctionnelle et fondée sur l'objet » et l'inobservation de cette obligation n'a pas pour effet de créer « un droit d'appel distinct » ou de conférer « en soi le droit à l'intervention d'une cour d'appel » (par. 53).

[100] La partie qui n'a pas gain de cause peut juger insuffisants les motifs du juge du procès, surtout s'il ne l'a pas crue. Il faut reconnaître qu'il peut être très difficile au juge appelé à tirer des conclusions sur la crédibilité des témoins de préciser le raisonnement qui est à l'origine de sa décision (voir l'arrêt *Gagnon*). Ses motifs ne sont pas insuffisants pour autant. Dans l'arrêt *R. c. R.E.M.*, [2008] 3 R.C.S. 3, 2008 CSC 51, rendu concurremment avec la présente décision, la juge en chef McLachlin explique que les conclusions relatives à la crédibilité peuvent faire intervenir des éléments difficiles à exprimer :

> Bien qu'il soit utile que le juge tente d'exposer clairement les motifs qui l'ont amené à croire un témoin plutôt qu'un autre, en général ou sur un point en particulier, il demeure que cet exercice n'est pas nécessairement purement intellectuel et peut impliquer des facteurs difficiles à énoncer. De plus, pour expliquer en détail pourquoi un témoignage a été écarté, il se peut

unflattering things about the witness; judges may wish to spare the accused who takes the stand to deny the crime, for example, the indignity of not only rejecting his evidence in convicting him, but adding negative comments about his demeanor. In short, assessing credibility is a difficult and delicate matter that does not always lend itself to precise and complete verbalization. [para. 49]

Nor are reasons inadequate because in hindsight, it may be possible to say that the reasons were not as clear and comprehensive as they might have been.

[101] Rowles J.A. found that the reasons of the trial judge showed why she arrived at her conclusion that F.H. had been sexually assaulted by McDougall. I agree with her that the reasons of the trial judge were adequate.

IV. Conclusion

[102] I am of the respectful opinion that the majority of the Court of Appeal erred in reversing the decision of the trial judge. The appeal should be allowed with costs. The decision of the Court of Appeal of British Columbia should be set aside and the decision of the trial judge restored.

Appeal allowed with costs.

Solicitors for the appellant: Donovan & Company, Vancouver.

Solicitors for the respondent Ian Hugh McDougall: Forstrom Jackson, Vancouver.

Solicitors for the respondent The Order of the Oblates of Mary Immaculate in the Province of British Columbia: Macaulay McColl, Vancouver.

Solicitor for the respondent Her Majesty the Queen in Right of Canada: Attorney General of Canada, Toronto.

que le juge doive tenir des propos peu flatteurs sur le témoin. Or, le juge voudra peut-être épargner à l'accusé, qui a témoigné pour nier le crime, la honte de subir des commentaires négatifs sur son comportement, en plus de celle de voir son témoignage écarté et d'être déclaré coupable. Bref, l'appréciation de la crédibilité est un exercice difficile et délicat qui ne se prête pas toujours à une énonciation complète et précise. [par. 49]

De même, les motifs ne sont pas insuffisants parce que, avec le recul, on peut dire qu'ils ne sont pas aussi clairs et exhaustifs qu'ils auraient pu l'être.

[101] La juge Rowles a conclu que les motifs de la juge du procès expliquaient les raisons pour lesquelles elle avait conclu que F.H. avait été agressé sexuellement par M. McDougall. Je conviens avec elle que les motifs de la juge du procès étaient suffisants.

IV. Conclusion

[102] En toute déférence, je suis d'avis que les juges majoritaires de la Cour d'appel ont eu tort d'annuler la décision de la juge du procès. Le pourvoi est accueilli avec dépens. La décision de la Cour d'appel de la Colombie-Britannique est annulée, et celle de la juge du procès rétablie.

Pourvoi accueilli avec dépens.

Procureurs de l'appelant : Donovan & Company, Vancouver.

Procureurs de l'intimé Ian Hugh McDougall : Forstrom Jackson, Vancouver.

Procureurs de l'intimé The Order of the Oblates of Mary Immaculate in the Province of British Columbia: Macaulay McColl, Vancouver.

Procureur de l'intimée Sa Majesté la Reine du chef du Canada : Procureur général du Canada, Toronto.

1.3.3 MITHRAS MANAGEMENT LTD. AND SKYLD HOLDINGS LTD.

April 25, 1990

RE: MITHRAS MANAGEMENT LTD. AND SKYLD HOLDINGS LTD.

The Ontario Securities Commission yesterday released its decision in this matter. The hearing was held before the Commission on February 26, 27 and 28 and April 2, 1990.

The Skyld group of companies was involved in the financing and distribution of film and television series throughout most of the 1980's. They are best known for their role in the financing and distribution of the television series "Night Heat".

The hearing was convened to consider whether it would be in the public interest to:

1. suspend, cancel or restrict the registration of Mithras Management;

2. extend the cease trading order made on July 7, 1989 in respect of units in limited partnerships of Mithras C to CVII and Mithras LXXV and LXXVI; and

3. remove certain trading privileges under the Securities Act from certain companies in the Skyld group and the individuals involved therewith.

The position of Commission staff was that the Skyld group had artificially divided up various film and television properties into multiple limited partnerships in order to take advantage of the "government incentive securities" prospectus exemption in Regulation 14(g) to the Act and the take-over bid exemption in section 92(1)(d) of the Act.

The Commission found that the Skyld group and the individuals involved acted in good faith in connection with the financings done in reliance upon section 14(g) of the Regulation. Accordingly, the Commission did not feel obliged to interpret section 14(g) of the Regulation but indicated that, if pressed to decide the issue, it would likely have ruled in favour of the interpretation advocated by Commission staff (i.e., a purposive interpretation that would not permit an artificial sub-division of a business enterprise in order to take advantage of the prospectus exemption). However, on the subject of certain "buy-backs" of limited partnership units from investors which the Skyld group began to make in 1987, the Commission found that the spirit and intent of the take-over provisions of the Act had not been complied with. As a result, the Commission found it to be in the public interest to order, under section 124 of the Act, that the exemptions contained in section 92 of the Act do not apply to the respondents (other than Elizabeth Citroen and the individual limited partnerships) until such time as the Commission shall otherwise order under section 140 of the Act. In this regard, the Commission indicated that, at the very least, the respondents affected by the order would want to remedy all past defaults to investors under buy-back offers before seeking to regain the benefit of the exemptions under section 92 of the Act.

In view of the terms of the order made and the fact that the buy- back offer for Mithras C to CVII and Mithras LXXV and LXXVI had already expired, the Commission found there to be no need to continue the cease trading order in respect of the units in the limited partnerships. Copies of the decision are available from the Office of the Secretary (593-8212).

Reference: James Douglas
(416) 593-8300

Philippe Tardif
(416) 593-8161

3.1.2 MITHRAS MANAGEMENT LTD., ET AL. -
S. 26, 123 & 124

ONTARIO SECURITIES COMMISSION

IN THE MATTER OF THE SECURITIES ACT, R.S.O. 1980, CHAPTER 466, AS AMENDED

AND

IN THE MATTER OF MITHRAS MANAGEMENT LTD., SKYLD HOLDINGS LTD., AMBER FINANCIAL SERVICES LTD., BLACKSTONE ENTERTAINMENT LTD., SPECTRAFILM INC., INTERNATIONAL SPECTRAFILM DISTRIBUTION INC., GRAMBLING, INC. II, B. W. YOUNG & CO. LTD., JOHN PENTURN & SON LTD., ELIZABETH CITROEN, BARRY W. YOUNG, NORTURN PENTURN, JAMES PENTURN, MITHRAS C LIMITED PARTNERSHIP TO MITHRAS CVII LIMITED PARTNERSHIP INCLUSIVE, MITHRAS LXXV LIMITED PARTNERSHIP AND MITHRAS LXXVI LIMITED PARTNERSHIP

HEARING:	February 26, 27 and 28 and April 2, 1990 Securities Act, Sections 26, 123 and 124	
PANEL:	W. Moull	- Commissioner (Chair)
	M. Taschereau	- Commissioner
	P. Waitzer	- Commissioner
COUNSEL:	W. Dingwall) K. Hood)	- for all Respondents other than Barry W. Young and B. W. Young & Co. Ltd.
	B. Young	- for himself and B. W. Young & Co. Ltd.
	J. Douglas) P. Tardif)	- for Commission Staff

DECISION AND REASONS

This hearing was held under sections 26, 123 and 124 of the Securities Act on February 26, 27 and 28 and April 2, 1990, pursuant to a Notice of Hearing dated July 20, 1989. Its purpose was to consider whether it would be in the public interest:

(a) to order, under section 26, that the registration of Mithras Management Ltd. as a limited market dealer under the Act should be suspended, cancelled or restricted or should have terms and conditions imposed upon it;

(b) to order, under section 123, that trading should cease in the limited partnership units in Mithras C Limited Partnership to Mithras CVII Limited Partnership inclusive, Mithras LXXV Limited Partnership, and Mithras LXXVI Limited Partnership (in effect, to make permanent a temporary Cease Trading Order in respect of these units dated July 7, 1989); and

(c) to order, under section 124, that any or all of the exemptions contained in sections 34, 71, 72 and 92 of the Act should not apply to the Respondents (other than the Limited Partnerships mentioned in (b) above).

For the reasons set forth below, we have concluded that it is in the public interest to order, under section 124 of the Act, that the exemptions contained in section 92 of the Act do not apply to the Respondents (other than the above Limited Partnerships and Elizabeth Citroen) until such time as the Commission shall

otherwise order under section 140 of the Act. However, we have not found it to be in the public interest to make any of the other orders sought by Commission staff in this matter.

The Respondents are part of a group of individuals, limited partnerships and corporations which were referred to before us collectively as the "Skyld Group". The Respondents Mithras Management Ltd., Skyld Holdings Ltd., Amber Financial Services Ltd., Blackstone Entertainment Ltd., Spectrafilm Inc., International Spectrafilm Distribution Inc. and Grambling, Inc. II each carry on one or more aspects of the business of the Skyld Group. The Respondents Norturn Penturn (through his holding company, John Penturn & Son Ltd.), Barry W. Young (through his holding company, B. W. Young & Co. Ltd.) and Elizabeth Citroen appear to be the significant investors behind the Skyld Group. The day-to-day operations of the Skyld Group were formerly under the control of Norturn Penturn (who remains involved in the Group's activities as a member of its Executive Committee), and then for several years were directed by Barry W. Young. James Penturn, who is Norturn Penturn's son, has also been involved in the activities of the Skyld Group for some time, and has been in charge of those activities since Mr. Young's departure from management in the middle of 1989. Elizabeth Citroen appears to have played no active role in the Group's operations at any time. The business of the Skyld Group is the financing of movies and, particularly, television programmes. Indeed, we were told that

the Skyld Group is one of the most successful of the many organizations engaged in this type of activity. Television series such as "Night Heat" are among their better-known ventures.

For many years, the Skyld Group has carried on this business through the creation of limited partnerships and the sale of units in such limited partnerships in reliance upon the "government incentive securities" exemption now found in clause 14(g) of the Regulation made under the Securities Act. The Respondent Limited Partnerships are but a few of the more than one hundred and seventy limited partnerships created by the Skyld Group for this purpose over the years. The Respondent Mithras Management Ltd. acts as the general partner of each such limited partnership, and limited partnership units are sold by it to individual investors who, typically, wish to shelter some of their income for tax purposes. These limited partnership units are usually priced at $10,000 each, although many investors seem prepared to purchase a number of such units in a given year (presumably in order to shelter as much income as possible, or as much as they deem necessary, for that year).

In the early 1980's, in financing a television series such as "Night Heat", the Skyld Group would create one limited partnership for each episode to be produced during a given year. The number of episodes of such a series actually produced in a year would vary, of course, depending upon such things as demand

from the television networks and production difficulties which might delay completion of one or more episodes until the following year. Each episode would be separately copyrighted and, we were told, upon completion would be separately certified by the federal government under its incentive programmes for such productions. As and when an episode was completed and certified, the Skyld Group would then be in a position to sell to investors the units in the limited partnership created in respect of that episode. Units in each such limited partnership would be sold to not more than fifty purchasers, with not more than seventy-five prospective purchasers being solicited in respect of each, all as required by the terms of the exemption contained in clause 14(g) of the Regulation (although it should be noted that the total number of purchasers who invested in, and who would have been solicited in respect of, the total number of episodes of a particular series produced in a given year would be far greater than fifty and seventy-five; in fact, they would aggregate, approximately, the number of episodes completed in the year multiplied by fifty and seventy-five, respectively). We were told that this type of structure was at the time, and remains to this day, quite common among those engaged in financing television series.

In argument before us, Staff Counsel asked us to take the position that this "one limited partnership per episode" structure violated the spirit and intent of the exemption in clause 14(g) as set out in that clause itself, in subsection 15(2)

of the Regulation (which defines a "government incentive security" for the purposes of clause 14(g)), and in Section D of Policy Statement 6.1 (which describes the Commission's designation of various "government incentive securities" for the purposes of the definition in subsection 15(2) of the Regulation). Their reasoning was that the "business venture" in respect of which each investor was solicited was, at the least, the whole group or "package" of episodes produced in a year (and might, in fact, even be seen as the entirety of all episodes of the series produced in all years), rather than the single episode in which the investor actually invested through his or her purchase of a limited partnership unit or units. Such a finding would, of course, put all such "one limited partnership per episode" structures (be they those of the Respondents or anyone else) off-side under clause 14(g) because, when so aggregated, they would then far exceed the stipulated "fifty/seventy-five" threshholds. Fortunately, we do not have to decide this issue given the conclusions we have reached regarding the appropriate disposition of this matter. We would note at this point simply that at least one of us has grave doubts regarding the apppropriateness of this reading of clause 14(g) even under the most purposive principles of interpretation.

At some time in late 1984 or early 1985, the Respondents developed a modified structure for their limited partnership offerings in connection with television series financing. Rather than "one limited partnership per episode", they caused each

limited partnership created in respect of a television series in a given year to acquire an undivided fractional interest in each episode of the series produced in that year. The exact interest acquired by each such limited partnership would vary in proportion to the number of episodes produced and the number of limited partnerships created therefor in the year (typically, the number of episodes would be double the number of limited partnerships). For instance, the Respondents Mithras LXXV Limited Partnership and Mithras LXXVI Limited Partnership each acquired an undivided one-half interest in each of "Night Heat" Episodes 58 to 61. An undivided one-ninth interest was acquired in each of "Night Heat" Episodes 40 to 57 by Mithras LX Limited Partnership to Mithras LXVIII Limited Partnership, inclusive. Between 1985 and 1989, we were told, the Respondents used this modified structure many times over, raising many millions of dollars from several thousand investors. In each instance to which we were referred, the number of purchasers and prospective purchasers in respect of each limited partnership was kept to not more than fifty and seventy-five, respectively (although, again, the total of each was much greater when looked at from a different perspective -- that of the number of purchasers and prospective purchasers in respect of the "package" of episodes of the series produced in the year).

It is this modified structure upon which Staff base their allegations in this matter. They say that this structure represents an attempt to divide a business venture (a year's worth

of episodes of a television series) into "artificial" units (as many limited partnerships as necessary) solely, or primarily, to achieve compliance, or purported compliance, with the "fifty/seventy-five" threshholds in clause 14(g). They point us to evidence that the Respondents themselves, those engaged on their behalf, and even the investors involved viewed the "business venture" as the whole year's "package" of episodes. They point to the "cross-collateralization" effected within each group of limited partnerships investing in the same batch of episodes, the common marketing of and accounting for each such batch (rather than on a partnership-by-partnership basis), and a variety of other factors as, they say, the clear indicia of an attempt to take undue and technical advantage of the terms of clause 14(g). This attempt, they say, represents a deliberate violation or, at least, circumvention of the spirit and intent of the "government incentive securities" exemption, and so it should attract the appropriate sanctions under the Act.

The Respondents, of course, deny these allegations. They assert that there were good business reasons for adopting the modified structure in the way they did -- spreading of risk and return among all investors in a year's episodes, convenience in marketing and accounting practices, and so on. They also point to the words of clause 14(g), and particularly those found in Section D, clause (b), of Policy 6.1, as an indication that the Commission has not prohibited their modified structure and, in fact, may have

expressly sanctioned it by designating, among others, "units or interests ... in a partnership the sole purpose of which is to invest in one or more motion picture films or video tapes ..." as "government incentive securities" for the purposes of subsection 15(2) of the Regulation.

The Respondents also raise the issue of what we will call, for reference purposes, the "Steen Correspondence". It seems that Mr. Young had some doubts about the view that this Commission and its staff might take of the Respondents' modified structure, and so he went for guidance to what he called "the horse's mouth" -- Mr. Robert Steen, who was then our Deputy Director (and later Director) of Corporate Finance. During the course of at least one meeting and several telephone discussions with Mr. Steen, Mr. Young says that he (and others acting on his behalf) were assured by Mr. Steen that the modified structure did not breach the terms of clause 14(g). A series of letters was introduced in evidence by Mr. Young in support of his recollection of what Mr. Steen had said -- not, of course, to prove that Mr. Steen's view was necessarily the correct one, but simply to show that he (Mr. Young) had been acting in good faith throughout and had reasonably relied upon Mr. Steen's guidance.

Mr. Steen was not called as a witness in this matter. Nor was any other representative of our Corporate Finance Branch brought forward to tell us whether Mr. Young's recollection of Mr.

Steen's advice was or was not consistent with the views and practices of that Branch at the relevant time. In short, no evidence at all was presented to us that would undermine or contradict in any way the impression left by the "Steen Correspondence" (despite invitations from us to Staff Counsel to do so). Staff did suggest that we should examine the "Steen Correspondence" very carefully to see whether it said what Mr. Young asserted it did. We have done so, and we agree that the letters submitted in evidence are not entirely unambiguous. However, when taken together with Mr. Young's oral evidence (which we have no reason whatever to doubt or question) and Staff Counsel's repeated assurance that they did not question Mr. Young's good faith in this regard, the "Steen Correspondence" amply bears out Mr. Young's contention that he went ahead with the Respondents' modified structure in the honest and reasonable belief that a responsible senior official of this Commission's staff had assured him that it was acceptable under clause 14(g).

This conclusion, obviously, does not oblige us to adopt the substantive interpretation of clause 14(g) advanced by the Respondents -- as Staff Counsel rightly pointed out, no member of the staff of this Commission has any authority to bind the Commission itself to any particular interpretation of the Act, the Regulation, or the Policy Statements. In fact, were we pressed to decide the issue, we would likely have ruled in favour of the interpretation of clause 14(g) advocated by Staff Counsel

(although, again, at least one of us has doubts on this point and, given the numbers of investors involved in each, we would readily acknowledge the irony of holding in favour of Staff's view of the Respondents' modified structure if we were not also prepared to adopt their view of the "one limited partnership per episode" structure). But our conclusion regarding the import of the "Steen Correspondence" means that we readily accept Mr. Young's assertions that he acted in good faith and reasonably throughout, that at all times he consulted fully with responsible authorities when he had any doubts as to the propriety of what he wanted to do, and, particularly, that the Respondents would never have gone ahead with their modified structure had Mr. Steen said it was inappropriate to do so under clause 14(g).

As a result, we see no basis at all upon which to make any order against any of the Respondents in respect of their modified structure. That structure may (or may not) have breached the terms of clause 14(g). But that is not the point. Under sections 26, 123 and 124 of the Act, the role of this Commission is to protect the public interest by removing from the capital markets -- wholly or partially, permanently or temporarily, as the circumstances may warrant -- those whose conduct in the past leads us to conclude that their conduct in the future may well be detrimental to the integrity of those capital markets. We are not here to punish past conduct; that is the role of the courts, particularly under section 118 of the Act. We are here to

restrain, as best we can, future conduct that is likely to be prejudicial to the public interest in having capital markets that are both fair and efficient. In so doing we must, of necessity, look to past conduct as a guide to what we believe a person's future conduct might reasonably be expected to be; we are not prescient, after all. And in so doing, we may well conclude that a person's past conduct has been so abusive of the capital markets as to warrant our apprehension and intervention, even if no particular breach of the Act has been made out. Equally, however, even if there has been a technical breach of the Act, we may well conclude that, in the circumstances, no sanction is necessary to protect the public interest. It may well be the rare case in which we reach such a conclusion, but in our view this case (or, at least, this branch of it) is one of them. Even if the Respondents' modified structure did violate clause 14(g), we are convinced that they would not have adopted it but for the reassurance they gained (and reasonably so, in our view) from what they said Mr. Steen told them. Accordingly, there is no basis upon which we can fairly say that the public interest requires us to intervene here.

[Before going on to deal with the rest of this matter, we would like to digress briefly. As should be evident to anyone who has read this far, we have had a great deal of difficulty in agreeing among ourselves as to the proper interpretation of the "government incentive securities" exemption as set out in clause

14(g) and subsection 15(2) of the Regulation, and particularly in Section D of Policy Statement 6.1. We have had these difficulties despite three days of evidence and a day's worth of able argument from counsel in this matter, and it has occurred to us in passing that many others in the broader community may well share our puzzlement. Accordingly, we would like to suggest that staff bring forward to the full Commission a reasoned proposal for revisions to Policy 6.1 (and, if necessary, clause 14(g) and subsection 15(2) of the Regulation), so that their view of the meaning and scope of the exemption can then be considered and adopted in the usual public, generalized way that this Commission prefers to act when dealing with policy matters.

As well, it may even be time for this Commission to re-visit the whole question of whether "government incentive securities" ought to be entitled to any special exemption under the Act at all. The difficulty that we have had in adopting whole-heartedly the purposive principles of interpretation advanced by Staff Counsel in this matter seems to stem, in large measure, from the fact that the policy basis for the exemption in clause 14(g) appears to us to be antithetical to the philosophy underlying the Act as a whole. Without belabouring the point unduly, it seems to us that all of the other exemptions in the Act (or, at least, almost all of them, since the "seed capital" exemption in clause 71(1)(p) of the Act might be seen as analogous) proceed from the theory that the usual protections of

the Act's disclosure requirements are not required in the particular circumstances in which a given exemption is available. No such rationale would appear to exist with respect to the "government incentive securities" exemption, and it may even be that -- given the usual timing and psychology of tax-shelter investments -- those who are solicited in respect of them may require more protection rather than less.]

Our conclusion on the first branch of this case does not end the matter, however. At some point in 1987, the Skyld Group began to make "buy-backs" of the outstanding units in many of the limited partnerships through which it had earlier financed its movie and television ventures. We were told that, once again, these "buy-backs" were tax-motivated. For the investors, who had already had the benefit of sheltering $10,000 of other income for each unit purchased, acceptance of a "buy-back" would convert the expected revenue stream in respect of that unit from an income receipt to a capital receipt. For the Skyld Group, use of a non-resident corporation to effect a "buy-back" would allow it not only to re-acquire a unit for less than its original purchase price, but also to do so with a "step-up" in cost basis for tax purposes. We do not fully appreciate how this alchemy worked for purposes of the Income Tax Act (nor is it really any of our business). What we do appreciate is that these "buy-backs" seem to have benefitted all concerned (except, perhaps, Revenue Canada), and particularly those investors whose individual

circumstances allowed them to take maximum advantage of a receipt of capital instead of a receipt of income.

These "buy-backs" were made by the Respondent Grambling, Inc. II, a Delaware corporation, in the form of "exempt take-over bids" pursuant to clause 92(1)(d) of the Act. Although such bids were typically made concurrently to all holders of units in each of the limited partnerships that had invested in a year's worth of episodes of a given television series, technically speaking each such bid was made separately to the holders of units in each such limited partnership. In particular, each such bid was made subject to the condition that at least two-thirds of the units in the particular limited partnership had to be tendered to Grambling under the bid (so that, upon completion of the bid, Grambling could, as the holder of at least two-thirds of the units in the limited partnership, make such "fundamental changes" as moving the limited partnership's residence to Delaware and changing its general partner from the Respondent Mithras Management Ltd. to Grambling itself or some other non-resident member of the Skyld Group -- both of which steps, we were told, were essential to the income tax treatment desired by the Skyld Group). This condition applied separately to each offeree limited partnership, so that the acceptance or non-acceptance of the bid made to the unit-holders in any given offeree limited partnership had no bearing on the success or failure of any of the contemporaneous offers made by Grambling to the unit-holders in the other offeree

limited partnerships which had invested in the same year's worth of episodes of the television series in question. If this condition was not met in respect of a given offeree limited partnership, Grambling would adandon that bid but would still go ahead with, and complete, any concurrent bid in respect of which the condition was satisfied.

Since, by definition, there would be fifty or fewer limited partners in each offeree limited partnership, each such bid would, on its face, meet the threshhold of "not more than fifty offerees" required to invoke the exemption found in clause 92(1)(d) of the Act. Accordingly, such bids did not fully comply with the requirements of Part XIX of the Act, which would usually apply to take-over bids that do not qualify for such an exemption. For example, in some cases only a part of the bid price would become payable by Grambling upon acceptance of its offer by a unit-holder; in these cases, the balance of the bid price was to become payable at a later date or dates as specified in the "exempt take-over bid circular" for that bid. As Staff Counsel pointed out, such "instalment payments" are not permitted in an all-cash bid that must comply with Part XIX, because section 95 of the Act requires that an all-cash offeror must "make adequate arrangements prior to the bid to ensure that the required funds are available to effect payment in full for all securities that the offeror has offered to acquire". The same rule applies to the cash portion of a part-cash/part-securities bid, but in such a

case, because of the securities portion of the consideration included in the bid price, Item 15 of Form 32 (the form of take-over bid circular mandated under Part XIX by section 170 of the Regulation) also requires that the financial statements of the offeror form part of the take-over bid circular. Even in an all-cash bid, financial statements must be included in the take-over bid circular if, as here, the bid is an "insider bid" as defined in subsection 163(1) of the Regulation (see Items 20 and 21 of Form 32 and Item 20 of Form 33). As Grambling's financial statements were not included in any of the relevant "exempt take-over bid circulars" to which we were referred, offeree unit-holders were unable to evaluate Grambling's ability to make any of the later "instalment payments" as and when they fell due.

And, as we were told, Grambling did have some difficulty in meeting its obligations with respect to certain of these "instalment payments" -- we were not told the exact amounts, but Respondents' Counsel estimated that some $4,000,000 in such payments are currently due and payable, but unpaid by Grambling. As was disclosed in the relevant "exempt take-over bid circulars", the Respondent Amber Financial Services Ltd. was to finance these bids by lending the required funds to Grambling. It was not disclosed that Amber, in turn, was relying upon the receipt of revenue from other members of the Skyld Group, such as the Respondent Spectrafilm Inc., to fund its loan obligations to Grambling. These revenues were, apparently, anticipated in the

ordinary course from distribution arrangements and the like, but did not fully materialize in Spectrafilm's hands because of defaults farther down the distribution chain (by arm's length third parties, we understand). As a result, Spectrafilm did not fully fund Amber, and so Amber did not fully fund Grambling's obligations in respect of the "instalment payments" that it had promised to pay to the investors whose units it had already acquired. Complaints from these investors brought the Respondents' activities to the attention of the staff of this Commission, and this hearing was the result (as was the temporary Cease Trading Order of July 7, 1989 against the Respondent Limited Partnerships, which were then the targets of bids from Grambling).

In these circumstances, we have no hesitation in adopting the purposive principles of interpretation advanced by Staff Counsel. It should be clear to all that the underlying purpose of Part XIX of the Act is the protection of the integrity of the capital markets in which take-over bids are made, and in particular the protection of investors who are solicited in the course of a take-over bid. Those purposes are carried out through provisions which, among other things, attempt to ensure that equal treatment is accorded to all offerees in a bid, that offerees have a reasonable time within which to consider the terms of a bid, and that adequate information is available to offerees to allow them to make a reasoned decision as to whether to accept or reject a bid. These provisions exist to protect investors, of course, but

their over-arching purpose is the protection of the integrity of the capital markets in which those investors have placed their money -- and their trust.

Certain exemptions are available, of course, from the strict requirements of Part XIX. These are set out in section 92 of the Act. Generally speaking, these exemptions are available in circumstances in which it is reasonable to expect that the purpose of Part XIX will be carried out even if formal compliance with all of its provisions is not required. Where the strict terms of an exemption are met, and the policy objectives of Part XIX are nonetheless fully carried out, this Commission will have no basis for intervening in a bid. But where the policy objectives of Part XIX are not carried out, then this Commission will not hesitate to intervene in a bid even if the strict terms of an exemption have been met.

Here, we are of course concerned that Grambling has not met its obligations to investors in respect of the very large amount of "instalment payments" still due and owing to them. We accept that this problem may well have been caused by events that were, strictly speaking, beyond the control of the Skyld Group. We also accept that the Skyld Group is trying to rectify the problem. And we recognize that we have no authority under the Act to make an order that would enforce payment of the amounts due by Grambling to the investors; that is for the courts, of course.

But we do have the authority, and the obligation, to protect the public interest by preventing any repetition of the conduct that led to the problem in the first place. Far more than Grambling's failure to pay what it owes to investors (serious though that is on its own), we are concerned about the lack of adequate disclosure to the investors of basic information that clearly would have affected their decision whether or not to accept a bid from Grambling. The offeree unit-holders were not told that their later "instalment payments" were in any way contingent upon the financial performance of other members of the Skyld Group. They were not told that Amber would be unable to meet its loan obligations to Grambling, to allow Grambling in turn to make the required "instalment payments", unless Amber itself received sufficient revenues to do so from Spectrafilm and other members of the Skyld Group involved in the distribution end of its business. In short, the investors were not told, as Mr. Young put it at one point, that they might have to wait "until the cows come home" to be paid what they had every reason to expect, based on what they were told, would be paid as and when it fell due.

Clearly, such conduct falls below the standard that this Commission expects of those who have resort to the exemptions in section 92 of the Act. Failure to disclose obviously relevant information to offerees in the course of a take-over bid -- even one that might be said to meet the strict terms of an exemption contained in section 92 -- is a clear breach of the underlying

purpose and policy objectives of Part XIX. Investors cannot make an informed choice without all relevant information. And capital markets that are deprived of relevant information can be neither fair nor efficient. The public interest therefore requires that we protect those investors, and the integrity of those capital markets, from the repetition of this kind of conduct in the future. We will do so by removing from certain of the Respondents the continuing benefit of the exemptions contained in section 92 of the Act.

As Respondents' Counsel pointed out several times, there has been no evidence at all before us that Elizabeth Citroen played any part in any of these events. Accordingly, there will be no order made against her. Nor would an order be appropriate in respect of the Respondent Limited Partnerships, as they were mere targets and not actors in this matter. Moreover, the temporary Cease Trading Order of July 7, 1989 in respect of those Limited Partnerships should now be lifted. In light of the order we are prepared to make in this matter, it serves no useful purpose to continue that Cease Trading Order -- the bids themselves having now been abandoned -- and its continuance might even be detrimental to the interests of the holders of the units to which it still applies.

With respect to all other Respondents, we find it to be in the public interest to order, under section 124 of the Act,

that the exemptions contained in section 92 of the Act do not apply to those Respondents until such time as the Commission shall otherwise order under section 140 of the Act.

Our order will not, of course, preclude any of these Respondents from continuing to make "buy-backs" of units in any of the limited partnerships through which they have previously financed their ventures. Nor would we want to do so, since the "buy-backs" seem beneficial to at least some of the investors, as well as to the Skyld Group, given the income tax consequences they apparently trigger. But, as a result of our order, any future "buy-backs" undertaken by the Skyld Group will have to comply in full with Part XIX of the Act, so that the investors concerned should have full information upon which to assess their risk and base their decisions.

In making this order, we have expressly indicated that it is to remain in effect until the Commission otherwise orders under section 140 of the Act. This may seem superfluous, as the Commission always has the ability to vary or revoke any of its orders under section 140. But it is not entirely superfluous here, since we wish to indicate to these Respondents that we do not believe that our order need necessarily apply to them forever. We are confident that they will, in time, be able to demonstrate to this Commission that they are able to abide by the spirit and intent of the Act, as well as by its strict letter. We would not

purport to tie the hands of any subsequent panel of this Commission who might be called upon to hear an application from one or more of these Respondents under section 140 of the Act. However, we would like to indicate that, at the very least, we would expect that these Respondents would want to make good all past defaults in payments to investors (so as to remedy the material harm to those investors caused by their failure to disclose) before seeking to regain the benefit of the exemptions in section 92 of the Act.

We would, again, like to thank all counsel for their assistance and patience in this matter. We would ask that Staff Counsel prepare for our signature an appropriate form of Order, bearing today's date, to give more formal effect to this decision.

DATED at Toronto this 24th day of April, 1990.

(Paul L. Waitzer) (Malcolm A. Taschereau)

(William D. Moull)

Enforcement Proceedings - Merits

Ontario Securities Commission
Commission des valeurs mobilières de l'Ontario
22nd Floor
20 Queen Street West
Toronto ON M5H 3S8
22e étage
20, rue Queen Ouest
Toronto ON M5H 3S8

Citation: Limelight Entertainment Inc. et al., 2008 ONSEC 4
Date: 2008-02-12

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

AND

**IN THE MATTER OF
LIMELIGHT ENTERTAINMENT INC.,
CARLOS A. DA SILVA,
DAVID C. CAMPBELL,
JACOB MOORE and JOSEPH DANIELS**

REASONS AND DECISION

(Section 127 of the *Securities Act*)

Hearing:	October 1, 2007	
Written submissions:	October 23, 2007	
Decision:	February 12, 2008	
Panel:	James E. A. Turner	Vice-Chair (Chair of the Panel)
	Suresh Thakrar	Commissioner
Counsel:	Derek Ferris	For the Ontario Securities Commission
	Hanah Shaikh (Articling Student)	
	Gary Clewley	For Carlos A. Da Silva

No one appeared for Limelight Entertainment Inc., David C. Campbell or Joseph Daniels

TABLE OF CONTENTS

REASONS AND DECISION

A. OVERVIEW

1. Background

[1] On April 7, 2006, the Ontario Securities Commission (the "Commission") issued a Notice of Hearing pursuant to section 127 of the Securities Act, R.S.O. 1990, c. S.5, as amended (the "Act") in connection with a Statement of Allegations issued by Staff of the Commission ("Staff") on that day with respect to Limelight Entertainment Inc. ("Limelight"), Carlos A. Da Silva ("Da Silva"), David C. Campbell ("Campbell") and Jacob Moore ("Moore").

[2] On April 13, 2006, the Commission issued a temporary cease trade order (the "First Temporary Order") pursuant to subsections 127(1) and 127(5) of the Act against Limelight, Da Silva, Campbell and Moore. The terms of the First Temporary Order were that all trading in the securities of Limelight cease; that Limelight, Da Silva, Campbell and Moore cease trading in all securities; and that any exemptions contained in Ontario securities law do not apply to Limelight, Da Silva, Campbell and Moore.

[3] On April 25, 2006, an Amended Notice of Hearing and Amended Statement of Allegations were issued adding Joseph Daniels ("Daniels") as a respondent.

[4] On April 26, 2006, the First Temporary Order was extended and its terms were amended to include Daniels (the "Amended Temporary Order"). The terms of the Amended Temporary Order were that Daniels was ordered to cease trading in all securities and that any exemptions contained in Ontario securities law do not apply to him. The Amended Temporary Order also required Limelight to provide the Commission's notice of these proceedings to its shareholders.

[5] The Amended Temporary Order was extended on May 11, 2006, September 12, 2006 and October 30, 2006.

[6] Following a hearing on August 2, 2007, the Commission approved a settlement agreement between Moore and Staff in connection with these proceedings (the "Settlement Agreement").

[7] For purposes of these reasons, Limelight, Da Silva, Campbell and Daniels are referred to collectively as the "Respondents."

[8] On September 28, 2007, Staff and Da Silva entered into an Agreed Statement of Facts (the "Agreed Statement") in which Da Silva admitted breaches of the Act but did not agree on sanctions.

[9] The hearing on the merits took place on October 1, 2007. The Agreed Statement was entered into evidence, and we accepted the submissions of Staff and Da Silva that a sanctions hearing, if necessary, would be held at a later date. After making that submission, Da Silva and his counsel left the hearing room.

[10] No one appeared at the hearing for Limelight, Campbell or Daniels. We accept Staff's evidence that Limelight and Campbell received proper notice of the hearing. We also find that Staff made reasonable attempts to locate and serve Daniels. We conclude, accordingly, that we are entitled to proceed to hear this matter in the absence of Limelight, Da Silva, Campbell and Daniels as permitted

under section 7 of the Statutory Powers Procedure Act, R.S.O. 1990, c. S.22, as amended (the "SPPA"). Section 7 of the SPPA provides as follows:

> Where notice of an oral hearing has been given to a party to a proceeding in accordance with this Act and the party does not attend at the hearing, the tribunal may proceed in the absence of the party and the party is not entitled to any further notice in the proceeding.

2. The Respondents

(i) Limelight

[11] Limelight is an Ontario corporation that was incorporated on August 14, 2000. It was dissolved on or about November 29, 2004 and revived on or about September 27, 2005. It has never been registered in any capacity with the Commission. Upon incorporation, Limelight's directors were Da Silva, Campbell and Harry Hinde.

[12] Beginning in April, 2004, Limelight operated from an office located at 300 Richmond Street West, Toronto, Ontario. Limelight also, for a period of time, maintained an office at 4306 Lawrence Avenue East, in Scarborough, Ontario. In April or May of 2006, after the issuance of the Amended Temporary Order, the Richmond Street office was shut down and the Lawrence Avenue office served as Limelight's principal place of business. In addition, Limelight had a mailbox at 2916 Dundas Street West, Suite 514, Toronto, Ontario.

[13] Limelight has never been registered in any capacity under the Act and has never filed a preliminary or final prospectus with the Commission, nor has it ever received a receipt for any such prospectus from the Commission. The shares of Limelight have never been listed on any exchange, nor has the Commission given written permission to Limelight to make any representation to investors that Limelight shares are or would be listed on an exchange.

(ii) Da Silva

[14] Da Silva was the president of Limelight from April 5, 2004 until he resigned on or about April 17, 2006. He was a director of Limelight throughout the period in question. He was registered as a securities salesperson with Marchment and MacKay Limited from March 25, 1994 until November 21, 1997 and with C. J. Elbourne Securities from November 28, 1997 to June 30, 2000 . Since that time Da Silva has not been registered in any capacity under the Act.

[15] Of the 18,482,035 outstanding shares of Limelight as of March 1, 2006, Da Silva is the owner of 10,750,000 shares or approximately 58% of such shares.

(iii) Campbell

[16] Campbell was the vice-president of Limelight from April 5, 2004 until on or about April 17, 2006, when he succeeded Da Silva as president. He was a director of Limelight throughout the period in question. He has never been registered in any capacity under the Act.

[17] As of March 1, 2006, Campbell owned 2,000,000 shares of Limelight representing approximately 11% of such shares. Campbell is the second largest shareholder of Limelight.

(iv) Daniels

[18] It appears from the evidence that Daniels was a salesperson with Limelight from approximately April, 2006 to May, 2006. He has never been registered in any capacity under the Act.

3. Issues

[19] Staff's allegations raise the following issues in this matter:

1. Did Limelight, Da Silva, Campbell and Daniels breach the registration and prospectus requirements of the Act by trading in Limelight shares contrary to subsections 25(1) and 53(1) of the Act in circumstances where the "accredited investor" exemption was not available under OSC Rule 45-501, *Prospectus and Registration Exemptions* (now NI 45-106) ("Rule 45-501")?
2. Did Limelight, Da Silva and Campbell give undertakings regarding the future value of Limelight shares, with the intention of effecting sales of Limelight shares, contrary to subsection 38(2) of the Act?
3. Did Limelight, Da Silva, Campbell and Daniels make representations regarding the future listing of Limelight shares, with the intention of effecting sales of Limelight shares, contrary to subsection 38(3) of the Act?
4. Did Da Silva mislead Staff, contrary to clause 122(1)(a) of the Act, when he advised Staff that (i) Limelight shareholders were accredited investors, (ii) Limelight salespersons always enquired to confirm that sales of Limelight shares were made only to accredited investors, (iii) no scripts were used by Limelight salespersons, (iv) Limelight salespersons also acted as project managers of Limelight's business, and (v) he did not know whether Limelight shares were sold to Ontario investors in 2005?
5. Did Limelight and Da Silva file misleading or untrue reports of exempt distributions with the Commission contrary to clause 122(1)(b) of the Act?
6. Did Limelight, Da Silva, Campbell and Daniels breach the First Temporary Order or the Amended Temporary Order?
7. Was the conduct of Limelight, Da Silva, Campbell and Daniels contrary to the public interest?

B. EVIDENCE

1. Introduction

[20] None of the Respondents appeared before us to dispute the evidence submitted to us by Staff, except that Da Silva appeared at the outset of the hearing to state that he disputes Staff's allegation that he knew "scripts" were being used by Limelight salespersons and that he would make submissions on sanctions at any sanctions hearing.

[21] The evidence before us consists of:

i) the Agreed Statement;

ii) the testimony of:

(a) one Limelight investor;

(b) two Limelight salespersons, Moore and Ove Simonsen ("Simonsen");

(c) the Commission's principal investigator, Larry Masci ("Masci"); and

iii) the affidavit evidence of three additional Limelight investors.

[22] Staff provided us with eight binders of documentary evidence, which were referred to during the hearing by the witnesses and Staff. Included in the binders is documentation relating to an additional five Limelight investors who neither testified nor swore affidavits.

[23] Overall, we found the evidence submitted to us to be consistent, clear and cogent, except with respect to certain allegations against Daniels.

2. The Agreed Statement of Facts between Staff and Da Silva

[24] The Agreed Statement includes numerous admissions with respect to the conduct of Da Silva and the other Respondents, and describes Limelight's operations in detail. The following is a summary of the agreed facts.

(i) Trading and Distribution of Limelight Shares

[25] The Agreed Statement indicates that from April, 2004 to May, 2006, Limelight sold approximately 1.6 million Limelight shares to investors at prices that ranged from $0.50 to $2.00 per share. As a result of these sales, Limelight raised approximately $2.75 million from investors located in all ten provinces of Canada and from investors outside of Canada.

[26] Limelight's shareholder list and investor cheques admitted in evidence indicate that approximately 71 Ontario residents invested in Limelight during the period from April, 2004 to May, 2006 inclusive.

[27] Limelight employed about six "qualifiers" (telemarketers) at any given time. The qualifiers were responsible for cold-calling prospective investors to solicit interest in buying Limelight shares. If any interest was expressed, the investor would be referred to a "consultant" (salesperson), who was responsible for completing the sale. Limelight employed about five to eight salespersons.

[28] Da Silva and Campbell acted as securities salespersons contrary to the registration requirements found in section 25 of the Act.

[29] The trades in Limelight shares were trades in securities not previously issued and were therefore distributions. No prospectus was filed and therefore the sales of Limelight shares were illegal distributions contrary to section 53 of the Act.

(ii) Prohibited Representations

[30] The Agreed Statement indicates that Campbell advised Limelight's salespersons that Limelight was raising money for the purpose of going public. Limelight salespersons in turn advised prospective investors that Limelight would be going public and that its shares would be listed on a stock exchange in order to effect sales of Limelight shares.

[31] Limelight's salespersons advised prospective investors that they could make two to four times their initial investment within six months. Some investors were told that the Limelight share value was expected to rise to $3 to $10 per share once Limelight went public. Other investors were advised by Limelight's salespersons that they were unable to sell their Limelight shares for six to twelve months.

[32] Limelight and its salespersons made representations regarding the future value of Limelight shares and Limelight being listed on a stock exchange with the intention of effecting trades in Limelight shares contrary to subsections 38(2) and (3) of the Act.

(iii) Misleading Statements by Da Silva

[33] The Agreed Statement indicates that by letter received by Staff on May 12, 2005, Da Silva advised Staff that each potential Limelight investor was told that the investment opportunity in Limelight was available only to accredited investors. This same information was provided to Staff during Da Silva's voluntary interview on December 13, 2005.

[34] During his voluntary interview on December 13, 2005, Da Silva also advised Staff that (i) Limelight shareholders were accredited investors; (ii) no scripts were used by Limelight; (iii) Limelight salespersons always enquired to confirm that all sales of Limelight shares were made only to accredited investors; and (iv) Limelight's salespersons also acted as project managers. These statements were false and misleading.

(iv) Untrue and Misleading Forms Filed with the Commission

[35] The Agreed Statement indicates that on or about July 23, 2004, Limelight filed a Form 45-103F4 – *Report of Exempt Distribution* ("Form F4") with the Commission relating to the distribution of common shares to nine investors in Alberta, Saskatchewan, British Columbia and Ontario.

[36] The Form F4 did not list or disclose any commissions or finders' fees paid in connection with the distributions of Limelight shares or the exemption relied on. The Form F4 stated that the Limelight shares were distributed on July 14, 15 and 16, 2004 and was signed by Da Silva as president of Limelight.

[37] On or about October 13, 2004, Limelight filed a second Form F4 with the Commission relating to the distribution of common shares of Limelight to 69 investors in British Columbia, Alberta, Saskatchewan, Manitoba, Ontario, Nova Scotia, New Brunswick, the United States, Barbados and the United Kingdom.

[38] The second Form F4 also did not disclose any commissions or finders' fees paid in connection with the distribution of Limelight shares or the exemption relied on. The second Form F4 was also signed by Da Silva as president of Limelight and reported on trades from July 27, 2004 to September 17, 2004 inclusive.

[39] On or about October 13, 2004, Limelight filed a Form 45-501F1 – *Report under Section 72(3) of the Act or Section 7.5(1) of Rule 45-501* ("Form 45-501F1") with the Commission relating to the distribution of Limelight shares to 29 investors in Alberta and Ontario.

[40] The Form 45-501F1 did not disclose any commissions or finders' fees paid and stated that the accredited investor exemption in section 2.3 of Rule 45-501 was being relied upon. The Form 45-501F1 was signed by George Schwartz on behalf of Da Silva, president of Limelight. The Form 45-501F1 incorrectly listed the dates of the 29 trades as October 4, 2004 whereas the trades actually occurred on or between June 10, 2004 and August 29, 2004.

[41] In selling Limelight shares to Ontario residents and residents of other jurisdictions, Limelight purported to rely upon the exemption for selling securities

to accredited investors in OSC Rule 45-501 in circumstances where the exemption is not available.

[42] The vast majority of Limelight investors are not accredited investors. Furthermore, Limelight's salespersons made no efforts to enquire into the financial situation of prospective investors in order to determine whether such persons qualified as accredited investors.

[43] Limelight and Da Silva filed untrue and misleading forms with the Commission and misrepresented that the sale of Limelight shares reported in the two Form F4s and the one Form 45-501F1 were exempt trades and that no commissions or finders' fees were paid in respect of those distributions.

(v) Breach of the Commission's Orders

[44] The Agreed Statement indicates that on April 13, 2006, the Commission issued the Temporary Order that: (i) all trading in the securities of Limelight cease; (ii) Limelight, Da Silva, Campbell and Moore cease trading in all securities; and (iii) any exemptions contained in Ontario securities law do not apply to Limelight, Da Silva, Campbell and Moore.

[45] The motion seeking a Temporary Order was made on notice to Limelight, Campbell and Da Silva. Counsel advised the Commission that the respondents did not oppose the Temporary Order.

[46] After the issuance of the Temporary Order, Limelight, Campbell, and Limelight's salespersons continued to solicit investors and receive investor cheques up to about June 1, 2006. Campbell and Da Silva each cashed investor cheques after the Temporary Order was issued. These activities were in breach of the Temporary Order.

[47] After the issuance of the Temporary Order, Limelight used: (i) the Limelight office at 300 Richmond Street West, Toronto, (ii) a mailbox address at suite 514-2916 Dundas Street West, Toronto, and (iii) a house at 4306 Lawrence Avenue East, Scarborough, for its sales activities.

(vi) Conduct Contrary to the Public Interest

[48] The Agreed Statement indicates that as officers and directors of Limelight, Da Silva and Campbell authorized, permitted or acquiesced in breaches of sections 25, 38 and 53 of the Act by Limelight and its salespersons contrary to subsection 122(3) and/or subsection 129(2) of the Act and in doing so have engaged in conduct contrary to the public interest.

(vii) Conclusion as to the Agreed Statement

[49] We accept Da Silva's admissions in the Agreed Statement with respect to his own conduct and his role at Limelight. Da Silva's admissions with respect to Limelight and Campbell and the operation of the Limelight trading scheme were corroborated by the other evidence we received, and accordingly, for the reasons given below, we accept this evidence.

3. Testimony of Ove Simonsen

[50] Simonsen was a salesperson at Limelight from March, 2005 to April, 2006, apart from several weeks when he was away because of illness and a further period when he worked part-time. He is currently 71 years old. He is trained as a

development planner and urban planner and has an undergraduate degree in architecture.

[51] Simonsen testified that an acquaintance referred him to Campbell, whom he called to inquire about a job in February, 2005.

[52] Simonsen testified that he had "a fairly lengthy meeting" with Campbell at Limelight's Richmond Street office. Campbell explained they were looking for people to buy Limelight shares "and they would be able to sell these shares once Limelight had the project listed on the stock market." Simonsen's job would be to solicit investors to "come in early on to take advantage of the shares that were being offered." Simonsen accepted the job offer. His job title was sales executive.

[53] On his first day at the office, Simonsen met again with Campbell. Campbell explained the procedure and handed him "a stack of information that should be used as a guide for when I contacted the customers I'd be phoning." The information included "messages and the kind of text I should use." Campbell suggested that he sit down with one of his co-workers to get a sense how the job should be done, "how I should make my calls, what I should say, how I should say it, the tone to use, also adding any other information that might be important for the client. . . ."

[54] Simonsen described the sales process and the Limelight offices. On the first floor, a group of telemarketers made initial calls to potential investors, using a very brief script, to determine interest. Simonsen testified there were five to six staff in this group, and each of them made hundreds of calls a day all across Canada. Also on the first floor were the offices of Da Silva, Campbell, a senior sales executive, an accountant and a secretary. Upstairs, five to six people worked as salespersons, including Simonsen and Moore. The initial contact people would prepare "lead cards" on potential investors for follow-up by the salespersons.

[55] Staff introduced, through Simonsen, several of the documents Simonsen testified he received on his first day, which would be used at different points in the process from the initial call to the completed sale.

[56] The first document was identified by Simonsen as a cold-call script. Simonsen testified that this script was part of the information package he received when he started. He explained that in a cold call he would introduce the project and answer any questions and encourage the person to purchase shares, indicating that "it would be a private listing initially, and then it would be available or be listed on the stock market." The time frame given for obtaining a listing "was something within a year." Simonsen testified that he used the document "almost in its totality" in making his calls. Further, Simonsen testified that most of the handwritten notes on the document were his own notes from his meetings with Campbell. He testified that the salespersons "often" met with Campbell "as frequently as once or even twice a week;" the briefings "were often to chastise if we weren't doing well on sales." Simonsen believed that other salespersons received the same set of documents.

[57] Another document introduced through Simonsen included a list of possible objections from potential investors and possible responses. Simonsen testified that another salesperson had prepared a document that included a series of such prompts, for example: if the potential investor said they had no interest, the

prompted response was "That's fine but before I let you go what would you say if I were to tell you that you were looking at making anywhere from 3 or 4 times (your money back) the money invested within the next six months . . . ." Simonsen testified that he rarely used this document and did not refer to a return of three or four times the investment, but stated only that the company should perform very well and make some gains in the future.

[58] According to Simonsen, if a potential investor asked if the shares could be resold, they would be advised that the shares could not be sold until they were listed on the stock market. Simonsen testified that at the beginning of his time with Limelight, he would tell potential investors that the principals of Limelight were aiming to list the company within the year, and this was reduced to six to seven months as time went on. If the investor said they did not know anything about Limelight, an "executive summary" of Limelight's projects would be sent out to them.

[59] Simonsen also identified documents setting out a "call-back pitch," and a "final order pitch." In the final call, the salesperson would obtain contact information and confirm the number of shares being purchased. Limelight would then send a courier to pick up the cheque from the investor.

[60] Simonsen testified that there were no "classes of persons" to whom the salespersons were told not to sell shares. Limelight's salespersons simply called the telephone numbers on the cards provided by Limelight's "qualifiers" or "pre-qualifiers," who made the initial calls to generate leads. Calls were also made to people outside Canada and in other provinces.

[61] Simonsen testified that although he had heard the term "accredited investor", he did not know what it meant. While he said that salespersons did question investors about their financial situation, it was not to determine whether or not the potential investor was an "accredited investor." It was to assist the salespersons in making a sale at an amount consistent with a potential investor's financial assets. Simonsen also testified that the salespersons at Limelight had no project management responsibilities and were solely involved in selling shares. He testified that he could make anywhere from 50 to 100 calls per day, depending on how many were follow-up calls and how many involved lengthy conversations.

[62] Simonsen testified that he and the other salespersons were not paid a salary, but were paid commissions on sales they generated. Simonsen said the commission was "between 15 and 20 percent" of the amount of the sale. The qualifiers were paid a salary plus a small commission on sales.

[63] Simonsen testified that Campbell was in the office every day and he was "the principal, as far as we were concerned, on the day-to-day management" of the company. Simonsen reported to Campbell. Campbell was responsible for briefing and training the salespersons as well as tracking their sales. From time-to-time, Campbell would demonstrate the use of the scripts by personally calling a potential investor. In addition, on one or two occasions where a salesperson had difficulty closing a sale, Campbell contacted the potential investor himself. Campbell was also responsible for approving the order forms, ensuring payment was received and doing the accounting.

[64] According to Simonsen, Da Silva was the "more senior person," but Simonsen understood Da Silva and Campbell to be "sort of equal partners." Simonsen

understood that Da Silva was the principal on the promotional side, developing projects for Limelight., while Campbell was the "day-to-day guy." Simonsen testified that Da Silva was in the office "from time to time" and "he spoke to us from time to time, but he never briefed us." Simonsen testified Da Silva could be out of the office for months at a time.

4. Testimony of Jacob Moore

[65] In the Settlement Agreement approved by the Commission on August 2, 2007, Moore admitted, amongst other things, that: (i) he was a Limelight salesperson; (ii) he has never been registered with the Commission in any capacity; (iii) he sold Limelight shares over the telephone to investors from July, 2005 to April, 2006 inclusive, and received approximately $14,525.00 in commissions or salary from the sale of those shares; (iv) the sale of Limelight shares constituted trades in securities of an issuer that had not been previously issued; (v) by selling Limelight shares, he distributed such shares without a prospectus being filed and with no exemption from the prospectus requirements being available; (vi) he made representations to potential investors regarding the future value of Limelight shares and Limelight shares being listed on a stock exchange, with the intention of effecting trades in Limelight shares; and (vii) his conduct in selling Limelight shares was contrary to Ontario securities law and the public interest. Moore agreed to sanctions including a four year ban from trading in any securities (with an RRSP carve-out), a four-year ban from relying on any prospectus or registration exemptions, a permanent prohibition on telephoning from inside Ontario to any residence within or outside Ontario for the purpose of trading in securities, and payment to the Commission of $5,000 in investigation costs. He also agreed to cooperate with the Commission in its investigation and any enforcement proceedings. He was one of Staff's witnesses at this hearing.

[66] Moore testified that he was a salesperson at Limelight for approximately eight months starting in July 2005. He worked previously in telephone sales, and became aware of the Limelight job through a posting on workopolis.com. After responding to that posting, he was interviewed by Campbell at the beginning of July 2005. He was hired as a salesperson, with a title of "venture capitalist," and started the following Monday.

[67] Moore testified that he and all the salespersons reported to Campbell. As a salesperson, he had no project management responsibilities, and his information about Limelight's projects came only from the "executive summary" that was provided by Campbell. He would follow up on the leads generated by Limelight's "qualifiers," who made initial contact with potential investors, as well as calling numbers from "cold-call sheets" provided by Campbell. Other Limelight salespersons worked as "loaders," contacting existing shareholders and offering further Limelight shares at a lower price. Moore was told that he would be paid a commission of 20% of the sale, but he would receive 25% if he generated the "lead" himself through a cold call. In addition, he would be paid 10% if one of his sales "loaded" (invested in more shares). For the first month, he would be paid $400 a week against commissions.

[68] Moore testified there were between five and eight salespersons at Limelight while he worked there. He testified that salespersons were supposed to make between 60 and 80 calls per day, but he was in the 40-50 range most of the time. He made calls to potential investors in other provinces and, though he did not make international calls, he recalled seeing documentation with U.K. addresses. Once

the salesperson closed the sale, the information would be given to one of the secretaries, who would send out a contract for the investor's signature. Investors paid by cheque, sent by courier, and Moore would receive a photocopy so he could document his sales. He testified he earned around $14,000 in commissions over the time he worked at Limelight.

[69] On his first day at Limelight, Moore was given scripts and rebuttal sheets by Campbell. Shown several of the documents identified by Simonsen, Moore recognized them as "scripts," and testified they were provided by Campbell and used by all the salespersons. Moore described a "first-call script," a "closing script" and "a sheet of rebuttals." He testified that most of the salespersons used the scripts and kept them on their desks.

[70] With respect to representations about future value of Limelight shares, Moore testified he would say "You could be looking at something like two to three times your money over the next year." He heard other salespersons making similar statements. He testified that most used "the scripted line" ("three or four times the money") but every so often he would hear somebody say "ten times or something like that."

[71] Moore testified that Campbell told him Limelight was collecting venture capital to take the company public, and he passed this on to potential investors. Moore did not think Campbell gave a specific time frame for listing the shares, though he suggested it was soon. Moore would tell potential investors "it's only a matter of time or something like that."

[72] Moore was not familiar with the term "accredited investor." He testified that he made financial inquiries only to determine what an "appropriate" investment would be for a particular investor. He testified that while he worked at Limelight there was no mention of obtaining registration under the Act for Limelight salespersons.

[73] According to Moore, Campbell was in the office daily. Campbell would, several times each day as part of his managerial role, attempt to motivate the salespersons to sell more shares. Moore testified, however, that he never personally heard Campbell telephone customers to solicit purchases.

[74] Moore believed Da Silva to be the president and chief executive officer of Limelight and he testified that Da Silva was in the office two to three times per week. Moore testified that he was once in Da Silva's office while Da Silva called one of Moore's leads in an attempt to close a sale. Moore testified that Da Silva used "pressure tactics," such as stating that shares were running out and that Limelight was going to go public soon. This was the only time, in Moore's experience, that Da Silva personally solicited investors. Moore said that Da Silva almost never came upstairs to the sales floor.

[75] Moore testified that his last day of work was the last business day of March 2006. He was given the option of working out of the Scarborough office they were setting up, but he turned it down. He went to the Scarborough office towards the end of April and met Da Silva, who gave him a cheque for $200 or $400. According to Moore, that was the last time he contacted Da Silva or Campbell.

5. Testimony of Investor One

[76] Investor One is from a small Ontario town. He is self-employed in a small business, earns approximately $25,000 per year, and has an RRSP worth about $8,000. He described himself as having a low level of investment and financial expertise. We are not satisfied Investor One is an accredited investor.

[77] In the spring of 2003, Campbell called Investor One soliciting investments in a company called Euston Capital ("Euston"). Investor One purchased 3,000 shares at $3 per share, for a total of $9,000, in four transactions.

[78] In the spring of 2004, Campbell or Hank Ulfan ("Ulfan") called Investor One to solicit a purchase of Limelight shares. (Investor One testified that he may also have dealt with Ulfan with respect to purchasing shares of Euston.) Campbell or Ulfan told Investor One that Limelight was an entertainment company that "had the sole rights to produce a greatest-hits CD by Shania Twain." Limelight's "executive summary" of its business was sent to him, along with an offering memorandum. Investor One purchased 2,000 Limelight shares at a price of $1 per share. He testified that he signed the purchase agreement on April 20, 2004, and on April 26, 2004, it was couriered to Limelight, along with his cheque, by way of Euston's Toronto office. He received another call from Ulfan, as well as a follow-up letter, but he did not purchase any more shares of Limelight. Investor One testified that another solicitation letter came in an envelope with Campbell's business card.

[79] During the sales process, Ulfan or Campbell told Investor One there was a good chance he could double his money once Limelight went public, and that if he decided to keep his shares in Limelight, the shares would receive a "continual" dividend. Investor One testified that neither Campbell nor Ulfan made inquiries into his financial situation and that he was unaware of the term "accredited investor." Campbell and Ulfan made no mention of the risks associated with purchasing Limelight shares.

[80] After purchasing shares in Limelight, Investor One was referred to Da Silva. Investor One understood that Da Silva was the president of Limelight and Campbell the Secretary. Da Silva offered to answer any questions and gave him his direct line. Investor One called Da Silva on a regular basis. Da Silva was positive about the direction Limelight was taking and Investor One was made to understand he could double his money.

[81] In the spring of 2005, Investor One called Da Silva about getting his money back. Da Silva told him he could not get his money back, and encouraged him to attempt to sell his shares in Euston, which had by this time been exchanged for shares in another company called "AccessMed." Investor One tried to sell the AccessMed shares through TD Waterhouse, but he was told the shares were not trading and TD Waterhouse could find no information on them. To date, Investor One has not recovered any of his investment in Limelight shares.

6. Affidavit of Investor Two

[82] Investor Two is a 41 year old lawyer who practices real estate and family law in Toronto, Ontario. He swore that he has been investing periodically for about twenty-two years through trading accounts at TD Waterhouse and Nesbitt Burns. Another lawyer referred him to Bill Tevrachte ("Tevrachte"), who advised that he knew someone who was looking for investors.

[83] Investor Two met Tevrachte and Da Silva for lunch in April 2004. Da Silva introduced himself as the president or vice-president of Limelight. He said he was seeking investors to finance a new Shania Twain album to be released by Christmas of that year, if things went well. He also told Investor Two that Limelight would be trading on a stock exchange within six months to a year, and that Limelight shares were priced at $1.00 per share. Investor Two was told that once the proposed album was released, the Limelight shares would produce income through dividends.

[84] Investor Two was aware that there were exemptions in the Act that allowed for the sale of shares without a prospectus, and he believed he qualified for the exemption. Investor Two swore that Da Silva made no attempt to obtain information regarding his financial assets or liabilities or his salary. Investor Two's financial assets do not exceed $1 million, his net income does not exceed $200,000 per year, and his combined family income does not exceed $300,000 per year. Accordingly, we are not satisfied that Investor Two is an accredited investor.

[85] On April 26, 2004, a Limelight share purchase agreement was faxed to Investor Two. He signed the agreement on April 28, 2004, purchasing 10,000 shares of Limelight at a price of $1.00 per share. On August 13, 2004, he received a share certificate as proof of his ownership of the 10,000 shares.

[86] In July, 2004, Investor Two purchased an additional 2000 shares of Limelight for $2,000. He has never received a share certificate for those Limelight shares.

7. Affidavit of Investor Three

[87] Investor Three is 50 years old, self-employed and resides in a small Ontario town. Investor Three has a net worth of $400,000, including RRSPs and cash. He owns land valued at approximately $400,000, and he owes approximately $100,000. He swore that he has a moderate level of market knowledge, trading mostly through TD Canada Trust. Based on the evidence before us, we are not satisfied that Investor Three is an accredited investor.

[88] In July, 2005, Investor Three received a telephone call from Moore, who described himself as a Limelight salesperson. Moore told Investor Three that Limelight had several successful projects and would be backing Shania Twain's next album, which, if successful, would likely double his investment. Moore also stated that Limelight shares were expected to begin trading on the "Toronto OTC" market by December 2005. When Investor Three asked whether any part of his investment would go towards Moore's sales commission, Moore told him he was paid in Limelight shares and not by commission. Moore informed Investor Three that few Limelight shares remained unsold and he should purchase quickly.

[89] Investor Three asked for a prospectus. In response, Moore sent out an "executive summary" describing Limelight's business. In response to a further enquiry, Moore sent out a Better Business Bureau report. Investor Three swore that in the months before he bought the Limelight shares, Moore called him about every ten days, repeatedly stating that the "deadline" for the shares to be publicly traded was getting close, and that the shares would increase in value once Limelight went public.

[90] At no time did Moore ask Investor Three about his financial situation, or whether he was an accredited investor.

[91] On November 14, 2005, Investor Three sent Limelight a signed share purchase agreement, and on or about December 15, 2005, he sent a cheque for $2,000 as payment for 1,000 Limelight shares. The evidence of Investor Three was corroborated by Moore, who testified that he sold Investor Three Limelight shares for $2,000.

[92] On or about March 10, 2006, Investor Three called Moore to ask why he had not yet received a share certificate. Moore told him he would send it, advised that Limelight had been in contact with the Commission, and that he was "100% sure that Limelight shares would be going to market." On or about March 25, 2006, Investor Three received a share certificate along with a share purchase confirmation form, but he did not sign or return it.

8. Affidavit of Investor Four

[93] Investor Four is 59 years old and has been on disability insurance since 1996. His net worth is approximately $40,000, which includes RRSPs and cash. His annual income from disability insurance, Canada Pension and an annuity, is $23,000. Investor Four has a high school education and has completed various computer courses. We are not satisfied that Investor Four is an accredited investor.

[94] In June, 2004, Investor Four received a telephone call from Allen Fox ("Fox") soliciting an investment in Limelight. Fox described himself as a broker with Limelight who dealt with accounting matters. Fox told Investor Four that Limelight was raising money to "build up the shares" of Limelight so that they could purchase the early recordings and videos of Shania Twain.

[95] Fox asked Investor Four about his age, income, occupation and financial means. Investor Four informed Fox that he was disabled and receiving disability insurance. Fox asked Investor Four to invest $100,000, but Investor Four refused.

[96] During June and July of 2004, Campbell contacted Investor Four and went over everything Fox had told him. Campbell represented that Limelight was attempting to obtain a listing on the Toronto Stock Exchange ("TSX"). Campbell sent Investor Four some press releases to read, but Investor Four did not invest.

[97] At the end of July, 2004, Investor Four was again contacted by Fox, who convinced Investor Four to purchase 5,000 Limelight shares for $10,000. Investor Four sent a cheque by courier and also signed a "confirmation letter" that was sent back to Limelight.

[98] When asked by Investor Four about the risk in purchasing Limelight shares, Campbell and Fox assured him that the risk was low, and that when the Limelight shares were traded on the TSX the price would rise to $5.00 per share. They advised Investor Four to sell half of his shares when the price reached $5.00, and assured him that they would call when it was time to sell. Fox and Campbell advised Investor Four that he was required to hold his shares for one year before they could be sold.

[99] Following his receipt of a letter from Staff in September, 2005, Investor Four contacted Da Silva to inquire about the status of Limelight. Da Silva advised

Investor Four that Limelight had been "through the courts" to obtain the Shania Twain recordings and that Limelight had purchased those recordings.

[100] During this telephone call, Investor Four asked Da Silva to repurchase his shares. Da Silva promised to send some information, but never did. Da Silva also told him that within three months Limelight would be offering to exchange Limelight shares for new shares of "U.S. Limelight" and that Investor Four would receive 25,000 of the new shares.

[101] Da Silva advised Investor Four that U.S. Limelight would be based in Houston, Texas, to take advantage of the bigger market for fundraising. He further advised Investor Four that he would be transferring $5 to $7 million to the U.S. company. We received no evidence of any U.S. Limelight company.

9. Evidence of Larry Masci

[102] Masci has been an investigator with the enforcement branch of the Commission for 19 years. In addition to his oral testimony, Masci swore two affidavits that were tendered by Staff. In his oral testimony, Masci described his investigation of Limelight, beginning in July 2005. He also authenticated and explained the documents tendered by Staff, including the affidavits of three Ontario investors (Investors Two, Three and Four).

[103] Masci's first affidavit, dated April 25, 2006, related to a New Brunswick investor ("Investor Five") who was a Limelight shareholder. Masci was contacted by a New Brunswick Securities Commission investigator, Ed LeBlanc ("LeBlanc"), regarding Investor Five. LeBlanc told Masci that Daniels contacted Investor Five on April 14, 2006. According to LeBlanc, Daniels solicited Investor Five to purchase Limelight shares at $1 per share and advised him that Limelight would be listed on an exchange within 10 to 12 days. According to Masci's affidavit, LeBlanc provided him with an affidavit describing his investigation, but Staff did not introduce LeBlanc's affidavit into evidence in this proceeding.

[104] In response to LeBlanc's information, Masci contacted Investor Five by telephone. During this conversation, Investor Five told Masci he is 65 years of age and has an income of $40,000 to $50,000 per year and total assets of approximately $200,000, including his home and business. Accordingly, we are not satisfied that Investor Five is an accredited investor.

[105] According to Masci's affidavit, Investor Five had originally purchased $5,000 of Limelight shares after he was told that Limelight had a contract with the CBC and was recording Shania Twain. Investor Five was contacted by Limelight on April 11 or 12, 2006. Following that contact, Investor Five telephoned Limelight and was solicited to purchase Limelight shares at $1 per share and was told that Limelight would soon be "going to market." He was unsure of exact dates, but he was certain that his discussion with the Limelight salesperson occurred after Limelight was "shut down by the OSC." Investor Five declined to purchase any additional shares.

[106] Masci's second affidavit, dated May 10, 2006, concerns two matters. The first is Staff's attempts to locate and serve Daniels, and the second is Masci's discussion with another Limelight investor ("Investor Six").

[107] Masci swore in his second affidavit that, since April 26, 2006, when the Commission issued its cease trade order against Daniels and added him as a Respondent, Masci had been attempting, unsuccessfully, to locate him.

[108] Staff learned of Daniels' telephone number from investors. The number is registered to Hompesch Media Group, 4306 Lawrence Ave East, Scarborough, but there is no evidence that the company exists. However, the business name is registered to Da Silva and Silvio Astarita. The number connects the caller to Da Silva's voicemail.

[109] Masci testified that on May 12, 2006 he attended at the Limelight office in Scarborough in an attempt to serve Daniels with a New Brunswick Securities Commission order, the Amended Statement of Allegations, the Amended Notice of Hearing, and other documents. Daniels was not present. Da Silva, who was present, told Masci that he was not aware of Daniels' whereabouts, that Daniels had left with Campbell, and that he was "an American who comes up here, does his thing, and goes back out." Masci served the documents upon Da Silva. Staff has not been able to make any direct contact with Daniels.

[110] Masci's second affidavit also concerned Investor Six. On May 8, 2006, Masci again spoke to LeBlanc, who advised him that Daniels had recently contacted Investor Six. As a result of this contact, according to LeBlanc, Investor Six was sent a share purchase agreement, a solicitation letter, an executive summary of Limelight's business and a Limelight share certificate.

[111] Masci spoke to Investor Six on May 8, 2006. Investor Six is a New Brunswick resident and a Limelight shareholder. According to Masci's affidavit, Investor Six was contacted by Da Silva some time in 2005 to solicit sales of Limelight shares to him. At that time, Investor Six purchased Limelight shares for $5,000.

[112] On May 10, 2006, Investor Six advised Masci that within the preceding week he had been contacted by Daniels, who told him that Limelight shares would be trading on NASDAQ within 30 days, and offered Limelight shares at a price of $1 per share. Investor Six did not purchase any additional shares.

[113] Masci was advised by Investor Six that he does not earn in excess of $200,000 per year and has financial assets of less that $1 million. Accordingly, we are not satisfied that Investor Six is an accredited investor.

10. Da Silva and Campbell as Directing Minds

[114] In the Agreed Statement, Da Silva admitted that he was a directing mind of Limelight and stated that Campbell was also a directing mind of Limelight. Da Silva was the president of Limelight until on or about April 17, 2006, but he remained a director thereafter. After Da Silva's resignation as president, Campbell, who was formerly the vice-president of Limelight, became its president and sole signing officer. Da Silva owned more than 50% of the shares of Limelight and Campbell owned approximately 11%.

[115] That Da Silva and Campbell were the directing minds of Limelight was also corroborated by Simonsen and Moore. They testified that Da Silva was the principal of the operation, and was understood to be involved in "project development." Campbell was responsible for day-to-day operations, supervised the Limelight salespersons and orchestrated Limelight's sales practices.

[116] We find, therefore, that Da Silva and Campbell were the directing minds of Limelight. Both men were aware of and authorized, permitted or acquiesced in Limelight's breaches of the Act. Accordingly, Da Silva and Campbell must take responsibility for the conduct of Limelight. As discussed below, both men also directly contravened the Act.

11. Limelight's Business Operations

[117] According to documentary evidence introduced through Masci, Limelight purported to be engaged in a number of business projects. The evidence we heard suggests that the Shania Twain project was the most often referred to in soliciting investments during the period in question. The evidence as to the exact nature of that project is conflicting. It has been described as involving a greatest hits album, a deal for the early recordings and videos of Shania Twain, a 'new' album, or a remake of Twain's 2001 album entitled "The Complete Limelight Sessions." A Limelight press release represents that this project was completed, but no album appears to have been produced.

[118] Whether or not Limelight was engaged in any legitimate business projects, we find that its principal business was trading in its securities. Limelight does not appear to have any financial resources and does not appear to be in business any longer.

C. ANALYSIS OF PRELIMINARY ISSUES

1. The Commission's Mandate

[119] The Commission's mandate is found in section 1.1 of the Act. That section provides as follows:

> 1.1 The purposes of this Act are,
>
> (a) to provide protection to investors from unfair, improper or fraudulent practices; and
>
> (b) to foster fair and efficient capital markets and confidence in capital markets.

[120] Both purposes are at issue in this matter, and will frame our consideration of the issues.

2. Actions Contrary to the Public Interest

[121] Section 127 of the Act gives the Commission authority to make certain orders against participants in the capital markets if it finds that they have acted contrary to the public interest. The purpose of the Commission's public interest jurisdiction is neither remedial nor punitive; it is protective and preventative, intended to be exercised to prevent likely future harm to Ontario's capital markets *(Re Mithras Management* (1990), 13 O.S.C.B. 1600 at 1610).

[122] The Commission does not need to find a breach of the Act to make a finding of conduct contrary to the public interest so as to invoke the Commission's public interest jurisdiction under section 127 (*Re Canadian Tire Corp.* (1987), 10 O.S.C.B. 857 at p. 933, aff'd (1987), 59 O.R. (2d) 79 (Div. Ct.)).

3. Standard of Proof

[123] Staff submits that the standard of proof in this case is the "balance of probabilities." Because the Respondents are not registrants, Staff submits that it is not required to show proof that is "clear and convincing and based upon cogent evidence."

[124] In *Re Lett* (2004), 27 O.S.C.B. 3215 *("Lett"),* the Commission considered this issue and made the following comments with respect to the required proof:

> Requiring proof that is "clear and convincing and based upon cogent evidence" has been accepted as necessary in order to make findings involving discipline or affecting one's ability to earn a livelihood.
>
> This is not such a hearing. Rather, it is a hearing to determine whether or not the Respondents traded in securities without registration contrary to section 25(1) of the Act.
>
> In *Bernstein v. College of Physicians and Surgeons (Ontario)* (1977), 15 O.R. (2nd) 477 at 470 (Div.Ct.). O'Leary J. stated:
>
> > In all cases, before reaching a conclusion of fact, the Tribunal must be reasonably satisfied that the fact occurred, and whether the Tribunal is so satisfied will depend on the totality of the circumstances involving the nature and consequences of the fact or facts to be proved, the seriousness of an allegation made, and the gravity of the consequences that will flow from a particular finding.
>
> In making our decision herein, we will have regard to that direction.
>
> (*Re Lett* (2004), 27 O.S.C.B. 3215, at para. 31-34)

[125] Similarly, in *Re ATI Technologies Inc.* (2005), 28 O.S.C.B. 8558 ("ATI"), the Commission stated:

> While the standard of proof in administrative proceedings is the civil standard of the balance of probabilities, Staff conceded that, this being an alleged violation of subsection 76(1) of the Act, it could only discharge its burden by clear and convincing proof based on cogent evidence.
>
> This standard of proof was recently affirmed in *Investment Dealers Assn. of Canada v. Boulieris* (2004), 27 O.S.C.B. 1597 (Ont. Securities Comm.) at paras. 33 and 34, affirmed *Investment Dealers Assn. of Canada v. Boulieris,* [2005] O.J. No. 1984 (Ont. Div. Ct.) where the Commission considered the standard required for proving a serious complaint against a person. The Commission noted in that case that the standard of proof and the nature of the evidence which is required to meet that standard, are integral to the duty of administrative tribunals to provide a fair hearing.
>
> We accept, as a matter of a fundamental fairness, that reliable and persuasive evidence is required to make adverse findings where those findings will have serious consequences for a respondent.
>
> (*Re ATI Technologies Inc.* (2005), 28 O.S.C.B. 8558, at para. 13)

[126] We agree with these statements from *Lett* and *ATI.* Given the potentially serious impact that orders under section 127 may have on the Respondents in this matter, we conclude that Staff must prove its case, on a balance of probabilities, based on clear, convincing and cogent evidence.

D. FINDINGS ON THE MERITS

1. Trading Contrary to Registration and Distribution Requirements

(i) Registration

[127] Subsection 25(1) of the Act states that no person or company shall "trade in a security" unless the person or company is registered under the Act.

[128] None of the Respondents is registered under the Act to trade in securities.

(ii) Trade

[129] Subsection 1(1) of the Act defines the term "trade." A trade includes "any sale or distribution of a security for valuable consideration" and "any act, advertisement, solicitation, conduct or negotiation directly or indirectly in furtherance of any of the foregoing."

[130] An act in furtherance of a trade must have a sufficiently proximate connection to a trade in securities. The Commission stated in *Re Costello* (2003), 26 O.S.C.B. 1617:

> There is no bright line separating acts, solicitations and conduct indirectly in furtherance of a trade from acts, solicitations and conduct not in furtherance of a trade. Whether a particular act is in furtherance of an actual trade is a question of fact that must be answered in the circumstances of each case. A useful guide is whether the activity in question had a sufficiently proximate connection to an actual trade.
>
> (*Re Costello* (2003), 26 O.S.C.B. 1617, at para. 47)

[131] In determining whether a person or company has engaged in acts in furtherance of a trade, the Commission has taken "a contextual approach" that examines "the totality of the conduct and the setting in which the acts have occurred." The primary consideration is, however, the effect of the acts on investors and potential investors. The Commission considered this issue in *Re Momentas Corporation* (2006), 29 O.S.C.B. 7408, at paras. 77-80, noting that "acts directly or indirectly in furtherance of a trade" include (i) providing promotional materials, agreements for signature and share certificates to investors, and (ii) accepting money; a completed sale is not necessary. In our view, depositing an investor cheque in a bank account is an act in furtherance of a trade.

[132] We find that Limelight and the other Respondents promoted and sold Limelight shares to investors in ten provinces and other jurisdictions. The Commission has jurisdiction over trading in securities in Ontario, and that jurisdiction extends to acts in furtherance of a trade that occur in Ontario even if the investor or potential investor is located outside Ontario *(Gregory & Co. Inc. v. Quebec Securities Commission,* [1961] S.C.R. 584 ("Gregory"), and *Re Allen* (2005), 28 O.S.C.B. 8541).

[133] In this case, while a number of sales of shares were made to investors outside Ontario, substantial elements of those trades occurred in this Province. Limelight carried on business in Toronto and most of the activities involved in the sales of shares to investors took place in Ontario. Limelight has its registered office in Toronto. Limelight's offices and operations were based in Toronto. Promotional materials, share purchase agreements, share certificates and other materials were mailed to investors from Toronto. The telephone calls made by the Respondents in connection with sales of Limelight shares were made from Limelight's Toronto offices and cheques in payment for the purchase of Limelight shares were sent to Toronto and deposited in a Toronto bank. These acts in furtherance of trades were directly linked to sales of shares. Accordingly, we find that we have jurisdiction over those trades. Limelight also sold shares to 71 investors in Ontario.

[134] Accordingly, we find that Limelight, Da Silva, Campbell and Daniels engaged in numerous trades and acts in furtherance of trades in Ontario.

(iii) Registration

[135] Pursuant to subsection 25(1) of the Act, a person or company is prohibited from trading in securities unless the person is registered. The requirement that an individual be registered in order to trade in securities is an essential element of the regulatory framework with the purpose of achieving the regulatory objectives of the Act. Registration serves an important gate-keeping mechanism ensuring that only properly qualified and suitable individuals are permitted to be registrants and to trade with or on behalf of the public. Through the registration process, the Commission attempts to ensure that those who trade in securities meet the applicable proficiency requirements, are of good character, satisfy the appropriate ethical standards and comply with the Act.

[136] In discussing the registration requirement, the Supreme Court of Canada in *Gregory* said the following:

> The paramount object of the Act is to ensure that persons who, in the province, carry on the business of trading in securities or acting as investment counsel, shall be honest and of good repute and, in this way, to protect the public, in the province or elsewhere, from being defrauded as a result of certain activities initiated in the province by persons who therein carry on such a business.
>
> (*Gregory, supra,* at paras. 11-15)

[137] Based on the evidence before us, we find that each of the Respondents traded in Limelight shares without being registered under the Act. For the reasons given below, we also find that no exemption from the registration provisions of the Act was available to the Respondents in respect of those trades.

(iv) Distribution

[138] "Distribution," is defined in subsection 1(1) of the Act and includes a trade in securities of an issuer that have not been previously issued.

[139] Subsection 53(1) of the Act states that no person or company shall trade in a security "if the trade would be a distribution of the security", unless a prospectus has been filed with and receipted by the Commission. The requirement to comply

with section 53 of the Act is important because a prospectus ensures that prospective investors have full, true and plain disclosure of information to properly assess the risks of an investment and make an informed investment decision. The prospectus requirements of the Act play a significant role in the overall scheme of investor protection. As stated by the court in *Jones v. F.H. Deacon Hodgson Inc.* (1986), 9 O.S.C.B. 5579 (H.C.) (at p. 5590), "there can be no question but that the filing of a prospectus and its acceptance by the Commission is fundamental to the protection of the investing public who are contemplating purchase of the shares."

[140] Based on the evidence, we find that previously unissued Limelight shares were sold to investors and that such trades were distributions within the meaning of the Act.

[141] We also find that Limelight did not file any prospectus to qualify the shares sold to investors.

(v) Accredited Investor Exemption

[142] Staff has established that the Respondents traded without registration and distributed shares without qualifying those shares under a prospectus. Having done so, the onus shifts to the Respondents to prove that an exemption from those requirements was available in the circumstances *(Re Euston Capital Corp.,* 2007 ABASC 75, *Re Lydia Diamond Exploration of Canada Ltd.* (2003), 26 O.S.C.B. 2511, and *Re Ochnik* (2006), 29 O.S.C.B. 3929). The Respondents purported to rely upon the "accredited investor" exemption in OSC Rule 45-501.

[143] The relevant portions of the definition of "accredited investor" provide as follows:

> "accredited investor" means ...
>
> (j) an individual who, either alone or with a spouse, beneficially owns, directly or indirectly, financial assets having an aggregate realizable value that before taxes, but net of any related liabilities, exceeds $1,000,000,
>
> (k) an individual whose net income before taxes exceeded $200,000 in each of the 2 most recent calendar years or whose net income before taxes combined with that of a spouse exceeded $300,000 in each of the 2 most recent calendar years and who, in either case, reasonably expects to exceed that net income level in the current calendar year,
>
> (l) an individual who, either alone or with a spouse, has net assets of at least $5,000,000, ...

[144] The Agreed Statement states, "The vast majority of Limelight investors are not accredited investors." This is corroborated by oral and affidavit evidence that Limelight and its salespersons did not even enquire into the financial status of prospective investors to determine whether they qualified as accredited investors. Based on the evidence before us, we are not satisfied that Investor One, Investor Two, Investor Three, Investor Four, Investor Five or Investor Six qualified for the accredited investor exemption. We conclude that the Respondents have not satisfied the onus on them to demonstrate that the accredited investor exemption or any other registration or prospectus exemption

was available to them in connection with the trading in and distribution of Limelight shares.

[145] Even if the purchasers of Limelight shares had been accredited investors, that exemption is not available to a "market intermediary," which is defined in OSC Rule 14-501 – *Definitions* as "a person or company that engages or holds himself, herself or itself out as engaging in the business of trading in securities as principal or agent." The Companion Policy to that Rule provides that:

> The [Ontario Securities] Commission takes the position that if an issuer retains an employee whose primary job function is to actively solicit members of the public for the purposes of selling the issuer's securities, the issuer and its employees are in the business of selling securities. Further, if an issuer and its employees are deemed to be in the business of selling securities, the Commission considers both the issuer and its employees to be market intermediaries. This applies whether the issuer and its employees are located in Ontario and solicit members of the public outside of Ontario or whether the issuer and its employees are located outside of Ontario and solicit members of the public in Ontario. Accordingly, in order to be in compliance with securities legislation, these issuers and their employees should be registered under the appropriate category of registration in Ontario.

[146] Based on the evidence of Simonsen and Moore, we find that Limelight employed several employees, including Simonsen, Moore and Daniels, who, despite initial statements to the contrary made by Da Silva to Staff, were involved solely in selling Limelight shares to investors. Therefore, in our view, Limelight and its employees were acting as market intermediaries in these circumstances, without registration, in breach of subsection 25(1) of the Act.

[147] Accordingly, we find that Limelight, Da Silva, Campbell and Daniels each contravened subsections 25(1) and 53(1) of the Act. The specific allegations against each Respondent are discussed below.

(vi) Limelight

[148] We accept the evidence of the four Ontario investors who purchased previously unissued Limelight shares from Da Silva, Campbell and other Limelight salespeople. Masci's affidavits also provided evidence that Limelight shares were sold to an additional three New Brunswick investors. There is no evidence before us that any of these investors was an accredited investor.

[149] Limelight has never been registered with the Commission and no exemption from registration is available to it. We therefore conclude that Limelight traded in shares of Limelight without being registered, in breach of subsection 25(1) of the Act. Limelight has made illegal distributions of its shares to investors because a prospectus was not filed and no prospectus exemption was available. Therefore, Limelight contravened subsection 53(1) of the Act.

(vii) Da Silva

[150] In the Agreed Statement, Da Silva admits that he traded in Limelight shares between April 2004 and May 2006. This is corroborated by the evidence. Moore

testified that he observed Da Silva making a sales pitch to one of Moore's potential investors. Investor One testified that Da Silva was his contact person at Limelight after he purchased shares. When Investor One asked Da Silva to repurchase his shares, Da Silva refused, and encouraged him to sell his AccessMed shares, but they could not be traded. Investor Two swore that Da Silva solicited him to purchase Limelight shares and sold Limelight shares to him for a consideration of $12,000. When Investor Four requested that Da Silva repurchase his Limelight shares, Da Silva stated, amongst other things, that he could soon exchange his Limelight shares for shares of "U.S. Limelight." Investor Six also told Masci that Da Silva sold Limelight shares to him.

[151] In forms filed with the Commission and during interviews with Staff, Da Silva represented that Limelight relied on the accredited investor exemption in effecting sales of its shares. In the Agreed Statement, Da Silva admits that the "vast majority" of the investors in Limelight were not accredited investors, and that Limelight salespersons made no effort to determine whether or not potential investors qualified for that exemption. Da Silva also admits in the Agreed Statement to not being registered with the Commission since June 2000.

[152] Accordingly, we find that Da Silva traded in Limelight shares in breach of subsection 25(1) of the Act. As the Limelight shares had not been previously issued, Da Silva also contravened subsection 53(1) of the Act by distributing shares without filing a prospectus, where no prospectus exemption was available.

(viii) Campbell

[153] Consistent evidence about Campbell's involvement in the trading of Limelight shares came from the Agreed Statement, the testimony of Moore, Simonsen and Investor One, and the affidavit evidence of Investor Four. We find that Campbell was responsible for the day-to-day operations of Limelight. This included hiring and training the sales force. He provided the salespersons with scripts, attempted to motivate them to sell shares and periodically demonstrated sales techniques.

[154] The documentary evidence, including bank deposit slips, also shows that Campbell deposited cheques from investors in Limelight's bank accounts.

[155] Campbell has never been registered under the Act and no exemption from registration is available to him. He therefore traded in shares of Limelight without registration, in breach of subsection 25(1) of the Act. Shares sold by Campbell directly or indirectly through Limelight salespersons were illegal distributions under the Act because a prospectus was not filed and no prospectus exemption was available. Campbell therefore also contravened subsection 53(1) of the Act.

(ix) Daniels

[156] Much of Staff's evidence against Daniels is hearsay. Masci swore in two affidavits that he spoke by telephone to Investor Five and Investor Six, to whom he was referred by LeBlanc, but he did not obtain an affidavit from either investor. Investor Six told Masci he was contacted by Daniels in May, 2006 and solicited to purchase shares at $1 per share. In addition, Masci's affidavit states that LeBlanc told him that Investor Five was contacted by Daniels on or about April 14, 2006.

[157] There is documentary evidence that supports Masci's affidavits. First, Staff submitted a fax from Daniels to another investor ("Investor Seven"), dated April 11, 2007, thanking him for his investment and enclosing a receipt for the shares purchased. In addition, Staff submitted as evidence courier receipts showing packages addressed to Limelight and Daniels both before and after the issuance of the First Temporary Order; these were sent to Limelight's Toronto mailbox. There is also evidence of more than 450 telephone calls to persons in all ten provinces from a telephone number registered to Limelight. That telephone number was given by Daniels as the contact number at the bottom of his faxed confirmation to Investor Seven. Investor Five and Investor Six were not accredited investors and no prospectus was filed in respect of the shares sold to them.

[158] Daniels has never been registered in any capacity with the Commission and there is no evidence that any registration exemption is available to him. We therefore conclude that Daniels traded in shares of Limelight without registration in breach of subsection 25(1) of the Act. Further, by distributing shares where no prospectus was filed and no exemption was available, Daniels contravened subsection 53(1) of the Act.

2. Breach of Subsections 38(2) and 38(3) of the Act

(i) Subsections 38(2) and 38(3)

[159] Subsection 38(2) of the Act states:

> No person or company, with the intention of effecting a trade in a security, shall give any undertaking, written or oral, relating to the future value or price of such security.

[160] Subsection 38(3) of the Act states:

> Subject to the regulations, no person or company, with the intention of effecting a trade in a security, shall, except with the written permission of the Director, make any representation, written or oral, that such security will be listed on any stock exchange or quoted on any quotation and trade reporting system, or that application has been or will be made to list such security upon any stock exchange or quote such security on any quotation and trade reporting system, unless,
>
> > (a) application has been made to list or quote the securities being traded, and securities of the same issuer are currently listed on any stock exchange or quoted on any quotation and trade reporting system; or
> >
> > (b) the stock exchange or quotation and trade reporting system has granted approval to the listing or quoting of the securities, conditional or otherwise, or has consented to, or indicated that it does not object to, the representation.

[161] The language in subsections (2) and (3) is different: while subsection 38(3) prohibits a "representation" as to listing, subsection 38(2) prohibits an

"undertaking" as to future value of a security. We invited Staff and Da Silva to file written submissions on the scope of subsection 38(2). Staff responded by letter dated October 23, 2007. Da Silva did not respond.

(ii) Staff Submissions on Subsection 38(2)

[162] Staff submits that an "undertaking" falls somewhere on the legal continuum between a representation and an enforceable legal obligation. In Staff's submission, an undertaking is a representation that amounts to a promise, guarantee or assurance as to the future value of a security. Staff submits, however, that an undertaking need not give rise to legal recourse against the person giving the undertaking. An undertaking is more than a mere representation but may be less than an enforceable obligation. In support of this interpretation, Staff notes that subsection 38(1) of the Act (representation that the seller will resell or repurchase or refund the purchase price of any security) does not apply where the security has an aggregate acquisition cost of more than $50,000 and "the representation is contained in an enforceable written agreement."

[163] Staff also submits that a contextual and purposive approach should be taken to interpreting subsection 38(2), because the purpose of that section is investor protection, and because representations as to future value are often made to vulnerable and unsophisticated investors and associated with other representations such as a representation as to the future listing of shares on an exchange. As a result, Staff submits that it is necessary to examine all of the surrounding circumstances in order to determine whether a representation amounts to a promise, guarantee or assurance and is therefore an undertaking within the meaning of subsection 38(2) of the Act.

(iii) Conclusion on Subsection 38(2)

[164] We agree that something less than a legally enforceable obligation can be an "undertaking" within the meaning of subsection 38(2), depending on the circumstances. We also accept Staff's submission that we should not take an overly technical approach to the interpretation of subsection 38(2) and that we should consider all of the surrounding circumstances and the Commission's regulatory objectives in interpreting the meaning of that section.

[165] We found the decision in *Re National Gaming Corp.* (2000), 9 A.S.C.S. 3570 *("National Gaming")* to be helpful on this issue. The Alberta Securities Commission (the "ASC") stated:

> ... an undertaking is a promise, assurance or guarantee of a future price or value of securities that can be reasonably interpreted as providing the purchaser with a contractual right against the person giving the undertaking if, for any reason, the value or price is not achieved.
>
> (*Re National Gaming Corp.* (2000), 9 A.S.C.S. 3570, at p. 16)

[166] In the same decision, the ASC also stated:

> In interpreting subsection 70(3)(a), we are mindful of the fact that predictions relating to the future value or price of securities are commonplace in the securities industry, and

> are not prohibited by the Act. Predictions encompass a broad spectrum. They range from very general predictions about the entire market, to very specific predictions about the value or price of a particular security within a particular time frame. Some predictions are developed with extreme care, based on rigorous, professional research and scientific analysis based on sophisticated market theory. Other predictions may be based on no more than wishful thinking or guesswork. In our view, the shared element of all predictions is that they are merely opinions.
>
> (*Re National Gaming Corp.* (2000), 9 A.S.C.S. 3570, at p. 16)

[167] Finally, the ASC stated that in determining whether a representation amounted to an undertaking, the context of the statement must be considered, and the "undertaking" must be given a "functional interpretation" in keeping with the objective of protecting investors. Accordingly, the ASC held it was not necessary to show that all the elements of an enforceable contract existed. The ASC concluded in *National Gaming* that no undertaking with respect to future value was given in the circumstances.

[168] In *Securities Law and Practice* (Borden Ladner Gervais LLP, *Securities Law and Practice,* 3rd ed., looseleaf (Toronto: Thomson Canada Limited, 2007) (WLeC)), it is stated that: "the prohibition in s. 38(2) appears to be justifiably narrow since trading in securities is necessarily based on statements concerning the future value or price of securities; as long as they are not construed as undertakings, s. 38(2) would not be breached."

[169] We agree with the approach of the ASC in *National Gaming* and the statement of the law from *Securities Law and Practice.*

[170] In our view, a mere representation as to future value is not an "undertaking" within the meaning of subsection 38(2) of the Act. Prohibiting all representations as to the future value of securities would ignore the reality of the marketplace.

[171] In this case, considering all of the circumstances, we do not believe that potential Limelight investors would have understood that the representations made to them as to the future value of Limelight shares amounted to a promise, guarantee or assurance of future value. The words used by the Limelight salespersons did not suggest that something more than a representation was being made or an opinion given. There is no evidence of any promise or assurance given to repurchase the securities or refund the purchase price if a certain value was not achieved. Accordingly, we do not view the representations as to future value given in this case to be "undertakings" within the meaning of subsection 38(2) of the Act.

[172] That does not mean, however, that we accept Limelight's sales practices.

[173] According to the evidence of Moore and Simonsen, the salespersons at Limelight made constant use of "scripts" provided to them by Campbell. Moore testified that "I would follow it almost verbatim for the first week when calling investors, potential investors."

[174] The Agreed Statement describes the use of scripts this way:

> Salespersons received scripts from David Campbell to use when salespersons spoke to investors. There was a script for cold calls, a script for persons who had already spoken to a qualifier, a call back script for prospective investors to whom a salesperson had spoken to on more than one occasion and a final order pitch script. Salespersons also received sheets which contained suggested wording to use when speaking to investors and sheets which had suggested responses for dealing with investors who (i) were not interested; (ii) wanted to speak to their spouse; (iii) had no money; (iv) wanted to speak to their broker; or (v) wanted to read the investor information.

[175] Though Da Silva advised Staff that he did not know about the use of scripts by Limelight's salespersons, it is clear to us that the purpose of the scripts was to use high pressure tactics to sell shares to investors and to provide a response to every objection a potential investor might raise. The scripts provide a road map of the sales practices used by Limelight and its salespersons.

[176] We have heard or received evidence from several investors who testified or swore that Da Silva, Campbell and other Limelight salespersons made representations as to the future value of Limelight shares. Moore testified that he told potential investors that they could make "three or four times the money", but sometimes heard other salespersons say "ten times." In addition, the Agreed Statement states that some investors were told that the Limelight share value was expected to rise to "$3 to $10 per share once Limelight went public."

[177] The scripts do not make explicit promises regarding the future value of Limelight shares, but they do predict a substantial rate of growth. For example, salespersons would recount one "success story", "Dynamic Fuels", in which a stock that opened at $7 on the TSX was originally sold privately for $0.75 per share. One script states: "We feel LM is going to do better than Dynamic ever could." The investor is then warned that "keep in mind you missed out on Dynamic, I don't want you to miss out on this one."

[178] It is also clear that misrepresentations were made about Limelight's business, the use of the proceeds of sales and whether salespersons were paid commissions. We conclude that Limelight salespersons, using scripts and high pressure sales tactics, were prepared to make almost any representation as to the future value of the Limelight shares in order to effect a sale.

[179] In *Re First Global Ventures, S.A.* (2007), 30 O.S.C.B. 10473 *("First Global"),* the Commission made the following comment with respect to high pressure sales tactics:

> High pressure sales tactics encompass a broad range of activity that has the effect of persuading individuals to invest inappropriately. A key characteristic of high pressure sales tactics is that these tactics put individuals in a position where they are pressured to make a decision quickly because the investment opportunity may disappear. High pressure sales tactics include, but are not limited to, selling tactics designed to induce, and having the effect of inducing, clients to purchase securities inappropriate to their situation

> on the basis of inadequate investment information and/or misinformation as to the issuers of the securities, the value of the securities, and the prospects of the issuer and the securities. Comments that give the impression that shares are attractive and quick action is needed because an investment opportunity will expire in a short time frame and repeatedly calling investors to get them to make an investment decision quickly based on misleading information also qualify as high pressure sales tactics.
>
> (*Re First Global Ventures, S.A.* (2007), 30 O.S.C.B. 10473)

[180] We consider the representations made by the Respondents with respect to the future value of the Limelight shares, together with their use of high pressure sales tactics, to be improper and unacceptable. We conclude that these representations and the high pressure sales tactics employed by Limelight, Da Silva and Campbell were contrary to the public interest.

(iv) Subsection 38(3)

(a) Limelight

[181] There is ample evidence from investors that Limelight's salespersons stated that Limelight shares would be listed on an exchange. The time frames given ranged from 10 to 12 days to a year. Both Simonsen and Moore confirmed that such representations were regular practice. The Agreed Statement states that "David Campbell advised Limelight's salespersons that Limelight was raising money for the purpose of going public. Limelight salespersons in turn advised prospective investors that Limelight would be going public and that its shares would be listed on a stock exchange in order to effect sales of Limelight shares." No one has suggested that the Director gave permission under the Act to make those representations, as permitted under subsection 38(3) of the Act. We are satisfied on the evidence that Limelight through its salespersons made representations as to the future listing of Limelight shares on a stock exchange for the purpose of effecting trades in Limelight shares contrary to subsection 38(3) of the Act.

(b) Da Silva

[182] Investor Two swore in his affidavit that Da Silva represented to him that Limelight shares would be listed on an exchange within six months. In addition, as noted above, in the Agreed Statement Da Silva states that Limelight and its salespersons represented that Limelight would be listed on a stock exchange.

[183] Section 129.2 of the Act states that a director or officer of a corporation is deemed to have breached Ontario securities law if he or she authorizes, permits, or acquiesces in a breach of Ontario securities law by the corporation. In the circumstances, we believe that there is sufficient evidence to conclude that Da Silva was aware of the representations as to listing being made by Limelight salespersons. At the least, he authorized, permitted or acquiesced in those representations. Accordingly, we find that Da Silva made a representation to at least one investor in breach of subsection 38(3) of the Act and that he authorized, permitted or acquiesced in breaches of subsection 38(3) by Limelight and its salespersons.

(c) Campbell

[184] It is clear on the evidence that Campbell was directly responsible for the sales tactics used by Limelight and its salespersons. The Agreed Statement states that "David Campbell advised Limelight's salespersons that Limelight was raising money for the purpose of going public. Limelight salespersons in turn advised prospective investors that Limelight would be going public and that its shares would be listed on a stock exchange in order to effect sales of Limelight shares." The scripts given by Campbell to salespersons confirm this. Further, Investor Four swears in his affidavit that Campbell represented to him that Limelight shares would be listed on the TSX. In addition, Investor One testified that Campbell or Ulfan represented to him that Limelight would soon be going public. Accordingly, we find that Campbell made representations contrary to subsection 38(3) of the Act. Campbell also authorized, permitted or acquiesced in the breach by Limelight of subsection 38(3) of the Act.

(d) Daniels

[185] The only evidence that was submitted regarding improper representations made by Daniels was through Masci's affidavit evidence concerning Investor Six. This evidence was not corroborated in any way and, in our view, is not sufficiently reliable. We therefore conclude that there is insufficient evidence to find that Daniels made representations contrary to subsection 38(3) of the Act.

3. Misleading Statements to Staff

(i) The Law

[186] Staff alleges that Limelight, Da Silva and Campbell made misleading statements to Staff during interviews conducted by Staff, contrary to clause 122(1)(a) of the Act. That clause states that:

> Every person or company that,
>
> (a) makes a statement in any material, evidence or information submitted to the Commission, a Director, any person acting under the authority of the Commission or the Executive Director or any person appointed to make an investigation or examination under this Act that, in a material respect and at the time and in the light of the circumstances under which it is made, is misleading or untrue or does not state a fact that is required to be stated or that is necessary to make the statement not misleading;
>
> . . . .
>
> is guilty of an offence and on conviction is liable to a fine of not more than $5 million or to imprisonment for a term of not more than five years less a day, or to both.

(ii) Findings

(a) Da Silva

[187] In the Agreed Statement, Da Silva admits to advising Staff that Limelight shares were sold only to accredited investors. That statement is contradicted by a number of investors, none of whom were accredited investors, and by the testimony of Simonsen and Moore. In the Agreed Statement, Da Silva acknowledges that, in fact, "the vast majority of Limelight investors are not accredited investors."

[188] The Agreed Statement states that Da Silva also advised Staff during its interview on December 13, 2005 that no scripts were used at Limelight, Limelight salespersons always inquired to confirm that all sales of Limelight shares were made to accredited investors, and Limelight's salespersons also acted as project managers. Da Silva has admitted that these statements were false and misleading and this admission has been confirmed by witnesses and documentary evidence.

[189] Accordingly, we find that Da Silva lied to and misled Staff in its investigation contrary to clause 122(1)(a) of the Act.

(b) Campbell

[190] Staff called evidence regarding misleading statements made by Campbell when interviewed by Staff. Staff has stated that they will address the issue of Campbell's misleading statements during the hearing on sanctions.

[191] Campbell, in his interview, told Staff that no scripts were used at Limelight. As stated above, it is clear from the evidence, which included copies of the scripts and the testimony of Moore and Simonsen explaining them, that scripts were used. In addition, Campbell told Staff that he told salespersons not to make representations as to the future value of Limelight shares or as to the listing of such shares on a stock exchange.

[192] As discussed above, we have found that the salespersons at Limelight made repeated representations as to the future listing of Limelight shares on a stock exchange. The scripts provided to the salespersons by Campbell, as well as the 'rebuttal sheets', mention both future listing and future share price. As the day-to-day manager of the business of Limelight, Campbell would have known that these statements were being made and that they were false and misleading.

[193] Accordingly, we find that Campbell lied to and misled Staff in its investigation contrary to clause 122(1)(a) of the Act.

4. Misleading Reports of Exempt Distributions

[194] Staff alleges that the forms filed by Limelight with the Commission in connection with the distributions made by Limelight were misleading or untrue in a material respect, contrary to clause 122(1)(b) of the Act. That clause states that:

> Every person or company that,
>
> . . . .
>
> (b) makes a statement in any application, release, report, preliminary prospectus, prospectus, return, financial statement, information circular, take-over bid circular, issuer bid circular or other document required to be filed or furnished under Ontario securities law that, in a material respect and at the time and in the light of the circumstances under which it is made, is misleading or untrue or does not state a fact that is required to be stated or that is necessary to make the statement not misleading;
>
> . . . .

> is guilty of an offence and on conviction is liable to a fine of not more than $5 million or to imprisonment for a term of not more than five years less a day, or to both.

[195] In the Agreed Statement, Da Silva admitted that the vast majority of Limelight investors were not accredited investors, and that Limelight purported to rely on the accredited investor exemption though it was not available. Furthermore, the evidence shows that Limelight's salespersons made no effort to enquire into the financial position of prospective investors to determine whether they would qualify as accredited investors. It was Limelight's responsibility to do so.

[196] The evidence shows that Limelight made filings with the Commission of forms required to be filed under the Act that misrepresented the dates of various trades and the exemption relied upon and failed to disclose the payment of commissions and other fees, as required. Accordingly, we find that Limelight's filings, signed and certified by or on behalf of Da Silva, were false and misleading.

[197] Accordingly, we find that Limelight and Da Silva made statements in documents required to be filed under Ontario securities law that contravened clause 122(1)(b) of the Act.

5. Violation of the Temporary Order

[198] Staff alleges that Limelight, Da Silva, Campbell and Daniels continued to sell and trade in Limelight shares after the First Temporary Order was issued on April 13, 2006.

(i) The Law

[199] Clause 122(1)(c) of the Act provides as follows:

> Every person or company that,
>
> . . . .
>
> (c) contravenes Ontario securities law,
>
> is guilty of an offence and on conviction is liable to a fine of not more than $5 million or to imprisonment for a term of not more than five years less a day, or to both.

[200] "Ontario securities law" is defined in subsection 1(1) of the Act to include "... in respect of a person or company, a decision of the Commission or a Director to which the person or company is subject." The First Temporary Order and the Amended Temporary Order constitute decisions of the Commission under section 127 of the Act. Accordingly, any breach by the Respondents of the First Temporary Order or the Amended Temporary Order contravenes Ontario securities law.

(ii) Findings

[201] The First Temporary Order was issued on April 13, 2006 and ordered Limelight, Da Silva, Campbell and Moore to cease trading in all securities, and that any exemptions available in Ontario securities law do not apply to them. It also ordered "that all trading cease in the securities of Limelight." The Amended Temporary Order, issued on April 26, 2006, extended the terms of the First Temporary Order, and ordered Daniels to cease trading in all securities and that any exemptions available in Ontario securities law do not apply to him.

[202] The Agreed Statement includes the following admissions:

> Carlos Da Silva was solely authorized to withdraw money from Limelight's bank accounts until he resigned on or about April 17, 2006. At that time, David Campbell obtained signing authority over the Limelight bank account.
>
> Two investor cheques totalling $4,500 were deposited by Carlos Da Silva at 5:27 p.m. on April 13, 2006 while he was president of Limelight and one investor cheque for $400 was deposited by Carlos Da Silva on April 20, 2006. Investor cheques totalling $86,750 were deposited by David Campbell on April 21, 24, 26, 28, May 2, 4, 8, 11, 12, 16 and 18 and June 1, 2006. Other investor cheques totalling $7,100 were deposited on April 24 and 25, 2006 by persons whose signatures have not been identified.

[203] Da Silva's admissions in the Agreed Statement are corroborated by Limelight's bank records. In our view, depositing these cheques in Limelight's bank account constituted acts in furtherance of trades that, depending on the date of deposit, were prohibited by the First Temporary Order or the Amended Temporary Order.

[204] Further, Limelight's telephone records show that several hundred calls were made after April 13, 2006. Purolator receipts show that Limelight continued to send information to potential investors and receive investor cheques after April 13, 2006.

[205] The Agreed Statement also states: "After the Temporary Order, Limelight, David Campbell, and Limelight salespersons continued to solicit investors and receive investor cheques after the Temporary Order. These activities were in breach of the Temporary Order." This assertion is corroborated by evidence that Campbell deposited cheques from investors in Limelight's bank account after April 13, 2006, as described above. As sole director and president, Campbell was solely responsible for the actions of Limelight following Da Silva's resignation.

[206] The initial motion for the First Temporary Order was made on notice to Limelight, Da Silva and Campbell, and they were served with the Notice of Hearing, Statement of Allegations, and affidavits of the investigator and two investors. They appeared by counsel at the Commission hearing on April 13, 2006, and did not oppose the First Temporary Order. The Amended Temporary Order was binding on all of the Respondents.

[207] We find that Limelight breached the First Temporary Order by continuing to trade after the First Temporary Order was issued, that Da Silva breached the first Temporary Order by depositing cheques in Limelight's bank account on April 13 and April 20, and that Campbell breached the Amended Temporary Order by depositing cheques in Limelight's bank account on April 26 and thereafter. We also find that Da Silva and Campbell authorized, permitted or acquiesced in Limelight's breach of the First Temporary Order and the Amended Temporary Order. We are not satisfied, however, that Staff has submitted sufficient, clear, convincing and cogent evidence to prove that Daniels breached the First Temporary Order or the Amended Temporary Order.

E. CONDUCT CONTRARY TO THE PUBLIC INTEREST

[208] From April 2004 to May 2006, Limelight, Da Silva and Campbell sold approximately 1.6 million Limelight shares to investors. As a result of these sales, Limelight raised approximately $2.75 million from investors in all ten provinces of Canada and outside Canada. It is clear that the Respondents were acting in concert with a common purpose in making these sales of Limelight shares to investors. In carrying out that common purpose, they preyed on investors with limited resources and financial experience and breached key provisions of the Act intended to protect those investors. The investors appear to have lost their entire investments.

[209] We have found that Limelight, Da Silva, Campbell and Daniels illegally traded without registration and engaged in illegal distributions. Their purported reliance on the "accredited investor" exemption was little more than a smoke screen for their blatant disregard of Ontario securities law.

[210] In addition, Limelight, Da Silva and Campbell made prohibited representations with respect to the future listing of Limelight shares on a stock exchange and used high pressure sales tactics that included improper and unacceptable representations as to the future value of Limelight shares.

[211] In carrying out their illegal purpose, Limelight and Da Silva filed false and misleading reports with the Commission.

[212] Further, when called to account, Da Silva and Campbell misled Staff about their conduct and that of Limelight. And when the Commission issued its First Temporary Order to protect investors from further harm, Limelight, Da Silva and Campbell blatantly ignored it and continued to illegally trade in Limelight shares.

[213] In conclusion, the Respondents breached a number of key provisions of the Act intended to protect investors. Their conduct was egregious. It caused great harm to investors and to the integrity of Ontario's capital markets, and was clearly contrary to the public interest.

F. CONCLUSIONS

[214] Accordingly, for the reasons given above , we make the following findings.

[215] We find that Limelight, Da Silva, Campbell and Daniels contravened subsection 25(1) of the Act by trading in Limelight shares without registration where no exemption was available;

[216] We find that Limelight, Da Silva, Campbell and Daniels contravened subsection 53(1) of the Act by distributing previously unissued Limelight shares when no prospectus was filed and no exemption was available;

[217] We are not satisfied that Limelight, Da Silva and Campbell gave undertakings regarding the future value of Limelight shares contrary to subsection 38(2) of the Act, but we find that they made representations and used high pressure sales tactics that were contrary to the public interest;

[218] We find that Limelight, Da Silva and Campbell make representations regarding the future listing of Limelight shares, with the intention of effecting sales of Limelight shares, contrary to subsection 38(3) of the Act, but we are not satisfied that Staff met its burden of proving that Daniels did so;

[219] We find that Da Silva lied to and misled Staff, contrary to clause 122(1)(a) of the Act;

[220] We find that Limelight and Da Silva filed misleading and untrue reports of exempt distributions with the Commission contrary to clause 122(1)(b) of the Act;

[221] We find that Limelight, Da Silva and Campbell breached the First Temporary Order and that Limelight and Campbell breached the Amended Temporary Order contrary to clause 122(1)(c) of the Act, but we are not satisfied that Staff met its burden of proving that Daniels breached either order; and

[222] We find that Limelight, Da Silva, Campbell and Daniels acted contrary to the public interest by breaching important provisions of the Act intended to protect investors.

[223] The parties are directed to contact the Office of the Secretary within the next 10 days to set a date for a sanctions hearing, failing which a date will be set by the Office of the Secretary.

DATED at Toronto this 12th day of February, 2008.

"James E. A. Turner"	"Suresh Thakrar"
James E. A. Turner	Suresh Thakrar

Enforcement Proceedings – Sanctions and Costs

Chapter 3

Reasons: Decisions, Orders and Rulings

3.1 Reasons for Decision

3.1.1 Belteco Holdings Inc. et al.

ONTARIO SECURITIES COMMISSION

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

AND

IN THE MATTER OF BELTECO HOLDINGS INC.,
TORVALON CORPORATION, GARY SALTER, ELAINE SALTER,
PETER ARTHUR MITCHELL, RODIKA FLORIKA, GLEN ERIKSON,
CHRISTINE ERIKSON, KAI HOESSLIN, HARCOURT WILSHIRE,
921159 ONTARIO INC. and 918211 ONTARIO INC.

HEARING:
October 21; November 16, 17, 18 and 19; December 14, 1998

PANEL:

John F. Howard, Q.C.	**Chair**
G. Patrick H. Vernon, Q.C.	**Commissioner**

COUNSEL:

Lawrence Ritchie, Esq. and Nancy Roberts	**OSC Special Counsel**
Darryl T. Mann, Esq.	**for Peter Arthur Mitchell**
Allan Sternberg, Esq.	**for Glen Erikson and Christine Erikson**

DECISION AND REASONS
(December 15, 1998)

Limitations Issue

In our Decision and Reasons (September 30, 1998) we indicated on page 49 that we would reconvene at 10:00 a.m. on Wednesday, 21 October 1998 so that Counsel for the Respondents could, if desired, make further submissions on the applicability of the limitation period provisions of the Act. When we reconvened on October 21, 1998 Counsel for the Respondents stated that they did want to make further submissions on the limitation period matter and wanted to file material in support of their submissions. On the consent of all Counsel we agreed to adjourn to Monday, 16 November 1998 at which time we would receive submissions on the applicability of the limitation period and other matters. We stated also that we would then sit continuously until all submissions on all remaining matters had been received.

Prior to the opening of proceedings on November 16 we received a joint volume entitled the Submissions and Authorities regarding the limitation period issue signed by both Counsel for the Respondents dated November 13, 1998 and also a volume consisting of the Submissions and Authorities Regarding the Limitation Period Issue dated November 13, 1998 on behalf of Staff of the Ontario Securities Commission ("Staff").

This issue was first addressed before us, along with other preliminary matters, on March 6 and 7, 1997. In our Decision of March 10, 1997 (1997 20 OSCB 1333) we ordered that the limitation motion proceed on April 2, 1997. We delivered our Reasons on April 4, 1997 (1997 20 OSCB 1835) and this resulted in three witnesses being called on the matter, namely Joanne Fallone on April 9, 10 and 11, 1997, Brian Butler on April 14 and 15, 1997 and Mehran Sadvari on April 17, 1997. Argument followed on this motion and others on

April 21, 22, 23, 24, 25 and May 5 and 8, 1997. Also during the period April 2, 1997 to May 8, 1997 document exhibits No. 14 to 41 and 44 to 52 were received.

We gave our written Decision and Reasons on the limitation motion on May 26, 1997 (1997 20 OSCB 2921) at page 2927 and following. We decided to dismiss the preliminary motion to quash or stay the proceedings based upon the limitation period. It was , however, made clear that a new application on this matter would be allowed, if desired, after all of the evidence had been heard during the hearing on the merits. As a result, all of the evidence, productions and submissions received during the course of the hearing on the merits have been available to us as we considered the renewed application on the applicability of the limitation period in this matter.

Throughout the hearing on the merits which started on July 6, 1998 we considered the evidence adduced to assess whether it was relevant to the limitation issue. For the same purpose we also reviewed all exhibits filed and productions made both at the hearing on the merits and on the two preliminary motions respecting the limitation issue. We note that these include the material which was before us on March 10, 1997, the material listed in paragraph 1.08, page 2922 of our May 26, 1997 Decision and Reasons and the relevant exhibits and productions particularly those numbered 105 onwards.

It is common ground that the statutory limitation period when the Notice of Hearing in these proceeding was issued (December 15, 1993) was as follows:

> **129 (1)** No proceeding under this Part shall be commenced in a court more than one year after the facts upon which the proceeding is based first came to the knowledge of the commission.
>
> **(2)** No proceeding under the Act shall be commenced before the Commission more than two years after the facts upon which the proceeding is based first came to the knowledge of the Commission.
>
> ***Securities Act*, R.S.O. 1990, C. s.5 (as amended) s. 129**

We note that this Section in the Act has been changed since the date of the Notice of Hearing.

It was common ground during the presentation of this matter that Staff had the onus of satisfying this panel that the proceedings were commenced within the limitation period.

We have concluded on all of the evidence before us in this hearing that time began to run when Staff had sufficient "knowledge" after diligent and reasonable attempts at verification of the facts which, if accepted as true by the trier of fact, would make out material elements upon which these proceedings could have been based and finally decided.

We are of the view that the use of the word "knowledge" in the limitations section requires that the facts leading up to the proposed proceeding be known to Staff in order to enable Staff to decide that the commencement of proceedings was justified. In coming to this conclusion we relied on the following cases:

> *Ontario Securities Commission* v. *Reid* (1994), 5. C.C.L.S. 1 (Ont. Ct.(Gen. Div.),
>
> *R.* v. *Fingold* (1996) O.S.C.B. 5301 at p. 5312, and
>
> *Ontario Securities Commission* v. *International Containers* 1989 O.J. No. 107.

The argument put forward by Respondents' Counsel relied heavily on the fact that for all purposes of this Motion, Canadian Dealing Network Inc ("CDN") and The Toronto Stock Exchange ("TSE") were agents of the Ontario Securities Commission ("OSC") for investigations and enforcement purposes, that facts known to either or both of those bodies would automatically be attributed to the Staff even though such facts had not in fact been communicated.

Our attention was drawn to a number of Agreements and Letters of Understanding between the OSC and the TSE relating to the operations of CDN that were applicable at the relevant time. As we have noted we heard oral evidence from Mr. Sadvari, Ms. Fallone and Mr. Butler, as to the nature of their work and the scope of their responsibilities. As well we had the evidence of Ms. Kim Stewart regarding the investigation at the TSE. It is clear that the TSE and the CDN are for some purposes the agent of the OSC. In our view the agency arrangements are limited in scope. Both CDN and the TSE began investigations as a result of observed market activity. A review of Belteco Holdings Inc. ("Belteco") trading was started by CDN in April 1991 and referred to the TSE 19 July 1991 and that of Torvalon Corporation ("Torvalon") in July 1991 and referred to the TSE in February 1992. A report of these investigations had been compiled by December 17, 1991. We do not consider it necessary to our Reasons and Decision to decide the scope or the nature of the agency arrangements between the TSE, CDN and the OSC and therefore the degree of knowledge of the agents which might be imputed to the OSC because for reasons to follow we do not consider that the facts in the Report of December 17, 1991 meet the range of "knowledge" required.

Both Counsel for the Respondents presented extensive and able arguments on this motion and we appreciated the force and skill of their presentations. A number of new productions and case law references were given to us. In addition Counsel for Mr. Mitchell stressed that "the crux of this case is the trading and pattern of trading". In this regard both Counsel set much store in the tables set out in Tables A, B, C and D to our September 30, 1998 Decision and Reasons as constituting the core basis for our Decision and all those facts constituted the necessary knowledge were known to the TSE and CDN well in advance of December 15, 1991. We prepared the Tables as an aid to the reader in understanding the dramatic end up of the whole abusive

manipulation. By themselves the appendices do not reflect the abusive and well disguised control block situation that was the real concern that we addressed in our Decision.

In our view, in the circumstances of this case, which is based on a complex set of facts which occurred over an extended period of time and involved many individuals and corporations, there would have to be an extensive review of the facts before Staff could properly be considered to have the necessary "knowledge" as that term is used in Section 129 for time to start running under the limitation provisions of Act. In particular, we are of the view that even the delivery on or about December 19, 1991 of the TSE Investigation Report to the OSC did not in itself complete the necessary knowledge for time to start running. Clearly it was a mass of data which demanded further attention. We note that the Report itself recommends that further investigations be done. Clearly further work and consideration by Staff was, in our view, necessary before the requisite "knowledge" as required by Section 129 could be attributed to Staff and on which they could base a proceeding such as that which evolved in this case. Accordingly we conclude that the onus has been met to our satisfaction that the "necessary" knowledge can only be attributed to Staff well after December 19, 1991. Accordingly Section 129 is satisfied. In the result for the above reasons we have decided to dismiss the applications of the Respondents appearing on this limitations motion.

Sanctions

On November 18 and 19, 1998, we heard submissions as to the consequences which should flow from the conclusions we reached and set out in our Reasons of September 30, 1998. It is not necessary to repeat those conclusions here except to say that we have found that by their conduct the three respondents who appeared in these proceedings participated to some degree in a scheme which was manipulative, deceptive, and unconscionability abusive of the capital markets and thus their conduct was clearly contrary to the public interest.

In these proceedings, Staff asked the Commission to consider whether it is in the public interest that an order be made, subject to such terms and conditions as the Commission may impose, that any or all of the exemptions contained in Sections 35, 72, 73, and 93 of the *Securities Act* (the "Act") no longer apply to the respondents and that in addition the registration of Peter Arthur Mitchell ("Mitchell") should be suspended, cancelled, restricted, or be made subject to conditions or that Mitchell should be reprimanded.

In argument, Mr. Ritchie, on behalf of Staff, submitted that in the circumstances of this case, the following order should be made:

a) As to Glen Erikson ("Erikson"), an order that none of the exemptions contained in Ontario Securities law, including the exemptions contained in Sections 35, 72, 73, and 93 of the Act, shall apply to him permanently, whether acting directly or indirectly through another person or company, or through any person or company acting on his behalf, including any trust arrangement.

b) As to Christine Erikson ("Christine"), an order that none of the exemptions contained in Ontario Securities law, including the exemptions contained in Sections 35, 72, 73, and 93 of the Act shall apply to her, acting directly or indirectly through another person or company, or through any person or company acting on her behalf, including any trust arrangement, for a period of between five to ten years.

c) As to Mitchell, an order suspending Mitchell's registration for a period ranging from five years to outright termination and an order that none of the exemptions contained in Ontario Securities law, including exemptions contained in Sections 35, 72, 73, and 93 of the Act, shall apply to Mitchell, acting directly or indirectly through another person or company, or through any person or company acting on his behalf, including any trust arrangement, for a minimum period of two years.

d) As to the respondents Kai Hoesslin ("Hoesslin"), and Harcourt Wilshire ("Wilshire"), who are non residents of Canada and who did not appear, an order that none of the exemptions contained in Ontario Securities law, including the exemptions contained in Sections 35, 72, 73, and 93 of the Act shall apply to these respondents, acting directly, or indirectly through another person or company, or through any person or company acting on their behalf, including any trust arrangement, for a minimum period of two years.

As to Belteco and Torvalon, it was submitted that no order is necessary since a cease trade order issued by the Commission in respect of these corporations remains in effect.

It should also be noted that pursuant to a settlement and agreement approved by the Commission, an order of the Commission was made March 21, 1997 imposing sanctions on the respondents Gary Salter, Elaine Salter, Rodika Florika, 921159 Ontario Inc., and 918211 Ontario Inc. The order is reported at (1997), 20 OSCB, 1575. For ease of reference, the operative portions of that order are set out here. They are:

1. Pursuant to section 127 of the Act, none of the exemptions provided for in Ontario Securities law shall apply to Gary Salter, Elaine Salter, 921159 and 918211, directly or indirectly, including any company of which any of them is an associate or which is an associate of any of them, from the date of the issuance of this Order, subject to further order of the Commission.

2. Notwithstanding the foregoing, after the expiration of a two (2) year period commencing from the date of this Order, Elaine Salter may trade in securities for the accounts of her registered retirement savings plans (as defined

in the Income Tax Act (Canada)), and Gary Salter may trade in securities, so long as:

(a) the trades are in securities referred to in clause 1 of subparagraph 35(2) of the Act; or

(b) in the case of securities other than those referred to in (a)

(i) the securities are listed and posted for trading on the Toronto Stock Exchange;
(ii) neither Gary Salter nor Elaine Salter nor any member of their respective families is an insider, partner or promoter of the issuer of the securities;
(iii) Gary Salter and Elaine Salter do not own directly or indirectly through another person or company, or through any person or company acting on their behalf or on behalf of either of them, independently or in aggregate more than two and one-half (2-1/2) per cent of the outstanding securities of the class or series of the class in question; and
(iv) the law governing such trades is otherwise complied with.

3. Pursuant to section 127 of the Act, none of the exemptions provided for in Ontario Securities law shall apply to Florika or any company which is an associate of Florika or of which she is an associate for a period of two years from the date of the issuance of this Order.

We set out the terms of that order here principally because we accept the argument advanced by Mr. Sternberg on behalf of the Eriksons that whatever sanctions are to be imposed should be fair and should be proportional to the sanctions imposed by the Commission on others who were participants in the scheme which is the subject of these proceedings. In this connection, we note, however, that pursuant to the terms of the settlement agreement which is attached to that order, the parties to the settlement agreed that they would not be "market participant"(s), as that term is defined in subsection 1(1) of the Act from the date of the issuance of the order. In the case of the individuals involved, that agreement means that in the case of the individuals involved, they would not act as a director, officer or promoter of a reporting issuer.

There may be some doubt as to whether or not the Commission has the jurisdiction to issue an order to this effect which we believe would more directly protect the public from future conduct of a respondent who has engaged in inappropriate conduct in the past than the removal of exemptions available under the Act, but clearly the existence of such an agreement and any breach thereof would be a material fact should a respondent apply to the Commission to modify an order removing exemptions for an indefinite term.

In our view, the authority to prohibit a person who is engaged in conduct which is abusive of the capital markets from acting as a director, officer or promoter of a reporting issuer, is a more direct way of ensuring the Commission's primary mandate to protect the public interest and foster confidence in the integrity of the capital markets.

In saying this, we adopt as the first factor to be considered in deciding upon the sanctions to be imposed for those whose conduct is abusive of the capital markets a statement of this Commission *In the Matter of Mithras Management Ltd. et al.* (1990), 13 O.S.C.B. 1600 at pp.1610-1611, as follows:

> Under section 26, 123 and 124 of the Act, the role of this Commission is to protect the public interest by removing from the capital markets - wholly or partially, permanently or temporarily, as the circumstances may warrant - those whose conduct in the past leads us to conclude that their conduct in the future may well be detrimental to the integrity of those capital markets. We are not here to punish past conduct; that is the role of the courts, particularly under Section 118 [now Section 122] of the Act. We are here to restrain, as best we can, future conduct that is likely to be prejudicial to the public interest in having capital markets that are both fair and efficient. In so doing we must, of necessity, look to past conduct as a guide to what we believe a person's future conduct might reasonably be expected to be; we are not prescient, after all. And in so doing, we may well conclude that a person's past conduct has been so abusive of the capital markets as to warrant our apprehension and intervention, even if no particular breach of the Act has been made out.

In this connection, see also *In the Matter of James F. Matheson* (June 20, 1991), A.S.C. Weekly Summaries, at p. 2 (Alta. Sec. Comm.).

In addition to this principal consideration, we have been referred to decisions of this Commission which indicate that in determining both the nature of the sanctions to be imposed as well as the duration of such sanctions, we should consider the seriousness of the allegations proved; the respondents' experience in the marketplace; the level of a respondent's activity in the marketplace; whether or not there has been a recognition of the seriousness of the improprieties; and whether or not the sanctions imposed may serve to deter not only those involved in the case being considered, but any like-minded people from engaging in similar abuses of the capital markets. We have considered all of these factors. In particular we have had regard to Erikson's experience and the level of his activities in the market place. The evidence shows that since his involvement with Belteco and Torvalon, Erikson has been a director, officer or holder of more than 10% of the shares of eight public companies and Christine Erikson to a like degree in six of those public companies. According to the record, their most recent transactions in the shares of one of these companies was in August of 1998.

As well, we have been mindful of the submissions made on behalf of the respondents that the result

should be fair, proportional to the degree of participation and should have regard for any mitigating factors which are present. We have also had regard to these considerations in reaching our conclusions. It was also urged that we should exercise caution in considering the numerous cases to which we were referred as precedent for sanctions as each case must depend upon its particular facts. We have also endeavoured to observe this caution.

Mr. Sternberg submitted on behalf of Erikson that the range of the order in his case should be from a reprimand to a maximum of two years and that it should have regard to the exceptions in the order made against Gary Salter after two years and to the limited exceptions made with respect to personal trading which have been made in such cases as *Re Robinson* (1996), 19 O.S.C.B., 3329.

On behalf of Christine Erikson, Mr. Sternberg submitted that the order should be limited to a reprimand in that her participation was limited to acting as a nominee director and officer and that the evidence suggests that she was doing nothing more than acting as an accommodation or a partner with her husband.

In his submissions on behalf of Mitchell, Mr. Mann urged that the sanction against him should be limited to a reprimand. In his submissions, he emphasized that our conclusions with respect to Mr. Mitchell's conduct was limited. While we concluded that he acted in a manner contrary to the public interest in that he ought to have known that the trading he facilitated involved distributions without filing a prospectus where prospectus exemptions under the Act were unavailable or that reliance upon such exemptions would constitute an abuse of the exemptions contrary to the purpose and objects of the Act and that he permitted, acquiesced in, or facilitated the same, there has been no finding on the direct allegations that he conducted trades without prior authorization of his clients; failed to maintain accurate books and records; or conducted discretionary trades contrary to section 221 of the Regulation. In his submissions, Mr. Mann emphasized that in his evidence, Mr. Mitchell conceded that with the benefit of hindsight he would have acted differently; that at most his conduct facilitated the egregious trading activities; that he was not a direct participant and that the sanctions urged on behalf of Staff would amount to a death sentence after more than half a century in the industry. Furthermore, he urged that on the evidence there was no likelihood that the omissions which occurred here would be repeated in the future.

Having given anxious consideration to the able submissions made by all counsel and having particular regard for the degree of participation of each of the respondents', we have concluded that the sanctions to be imposed in the case of Glen Erikson and Christine Erikson should parallel the sanctions imposed upon Glen Salter; and that Peter Arthur Mitchell should be reprimanded. We have also concluded that all personal exemptions under the *Securities Act* should be denied to Hoesslin and Wilshire until further order of the Commission. Having come to these conclusions, we have today signed an order to this effect which is attached to these Reasons.

Dated this 15th day of December, 1998.

"J. F. Howard" "G. P. H. Vernon"

Glen & Christine Erikson v. O.S.C. **22/99**

Coram: Archie Campbell, Cosgrove & Thomas JJ.

For Appellant Allan Sternberg
For Respondent Yvonne B. Chisholm

Heard: September 11, 2002
Decided: February 7, 2003

ENDORSEMENT

The Facts

[1] It is unnecessary to repeat the facts set out in the factums in such detail.

The Grounds of Appeal

[2] Mr. Sternberg in his able argument says the tribunal erred in principle within the meaning of *Committee for the Treatment of Asbestos Minority Shareholders v. O.S.C.* (1999) 43 O.R. (3rd) 257 per Laskin J.A. at p. 269.

[3] He says that the tribunal misapprehended the evidence, wrongly analyzed the question of culpability, and wrongly concluded that there was clear cogent and persuasive evidence that the appellants had any awareness or knowledge of the alleged manipulative scheme. He says that the tribunal took a market manipulation case and turned it into a reporting violation case. In response to a question from the court he said there was "an absence of any evidence that Glen Erikson had knowledge of his client's wrongdoing." He challenges the finding of fact that there was any deceptive manipulative scheme at all. He says that: "if one analyzes the whole of the evidence it would be unreasonable to make any inference of culpability against the appellants."

[4] Despite Mr. Sternberg's valiant attempt to couch his appeal in terms of error in principle, the appellants' case depends on a complete factual re-argument of the case they lost before the tribunal, largely on the basis that the tribunal drew the wrong factual inferences as to the knowledge of the appellants, who did not testify.

The Decision

[5] The tribunal heard 22 witnesses over 18 hearing days, considered 156 exhibits, some comprising many volumes, and then heard argument for seven days. After delivering extensive reasons on the first phase of the hearing it then proceeded for six days on the issues of limitation period and sanction.

[6] The tribunal found as a fact that there was a carefully prepared scheme designed to profit the participants whether or not the speculative ventures proved to be successful, a scheme designed to take advantage of every possible exemption under the act to reduce expense and provide practically no information on the public record as to the likelihood of success. Towards the beginning of its reasons the tribunal said:

> As will appear from what follows, we are satisfied that there were violations of important requirements of the Act which deserves censure. Even if we are wrong in this, however, we also hold that by knowingly participating in a scheme which was clearly designed to place securities in the hand of investors at prices which did not reflect their real value, the respondents have participated in a process which was abusive of the market which also should lead to censure.

At the end of the reasons the tribunal said:

> In coming to the conclusions we have set out, we have been mindful of the many statements to which we were referred that we should act on nothing short of clear and convincing proof based upon cogent evidence accepted by the tribunal where potential disciplinary matters or where matters of personal reputation are involved.
>
> .....
>
> As a result of our review of the voluminous documentary evidence and our consideration of the evidence, we have concluded that Christine Erikson was either a pure nominee or a member of a control group and that Erikson knowingly acquiesced in and facilitated the distribution of the common shares of Belteco and Torvalon where violations of the prospectus and reporting requirements of the Act occurred. The result has been a serious abuse of the capital market contrary to the public interest. We believe their conduct deserves censure.
>
> Finally, if we are wrong in our findings that important violations of the Act and the Regulations have occurred, we find that on all the evidence before us what occurred in this case was manipulative, deceptive and unconscionably abusive of the capital markets and we would exercise our discretion under Section 127 of the Act in the absence of any breach of the Act to find that the public interest was involved, that what occurred was contrary to the public interest and thus sufficient to receive submissions as to what, if any, Order should be made within those permitted under Section 127. In this regard we rely on Re CTC Dealer Holdings et al. and Ontario Securities Commission et al. (1957) 59 OR (2d) 79 (DivCt) affirming (1997) 10 OSCB 857.

[7] It is important to note that the findings are couched in the alternative. Neither violations nor knowledge of violations are essential to the overall conclusion. The appeal is not from the reasons, which refer in the alternative to knowledge. The appeal is from the result, in which knowledge is not a necessary ingredient.

The tribunal when considering sanction summed it up even more succinctly:

> It is not necessary to repeat those conclusions here except to say that we have found that by their conduct the three respondents who appeared in these proceedings participated to some degree in a scheme which was manipulative, deceptive, and unconscionably abusive of the capital markets and thus their conduct was clearly contrary to the public interest.

Standard Of Review

[8] It is unnecessary to pinpoint the exact position of the standard of review within the intermediate reasonableness spectrum addressed in *Committee for the Equal Treatment of Asbestos Minority Shareholders v. O.S.C.* (2001), 2 S.C.R. 132 per Iacobucci J. at para 49, 152 – 3. This case is entirely fact-driven and the issues faced by the tribunal are at the heart of its specialized expertise in understanding the knowledge of marketplace players engaged in complex marketplace transactions. This decision attracts a high degree of appellate deference.

Criminal Law Notions

[9] The tribunal found three separate bases for the exercise of its public interest jurisdiction, any one of which was sufficient:

> Knowing participation in a manipulative scheme
>
> Violations of the act which resulted in an abuse of capital markets
>
> Conduct, whether a violation or not, which resulted in an abuse of capital markets

[10] None of these ultimate conclusions require criminal knowledge or intent. The tribunal, to exercise its public interest jurisdiction after a hearing under s.128, was not obliged to find criminal intent or knowledge. As the Commission pointed out in *Re Standard Trustco Limited* (1992), 15 OSCB 4322 at 4359-60:

> State of Mind of the Respondents
>
> While the Commission should consider the state of mind of the Respondents in deciding whether to exercise its public interest jurisdiction, it is not determinative. It is

> not necessary for us to find that the Respondents acted wilfully or deceitfully in order to exercise our public interest jurisdiction. In the case of Gordon Capital Corporation and Ontario Securities Commission (1990), 13 OSCB 2035, affirmed (1991) 14 OSCB 2713 (Ont. Div. Ct.) at p. 14, Craig J. stated:
>
> "The fact that Gordon may have acted without malevolent motive and inadvertently is not determinative of the right of the OSC to exercise its regulatory and discretionary powers to impose a sanction upon Gordon".
>
> Although that case involved a hearing into whether it was in the public interest to suspend, cancel, restrict or impose conditions on the registration of a registrant and not a section 128 hearing, we believe the same principle applies in the case at hand.

[11] As for the appellants' criminal law arguments on proof of intention and *mens rea*, this is not a criminal case *like R. v. Carter* (1996) 9 CCLS 21 or *R. v. Mammolita* (1983) 9 C.C.C. (3rd) 85 The applicants were not charged with any offence or prosecuted under any penal statute, nor did the tribunal make any "findings of guilt." The tribunal was not obliged to apply criminal law principles such as "accessorial liability" in exercising its jurisdiction to protect capital markets and regulate the activity of the participants in that marketplace.

[12] Notwithstanding Mr. Sternberg's able re-argument of the points he made before the tribunal there was overwhelming evidence that

there was a deceptive scheme of the kind alleged and

the exemptions were used abusively to facilitate the scheme

The appellants, whether or not guilty of violations, participated in acts vital to the implementation of the scheme which abused the market

[13] It is important to remember the tribunal 's finding that even if it erred in finding violations, there was in any event an abuse of the market that triggered the application of s. 127.

[14] So far as knowledge is concerned there comes a point where the unexplained participation of individuals in a vital capacity in a scheme which abuses the market supports an inference that some sanction is required to prevent them from doing so again, whatever their precise degree of knowledge.

[15] This was a classic scheme where the promoters, in order to avoid scrutiny of risk by prospective investors, adopted procedures including the use of exemptions in order to withhold information showing that the ventures are nothing more than commercial moose pasture.

[16] Although it was essentially agreed by the tribunal that Glen Erikson participated only in the build up phase, his participation in misleading press

releases demonstrates his participation in activities (whether one characterizes them as build-up or marketing) directed at the public market.

[17] It is unnecessary to prove his participation in the marketing or blow-out phases. The build-up phase was just as essential to the abuse of the market as the marketing and blow-out phases. Erikson's crucial engineering of the first phase of the scheme was an essential part of the ultimate abuse of the market.

[18] Although the Eriksons complain of insufficient evidence and findings about their precise degree of knowledge, they declined to testify. They provided no explanation for any of the evidence against them. Their failure to testify as to their knowledge and intention weakens their attack on the tribunal's findings about their knowledge and intention. Their elaborate argument about the precise nature and quality of their suspicion, willful blindness, or knowledge and the "complexity of the mental element necessary for accessorial liability" rings hollow in light of their failure to testify.

Sufficiency of Reasons

[19] The tribunal set out the evidence, their primary findings of fact as to the appellants' participation, and their ultimate conclusions without fully elaborating everything they could have said about their intermediate reasoning. The reasons for judgment could have been more explicit in relation to the continuum between innocence, naive inexperience, ignorance, suspicion, negligent failure to inquire, reckless failure to inquire, sophisticated blindness, wilful blindness, things the appellants ought to have known, imputed knowledge, and actual knowledge. The tribunal could have been more explicit in finding precisely how the trees fit into the forest or, to put it legally, "in the logical process by which conclusions are sought to be drawn" from the evidence. [Iacobucci J. in Southam at pp. 776 – 7.] It must always be remembered, when parsing reasons for judgment, that the appeal is from the result and not from the reasons.

[20] In finding knowledge on the part of the appellants the tribunal made no express reference to its marketplace expertise. Nor was it obliged to do so. The entire judgment reflects the tribunal 's understanding of the marketplace and of the kind of mental awareness one would normally expect of someone in the appellants' position.

[21] There is no obligation on the tribunal to say everything it might have said and failure to do so does not evidence error. The reasons, taken as a whole, demonstrate a meticulous review of the evidence and clear findings of primary fact which were more than adequate as a foundation for the ultimate conclusions. To take but one of dozens of examples, the tribunal said this

about Glen Erikson's participation in the issuance of Betelco shares from treasury in return for the rights to the moon balancer and continuous squirt gun:

> On this first acquisition of business assets for treasury shares, it is clear that a prospectus was required. This is part of the fundamental protection under the Act. Mr. Erikson as a solicitor knowledgeable in securities law and as the president and a director of Belteco at the time ought to have ensured compliance. The press release which was filed was woefully lacking in the information required in the circumstances.

[22] The primary findings of fact, taken cumulatively, are more than enough to support the ultimate conclusion that the appellants participated in the abuse of capital markets in a manner that required the imposition of a preventive sanction.

Sufficiency of Evidence

[23] The case against the appellants was strong. The assets underlying the shares were "commercial moose pasture". It was not necessary to follow the money or to have any evidence of where it went. Neither was it necessary to conduct a formal valuation of the commercial moose pasture.

[24] It was for the tribunal, not this court, to weigh the evidence of all the witnesses whom they saw and heard, including Whymark and Madeiros. There were some matters the tribunal did not refer to although they could have, and some minor errors in relation to the details of this elaborate and complicated scheme. But nothing in the evidence or the reasons suggests any factual error that might affect the result, any failure to consider a vital matter, or any other error in principle.

[25] The appellant seeks to re open and reargues the case it lost before the O.S.C. This is not a trial de novo and it is not for the court to rehear the case.

Seven Alleged Errors

[26] The appellants raise seven alleged "factual" errors:

1. Cleaning up the shell: Whymark's suggestion or Erikson's?

2. Was the promoter exemption available to Petry?

3. Was the employee exemption available to Madeiros?

4. Did Madeiros act in a purely accommodation capacity?

5. Submissions for G. Erikson, Private Placement December 23 1991

6. Elaine Salter's holdings on April 30 1992

7. Did Erikson avoid a prospectus or a takeover bid circular?

[27] Some of these alleged errors have nothing to do with any factual mistake but rather with technical statutory pigeonholes, for instance whether there was a failure to file a prospectus or a failure to file a takeover bid circular.

Re-Argument before Tribunal

[28] The seven alleged errors were argued not only on appeal but also, in the following manner, in front of the tribunal after it had rendered its decision.

[29] In its extensive reasons for judgment on September 30,1998 the tribunal left it open to the appellants to make further submissions on the facts:

> ... when counsel re-attend to address us on the consequences of our decision we are prepared to hear any reasonable representations arising from our analysis or presentation of the facts.

[30] Mr. Sternberg took up the tribunal 's invitation. On November 17 when the tribunal came back he argued these points as shown in volume 25 pages 1-41 of the transcript, followed by Mr. Ritchie's response. During this reargument it became obvious that the tribunal had intended a limited argument on four new transaction summary tables attached to the reasons, but not a plenary reargument on all the findings in the reasons. The tribunal made a few observations during the course of these submissions such as "I think you may be right" or "You are probably right" in respect of minor details but made it clear that on the controlling findings and conclusions they were not open to re-argument. Mr. Sternberg's argument before the tribunal was largely to preserve rights of appeal on the points with which he took issue.

The Seven Alleged Errors Analyzed

[31] The **first** alleged error (reasons page 12, fourth full paragraph) has to do with the assignment to Krater of Whymark's Beltco shares. The chair agreed that the tribunal maybe should have said "as a result of Mr. Erikson's suggesting that it had value" (v. 25 November 18 pp. 13 – 140) and agreed that "you can qualify the degree of suggestion." Whatever should have been said on that point it is a small point that predates 1991, a point of no moment.

[32] The **second** alleged error (reasons page 18, second last full paragraph) has to do with the moonbalancer and the continuous feed squirt gun and the finding that the promoter exemption was not applicable to Petrie. In light of the lack of any role by Petrie in the reorganization of Betelco's business and in light of the inability to find Petrie's alleged company in Kent, Ohio, the finding is not unreasonable.

[33] The **third** alleged error has to do with the finding (reasons p. 23, last full paragraph) that Madeiros was not an employee of Betelco or Pearl "in the spirit in which that term is used in Section 72 (1) (n)". Madeiros testified on July 22 and July 23. The tribunal had a full opportunity to assess the real nature of her role. She was unaware what it meant to act as a director of a company, did not know the difference between a public and a private company, was unaware until the investigation that she was listed as the secretary of Betelco or that she had resigned. She never attended a board of directors meeting although she signed a lot of documents, sometimes in blank. Whatever technical argument might be made about her legal status, the finding is not unreasonable that she was not an employee in which the spirit of that term is intended in the Act.

[34] The **fourth** alleged error has to do with the finding (reasons p. 10 last paragraph);

> We accept the evidence of Madeiros that in her capacity as a director and officer of Belteco and as an officer of Torvalon, she was acting as a pure accommodation party at the request of Gary Salter or through him at the request of Erikson. In our view, this is also true with respect to the trading in shares which were issued to her or to the actions of corporations of which she was the sole director and officer.

[35] Mr. Sternberg pointed out to the tribunal that there was no evidence that "on the trading aspect that she was in any way acting through Erikson" and the chair said "I think that is right." (transcript November 18 page 11). So far as trading is concerned it is clear that the tribunal did not associate Glen Erikson with the blow-out phase and any slip reflected in the quoted paragraph could have had no effect on the result.

[36] This fourth alleged error involves a subtext to the other complaints of the appellants. This cumulative complaint alleges that the tribunal followed the investigators' error by seeing something wrong at the end of the day and then working far back ex *post facto* to tar, as sinister, every detail of Erikson's behaviour. This subtext applies also to the fifth and sixth alleged errors.

[37] There was no error in the tribunal's approach. Behaviour associated with a market abuse invites a trier of fact quite properly, when the behaviour is unexplained, to analyze it in the context of the abuse with which it was

associated. There is nothing in the alleged errors that could, individually or cumulatively, have affected the result of the hearing.

[38] The **fifth** alleged error has to do with the tribunal's treatment of Glen Erikson's role in the private placement of December 23 1991 (page 29)

> As to Erikson's participation, it is clear from the record that he was fully aware of the circumstances and probably participated in the preparation of both the report and the press release.
>
> No submission was made on behalf of Erikson on this transaction, but none of these shares reached the market as it had collapsed before the shares became tradeable.

[39] In fact submissions had been made on behalf of Erikson, submissions to the effect that this was one of the few transactions in which there was complete compliance with all filing requirements.

[40] On this issue the staff had conceded that although the transaction required a prospectus, an exemption was probably available. The staff submitted that the use of the exemption in the circumstances was abusive because the press release was incomplete in relation to the destination of the funds to be applied to debt reduction.

[41] There was no error here that could have affected the result. The tribunal appeared to acknowledge the availability of an exemption and there was no finding against Erikson in respect of the issue on which submissions were made on his behalf.

[42] The **sixth** alleged error (page 29) has to do with a finding that the cumulative total of shares of Betelco issued to Elaine Salter and her company 918211 amounted to 832,342 shares or 17% of the issued and outstanding shares at the end of April 1992. The alleged error is the failure to consider that sales from January to April would have reduced the percentage.

[43] On this point the Chair during re-argument (page 19) said:

> THE CHAIR: ...I think you may be right. What the 17 percent is calculated on is the 832,342, that obviously those numbers can be added up in the table and probably does not take into account sales.
>
> MR. STERNBERG: Yes.
>
> THE CHAIR: Probably does not. I think you are quite right.

[44] There followed a dialogue between Mr. Sternberg and the Chair as to whether she clearly had over 10% which triggers the creeping control provisions of s. 101.

[45] Again, the error resulted in no crystallized finding against Erikson. It was certainly not the key to the decision against him and could not in the overall body of findings have affected the ultimate result.

[46] Mr. Sternberg characterizes the **seventh** alleged error as the most offensive error that impacted on the way Glen Erikson was viewed. The argument on this point is highly technical and was reviewed extensively during re-argument (transcript pp. 22 – 33). It involves the Torvolon acquisition of control and the following concluding passage (reasons page 35):

> We have no doubt that the real number of sellers was artificially reduced so that the prospectus requirements of the Act could be avoided. This fact was clearly known to Erikson and consequently no prospectus exemption was applicable because he knew that the nominal sellers were acting as nominees or agents for others having a beneficial interest in the securities being sold. There was a clear breach of the Act. A prospectus was required. Furthermore, the Section 101 filing was inaccurate and incomplete as it did not disclose the true identity of the purchasers.

[47] Although a lot can be said about this issue it makes no difference in the result. Even if a prospectus was not required but a take over bid circular was required, the result is the same. Neither a prospectus nor a take over bid circular was filed. In the result the public was deprived of critical information and it does not matter which pigeonhole the delict best fits.

[48] Most of the alleged errors are not made out. None of those that are made out are substantial and none of them could have affected the result.

Limitation Period

[49] Because it found as a fact that the reports in question did not contain the range of knowledge required to trigger the limitation period, the tribunal found it unnecessary to decide whether the knowledge of TSE and CDN should be attributed to OSC.

[50] There is no basis to interfere with that finding of fact, uniquely within the expertise of the tribunal.

[51] The report itself recommended that further investigations be done. It is difficult to pinpoint the exact stage during an investigation when there is enough knowledge of facts to launch proceedings. Between suspicion and knowledge there is no bright line. The regulator is guilty of tunnel vision if it proceeds against individuals on the basis of mere suspicion before conducting an adequate investigation, including necessary interviews, of the kind required to turn suspicion into knowledge.

[52] The Boyce letter of December 17 said there was a possibility of manipulative trading and unwarranted markups. Although a great deal of

trading and transaction detail was presented, there were at that time no interviews of people like Madeiros, Rooney, Kirkwood, Petrie, Virginia Bailey, Daniel Bailey, Wayne Whymark, Link, Torrens or Erikson's mother in law, Mrs. Picke.

[53] More is needed than "This looks like a market manipulation; something is going on here and we have to investigate." It would be irresponsible, without conducting personal interviews, to conclude that there was enough evidence to launch proceedings. The tribunal correctly held that the necessary knowledge could only be attributed to staff well after December 19, 1991.

Sanction

[54] The sanction is not as serious as suggested by the appellants. It is not a life-time ban on trading. In the first place it is always open to the appellants to apply to the Commission at any time under s. 144(1) to revoke or vary the sanction. Second, the appellants are entitled, after the expiry of two years, to trade firstly in s. 35 (2)(1) securities, bonds and debentures and also in TSE-listed securities in respect of companies where they are not an insider and do not own more than 2 ½ %.

[55] The sanction must also be considered in light of the fact that it did not deprive the appellants of any right. Participation in the capital markets is a privilege, not a right. As this court said in *Manning v. O.S.C.,* [1996] O.J. No. 3414 (O'Driscoll, Borkovich and Corbett JJ.) per O'Driscoll J.:

> [6] We agree with paragraphs 47 and 48 of the Respondent's Factum:
>
> 47. There is no right of any individual to participate in the capital markets in Ontario. Section 35 of the Act provides certain exemptions which allow individuals to make certain trades without being registered, however the OSC has explicit jurisdiction to remove the exemptions if an individual engages in conduct contrary to the letter or spirit of the Act, whether such conduct causes damage to investors or is detrimental to the integrity of the capital markets. The OSC found that such conduct existed on the facts of the present case.
>
> 48. The OSC exercised its public interest discretion in a manner within the core of its regulatory jurisdiction. Its decision was based on voluminous evidence, made in good faith, for the purposes of the Act and on the basis of relevant factors. It is a matter that falls within the OSC's exclusive jurisdiction and one with which the Court should not interfere.
>
> [7] The removal of the exemptions of the appellants, in our view, falls within the OSC's exclusive jurisdiction. On this record, we are not persuaded that there is any basis upon which to interfere. In the result, the appeals are dismissed.

[56] This extract from *Manning* shows that participation in capital markets is a privilege and not a right. It also shows that sanctions addressed to that privilege are within the deference accorded to decisions at the heart of the Commission's specialized expertise.

[57] The tribunal is in a much better position than this court to determine the gravity of the conduct and the risk to the public. As this court said in *Robinson v. O.S.C.*, [2000] O. J. No. 648 (Southey, MacFarland and Swinton JJ.).

> The Commission is in a much better position than this court to determine the gravity of the breaches of the Securities Act that have been found, and to assess the risk to the public from the future conduct of the persons involved. Such determinations are squarely within the core jurisdiction of the Commission. The Commission is entitled to deference. We are not persuaded that any of the decisions as to penalty was unreasonable, and there will be no order disturbing the penalties that have been imposed by the Commission.

[58] The tribunal when considering sanction addressed itself expressly to the appropriate factors including:

> the seriousness of the allegations proved;
>
> the respondents' experience in the marketplace;
>
> the level of the respondents' activity in the marketplace;
>
> whether or not there has been recognition of the seriousness of the improprieties, and

whether or not the sanctions imposed serve to deter not only those involved in the case being considered but also any like-minded people from engaging in similar abuses of capital markets.

[59] The tribunal addressed, in particular, the principal consideration of the need not to punish past conduct but to restrain future conduct likely to be prejudicial to the public interest in the integrity of capital markets. The tribunal in this respect quoted *In the Matter of Mithras Management Ltd.* (1990), 13 O.S.C.B. at pp. 1610-1611:

> Under sections 26, 123 and 124 of the Act, the role of this Commission is to protect the public interest by removing from the capital markets -- wholly or partially, permanently or temporarily, as the circumstances may warrant -- those whose conduct in the past leads us to conclude that their conduct in the future may well be detrimental to the integrity of those capital markets. We are not here to punish past conduct; that is the role of the courts, particularly under section 118 of the Act. We are here to restrain, as best we can, future conduct that is likely to be prejudicial to the public interest in having capital markets that are both fair and efficient. In so doing we must, of necessity, look to past conduct as a guide to what we believe a person's

> future conduct might reasonably be expected to be; we are not prescient, after all. And in so doing, we may well conclude that a person's past conduct has been so abusive of the capital markets as to warrant our apprehension and intervention, even if no particular breach of the Act has been made out.

[60] Nothing in the negotiated settlements of the other participants suggests any error in the appellants' sanctions. As for the identity of sanction between the two appellants it was open to the tribunal, in considering future conduct, to consider their continuing mutual participation in public companies since the Betelco and Torvolon matters. Glen Erikson was a director, officer or holder of more then 10% of the shares of eight public companies and Christine Erikson to like degree in six of those public companies.

[61] Penalty is a matter uniquely within the expertise of this regulatory tribunal which is intimately familiar on a daily basis with the practices and expectations of the marketplace. The appellants, as the commission found, participated in a scheme which was manipulative, deceptive, and unconscionably abusive of capital markets. Their conduct, which was clearly contrary to the public interest, resulted in net proceeds of $969,000 for Betelco and over $2 million for Torvalon.

[62] Neither the reasons not the sanctions demonstrate any error in principle or any reason to interfere with the imposition of these sanctions at the heart of the Commission's specialized understanding of what is necessary to protect the integrity of capital markets.

Conclusion

[63] For these reasons the appeal is dismissed with costs fixed in the agreed amount of $10,000.

Ontario Securities Commission | Commission des valeurs mobilières de l'Ontario | P.O. Box 55, 19th Floor 20 Queen Street West Toronto ON M5H 3S8 | CP 55, 19e étage 20, rue Queen Ouest Toronto ON M5H 3S8

Citation: Limelight Entertainment Inc. et al., 2008 ONSEC 28
Date: 2008-12-10

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

AND

IN THE MATTER OF LIMELIGHT ENTERTAINMENT INC., CARLOS A. DA SILVA, DAVID C. CAMPBELL, JACOB MOORE, AND JOSEPH DANIELS

REASONS AND DECISION ON SANCTIONS AND COSTS

Hearing: September 11, 2008

Decision: December 10, 2008

Panel:

James E. A. Turner	-	Vice-Chair and Chair of the Panel
Suresh Thakrar	-	Commissioner

Counsel:

Derek Ferris Larry Masci	-	For the Ontario Securities Commission

No one appeared for Limelight Entertainment Inc., Carlos A. Da Silva, David C. Campbell or Joseph Daniels

TABLE OF CONTENTS

REASONS AND DECISION ON SANCTIONS AND COSTS

I. BACKGROUND

[1] This was a bifurcated hearing before the Ontario Securities Commission (the "Commission") pursuant to sections 127 and 127.1 of the *Securities Act,* R.S.O. 1990, c. S.5, as amended (the "Act"), to consider whether it is in the public interest to make an order with respect to sanctions and costs (the "Sanctions and Costs Hearing") against Limelight Entertainment Inc. ("Limelight"), Carlos A. Da Silva ("Da Silva"), David C. Campbell ("Campbell") and Joseph Daniels ("Daniels").

[2] On April 13, 2006, the Commission issued a temporary cease trade order (the "First Temporary Order") pursuant to subsections 127(1) and 127(5) of the Act against Limelight, Da Silva, Campbell and Jacob Moore ("Moore"). The terms of the First Temporary Order were that all trading in the securities of Limelight cease; that Limelight, Da Silva, Campbell and Moore cease trading in all securities; and that the exemptions contained in Ontario securities law do not apply to Limelight, Da Silva, Campbell and Moore.

[3] On April 25, 2006, an Amended Notice of Hearing and Amended Statement of Allegations were issued adding Daniels as a respondent.

[4] On April 26, 2006, the First Temporary Order was extended and its terms were amended to include Daniels (the "Amended Temporary Order"). The terms of the Amended Temporary Order were that Daniels cease trading in all securities and that the exemptions contained in Ontario securities law do not apply to him. The Amended Temporary Order also required Limelight to provide the Notice of Hearing in this proceeding to its shareholders. The Amended Temporary Order was extended on May 11, 2006, September 12, 2006 and October 30, 2006 and is still in effect.

[5] Staff and Moore entered into a settlement agreement that was approved by order of the Commission on August 2, 2007 *(Re Limelight* (2007), 30 O.S.C.B. 8368). Limelight, Da Silva, Campbell and Daniels are the remaining respondents in this proceeding. In these reasons, Limelight, Da Silva, Campbell and Daniels are referred to collectively as the "Respondents".

[6] On September 28, 2007, Staff and Da Silva entered into an Agreed Statement of Facts (the "Agreed Statement") in which Da Silva admitted breaches of the Act but did not agree to sanctions.

[7] The hearing on the merits was held on October 1, 2007 and a decision was rendered on February 12, 2008 (*Re Limelight et al.* (2008), 31 O.S.C.B. 1727) (the "Merits Decision"). None of Limelight, Campbell or Daniels attended the hearing on the merits. The Commission was satisfied that Limelight and Campbell received proper notice of the hearing and that reasonable attempts to locate and give notice to Daniels were made by Staff. Da Silva was present and represented at the commencement of the hearing, but left the hearing room and did not participate after the Agreed Statement was entered into evidence.

[8] The Sanctions and Costs Hearing was held on September 11, 2008. None of the Respondents appeared before the Commission or made submissions. Staff made oral and written submissions to the Commission on sanctions and costs.

[9] While none of the Respondents attended the Sanctions and Costs Hearing, the Commission was satisfied that it was entitled to proceed to hear the submissions of Staff as to sanctions and costs as permitted under section 7 of the *Statutory Powers Procedure Act,* R.S.O. 1990, c. S.22, as amended (the "SPPA"). Section 7 of the SPPA provides as follows:

> Where notice of an oral hearing has been given to a party to a proceeding in accordance with this Act and the party does not attend at the hearing, the tribunal may proceed in the absence of the party and the party is not entitled to any further notice in the proceeding.

[10] These are our reasons and decision as to the appropriate sanctions and costs against the Respondents.

II. THE DECISION ON THE MERITS

[11] Staff's Statement of Allegations dated April 7, 2006, and the Amended Statement of Allegations dated April 25, 2006, raised the following issues:

(a) Did Limelight, Da Silva, Campbell and Daniels breach the registration and prospectus requirements of the Act by trading in Limelight shares contrary to subsections 25(1) and 53(1) of the Act in circumstances where the "accredited investor" exemption was not available under OSC Rule 45-501, *Prospectus and Registration Exemptions* (now NI 45-106) ("Rule 45-501")?

(b) Did Limelight, Da Silva and Campbell give undertakings regarding the future value of Limelight shares, with the intention of effecting sales of Limelight shares, contrary to subsection 38(2) of the Act?

(c) Did Limelight, Da Silva, Campbell and Daniels make representations regarding the future listing of Limelight shares with the intention of effecting sales of Limelight shares, contrary to subsection 38(3) of the Act?

(d) Did Da Silva mislead Staff, contrary to clause 122(1)(a) of the Act, when he advised Staff that (i) Limelight shareholders were accredited investors, (ii) Limelight salespersons always enquired to confirm that sales of Limelight shares were made only to accredited investors, (iii) no scripts were used by Limelight salespersons, (iv) Limelight salespersons also acted as project managers of Limelight's business, and (v) he did not know whether Limelight shares were sold to Ontario investors in 2005?

(e) Did Limelight and Da Silva file misleading or untrue reports of exempt distributions with the Commission contrary to clause 122(1)(b) of the Act?

(f) Did Limelight, Da Silva, Campbell and Daniels breach the First Temporary Order or the Amended Temporary Order?

(g) Was the conduct of Limelight, Da Silva, Campbell and Daniels contrary to the public interest?

[12] The Commission found in the Merits Decision that:

(a) Limelight, Da Silva, Campbell and Daniels contravened subsection 25(1) of the Act by trading in Limelight shares without registration where no

exemption was available (Merits Decision, *supra* at paras. 144, 146, 149, 152, 155, 158 and 215);

(b) Limelight employed several employees, including Ove Simonsen, Moore and Daniels, who were involved solely in selling Limelight shares to investors. Limelight and its salespersons were acting as market intermediaries in the circumstances, without registration, in breach of subsection 25(1) of the Act (Merits Decision, *supra* at para. 146);

(c) Limelight, Da Silva, Campbell and Daniels contravened subsection 53(1) of the Act by distributing previously unissued Limelight shares where no prospectus was filed and no exemption was available (Merits Decision, *supra* at paras. 140 and 216);

(d) it was not satisfied that Limelight, Da Silva and Campbell gave undertakings regarding the future value of Limelight shares contrary to subsection 38(2) of the Act, but the Commission did find that those Respondents made representations and used high pressure sales tactics that were improper, unacceptable and contrary to the public interest (Merits Decision, *supra* at para. 217);

(e) Limelight, Da Silva and Campbell made representations regarding the future listing of Limelight shares on an exchange with the intention of effecting sales of Limelight shares contrary to subsection 38(3) of the Act, but the Commission was not satisfied that Staff proved that Daniels did so (Merits Decision, *supra* at paras. 183-185, 210 and 218);

(f) Da Silva lied to and misled Staff contrary to clause 122(1)(a) of the Act (Merits Decision, *supra* at para. 219). Specifically, Da Silva admitted and acknowledged that he misled Staff during the investigation in two ways: (1) by advising Staff initially that Limelight shares were sold only to accredited investors, and (2) by claiming that no scripts were used by Limelight salespersons (Merits Decision, *supra* at paras. 187 and 188);

(g) Limelight and Da Silva filed misleading and untrue reports of exempt distributions with the Commission contrary to clause 122(1)(b) of the Act (Merits Decision, *supra* at para. 220). Specifically, the Commission found that Limelight filed documents containing inaccurate dates and misrepresented that the accredited investor exemption was properly relied upon for distributions of Limelight shares. Similarly, the Limelight filings failed to disclose payment of commissions and other fees as required by the Act. Da Silva, or someone on his behalf, signed and certified all of the documents containing these misleading statements (Merits Decision, *supra* at para. 196);

(h) Limelight, Da Silva and Campbell breached the First Temporary Order, and Limelight and Campbell breached the Amended Temporary Order, contrary to clause 122(1)(c) of the Act (Merits Decision, *supra* at para. 221). The Commission also held that depositing investor cheques into a Limelight bank account held by Limelight constituted acts in furtherance of trades and that, depending on their date, such deposits violated the conditions of the First Temporary Order or the Amended Temporary Order (Merits Decision, *supra* at para. 203). In addition, the Commission found that, even after the issue of the Amended Temporary Order, several hundred telephone calls were made, and information was sent by courier,

to potential investors and cheques from investors were received (Merits Decision, *supra* at paras. 204 and 205).

(i) it was not satisfied that Staff proved that Daniels breached either the First Temporary Order or the Amended Temporary Order (Merits Decision, *supra* at para. 221);

(j) Limelight, Da Silva, Campbell and Daniels acted contrary to the public interest by breaching important provisions of the Act intended to protect investors (Merits Decision, *supra* at para. 222). The Commission found that the Respondents were acting with the common purpose of selling Limelight securities. While doing so, "they preyed on investors with limited resources and financial experience" (Merits Decision, *supra* at para. 208). The Commission concluded that:

> ... the Respondents breached a number of key provisions of the Act intended to protect investors. Their conduct was egregious. It caused great harm to investors and to the integrity of Ontario's capital markets, and was clearly contrary to the public interest (Merits Decision, *supra* at para. 213);

(k) Limelight, Da Silva and Campbell made "prohibited representations with respect to the future listing of Limelight shares on a stock exchange and used high pressure sales tactics that included improper and unacceptable representations as to the future value of Limelight shares" (Merits Decision, *supra* at para. 210);

(l) the purported use of the accredited investor exemption by Limelight, Da Silva, Campbell and Daniels "was little more than a smoke screen for their blatant disregard of Ontario securities law" (Merits Decision, *supra* at para. 209).

[13] The Commission also concluded that Da Silva and Campbell were the directing minds of Limelight and they were aware of and authorized, permitted or acquiesced in Limelight's breaches of the Act (Merits Decision, *supra* at paras. 116 and 118). Limelight, Da Silva and Campbell raised approximately $2.75 million from 611 investors located in all ten provinces of Canada and from investors outside of Canada (Merits Decision, *supra* at para. 25). This included 71 investors who were Ontario residents (Merits Decision, *supra* at para. 26). The Commission noted in the Merits Decision that it appears that the investors in Limelight have lost all of their investment (Merits Decision, *supra* at para. 208).

III. SANCTIONS REQUESTED BY STAFF

[14] In their written and oral submissions, Staff requested that the following orders be made against the Respondents:

(a) that Limelight, Da Silva and Campbell cease trading in securities permanently, with the exception that Da Silva and Campbell be permitted to trade securities for the account of their registered retirement savings plans (as defined in the Income Tax Act (Canada) (the "Tax Act"));

(b) that any exemptions contained in Ontario securities law not apply to Limelight, Da Silva and Campbell permanently, except for the exemptions

needed to trade in securities in the manner permitted by paragraph (a) above;

(c) that Daniels cease trading in securities for 10 years, with the exception that Daniels be permitted to trade securities for the account of his registered retirement savings plans (as defined in the Tax Act);

(d) that any exemptions contained in Ontario securities law not apply to Daniels for 10 years, except for the exemptions needed to trade in securities in the manner permitted by paragraph (c) above;

(e) that Da Silva and Campbell be prohibited permanently from becoming or acting as a director or officer of any issuer;

(f) that Limelight, Da Silva, Campbell and Daniels be permanently prohibited from telephoning residences within or outside Ontario for the purpose of trading in securities;

(g) that Limelight, Da Silva and Campbell each pay an administrative penalty of $200,000 for failing to comply with Ontario securities law;

(h) that Daniels pay an administrative penalty of $50,000 for failing to comply with Ontario securities law;

(i) that Limelight, Da Silva and Campbell jointly disgorge to the Commission $2,747,089.45;

(j) in the alternative to (i), that Limelight disgorge $2,747,089.45 and each of Da Silva and Campbell disgorge the amounts they received from Limelight; and

(k) that Limelight, Da Silva, Campbell and Daniels jointly and severally pay the costs of Staff's investigation and this proceeding in the amount of $154,979.79 plus $5,637.29 in disbursements.

[15] In Staff's submission, the sanctions requested are appropriate in light of the Respondents' serious breaches of the Act and conduct contrary to the public interest.

IV. THE LAW ON SANCTIONS

[16] The Commission's mandate is to: (i) provide protection to investors from unfair, improper or fraudulent practices; and (ii) foster fair and efficient capital markets and confidence in capital markets (section 1.1 of the Act).

[17] In exercising its public interest jurisdiction, the Commission must act in a protective and preventative manner, as stated by the Commission in *Re Mithras Management Ltd:*

> ...the role of this Commission is to protect the public interest by removing from the capital markets -- wholly or partially, permanently or temporarily, as the circumstances may warrant -- those whose conduct in the past leads us to conclude that their conduct in the future may well be detrimental to the integrity of those capital markets. We are not here to punish past conduct; that is the role of the courts, particularly under section 118 [now 122] of the Act. We are here to restrain, as best we can, future conduct that is likely to be prejudicial to the public interest in having

> capital markets that are both fair and efficient. In so doing we must, of necessity, look to past conduct as a guide to what we believe a person's future conduct might reasonably be expected to be; we are not prescient, after all *(Re Mithras Management Ltd.* (1990), 13 O.S.C.B. 1600 at pp. 1610-1611).

[18] The Supreme Court of Canada has described the Commission's public interest jurisdiction as follows:

> The purpose of an order under s. 127 is to restrain future conduct that is likely to be prejudicial to the public interest in fair and efficient capital markets. The role of the [Commission] under s. 127 is to protect the public interest by removing from the capital markets those whose past conduct is so abusive as to warrant apprehension of future conduct detrimental to the integrity of the capital markets *(Committee for Equal Treatment of Asbestos Minority Shareholders v. Ontario (Securities Commission),* [2001] 2 S.C.R. 132 at para. 43).

[19] In addition, the Commission should consider general deterrence as an important factor when determining appropriate sanctions. In *Re Cartaway Resources Corp.,* [2004] 1 S.C.R. 672 at para. 60, the Supreme Court of Canada stated that "... it is reasonable to view general deterrence as an appropriate, and perhaps necessary, consideration in making orders that are both protective and preventative".

[20] In determining the appropriate sanctions in this matter, we must ensure that the sanctions imposed are proportionate to the conduct involved (*Re M.C.J.C. Holdings Inc. and Michael Cowpland,* (2002), 25 O.S.C.B. 1133 ("*Re M.C.J.C. Holdings")* at para. 26).

[21] The Commission has previously identified the following as some of the factors that the Commission should consider when imposing sanctions:

(a) the seriousness of the conduct and the breaches of the Act;

(b) the respondent's experience in the marketplace;

(c) the level of a respondent's activity in the marketplace;

(d) whether or not there has been recognition by a respondent of the seriousness of the improprieties;

(e) whether or not the sanctions imposed may serve to deter not only those involved in the matter being considered, but any like-minded people, from engaging in similar abuses of the capital markets;

(f) the size of any profit obtained or loss avoided from the illegal conduct;

(g) the size of any financial sanction or voluntary payment;

(h) the effect any sanctions may have on the ability of a respondent to participate without check in the capital markets;

(i) the reputation and prestige of the respondent;

(j) the remorse of the respondent; and

(k) any mitigating factors.

(See *Re Belteco Holdings Inc.* (1998), 21 O.S.C.B. 7743 at page 7746; and *Re M.C.J.C. Holdings Inc.* , *supra* at para. 26)

V. ANALYSIS

A. Appropriate Sanctions in this Case

1. The Seriousness of the Allegations Proven

(i) Staff's Submissions

[22] In Staff's view, the conduct of the Respondents is of the most serious nature, and as a result, Limelight, Da Silva and Campbell should be permanently banned from trading securities in Ontario, while Daniels should be subject to a 10 year trading ban. Staff has proposed an RRSP exception to such trading bans.

[23] To justify the trading bans sought, Staff referred us to Commission decisions that have dealt with conduct similar to that before us.

[24] First, Staff relied on the decision in *Re E. A. Manning* (1995), 18 O.S.C.B. 5317 *("Manning").* In *Manning* members of the public were solicited to invest by cold-calls from a boiler room. If a member of the public showed any interest, high pressure sales tactics were then used to sell penny stocks to those individuals. Subsequent calls were made to sell more securities or to convince the investors not to sell the securities they had already purchased. The Commission found that the respondents were engaged in a "boiler room" operation and that such activity was inherently contrary to the public interest. The Commission ordered that the principals of E. A. Manning Limited ("E. A. Manning") be permanently banned from Ontario capital markets and ordered 10 and 5 year trading bans against E. A. Manning salespersons.

[25] Staff also referred us to the decision in *Re Marchment & Mackay Ltd.* (1999), 22 O.S.C.B. 6446 and (1999), 22 O.S.C.B. 4705 ("Marchment"). The operations of Marchment & Mackay Ltd. ("Marchment Ltd.") were similar to those of E. A. Manning. Cold-callers made the initial contact with the public. Junior salespersons then attempted to make initial sales. Later senior salespersons attempted to sell larger numbers of securities to potential investors. The Commission found that Marchment Ltd.'s core business was the sale of low cost, high risk penny stocks from its own inventory to members of the public. The Commission also found that allowing that business to continue would result in serious risk to the integrity of the capital markets. The Commission ordered that Marchment Ltd. and its principal be permanently banned from Ontario capital markets and ordered 10, 7 and 5 year trading bans against individual Marchment Ltd. salespersons.

[26] Staff also referred to the findings and sanctions ordered against the Respondents by the New Brunswick Securities Commission ("NBSC") in *Limelight Entertainment Inc.,* Decision, Reasons for Decision and Order, dated August 17, 2007 (unreported) (the "NBSC Limelight Decision") and by the Alberta Securities Commission ("ASC") in *Limelight Entertainment Inc.,* 2007 ABASC 914, dated December 12, 2007 (the "ASC Limelight Decision"). Those orders related to some of the same conduct and transactions that were referred to in evidence before us. The NBSC ordered a permanent trading ban against Limelight, Da Silva and Campbell. The NBSC also imposed administrative penalties of

$100,000 against Limelight and Da Silva, and $150,000 against Campbell. The ASC imposed an administrative penalty of $100,000, a 10 year trading ban and a 10 year director and officer ban against Da Silva. The ASC ordered an administrative penalty of $75,000, an 8 year trading ban and an 8 year director and officer ban against Campbell.

(ii) Analysis

[27] The Commission found in the Merits Decision that the Respondents' conduct in this matter was egregious and showed a blatant disregard of Ontario securities law (Merits Decision, *supra* at paras. 209 & 213). Vulnerable investors were severely harmed and cumulatively lost more than two million dollars.

[28] The Respondents' actions "breached a number of key provisions of the Act intended to protect investors" (Merits Decision, *supra* at para. 213) and those breaches "caused great harm to investors and to the integrity of Ontario's capital markets, and [were] clearly contrary to the public interest" (Merits Decision, *supra* at para. 213). Two victim impact statements were tendered in evidence as examples of the serious harm caused to investors.

[29] We agree with Staff's submission that boiler rooms that use unregistered sales persons and high pressure sales tactics to sell securities to unsophisticated and vulnerable investors are simply unacceptable and such conduct must be dealt with severely.

[30] As stated in *Manning,* "Boiler Room activity consists essentially of offering to customers securities of certain issuers in large volume by means of an intensive selling campaign through numerous salesmen by telephone or direct mail, without regard to the suitability to the needs of the customer, in such a manner as to induce a hasty decision to buy the security being offered without disclosure of the material facts about the issuer" *(Manning, supra* at para. 88). Similarly in *Re First Global et al.* (2008), 31 O.S.C.B. 10869 at para. 49, the Commission emphasized that high pressure sales techniques, selective solicitation of vulnerable investors, solicitations made without regard to the investor's needs and without regard to the requirements of the Act, damage the integrity of the capital markets and is activity contrary to the public interest.

[31] That is the same type of boiler room activity that took place in this matter. The Merits Decision found that the Respondents "used high pressure sales tactics that included improper and unacceptable representations as to the future value of Limelight shares" and that this activity was contrary to the public interest (Merits Decision, *supra* at para. 210). We would add that the securities of Limelight sold to investors appear to have been of dubious or no value.

[32] In both *Manning* and *Marchment,* the corporate respondents were registrants, while in the case before us, Limelight is not a registrant. Staff referred us to the decision in *Re Koonar* (2002), 25 O.S.C.B. 2691 in support of the principle that the same sanctioning considerations that apply to registrants may also apply to non-registrants. In that case, the Commission found that "in reviewing the appropriateness of sanctions based on past cases we do not think it appropriate to distinguish between cases where the respondents were registrants and those cases where the respondents were not registrants but were selling securities without registration or through fraudulent, manipulative or unfair means" *(Re Koonar, supra* at p. 2691). We agree with the application of that principle in the circumstances before us. While Limelight and the other Respondents were not

registrants, they engaged in very serious misconduct that harmed investors. Reduced sanctions should not be imposed simply because Limelight and the other Respondents are not registrants. We note that, in any event, Da Silva was formerly registered with the Commission as a securities salesperson with Marchment Ltd. during the period that Marchment Ltd. engaged in the actions that the Commission has previously found to be contrary to the public interest. Da Silva was aware of the registration and prospectus requirements of the Act and ought to have been fully aware that his actions constituted serious breaches of Ontario securities law.

[33] In considering the factors referred to in paragraph 21 above, we take into account particularly the following:

(a) Limelight securities were sold to the public, raising approximately $2.75 million from investors (Merits Decision, *supra* at para. 25). Staff estimated that 611 investors were affected in total, of whom 71 were Ontario residents;

(b) the conduct of the Respondents was egregious. They breached a number of key provisions of the Act intended to protect investors. This caused great harm to investors and to the integrity of Ontario's capital markets and is contrary to the public interest (Merits Decision, *supra* at para. 213).

(c) it appears that investors have lost the full amount of their investment (Merits Decision, *supra* at paras. 208 and 213). That has had a devastating effect on the investors from whom we heard evidence;

(d) Limelight, Da Silva and Campbell made illegal representations to investors "with respect to the future listing of Limelight shares on a stock exchange and used high pressure sales tactics that included improper and unacceptable representations as to the future value of Limelight shares" (Merits Decision, *supra* at para. 210). "Salespersons at Limelight made repeated representations as to the future listing of Limelight shares on a stock exchange. The scripts provided to salespersons by Campbell, as well as the 'rebuttal sheets', mention both future listing and future share price" (Merits Decision, *supra* at para. 192);

(e) Da Silva lied to and made a number of misleading statements to Staff (Merits Decision, *supra* at paras. 189, 193 and 220);

(f) Limelight, Da Silva and Campbell knowingly breached the First Temporary Order and/or the Amended Temporary Order. Specifically, the Merits Decision found that: "Limelight breached the First Temporary Order by continuing to trade after the First Temporary Order was issued, that Da Silva breached the First Temporary Order by depositing cheques in Limelight's bank account on April 13 and April 20, and that Campbell breached the Amended Temporary Order by depositing cheques in Limelight's bank account on April 26 and thereafter. We also find that Da Silva and Campbell authorized, permitted or acquiesced in Limelight's breach of the First Temporary Order and the Amended Temporary Order" (Merits Decision, *supra* at para. 207); and

(g) none of the Respondents have expressed any remorse.

[34] In considering sanctions, we recognize that Da Silva and Campbell were the directing minds of Limelight. They committed illegal acts both personally and

through their control or direction over Limelight and its salespersons. Campbell ran the Limelight office and trained and supervised the salespersons. Accordingly, in our view, Da Silva and Campbell are legally responsible for all of the actions of Limelight.

[35] The evidence indicates that Daniels was much less involved in the sale of securities to investors than Limelight, Da Silva and Campbell. Daniels traded in securities in breach of the Act, but he was not a directing mind of Limelight, he had less responsibility for the breaches of the Act by Limelight and the evidence did not disclose that he was significantly involved in selling Limelight securities to investors.

[36] We recognize that in imposing sanctions, we must do so (a) based only on the findings in the Merits Decision, on the Agreed Statement and on the other evidence presented at the merits hearing and the sanctions hearing (see for example, *Re First Global et al, supra* at para. 65); (b) in respect of trades and acts in furtherance of trades that occurred in Ontario; and (c) with the objective of protecting Ontario investors and Ontario capital markets.

[37] Overall, the sanctions imposed must protect investors and Ontario capital markets by barring or restricting the Respondents from participating in those markets in the future and by sending a clear message to the Respondents and to others participating in our capital markets that these types of illegal activities and abusive sales practices will simply not be tolerated.

2. Barring Participation in Ontario Capital Markets

(i) Staff's Submissions

[38] Staff has requested the Commission to make the following orders against Limelight, Da Silva and Campbell:

(a) a permanent cease trade order (subject to an RRSP carve out);

(b) a permanent removal of exemptions order (subject to the RRSP carve out);

(c) a permanent ban from being or acting as a director or officer of any issuer; and

(d) a permanent ban from telephoning residences within or outside Ontario for the purpose of trading in securities.

[39] Staff has also requested the Commission to make the following orders against Daniels:

(a) a 10 year cease trade order (subject to an RRSP carve out);

(b) a 10 year removal of exemptions order (subject to the RRSP carve out); and

(c) a permanent ban from telephoning residences within or outside Ontario for the purpose of trading in securities.

[40] Staff submits that such orders are necessary in the public interest to protect investors and the Ontario capital markets from future misconduct by the Respondents. Staff submits that such orders are appropriate given the specific conduct of the Respondents in this case and the serious breaches by them of key provisions of the Act.

(ii) Conclusions as to Trading and Other Sanctions

[41] The activities of the Respondents in this matter involved illegally selling securities to investors through "cold calls" made to their residences in which illegal or misleading representations were made and high pressure sales tactics were used. Da Silva and Campbell used Limelight as a vehicle to conduct those illegal activities. The provisions of the Act that were breached by the Respondents are intended to protect investors from just such conduct. We will not repeat here the seriousness with which we view the Respondents' conduct and their breaches of the Act. It is important that our order protect investors in Ontario by restraining future market participation and conduct by the Respondents. Limelight, Da Silva and Campbell have demonstrated by their conduct that they should not be permitted to participate on an on-going basis in Ontario capital markets. Accordingly, we have concluded that it is in the public interest to make the following orders against Limelight, Da Silva and Campbell (as requested by Staff):

(a) a permanent cease trade order (subject to an RRSP carve out);

(b) a permanent removal of exemptions order (subject to the RRSP carve out);

(c) a permanent ban from being or acting as a director or officer of any issuer; and

(d) a permanent ban from telephoning residences within or outside Ontario for the purpose of trading in securities.

[42] We have also concluded that it is in the public interest to make the following orders against Daniels (as requested by Staff):

(a) a 10 year cease trade order (subject to an RRSP carve out);

(b) a 10 year removal of exemptions order (subject to the RRSP carve out); and

(c) a permanent ban from telephoning residences within or outside Ontario for the purpose of trading in securities.

3. Disgorgement

(i) Staff's Submissions Regarding Disgorgement

[43] Staff submits that Limelight, Da Silva and Campbell should be ordered to jointly disgorge to the Commission $2,747,089.45, the aggregate amount that Limelight obtained from investors.

[44] In the alternative, Staff requests an order that Limelight disgorge $2,747,089.45 and each of Da Silva and Campbell disgorge the amounts they personally received from Limelight.

[45] In support of its disgorgement request, Staff referred us to *Re Allen* (2006), 29 O.S.C.B. 3944 *("Allen")* and *Re Momentas Corp.* (2007), 30 O.S.C.B. 6475 *("Momentas"). Allen* involved high pressure sales to investors and the Commission ordered a permanent trading ban against Joseph Edward Allen ("J. E. Allen") and disgorgement of substantially all fees received by him, whom it found to be the directing mind behind the investment scheme. In *Momentas,* the Commission found that Momentas Corp.'s core business involved the selling of convertible debentures in breach of the registration requirements of the Act. The

Commission ordered that all the respondents permanently cease trading and ordered that two of the individual respondents (the principals of Momentas Corp.) disgorge the proceeds personally received by them as a result of the illegal sales.

[46] Staff also made submissions relating to the purpose of the disgorgement remedy and what factors the Commission should consider when deciding whether to order disgorgement.

(ii) Applying the Disgorgement Remedy

[47] As background, the disgorgement remedy was added to the Act based on recommendations contained in the final report of the Five Year Review Committee, *Reviewing The Securities Act of Ontario* (the "Five Year Review Report"). That report stated that the objective of the disgorgement remedy is to deprive a wrongdoer of ill-gotten gains, reflecting the view that it would be inappropriate for those who contravene Ontario securities law to be able to retain any illegally obtained profits. *(Five Year Review Committee, "Reviewing the Securities Act (Ontario)*" Final Report (2003), at p. 218, online at www.osc.gov.on.ca/Regulation/FiveYearReview/fyr_20030529_5yr-final - report.pdf)

[48] The Five Year Review Report referred to the United States Securities and Exchange Commission ("SEC") disgorgement powers and noted that the following principles have been established in SEC decisions:

(a) the SEC has ruled that disgorgement is "an equitable remedy designed to deprive [respondents] of all gains flowing from their wrong, rather than to compensate the victims of the fraud" *(In the Matter of Guy P. Riordan,* 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.,* 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.,* 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.

[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. In our view, this distinction is made in the Act to make clear that all money illegally obtained from investors can be ordered to be disgorged, not just the "profit" made as a result of the activity. This approach also avoids the Commission having to determine how "profit" should be calculated in any particular circumstance. Establishing how much a respondent obtained as a result of his or her misconduct is a much more straightforward test. In our view, where there is a breach of Ontario securities law that involves the widespread and illegal distribution of securities to members

of the public, it is appropriate that a respondent disgorge all the funds that were obtained from investors as a result of that illegal activity. In our view, such a disgorgement order is authorized under paragraph 10 of subsection 127(1) of the Act.

[50] In *Allen,* the respondent submitted that he did not make the full amount attributed to him in profits because of the very substantial costs of the offering and the 20% commissions paid to salespersons. It appeared to be the respondent's submission that any order to disgorge amounts obtained should have regard only to "net" amounts obtained as opposed to "gross" amounts. On this issue, the Commission stated:

> It is Staff's submission that the wording of the legislation permits the panel to order disgorgement of the gross amount obtained. Further, Staff submitted that the legislation should not be read so as to restrict any disgorgement order to the net amount obtained as to do so would reduce the deterrent effect of the disgorgement sanction. *(Allen, supra* at para. 36)

The Commission concluded by stating that "we agree with Staff's submission on the interpretation of subsection 127(1) clause 10 of the Act" *(Allen, supra* at para. 37).

[51] That analysis and conclusion in *Allen* is consistent with the approach we have discussed above.

[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;

(b) the seriousness of the misconduct and the breaches of the Act and whether investors were seriously harmed;

(c) whether the amount that a respondent obtained as a result of non-compliance with the Act is reasonably ascertainable;

(d) whether the individuals who suffered losses are likely to be able to obtain redress; and

(e) the deterrent effect of a disgorgement order on the respondents and other market participants.

These factors are not exhaustive; other factors to consider include those referred to in paragraph 21.

[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.

[54] In our view, no one should profit from his or her breach of the Act.

(iii) Conclusion as to Disgorgement

[55] The Commission has found in the Merits Decision that Limelight, Da Silva, Campbell and Daniels contravened Ontario securities law (Merits Decision, *supra* at paras. 214-223). The Commission concluded that from April 2004 to May

2006, Limelight sold approximately 1.6 million Limelight shares to investors. As a result of these sales, Limelight received approximately $2.75 million from investors. The Commission found that in doing so Limelight, Da Silva, Campbell and Daniels illegally traded without registration and engaged in illegal distributions of shares of Limelight. (Merits Decision, *supra* at paras. 208 -209)

[56] In the Merits Decision, the Commission held that Limelight and its salespersons were acting as market intermediaries without registration in breach of subsection 25(1) of the Act. Accordingly, all of the trading by the Respondents breached the registration provisions of the Act and all of the amounts obtained by the Respondents from investors were obtained as a result of non-compliance with the Act. The Merits Decision also referred to the Agreed Statement which stated that "the vast majority of Limelight investors are not accredited investors" (Merits Decision, *supra* at para. 144). The Merits Decision concluded that "the Respondents have not satisfied the onus on them to demonstrate that the accredited investor exemption or any other registration or prospectus exemption was available to them in connection with the trading in and distribution of Limelight sales" (Merits Decision, *supra* at para. 144).

[57] We note that none of the Respondents are registered under the Act.

[58] Da Silva was president of Limelight from April 5, 2004 until he resigned on April 17, 2006 and was a director of Limelight for all the periods in question (Merits Decision, *supra* at para. 14). In the Agreed Statement, Da Silva admits to Limelight having raised $2.75 million from investors as a result of trades that amounted to a breach of Ontario securities law. (Merits Decision, *supra* at para. 25)

[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 (Merits Decision, *supra* at paras. 116 and 118) 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.

[60] We note that the misconduct by Limelight, Da Silva and Campbell involved obtaining very substantial amounts of money from vulnerable investors to whom misrepresentations were made. From the investors' perspective, they have likely lost all of their investment. In our view, a disgorgement order is particularly appropriate in such circumstances and is a powerful tool to deter others from similar misconduct. It is appropriate that a disgorgement order in these circumstances relate to the full amount obtained by Limelight, Da Silva and Campbell from investors.

[61] In our view, Limelight, Da Silva and Campbell should not be permitted to profit from their contraventions of Ontario securities law. It is in the public interest that they disgorge the full amount invested by investors in Limelight as a result of the contraventions of the Act by Limelight, Da Silva and Campbell.

[62] We therefore order that Limelight, Da Silva, and Campbell jointly disgorge $2,747,089.45 to the Commission pursuant to paragraph 10 of subsection

127(1) of the Act for allocation to or for the benefit of third parties in accordance with subsection 3.4(2)(b) of the Act.

[63] In making that order, we understand that no other Canadian securities regulator or court has ordered disgorgement from Limelight, Da Silva or Campbell as a result of the circumstances before us. If they had, we would have taken such an order or orders into account in making our disgorgement order. We recognize 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 Limelight, Da Silva and Campbell from investors.

4. Administrative Penalty

(i) Staff's Submissions

[64] Staff requested the following administrative penalties be imposed on the Respondents as a result of their breaches of the Act:

(a) that Limelight, Da Silva, and Campbell each pay an administrative penalty of $200,000 for failing to comply with Ontario securities law; and

(b) that Daniels pay an administrative penalty of $50,000 for failing to comply with Ontario securities law.

Staff indicated that the lower administrative penalty requested in respect of Daniels reflected his more limited role as a salesperson of Limelight.

[65] Staff referred us to the administrative penalties ordered in the NBSC Limelight Decision and the ASC Limelight Decision, which resulted from some of the same conduct of the Respondents that is before us. The NBSC imposed administrative penalties of $100,000 against each of Da Silva and Limelight and $150,000 against Campbell. The ASC imposed administrative penalties of $100,000 and $75,000 against Da Silva and Campbell, respectively.

[66] Staff submitted that the fact that administrative penalties were ordered by the NBSC and the ASC should not reduce the administrative penalties that should be imposed by the Commission. Staff submitted that the Respondents were aware of the multi-jurisdictional nature of securities regulation in Canada and thus ought to have known that each jurisdiction would separately exercise their protective and preventative mandates.

(ii) Purpose of Administrative Penalties

[67] The purpose of an administrative penalty is to deter the particular respondents from engaging in the same or similar conduct in the future and to send a clear deterrent message to other market participants that the conduct in question will not be tolerated in Ontario capital markets.

(iii) Applying the Administrative Penalty Provision

[68] The Commission's findings against the Respondents in the Merits Decision are summarized in paragraph 12.

[69] In the Merits Decision, the Commission concluded as follows:

> From April 2004 to May 2006, Limelight, Da Silva and Campbell sold approximately 1.6 million Limelight shares to investors. As a result of these sales, Limelight raised approximately $2.75 million from investors in all ten

> provinces of Canada and outside Canada. It is clear that the Respondents were acting in concert with a common purpose in making these sales of Limelight shares to investors. In carrying out that common purpose, they preyed on investors with limited resources and financial experience and breached key provisions of the Act intended to protect those investors. The investors appear to have lost their entire investments. (Merits Decision, *supra* at para. 208)

[70] We note that paragraph 9 of subsection 127(1) of the Act provides for a maximum administrative penalty for each contravention of the Act of $1 million.

[71] The misconduct by each of the Respondents in this matter involved numerous serious breaches of the Act over a period of approximately two years. As noted above, we are legally entitled to impose an administrative penalty of up to $1 million in connection with each breach of the Act. In our view, as a matter of principle, a respondent that commits multiple breaches of the Act should know that continuing and multiple breaches of the Act will have consequences in terms of the sanctions ultimately imposed. At the same time, however, in imposing an administrative penalty, the Commission must consider the level of administrative penalties imposed in other similar cases.

[72] The administrative penalty we impose in this case relates to breaches of the Act by the Respondents in Ontario. The Respondents are at risk of administrative sanctions in any jurisdiction in which they contravene relevant securities laws. In this case, the Respondents operated from Ontario and illegally distributed securities to Ontario investors as well as to investors in other provinces. Acts in furtherance of such trading occurred in Ontario even when shares were ultimately sold to investors outside Ontario. In addition to protecting Ontario investors and maintaining the integrity of the Ontario capital markets, we have a public interest in ensuring that participants in Ontario capital markets do not illegally distribute securities to investors in other provinces or to investors outside Canada. The administrative penalties we impose in this matter relate to trading and acts in furtherance of trading that occurred in Ontario.

[73] In our view, the fact that administrative penalties were imposed in other jurisdictions for breach of the securities laws of those jurisdictions should not limit our discretion in this case to impose appropriate administrative penalties under the Act.

[74] In imposing administrative penalties on the Respondents, we also consider it essential that market participants know that if they make misrepresentations to Staff of the Commission in their investigation or breach a Commission cease trade or other order, they do so at their peril.

(iv) Conclusion as to Administrative Penalties

[75] We order that a $200,000 administrative penalty be imposed upon each of Limelight and Da Silva. We determined that amount by reflecting the following allocation:

(a) $75,000 for breaching subsections 25(1) and 53(1) of the Act;

(b) $50,000 for making illegal and misleading representations to investors;

(c) $50,000 for breaching the Commission's cease trade orders; and

(d) $25,000 for making misrepresentations to and misleading the Staff of the Commission and for filing misleading forms with the Commission.

[76] We order that a $175,000 administrative penalty be imposed upon Campbell. We have determined that amount by reflecting the allocation in clauses (a) to (c) of paragraph 75.

[77] In our view, in the circumstances, administrative penalties in the aggregate amounts referred to paragraphs 75 and 76 are appropriate and in accordance with the public interest. Those amounts have been determined in part by reference to other decisions in similar circumstances.

[78] But for our decision to order disgorgement in this matter, we would have considered an administrative penalty of $175,000 to $200,000 to be inadequate in light of the serious nature of the misconduct that occurred here and the serious harm done to investors. In our view, previous decisions with respect to the amount of the administrative penalties imposed for conduct such as that before us are not adequate, particularly where repeated violations of key provisions of the Act occur or where large amounts of money are raised from investors. Where multiple violations of the Act occur, in our view, substantial administrative penalties should be ordered with respect to more than one or two of such contraventions, as permitted by paragraph 9 of subsection 127(1) of the Act. An administrative penalty imposed must be more than a mere "cost of doing business" for those intent on breaching the provisions of the Act. In our view, the disgorgement order and the orders with respect to administrative penalties that we make in this matter are appropriate in the circumstances.

[79] We also order that a $50,000 administrative penalty be imposed upon Daniels for his breaches of the Act. We conclude that administrative penalty is appropriate in the circumstances and in accordance with the public interest.

B. Costs

[80] Staff submitted that the Respondents should be ordered pursuant to section 127.1 of the Act to jointly and severally pay costs in the amount of $154,979.79 plus $5,637.29 in disbursements to indemnify the Commission for its investigation and hearing costs in this matter.

[81] According to Staff, the costs claimed in this case are reasonable and conservative and relate only to the time of the lead litigator and investigator. No costs were sought in respect of the time of other investigators, legal counsel, clerks or assistants. Further, Staff indicated that costs are being sought only for expenses incurred up to October 2007. No award is being sought for costs incurred to prepare for and attend at the sanctions hearing.

[82] To support its claim for costs, Staff provided information specifying the hours worked by Staff employees on this matter.

[83] We have concluded that it is appropriate to impose costs in this matter because it was the illegal conduct of Limelight, Da Silva, Campbell and Daniels that gave rise to this proceeding.

[84] Based on the submissions and information presented by Staff, we assess the total costs payable by Limelight and Campbell at $114,979.79 plus $5,637.29 in disbursements. We order that they are jointly and severally responsible for the costs and disbursements payable.

[85] The Agreed Statement entered into by Da Silva saved substantial hearing time and substantially assisted in proving Staff's case against all of the Respondents. Accordingly, we order Da Silva to pay a lower amount of costs of $15,000 and no disbursements.

[86] We also order that Daniels pay costs of $25,000 and no disbursements. We have ordered reduced costs against Daniels because, while he breached the Act, he appears to have had a more limited involvement in illegally selling securities to investors.

VI. ORDER

[87] For the reasons discussed above, we have concluded that the sanctions and costs imposed by us are in the public interest and are proportionate to the circumstances of this matter. Accordingly, we order that:

(a) pursuant to paragraph 2 of subsection 127(1) of the Act, Limelight, Da Silva and Campbell shall cease trading in securities permanently, with the exception that each of Da Silva and Campbell are permitted to trade securities for the account of his registered retirement savings plans (as defined in the *Tax Act)* in which he and/or his spouse have sole legal and beneficial ownership, provided that:

(i) the securities traded are listed and posted for trading on the Toronto Stock Exchange, the New York Stock Exchange or NASDAQ (or their successor exchanges) or are issued by a mutual fund which is a reporting issuer;

(ii) he does not own legally or beneficially (in the aggregate, together with his spouse) more than one percent of the outstanding securities of the class or series of the class in question; and

(iii) he carries out any permitted trading through a registered dealer and through accounts opened in his name only and he must close any accounts that are not in his name only;

(b) pursuant to paragraph 3 of subsection 127(1) of the Act, any exemptions contained in Ontario securities law do not apply to Limelight, Da Silva and Campbell permanently, except for any exemptions necessary to allow the trading in securities permitted in paragraph (a) above;

(c) pursuant to paragraph 2 of subsection 127(1) of the Act, Daniels shall cease trading in securities for 10 years, with the exception that Daniels is permitted to trade securities for the account of his registered retirement savings plans (as defined in the *Tax Act)* in which he and/or his spouse have sole legal and beneficial ownership, provided that:

(iv) the securities traded are listed and posted for trading on the Toronto Stock Exchange, the New York Stock Exchange or NASDAQ (or their successor exchanges) or are issued by a mutual fund which is a reporting issuer;

(v) he does not own legally or beneficially (in the aggregate, together with his spouse) more than one percent of the outstanding securities of the class or series of the class in question; and

(vi) he carries out any permitted trading through a registered dealer and through accounts opened in his name only and he must close any accounts that are not in his name only;

(d) pursuant to paragraph 3 of subsection 127(1) of the Act, any exemptions contained in Ontario securities law do not apply to Daniels for 10 years, except for any exemptions necessary to allow the trading in securities in the manner permitted in paragraph (c) above;

(e) pursuant to paragraph 8 of subsection 127(1) of the Act, Da Silva and Campbell are prohibited permanently from becoming or acting as a director or officer of any issuer;

(f) pursuant to subsection 37(1) of the Act, Limelight, Da Silva, Campbell and Daniels are permanently prohibited from telephoning residences within or outside Ontario for the purpose of trading in securities;

(g) pursuant to paragraph 10 of subsection 127(1) of the Act, Limelight, Da Silva and Campbell shall jointly disgorge to the Commission $2,747,089.45 to be allocated by the Commission to or for the benefit of third parties in accordance with subsection 3.4(2) of the Act;

(h) pursuant to paragraph 9 of subsection 127(1) of the Act, each of Limelight and Da Silva shall pay an administrative penalty of $200,000, to be allocated by the Commission to or for the benefit of third parties in accordance with subsection 3.4(2) of the Act;

(i) pursuant to paragraph 9 of subsection 127(1) of the Act, Campbell shall pay an administrative penalty of $175,000 to be allocated by the Commission to or for the benefit of third parties in accordance with subsection 3.4(2) of the Act;

(j) pursuant to paragraph 9 of subsection 127(1) of the Act, Daniels shall pay an administrative penalty of $50,000 to be allocated by the Commission to or for the benefit of third parties in accordance with subsection 3.4(2) of the Act; and

(k) pursuant to subsection 127.1 of the Act,

(i) Limelight and Campbell shall jointly and severally pay the costs of Staff's investigation and this proceeding in the amount of $114,979.79 plus $5,637.29 in disbursements; and

(ii) Da Silva shall pay the costs of Staff's investigation and this proceeding in the amount of $15,000; and

(iii) Daniels shall pay the costs of Staff's investigation and this proceeding in the amount of $25,000.

Dated this 10th day of December, 2008

"James E. A. Turner"
James E. A. Turner

"Suresh Thakrar"
Suresh Thakrar

Chapter 3

Reasons: Decisions, Orders and Rulings

3.1 Reasons: Decisions

3.1.1 M.C.J.C. Holdings and Michael Cowpland

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

AND

IN THE MATTER OF
M.C.J.C. HOLDINGS INC. AND MICHAEL COWPLAND

Hearing:	**February 12, 2002**		
Panel:	**Paul M. Moore, Q.C.**	-	**Vice-Chair (Chair of the Panel)**
	Kerry D. Adams, FCA	-	**Commissioner**
	Mary Theresa McLeod	-	**Commissioner**
Counsel:	**Melissa Kennedy** **Matthew Britton**	-	**For the Staff of the Ontario Securities Commission**
	Nigel Campbell	-	**For M.C.J.C. Holdings Inc. and Michael Cowpland**

EXCERPT FROM THE SETTLEMENT HEARING
CONTAINING THE ORAL REASONS FOR DECISION

The following statement has been prepared for purposes of publication in the Ontario Securities Commission Bulletin and is based on the transcript of the oral hearing, including oral reasons delivered at the hearing, in the matter of M.C.J.C. Holdings Inc. and Michael Cowpland. The transcript has been edited, supplemented and approved by the panel for the purpose of providing a public record of the panel's decision in the matter.

VICE CHAIR MOORE:

Please be seated. I'm going to deliver oral reasons. We reserve the right to edit these reasons and supplement them when we see the transcript.

The agreed facts in the settlement agreement are as follows:

1. The respondent Cowpland is an individual resident of Ontario. At all material times Cowpland was a director and the president and chief executive officer of Corel Corporation. Corel was at all material times a reporting issuer in Ontario.

2. M.C.J.C. is a private company which was incorporated pursuant to the laws of Ontario. At all material times Cowpland was the sole officer, director and shareholder of M.C.J.C.

3. Between August 11, 1997 and August 14, 1997, M.C.J.C. sold 2,431,200 Corel shares for total proceeds of approximately $20.4 million. At the time that these Corel shares were sold, M.C.J.C. had knowledge of a material fact with respect to Corel which had not been generally disclosed. The material fact was that Corel would fall short of its forecasted sales for the third quarter of 1997 ("Q3 1997") by a significant margin.

4. Corel had prepared a forecast for analysts that sales for Q3 1997 were expected to be $94 million U.S. On September 10, 1997 Corel announced losses for Q3 1997 of $32 million U.S. Following the announcement of Corel's loss for the quarter, the price of Corel shares

listed on the Toronto Stock Exchange fell considerably.

5. M.C.J.C. learned of the material fact from Cowpland who, as a director and officer of Corel, was an insider of Corel and therefore in a "special relationship" with Corel as defined in the *Securities Act*. By learning of the material fact from Cowpland, M.C.J.C. was in a special relationship with Corel.

6. Therefore, M.C.J.C., as a company in a special relationship with Corel, sold securities of Corel with knowledge of a material fact about Corel that had not been generally disclosed. In this way, M.C.J.C. contravened subsections 76(1) and 122(1)(c) of the Act.

7. As a director of M.C.J.C., Cowpland acquiesced or permitted the commission of the offence by M.C.J.C. under subsections 76(1) and 122(1)(c) of the Act and therefore contravened subsection 122(3) of the Act.

8. On February 11, 2002, M.C.J.C. pleaded guilty to the offence of insider trading in the Ontario Court of Justice in Ottawa, Ontario and was fined $1 million, which M.C.J.C. has paid.

In the settlement agreement, the respondents agreed to the following sanctions:

1. The respondents will be reprimanded by the Commission.

2. The respondents will make payment to the Commission in the amount of $500,000 such payment to be allocated to such third parties as the Commission may determine for purposes that benefit Ontario investors.

3. Cowpland will not act as a director of a registrant or a reporting issuer for a period of 2 years effective the date of approval of the settlement agreement by the Commission.

4. M.C.J.C. will make payment of $75,000 to the Commission, in respect of a portion of the Commission's costs with respect to this matter, upon the approval of this settlement agreement by the Commission.

We do not approve this settlement agreement as being in the public interest.

We would not usually include a recitation of agreed facts and the proposed sanctions in reasons for not approving a settlement agreement. We have done so with these reasons because counsel for OSC staff and the respondents requested that the portion of this hearing in which the settlement agreement was disclosed and discussed not be in camera; consequently, the contents of the settlement agreement, including the agreed facts and proposed sanctions, are on the public record.

Since we are not approving the settlement agreement, the agreed facts will not be available in any subsequent dealing with this matter, unless they are subsequently agreed to. This is because the terms of the agreement provide that, if it is not approved, it will be without prejudice to OSC staff and the respondents and will not be referred to in any subsequent proceeding. Of course, matters ascertainable outside of the settlement agreement, such as the conviction of M.C.J.C. Holdings Inc. in the Ontario Court of Justice, which is on the public record, are not covered by this restriction in the settlement agreement.

The fact we are not approving the settlement agreement does not preclude the parties from coming back with another settlement agreement so that we can be satisfied that sanctions will have an impact on the respondents and will send the right message.

We cannot approve this settlement agreement based on the admitted facts in the settlement agreement, including an admission of illegal insider trading and knowledge of a material fact, without assurance that the conduct would not reoccur on the part of the respondents. We have a duty to protect the marketplace. But equally, or more, importantly, we want to be sure that the right message is sent so others will be deterred from illegal insider trading.

The settlement of the proceeding before the Commission should not be mixed up by the Commission with the settlement of the quasi-criminal case. The considerations that the Commission has to take into account are different from what the Ontario Court of Justice had to take into account in the other proceeding. This is an administrative proceeding before the Commission. It is not a penal proceeding. We have a duty to consider what is in the public interest. To do that, we have to take into account what sanctions are appropriate to protect the integrity of the marketplace where illegal insider trading has been admitted.

In doing this, we have to take into account circumstances that are appropriate to the particular respondents. This requires us to be satisfied that proposed sanctions are proportionateley appropriate with respect to the circumstances facing the particular respondents. We should not just look at absolute values, e.g. what has been paid voluntarily in other settlements, or what has been found to be appropriate sanctions by way of cease trade orders in other cases.

Of particular significance, we are faced with the fact that there is an admission of illegal insider trading, an admission of knowledge of a material fact, and an admission that the price of the stock declined significantly following the public disclosure of the material fact. We were advised that Cowpland did not understand the materiality of the information and that he did not act out of malice aforethought. However, we are not prepared to make assumptions in favour of the respondents that are not supported by facts before us. Our duty is to be satisfied, on the information provided to us, and not just assertions of counsel, that this settlement agreement is in the public interest.

We believe that if we were to approve this settlement agreement on the agreed facts, members of the public would be entitled to criticize the regulatory system as not looking after investors.

Our duty is to look after investors. We have a duty to take steps to make sure that manipulative or other improper practices in the financial marketplace are not tolerated and that there is a reason for confidence in that marketplace.

Illegal insider trading by its very nature is a cancer that erodes public confidence in the capital markets. It is one of the most serious diseases our capital markets face. If we do not act in the public interest by sending an appropriate message in appropriate circumstances, then we fail in doing our duty.

We have looked at the cases that counsel has provided to us in staffs' submission. They are very helpful. It is appropriate to refer to a few.

In *Mithras Management Ltd. et al* (1988), 11 OSCB 1600, at page 1610 the Commission stated with reference to various sections of the *Securities Act*:

> [T]he role of this Commission is to protect the public interest by removing from the capital markets – wholly or partially, permanently or temporarily as the circumstances may warrant – those whose conduct in the past leads us to conclude that their conduct in the future may well be detrimental to the integrity of those capital markets. We are not here to punish past conduct; that is the role of the courts, particularly under section 118 of the Act. We are here to restrain, as best we can, future conduct that is likely to be prejudicial to the public interest in having capital markets that are both fair and efficient. In so doing, we must, of necessity, look to past conduct as a guide to what we believe a person's future conduct might reasonably be expect to be; we are not prescient, after all.

In *Belteco Holdings Inc. et al* (1998), 21 OSCB 1774, at page 7746 the Commission said:

> [W]e have been referred to decisions of this Commission which indicate that in determining both the nature of the sanctions to be imposed as well as the duration of such sanctions, we should consider the seriousness of the allegations proved; the respondent's experience in the marketplace; the level of a respondent's activity in the marketplace; whether or not there has been a recognition of the seriousness of the improprieties; and whether or not the sanctions imposed may serve to deter not only those involved in the case being considered but any like-minded people from engaging in similar abuses of the capital markets. We have considered all of these factors.

In *Richard Theberge* (2001), 24 OSCB 4033, referring to a voluntary cash contribution which amounted to merely $25,000, although there had occurred deliberate illegal insider trading contrary to advice from the respondent's father not to do it, the Commission said that the sanctions would have a significant impact on the respondent in that particular case: the respondent was unemployed; his previous salary was quite small; and the $25,000 was significant to him.

These cases suggest that we have to measure the significance of proposed sanctions by taking all circumstances into account.

Now, the conduct which has been admitted in the settlement agreement before us is benefiting at the expense of others through illegal insider trading.

In *Larry Woods* (1995), 18 OSCB 4625, at 4627 the Commission said:

> The prohibition on "insider trading", i.e. trading in securities of a reporting issuer with the knowledge of a material fact or material change with respect to the reporting issuer which has not been generally disclosed, is a significant component of the schemes of investor protection and of the fostering of fair and efficient capital markets and confidence in them, that are the cornerstones of the Act. It would be grossly unfair to permit a person who obtains undisclosed information with respect to a reporting issuer because of his relationship with the issuer to trade with the informational advantage this gives him or her....
>
> As well, such activity, if countenanced, would detract from the credibility of our capital markets and lead to the undermining of investor confidence in those markets....Accordingly, an intentional violation of the prohibition is, and must be regarded by the Commission as being, a very serious matter. It is not for us to punish the offence, the courts have already done that. Having found that Woods was guilty of insider trading, what we are now obliged to consider is whether, and if so to what extent, the public interest requires us to intervene to protect the marketplace, and investors in it, from future improper or illegal activities by Woods.

We believe there are three issues we need to consider to form an opinion whether proposed sanctions in the settlement agreement are appropriate based on the admitted facts.

In *Larry Woods* the Commission referred to two of these issues at 6428:

> Both sections of the Act under consideration require us to form an opinion that a decision to sanction is in the public interest. In our opinion there are two issues which require consideration. The first, already mentioned, is whether or not, assuming the conduct is objectionable, there is a reasonable likelihood it will be repeated. The second is whether or not the conduct of the respondents, if objectionable, is such as to bring into question the integrity and reputation of the capital markets in general. These were the tests which we followed in reaching our conclusions.

The third issue was referred to in the *Theberge* case: that is the issue of impact on the respondents. In determining impact, we need to consider all relevant factors in proportion to circumstances relevant to a respondent to be sure sanctions are proportionately appropriate. Such factors may include in varying importance the following: the size of any profit (or loss avoided) from the illegal conduct; the size of any financial sanction or voluntary payment when considered with other factors; the effect any sanction might have on the livelihood of the respondent; the restraint any sanction may have on the ability of the respondent to participate without check in the capital markets; the respondent's experience in the marketplace; the reputation and prestige of the respondent; the shame, or financial pain, that any sanction would reasonably cause to the respondent; and the remorse of the respondent. These are some of the factors that we believe may be relevant in various degrees. There may be others, and perhaps all of the factors we have mentioned would not be relevant in this or another particular case.

However, we are not prepared to approve the settlement agreement before us because we do not have sufficient facts to give us comfort in this particular case, that the proposed sanctions together with the $1 million dollars already paid, are not, to use OSC staff counsel's words in suggesting the contrary, "too light".

Appearance is important. The public record has to reflect all relevant facts to give credibility to any decision that any settlement agreement is in the public interest.

Counsel for OSC staff submitted that *R. v Harper* [2002] O.J. No. 8, was binding on the Commission. She argued that, taking into account the evidentiary difficulties presented by *Harper*, limitations on amounts that could be recovered against Harper, and difficulties in the methodology of calculating gains or avoiding losses from illegal conduct in *Harper*, the proposed settlement agreement was in the public interest.

We accept that *Harper*, although under appeal, is binding on this Commission in proceedings based on Section 122 of the *Securities Act*. However, the proceeding in this case is an administrative proceeding under Section 127 of the *Securities Act*. The Commission itself does not even have the ability to levy a fine. Section 127 requires us to address the public interest, not to punish the respondents.

If the respondents voluntarily enter into a settlement agreement and agree to make a voluntary payment, there is no limit on the amount they may agree to pay. Indeed, they might want to pay a sufficiently large amount in place of some of the sanctions that we might otherwise imposed on them under section 127 if this matter were otherwise to come before us for a hearing on the merits and we were to find against them, to achieve the necessary impact and proportionality referred to previously in these reasons.

Any sanctions that might be proposed in a new settlement as being in the public interest should result in real consequences to illegal conduct that sends a real message, not only to the respondents, but to others, by having a proportional impact on the respondents. Persons engaging in illegal insider trading should not, after the full impact of sanctions are taken into account, be seen to have benefited from their illegal conduct.

Litigants like matters to come to a conclusion. We have not come to a conclusion on this matter. OSC staff is free to bring forward the matter for a hearing. The parties are free to agree to another settlement. If the matter does not go to a full hearing on the merits where everything of interest would be on the public record and there is a new settlement agreement, it should, I suggest, set out a full statement of agreed facts so that all relevant facts would be on the public record if the new agreement were approved.

We would like to thank both counsel for their participation in this hearing. They were well prepared and helpful to the panel.

We understand that the settlement was global in that it covered not only this administrative hearing but also the court proceeding that occurred yesterday, although that proceeding was not conditional on today's proceeding. Accordingly, counsel had a duty at this hearing to remain within the parameters of what had been agreed to in order to obtain the settlement of the court proceeding and to overcome difficult evidentiary matters and differences of opinion with the respondents on the respondents' view of materiality with respect to the consequences on the market of the conduct in question.

In accordance with principles of fairness and independence, of course, the panel of the Commission hearing this matter and OSC staff have not communicated in any way concerning this matter, except in this hearing. Clearly, staff formed its view of the settlement as being in the public interest in the context of the negotiations, and took into account *Harper* (which we do not consider relevant in determining the public interest under Section 127 of the *Securities Act*) and other difficulties and considerations of which this panel was not privy.

Commissioner McLeod: I agree.

Commissioner Adams: I agree.

February 12, 2002.

Approved on behalf of the panel

Paul M. Moore, Vice-Chair

Enforcement Proceedings – Inter-Jurisdictional

Ontario Securities Commission | Commission des valeurs mobilières de l'Ontario | P.O. Box 55, 19th Floor 20 Queen Street West Toronto ON M5H 3S8 | CP 55, 19e étage 20, rue Queen Ouest Toronto ON M5H 3S8

Citation: Euston Capital Corp. et al., 2009 ONSEC 23
Date: 2009-07-29

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

- AND -

IN THE MATTER OF EUSTON CAPITAL CORP. AND GEORGE SCHWARTZ

REASONS AND DECISION
Section 127 of the *Securities Act,* R.S.O. 1990 c. S.5

Hearing:	March 19 and April 1, 2009		
Decision:	July 29, 2009		
Panel:	Wendell S. Wigle, Q.C.	-	Commissioner (Chair of the Panel)
	Suresh Thakrar	-	Commissioner
Counsel:	Yvonne Chisholm	-	for Staff of the Ontario Securities Commission
	Julia Dublin	-	for Euston Capital Corp. and George Schwartz

TABLE OF CONTENTS

REASONS AND DECISION

I. OVERVIEW

A. Background

[1] This was a hearing before the Ontario Securities Commission (the "Commission") on March 19 and April 1, 2009 pursuant to section 127 of the *Securities Act,* R.S.O. 1990, c. S.5, as amended (the "Act") to consider whether it is in the public interest to make an order imposing certain sanctions against Euston Capital Corp. ("Euston") and George Schwartz ("Schwartz") (together, the "Respondents").

[2] This matter arose out of a temporary order issued by the Commission on May 1, 2006, which ordered that all trading in securities of Euston cease, that any trading in securities by Euston and Schwartz cease, as well as that any exemptions contained in Ontario securities law do not apply to the Respondents (the "Temporary Order").

[3] A Notice of Hearing was issued by the Commission on May 2, 2006, in relation to a Statement of Allegations issued by Staff of the Commission ("Staff") on the same date.

[4] The Temporary Order was subsequently extended on May 11, June 9, and October 17, 2006. On December 4, 2006, the Temporary Order was extended until the next appearance and the hearing was adjourned pending the delivery of a decision by the Saskatchewan Court of Appeal, in an appeal by the Respondents of a decision of the Saskatchewan Financial Services Commission ("SFSC") dated February 9, 2006.

[5] On February 14, 2008 the Saskatchewan Court of Appeal released its decision, which allowed the Respondents' appeal in part, deciding that the SFSC failed to provide sufficient reasons for its sanctions decision, but took no objection to its evidentiary findings, and remitted the matter back to the SFSC for reconsideration, *Euston Capital Corp. v. Saskatchewan Financial Services Commission,* 2008 SKCA 22. The SFSC released its decision on March 27, 2008.

[6] An Amended Statement of Allegations was issued by Staff on February 20, 2009, followed by an Amended Notice of Hearing issued by the Commission on February 20, 2009 setting down the hearing for March 19, 2009.

[7] Staff and counsel for the Respondents were in attendance at this hearing on March 19, 2009. In order to allow the parties to complete their submissions, an order was made on March 20, 2009 adjourning the hearing and extending the Temporary Order until April 1, 2009.

[8] At the conclusion of this hearing on April 1, 2009, the Temporary Order was extended until the release of this decision.

B. The Respondents

[9] Euston was incorporated in Ontario on August 21, 2001. Its registered office is located in Toronto at 1267A St. Clair Avenue West, Suite 600. Euston is neither a reporting issuer nor a registrant in Ontario and has never filed a prospectus with the Commission. Euston was previously a reporting issuer in Nova Scotia, but has been in default since June 30, 2005.

[10] Schwartz is an Ontario resident, and was the President, Secretary, and sole director of Euston. Schwartz has never been registered with the Commission.

C. Issues

[11] Staff allege that the Respondents violated subsections 25(1)(a) and 53(1) of the Act, and seek final orders against the Respondents pursuant to section 127 of the Act.

[12] In addition to section 127 generally, Staff relies upon paragraph 4 of subsection 127(10) of the Act, which provides that the Commission may make an order under subsection 127(1) or (5) "in respect of a person or company if ... [t]he person or company is subject to an order made by a securities regulatory authority in any jurisdiction imposing sanctions, conditions, restrictions or requirements on the person or company".

[13] We consider whether a sanctions order should be made against the Respondents below.

[14] Staff seek the following order against the Respondents:

(a) that pursuant to subsection 127(1)2. trading in any securities by or of the Respondents cease for a period of ten years;

(b) that pursuant to subsection 127(1)2.1 the acquisition of any securities by the Respondents is prohibited for a period of ten years;

(c) that pursuant to subsection 127(1)3. any exemption contained in Ontario securities laws do not apply to the Respondents for a period of ten years;

(d) that pursuant to subsection 127(1)7. Schwartz resign any position he holds as a director of officer of an issuer; and,

(e) that pursuant to subsection 127(1)8. Schwartz is prohibited from becoming or acting as a director or officer of any issuer for a period of ten years.

D. Evidence

[15] Staff did not conduct a full investigation in this matter, and called a limited amount of evidence during this hearing. Instead, pursuant to the Commission's public interest jurisdiction under section 127 and pursuant subsection 127(10) of the Act, Staff rely on orders made against the Respondents by the SFSC on March 27, 2008, the Alberta Securities Commission ("ASC") on May 31, 2007, *Re Euston Capital Corp,* 2007 ABASC 338, and by the Northwest Territories Office of the Superintendent of Securities ("NTOSS") on December 16, 2005. Staff also rely on an order made by the Manitoba Securities Commission ("MSC") on January 22, 2008 against Euston, and an order made by the British Columbia Securities Commission ("BCSC") against Schwartz on July 15, 2008, *Re Schwartz,* 2008 BCSECCOM 403.

[16] Staff filed written submissions in May, 2006 and March, 2009, and provided oral submissions during the hearing. The Respondents filed written submissions in November, 2006, and March, 2009, and counsel for the Respondents provided oral submissions during the hearing.

II. ANALYSIS

[17] Staff have not conducted a full investigation in this matter, and primarily rely on findings and orders made in other jurisdictions. Staff submit that the Commission may make a final order against the Respondents based on findings made in other jurisdictions, pursuant to section 127 of the Act generally or pursuant to the inter-jurisdictional enforcement regime contemplated by subsection 127(10) of the Act.

[18] Accordingly, Staff have not called any evidence aside from an affidavit sworn by Staff's investigation counsel in this matter, which outlines the following background information in regards to the Respondents.

[19] Euston issued a private offering memorandum for the sale of Euston shares from the treasury to accredited investors at a price of $3.00 per share on August 26, 2002. The offering memorandum was filed with the Commission in November, 2002.

[20] Euston also filed 45-501F1 forms with the Commission between October 2002 and November 2004. Euston's filings with the Commission indicate that 956,129 Euston shares were sold, resulting in proceeds of $2,868,527. According to a shareholders list dated April 19, 2006 obtained from Euston's transfer agent, Capital Transfer Agency Inc., Euston had over 500 shareholders. The majority of the shares were sold to residents of Saskatchewan, Alberta, Manitoba, Ontario, and British Columbia. Some shares were also sold to residents of the Northwest Territories, and to those residing in countries other than Canada.

[21] In particular, according to Euston's filings, 116,258 shares were sold to over 100 residents of Ontario in exchange for $384,774.

[22] Euston and Schwartz purported to rely on the accredited investor exemption in OSC Rule 45-501 and Multilateral Instrument 45-103.

A. Proceedings in other jurisdictions

[23] There have been numerous proceedings against the Respondents in other jurisdictions, in regards to related conduct which took place during the same time period.

Saskatchewan

[24] The SFSC held a hearing on February 1 and 2, 2006, and heard from Schwartz, as well as six Euston investors. In proceedings before the SFSC, Schwartz and Euston admitted that between September 2003 and November 2004, Euston, through its sales representatives, sold shares to Saskatchewan residents using a telemarketing campaign based in Toronto which resulted in approximately 53 Saskatchewan investors purchasing more than 73,000 Euston shares for at total of $220,440, and that Schwartz's actions in developing and overseeing the execution of the scheme of distribution of Euston securities to investors in Saskatchewan were acts directly or indirectly in furtherance of trades of Euston securities. Schwartz also admitted that he was responsible for all activities engaged in by Euston.

[25] The SFSC released its decision on February 9, 2006, and found that Euston and Schwartz were not entitled to rely on the accredited investor exemption as claimed. The SFSC found that "at no time, during discussions over the telephone with the possible investor, did the salesman endeavor to determine whether the possible investor could meet the test to qualify as an Accredited Investor". None of the investors who testified qualified as accredited investors, and all of them

stated that they were not asked by representatives of Euston if they qualified as such.

[26] The SFSC also found that "[t]he only attempt to satisfy the Accredited Investor requirement was in the Purchase Agreement which, as we hold, was submitted to the Purchaser after the fact of the purchase having been made and therefore too late to satisfy the exemption requirements".

[27] As a result of the SFSC's finding that Euston and Schwartz traded in shares of Euston without a prospectus and without being registered, and because insufficient steps were taken to allow them to rely on the accredited investor exemption, the SFSC found that they had engaged in illegal distributions.

[28] The SFSC's finding that neither the exemption from registration nor the exemption from the prospectus requirements imposed by the Saskatchewan *Securities Act,* 1988, S.S. 1988-89, c. S-42.2 were available to Euston and Schwartz, was upheld by the Saskatchewan Court of Appeal. However, the Saskatchewan Court of Appeal did find that the SFSC erred by failing to provide reasons explaining why it imposed the sanctions it did, and remitted the matter back to the SFSC.

[29] On March 27, 2008 the SFSC released a second decision providing reasons for its sanctions decision. It made the same sanctions order as in its first decision, and ordered that Euston and Schwartz cease trading in all securities for ten years, that the exemptions provide for in section 134(1)(a) of the Saskatchewan *Securities Act* do not apply to Euston and Schwartz for ten years, and that Euston and Schwartz each pay an administrative penalty of $50,000. In its February 9, 2006 decision the SFSC ordered Schwartz to pay costs in the amount of $14,622.40.

Alberta

[30] The ASC held a hearing from May 15 to May 18, 2006, and released its decision on February 14, 2007. It found through the efforts of Schwartz and salespersons for Euston, securities in Euston were sold to 314 Alberta residents in exchange for approximately $1.4 million, purportedly in reliance on the accredited investor exemption provided for in what was then Multilateral Instrument 45-103.

[31] The ASC found that several Alberta residents did not qualify as accredited investors, and that Euston took no reasonable steps to ensure that the investors met the income or assets threshold to qualify for the exemption. Consequently the ASC found that Euston could not rely on the accredit investor exemption. Euston and Schwartz were not registered to trade securities in Alberta, and Euston had not received a receipt for a prospectus.

[32] The ASC also found that Schwartz was the guiding mind behind the distribution of Euston securities, and that he authorized the selling activities undertaken by salespersons for Euston. Finally, the ASC found that Schwartz and Euston's salespersons made prohibited representations that Euston's securities would be listed on an exchange, and that Euston and Schwartz filed untrue reports with the ASC.

[33] The ASC held a separate sanctions hearing on March 23, 2007, and released its decision on May 31, 2007. The ASC ordered that Euston cease trading in securities until it files a prospectus and receives a receipt from the ASC, and that Schwartz cease trading securities for 10 years, that none of the exemptions

under the Alberta *Securities Act,* R.S.A. 2000, c. S-4, apply to him for 10 years, that he be prohibited from acting as a director or officer for 10 years, and that he pay an administrative penalty of $50,000. The ASC also ordered Euston to pay costs in the amount of $10,000, and Schwartz to pay costs in the amount of $20,000.

Manitoba

[34] The MSC held a hearing and rendered a decision on January 8, 2008, which found the following:

> Eight witnesses who had bought shares in Euston testified. All of them were or had been involved in small businesses, many of them in small towns and rural areas of Manitoba. Generally, each had been contacted by telephone by a representative of Euston, and solicited to purchase shares in the company. Usually several calls were made to each prospective investor, sometimes by more than one representative of Euston. Evidence suggested that the callers were persuasive in promoting the company. The amount invested varied from one purchaser to another, although the price per share was a constant $3.00.
>
> ...
>
> No one from Euston had explained the definition of an accredited investor, nor explained the reason for the financial requirements, nor canvassed the investors whether they qualified under the definition. During the hearing, each witness was asked if he or she met the definition, and all denied it.

[35] The MSC also found that once the trades were completed, usually several weeks later, the investors received a Purchase Agreement and were instructed to sign it and return it to Euston. Schedule "B" of the Purchase Agreement represented that the securities were being sold pursuant to the accredited investor exemption under what was then Multilateral Instrument 45-101.

[36] In regards to Schwartz the MSC found that he "was willfully blind in not making inquiries when he should have [in regards to whether the investors qualified for the accredited investor exemption], because he wished to remain ignorant of prospective investors' true financial situation. Quite simply put, the requirements of the Instrument were not met, the exemption was unavailable and clearly the investment was not suitable for these investors".

[37] Consequently the MSC ordered that Euston is not entitled to the exemptions from registration under Manitoba's Securities Act, *The Securities Act,* R.S.M 1988, c. S50, for a period of ten years, that Euston pay an administrative penalty of $15,000 and costs of $20,325.56, and that Euston compensate five investors for a total of $48,000.

British Columbia

[38] The BCSC made a reciprocal order under the British Columbia *Securities Act,* R.S.B.C. 1996, c. 418, based on the ASC's decision. It ordered that Schwartz cease trading aside from trading in his name by a registered dealer, that he is prohibited from acting as a director or officer, from acting in a management or

consultative capacity in connection with activities in the securities market, and that he is prohibited from engaging in investor relations activities, all for a period of ten years from the date of the ASC's decision.

Northwest Territories

[39] Euston and Schwartz are also subject to an order by the NTOSS, dated December 16, 2005, prohibiting them from trading in securities.

B. Section 127 of the Act

[40] Staff have taken the position that we have the authority to make a final order against the Respondents under our general public interest jurisdiction pursuant to section 127 of the Act. Staff have referred us to *Re Biller* (2005), 28 O.S.C.B. 10131 *("Biller"), Re Woods* [1997] 8 BCSC Weekly Summary 22 *("Woods"),* and *Re Foreign Capital Corp.* (2005), 28 OSCB 4221 *("Foreign Capital"),* as support for their position.

[41] In *Biller* the Commission made an order permanently prohibiting the respondent from trading in securities and from acting as a director or officer of a registrant or issuer. In making its order the Commission relied primarily on the decision of the British Columbia Supreme Court, which found that the respondent was guilty of securities-related fraud contrary to section 380(1) of the *Criminal Code* and the misappropriation of funds contrary to section 334(a) of the *Criminal Code,* though it also considered the decision of the B.C. Securities Commission. The Commission also heard evidence that following his prison sentence the respondent planned to come to Ontario and participate in the capital markets.

[42] In *Biller* at paras. 32-33 and 35-36, the panel considered the Commission's jurisdiction over the respondent, given that his illegal conduct was carried out in British Columbia and not Ontario:

> 32 A transactional nexus to Ontario is not a necessary pre-condition to the Commission's public interest jurisdiction. Rather a connection to Ontario is only one of a number of factors to be considered in the exercise of its discretion under section 127 of the Act.
>
> 33 In *Committee for the Equal Treatment of Asbestos Minority Shareholders v. Ontario (Securities Commission),* [2001] 2 S.C.R. 132 */?/("Asbestos"), the Supreme Court of Canada had to decide whether the Commission had to be satisfied that a sufficient Ontario nexus or connection to Ontario had been established as a pre-requisite to exercising its jurisdiction. At paragraph 51, the Supreme Court stated:*
>
> > *I agree with Laskin J.A. that "the Commission did not set up any jurisdictional preconditions to the exercise of its discretion" (p. 273). In my view, the erection of such a jurisdictional barrier by the OSC is inconsistent with its having fought in the earlier proceedings for the recognition of its jurisdiction to hear this matter.* Furthermore, in its reasons in the present case, the OSC clearly rejected the idea that the transactional connection factor could act as a jurisdictional barrier to the exercise of its public interest discretion. At

> para. 63, the OSC quoted the decision of McKinlay J.A. in the earlier proceedings rejecting a transactional connection with Ontario as an implied precondition to the exercise of its s. 127 jurisdiction. The OSC then continued, at para. 64:
>
> > . . . we regard this statement as a refusal to impose a "sufficient Ontario connection" as a jurisdictional requirement which must be satisfied in any clause 127(1)3 proceedings before the Commission's discretion arises, thus leaving it to the Commission to make the necessary discretionary determination unencumbered by any a priori requirement imposed by the court as a matter of interpretation of the statutory provision. (Emphasis added)
> >
> > ...
> >
> > 35 **Accordingly, an Ontario connection is not a pre-condition to the exercise of the Commission's jurisdiction. It is however, a factor considered in *Asbestos* and can be considered by the Commission in this case in exercising its discretion.**
> >
> > 36 Biller's conduct in Eron was so egregious and the losses to investors so significant that investor confidence in the Ontario capital markets would be damaged if this panel could not consider and, if it thought to be in the public interest to do so, make an order against Biller under section 127 of the Act.
> >
> > [Emphasis added]

[43] In *Foreign Capital* the Commission made a sanctions order against the Respondent after considering his past criminal conduct in a securities-related matter. The Commission stated at paragraph 26 that a "respondent's past criminal conduct may be an important indicator of the need for protective action". The Commission relied on transcripts from the respondent's criminal hearing before the Ontario Superior Court of Justice, in which the respondent was found guilty of defrauding 128 investors contrary to section 380(1)(a) and 334(a) of the *Criminal Code of Canada.*

[44] In *Woods* the B.C. Securities Commission relied on the findings of the Ontario courts that the respondent had breached the Act, by trading in securities with knowledge of a material fact or material change that had not been generally disclosed. The respondent was sentenced to imprisonment for 30 days. No other evidence was put before the panel. The B.C. Securities Commission stated the following:

> **We consider it reasonable to rely on the findings of fact made by the courts in Ontario and accordingly we adopt the foregoing findings as our own.**
>
> ...

> Provincial securities litigation in Canada is substantially uniform in most material respects. The Commission is therefore interested in the activities of persons found to have contravened securities legislation in other jurisdictions ... For these reasons, applications are made to the Commission from time to time to issue orders on a more or less reciprocal basis to those issue in other jurisdictions. Similarly, applications are made to securities regulators in other jurisdictions to issue these types of orders based on orders made by this Commission in the first instance.
>
> The orderly and credible regulation of the securities market throughout Canada, not to mention common sense, argues strongly that such applications be favourably received. **However, the Commission's responsibility in hearing such applications is no different than in any other case. In each case, the Commission must consider what is in the public interest, and act accordingly.**
>
> [emphasis added]

[45] In *Biller, Woods,* and *Foreign Capital* the respective panels considered the appropriate sanctions separately; the findings made by the courts served only to establish that a sanctions order should be made.

[46] Accordingly, we conclude that we can make an order against the Respondents pursuant to our public interest jurisdiction under section 127 of the Act on the basis of decisions and orders made in other jurisdictions, if we find it necessary in order to protect investors in Ontario and the integrity of Ontario's capital markets.

C. Subsection 127(10) of the Act

[47] On November 27, 2008, subsection 127(10) of the Act came into force. Staff seek to rely upon the inter-jurisdictional enforcement provisions of the Act and in particular, on subsection 127(10) of the Act which provides the following:

> **Inter-jurisdictional enforcement**
>
> 127. (10) Without limiting the generality of subsections (1) and (5), an order may be made under subsection (1) or (5) in respect of a person or company if any of the following circumstances exist:
>
> 1. The person or company has been convicted in any jurisdiction of an offence arising from a transaction, business or course of conduct related to securities.
>
> 2. The person or company has been convicted in any jurisdiction of an offence under a law respecting the buying or selling of securities.
>
> 3. The person or company has been found by a court in any jurisdiction to have contravened the laws of the jurisdiction respecting the buying or selling of securities.

4. The person or company is subject to an order made by a securities regulatory authority in any jurisdiction imposing sanctions, conditions, restrictions or requirements on the person or company.

5. The person or company has agreed with a securities regulatory authority in any jurisdiction to be made subject to sanctions, conditions, restrictions or requirements.

Does subsection 127(10) operate retrospectively?

[48] Subsection 127(10) of the Act came into force after the various decisions and orders made by other securities regulatory authorities upon which Staff seeks to rely. Staff submits that the fact that subsection 127(10) came into force after the various orders and decisions were made, should not impair their ability to rely on subsection 127(10) in this matter. Specifically, Staff submits that the presumption against retrospectivity is not applicable to subsection 127(10) because it is procedural and not substantive in nature, and because it can only be exercised in the public interest and is not punitive in nature.

[49] In Canadian law, in addition to Charter provisions which restrict the retroactive effect of penal laws, the retrospective application of laws is limited by a presumption that laws only operate prospectively. However, there are exceptions to the presumption. If the purpose of the law is to protect the public rather than to be punitive, or if the law is procedural in nature rather than substantive, the presumption does not apply.

[50] Staff refers us to the Alberta Court of Appeal's decision in *Alberta Securities Commission v. Brost,* 2008 ABCA 326 ("Brost"). In *Brost* at para. 57, the Alberta Court of Appeal considered whether or not the increase in the maximum possible administrative penalty under the Alberta *Securities Act,* R.S.A. 2000, c. S-4 was retrospective:

> The Commission was correct to conclude that the presumption against retrospective application did not apply in this case because administrative penalties under the *Act* are not punitive but are instead designed to protect the public: *Brosseau v. Alberta Securities Commission,* [1989] 1 S.C.R. 301, 57 D.L.R. (4th) 458 at 471-3, cited in *Re Morrison Williams Investment Management Ltd.* (2000), 7 ASCS 2888. Moreover, contrary to what Brost and Alternatives suggest, it is well settled that "[e]xcept for criminal law, the retrospectivity and retroactivity of which is limited by s. 11(g) of the *Charter,* there is no requirement of legislative prospectivity embodied in ... any provision of our Constitution": *British Columbia v. Imperial Tobacco Canada Ltd.* , 2005 SCC 49, [2005] 2 S.C.R. 473 at para. 69.

[51] The British Columbia Court of Appeal considered the same issue in *Thow v. B.C. (Securities Commission),* 2009 BCCA 46 at para. 50 *("Thow"),* and concluded that the presumption against the retrospective application of legislation does apply to the increased maximum possible administrative penalty under the British Columbia *Securities Act,* R.S.B.C. 1996, c. 418.

[52] The divergence of the conclusions reached by the Alberta Court of Appeal and the British Court of Appeal hinges, in part, on their differing interpretations of the Supreme Court of Canada's decision in *Brosseau v. Alberta Securities Commission,* [1989] 1 S.C.R. 301 *("Brosseau").*

[53] In *Brosseau,* the Supreme Court of Canada considered whether or not new sections in Alberta's *Securities Act,* R.S.A. 1981, c. S-6.1, which gave the Alberta Securities Commission the authority to prohibit individuals from trading in securities and to decide whether or not certain exemptions in the act apply, should attract the presumption against retrospectivity. L'Heureux-Dubé J., writing for the court, cited the following excerpt of the decision by Dickson J. (as he then was) in *Gustavson Drilling (1964) Ltd. v. The Minister of National Revenue*, [1977] 1 S.C.R. 271 /?/ *at p. 279, as the general principal with respect to the retrospectivity of legislative enactments:*

> *The general rule is that the statutes are not to be constructed as having retrospective operation unless such a construction is expressly or by necessary implication required by the language of the Act. An amending enactment may provide that it shall be deemed to have come into force on a date prior to its enactment or it may provide that it is to be operative with respect to transactions occurring prior to its enactment. In those instances the statute operates retrospectively.*

[54] *However, the presumption against retrospectivity does not apply to all types of legislation. In Brosseau* at paras. 50-51 and 53, L'Heureux-Dubé J., in deciding that the changes to Alberta's *Securities Act* did not attract the presumption against retrospectivity, outlined a rebuttal to the presumption where the goal of the legislation is not to punish, but rather to protect the public. I:

> The so-called presumption against retrospectivity applies only to prejudicial statutes. It does not apply to those which confer a benefit. As Elmer Driedger, Construction of Statutes, 2nd ed. (1983), explains at p. 198::
>
> > ... there are three kinds of statutes that can properly be said to be retrospective, but there is only one that attracts the presumption. First, there are the statutes that attach benevolent consequences to a prior event; they do not attract the presumption. Second, there are those that attach prejudicial consequences to a prior event; they attract the presumption. Third, there are those that impose a penalty on a person who is described by reference to a prior event, but the penalty is not intended as further punishment for the event; these do not attract the presumption.
>
> A subcategory of the third type of statute described by Driedger is enactments which may impose a penalty on a person related to a past event, so long as the goal of the penalty is not to punish the person in question, but to protect the public. This distinction was elaborated in the

early case of R. v. Vine (1875), L.R. 10 Q.B. 195 , /?/ where Cockburn C.J. wrote at pp. 199-200:

> If one could see some reason for thinking that the intention of this enactment was merely to aggravate the punishment for felony by imposing this disqualification in addition, I should feel the force of Mr. Poland's argument, founded on the rule which has obtained in putting a construction upon statutes -- that when they are penal in their nature they are not to be construed retrospectively, if the language is capable of having a prospective effect given to it and is not necessarily retrospective. But here the object of the enactment is not to punish offenders, but to protect the public against public-houses in which spirits are retailed being kept by persons of doubtful character ... the legislature has categorically drawn a hard and fast line, obviously with a view to protect the public, in order that places of public resort may be kept by persons of good character; and it matters not for this purpose whether a person was convicted before or after the Act passed, one is equally bad as the other and ought not to be intrusted with a licence.

...

Elmer Dreidger summarizes the point in "Statutes: Retroactive, Retrospective Reflections" (1978), 56 *Can. Bar Rev.* 264, at p. 275:

> In the end, resort must be had to the object of the statute. If the intent is to punish or penalize a person for having done what he did, the presumption applies, because a new consequence is attached to a prior event. But if the new punishment or penalty is intended to protect the public, the presumption does not apply.

[55] The Supreme Court of Canada considered the nature of section 127 in Committee for the Equal Treatment of Asbestos Minority Shareholders v. Ontario (Securities Commission), [2001] 2 S.C.R. 132 ("Asbestos") at para. 43:

> ...Rather, the purpose of an order under s. 127 is to restrain future conduct that is likely to be prejudicial to the public interest in fair and efficient capital markets. The role of the OSC under s. 127 is to protect the public interest by removing from the capital markets those whose past conduct is so abusive as to warrant apprehension of future conduct detrimental to the integrity of the capital markets: Re Mithras Management Ltd. (1990), 13 O.S.C.B. 1600 /?/ (Ont. Securities Comm.)...

[56] Based on a plain reading of subsection 127(10) in the context of section 127 as a whole, and after taking into account the Supreme Court of Canada's decisions in *Brosseau* and *Asbestos,* we conclude that the purpose of purpose of subsection

127(10) is to protect the public. Hence, the presumption against retrospectivity is not applicable, and subsection 127(10) may operate retrospectively .

[57] While the courts in *Brost* and *Thow* had to consider the retrospective application of a provision which expanded the sanctioning powers of a securities regulator, subsection 127(10) of the Act does no such thing. Rather, subsection 127(10) of the Act simply allows the Commission to consider any convictions or orders made against an individual in other jurisdictions, when deciding whether or not to make an order under subsection 127(1) or (5) in the public interest.

[58] Moreover, this Commission has considered the conduct of individuals in other jurisdictions in the past when making an order under subsections 127(1) and (5) in the public interest, even before subsection 127(10) came into effect (see our earlier discussion of *Biller* and *Foreign Capital).*

[59] In light of our conclusion that the presumption against retrospectivity is inapplicable to subsection 127(10) of the Act, given that the purpose of the subsection is to protect the public, it is not necessary to consider whether subsection 127(10) of the Act is procedural or substantive in nature.

D. The Necessity of Sanctions

[60] Having determined that we can make an order against the Respondents pursuant to our public interest jurisdiction under section 127 or pursuant to subsection 127(10) of the Act, we now have to determine whether sanctions are necessary, and if so, whether the order proposed by Staff is appropriate in the circumstances.

[61] In deciding whether or not it is in the public interest that an order be made against the Respondents, we are guided by the underlying purposes of the Act, as set out in section 1.1:

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

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

[62] In pursuing the purposes of the Act, we are also guided by the fundamental principles of the Act as enunciated by section 2.1, which include: "the maintenance of high standards of fitness and business conduct to ensure honest and responsible conduct by market participants"; that "effective and responsive securities regulation requires timely, open and efficient administration and enforcement of this Act by the Commission"; and that the "integration of capital markets is supported and promoted by the sound and responsible harmonization and co-ordination of securities regulation regimes".

[63] In making an order under section 127 of the Act, the Commission exercises its public interest jurisdiction in a protective and preventative manner. As stated in *Re Mithras Management Ltd.* (1990), 13 O.S.C.B. 1600 at pp. 1610-1611:

> ..., the role of this Commission is to protect the public interest by removing from the capital markets – wholly or partially, permanently or temporarily, as the circumstances may warrant – those whose conduct in the past leads us to conclude that their conduct in the future may well be detrimental to the integrity of those capital markets. We are

> not here to punish past conduct; that is the role of the courts, particularly under section 118 [now 122] of the Act. We are here to restrain, as best we can, future conduct that is likely to be prejudicial to the public interest in having capital markets that are both fair and efficient. In doing so we must, of necessity, look to past conduct as a guide to what we believe a person's future conduct might reasonably be expected to be; we are not prescient, after all.

[64] In view of the various decisions and orders made by securities regulatory authorities in other jurisdictions, we considered the following factors in deciding whether or not sanctions against the Respondents are necessary in order to protect the public interest:

- Euston sold shares in exchange for nearly $2.9 million from investors across Canada, including Ontario, while purportedly relying on the accredited investor exemption;
- Schwartz admitted before the SFSC that he was responsible for the conduct of Euston;
- many of the witnesses who testified at the various hearings in other jurisdictions stated that they were not accredited investors;
- the SFSC and the ASC found that the Respondents did not take reasonable steps to ensure that the investors qualified for the accredited investor exemption;
- the SFSC, the ASC, and the MSC all found that investors received a Purchase Agreement which made representations that they were accredited investors, after the trades had already been completed;
- the ASC found that Euston filed untrue reports, and that Schwartz and Euston made prohibited representations that Euston's securities would be listed on an exchange;
- Euston and Schwartz marketed Euston's securities from an office in Ontario, and according to filings made with the Commission, sold securities to residents of Ontario;
- relying on the various decisions and orders made by securities regulatory authorities in other jurisdictions, represents a timely, open and efficient administration and enforcement of the Act by the Commission (section 2.1 of the Act);
- the terms of the orders made by the various securities regulatory authorities indicate that they viewed the Respondents conduct as a serious threat to the public interest.

[65] We also considered the following factors, which we considered to be the most important:

- if the conduct as found to have taken place in Saskatchewan, Alberta, and Manitoba had been found to have taken place in Ontario with Ontario investors, that conduct would have been contrary to the public interest in Ontario, and would have also amounted to violations of subsection 25(1)(a) of the Act for trading in securities without registration and

subsection 53(1) of the Act for distributing securities without a prospectus or receipt from the Director;

- the proposed sanctions by Staff correspond with the fundamental principles that the Commission maintain "high standards of fitness and business conduct to ensure honest and responsible conduct by market participants" and that the "integration of capital markets is supported and promoted by the sound and responsible harmonization and co-ordination of securities regulation regimes". (section 2.1, paragraph 2 of the Act).

[66] Counsel for the Respondents suggested that in considering decisions reached by other securities regulatory authorities, we should "take into account everything that's happened up to this point and review it as ... an appeal court ... but with powers beyond an appeal court because all securities regulators can review their own decisions, remake their own decisions, with raw discretion". While we agree with counsel's assertion that we are not bound by the decisions of other securities regulatory authorities, we have been given no reason to doubt the veracity of the findings made by the SFSC, the MSC, and the ASC. Furthermore, we note that the Respondents had opportunities to make submissions during those hearings, and did in fact do so; counsel for the Respondents appeared during proceedings before the SFSC and the ASC, and Euston made written submissions to the MSC.

[67] In addition, the Saskatchewan Court of Appeal reviewed the findings of the SFSC, and decided only that the SFSC was required to provide more detailed reasons for its sanctions decision and took no objection to its evidentiary findings.

[68] Counsel for the Respondents also suggested that there should have been a joint hearing amongst the various securities regulatory authorities, rather than multiple separate proceedings. Here we note only that it was the Respondents' actions which resulted in the necessity of proceedings in multiple jurisdictions. In deciding to market and sell securities in multiple jurisdictions, the Respondents must have known or should have known that they would be subject to regulation by multiple authorities.

[69] Schwartz testified during this hearing to show that there has been "no loss of value to investors". He testified that at some point Euston acquired a public shell company named AccessMed for $200,000, which was meant to be the vehicle by which Euston went public. Schwartz testified that once Euston ran into regulatory problems, he attempted to save shareholder value by gifting one share of AccessMed in exchange for each share of Euston held by shareholders. He stated that Euston gave all of its assets and business to AccessMed. Schwartz also stated that he transferred his entire interest in AccessMed of 2 million shares to Uranium 308 Resources Inc. in exchange for 15,000 Euros; the cost of listing AccessMed on the Frankfurt Stock Exchange.

[70] Schwartz testified that he was then approached by a company called Kinti Mining Group that was seeking to list on the Frankfurt Stock Exchange. He stated that Kinti Mining Group performed a reverse takeover of AccessMed to gain access to the Exchange. Schwartz testified that immediately after the reverse takeover, Kinti Mining Group was trading at the approximate value at which Euston shares were purchased.

[71] Schwartz stated the following in regards to the current situation:

> Schwartz: So, yes, today is the stock is about on the -- well, there are two markets, two venues on the Frankfurt Stock Exchange for this Kinti Mining stock. On what's called the Xetra, the X-E-T-R-A market, it's quoted at -- which is an electronic market, it's not floor trading, it's an electronic market, it's quoted at, I believe -- still quoted at two Euros, but on the -- on the floor -- on the regular floor trading market it's down to three and a half Euro cents. So it has collapsed since the gifting took place.
>
> ...
>
> Schwartz: Because of the -- well, primarily, I guess, because if -- if I had to put on my handicapper hat, I would say because the market itself has plunged due to the world financial crisis. I do not know how many shareholders were able to cash out while the stock was at the two Euro, but ... I do not know that.

[72] We were shown no evidence that any investors actually cashed in their shares of AccessMed or Kinti Mining Group while it was still trading at two Euros, nor were we provided with an explanation as to why Schwartz was willing to give Uranium 308 Resources Inc. 2 million shares of AccessMed which were ostensibly worth 4 million Euros in exchange for 15,000 Euros. It appears to us that contrary to Schwartz's assertion, over 500 investors have experienced at least a significant loss of their investment, and possibly even a loss of their entire investment of nearly $2.9 million.

[73] As a result of the fact that we were presented with only limited evidence, and heard from no investors resident in Ontario, we are not able to come to the conclusion that the Respondents violated subsections 25(1)(a) or 53(1) of the Act.

[74] However, in light of the reasons listed above, we find that sanctions against the Respondents are necessary in order to protect the public interest.

E. The Appropriate Sanctions

[75] In determining the nature and duration of the appropriate sanctions, the Commission may consider a number of factors including:

(a) the seriousness of the allegations;

(b) the respondent's experience in the marketplace;

(c) the level of a respondent's activity in the marketplace;

(d) whether or not there has been recognition of the seriousness of the improprieties;

(e) whether or not the sanctions imposed may serve to deter not only those involved in the case being considered but any like-minded people from engaging in similar abuses of the capital markets; and

(f) any mitigating factors.

(*Re Belteco Holdings Inc.* (1998), 21 O.S.C.B. 7743, at paras. 25-26)

[76] Further, the Supreme Court of Canada in *Re Cartaway Resources Corp.,* [2004] 1 S.C.R. 672 has affirmed that the Commission may properly impose sanctions which are a general deterrent, stating "... it is reasonable to view general deterrence as an appropriate, and perhaps necessary, consideration in making orders that are both protective and preventative".

[77] While we are mindful that in determining the appropriate sanctions in this matter, we must consider the specific circumstances to ensure that the sanctions are proportionate to the conduct involved (see *Re M.C.J.C. Holdings Inc. and Michael Cowpland,* (2002), 25 O.S.C.B. 1133 ("*Re M.C.J.C. Holdings")* at para. 26).

[78] Staff decided to rely on subsection 127(10) of the Act in this matter, and thus presented us with only limited evidence. The limited evidence before us indicates that the Respondents may have been engaged in serious misconduct in Ontario, and their conduct may have harmed a number of Ontario investors. A more thorough presentation of the evidence in regards to the Respondents' conduct in Ontario may have led to more serious sanctions against the Respondents.

[79] Nevertheless, we find that Staff's proposed sanctions further the goals of the Act, and reflect a fair and proportionate outcome relative to the Respondents' known conduct.

III. CONCLUSION

[80] For the aforementioned reasons, we find that it is in the public interest to impose the sanctions against the Respondents recommended by Staff, which we note are similar to those imposed by the SFSC, the ASC, the MSC, and the BCSC.

[81] Pursuant to our public interest jurisdiction under section 127 and pursuant to subsection 127(10) of the Act, we have decided to order:

- that trading in securities by or of the Respondents shall cease for a period of ten years from the date of the order;
- that the Respondents be prohibited from acquiring any securities for a period of ten years from the date of the order;
- that any exemptions contained in Ontario securities laws shall not apply to the Respondents for a period of ten years from the date of the order;
- that Schwartz resign any positions he holds as a director or officer of an issuer; and
- that Schwartz be prohibited from becoming a director or officer of any issuer for a period of ten years from the date of the order.

Accordingly, we have issued our order dated July 29, 2009.

Dated at Toronto this 29th day of July, 2009

"Wendell S. Wigle"
Wendell S. Wigle, Q.C.

"Suresh Thakrar"
Suresh Thakrar

Ontario Securities Commission | Commission des valeurs mobilières de l'Ontario | P.O. Box 55, 19th Floor 20 Queen Street West Toronto ON M5H 3S8 | CP 55, 19e étage 20, rue Queen Ouest Toronto ON M5H 3S8

Citation: JV Raleigh Superior Holdings Inc. et al., 2013 ONSEC 18
Date: 2013-04-25

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

– AND –

**IN THE MATTER OF
JV RALEIGH SUPERIOR HOLDINGS INC.,
MAISIE SMITH (also known as MAIZIE SMITH) and INGRAM JEFFREY ESHUN**

REASONS AND DECISION
(Subsections 127(1) and 127(10) of the *Securities Act*)

Decision:	April 25, 2013	
Panel:	Alan J. Lenczner, Q.C.	- Commissioner and Chair of the Panel
Submissions:	Sylvia Schumacher	- For Staff of the Ontario Securities Commission

TABLE OF CONTENTS

REASONS AND DECISION

I. BACKGROUND

[1] This was a hearing, in writing, before the Ontario Securities Commission (the **"Commission")** pursuant to subsections 127(1) and (10) of the *Securities Act,* R.S.O. 1990, c. S.5, as amended (the **"Act")** to consider whether it is in the public interest to make an order imposing sanctions against JV Raleigh Superior Holdings Inc. **("JV Raleigh"),** Maisie Smith, also known as Maizie Smith, **("Smith")** and Ingram Jeffrey Eshun **("Eshun")** (collectively, the **"Respondents").**

[2] A Notice of Hearing was issued by the Commission on February 22, 2013 (the **"Notice of Hearing"),** in relation to a Statement of Allegations filed by Staff of the Commission ("Staff") on February 15, 2013 (the **"Statement of Allegations").**

[3] Staff relies on the decisions of the British Columbia Securities Commission **("BCSC")** dated July 27, 2012 *(Re JV Raleigh Superior Holdings et al.,* 2012 BCSECCOM 301 **("BCSC Merits Decision"))** and December 24, 2012 *(Re JV Raleigh Superior Holdings et al,* 2012 BCSECCOM 492 **("BCSC Order")).** The BCSC found that between July 2006 and January 2009 (the **"Material Time")** the Respondents engaged in unregistered trading in breach of section 34 and an illegal distribution in breach of section 61 of the British Columbia *Securities Act,* R.S.B.C. 1996, c. 418 (the **"BC Act")** and that Smith and Eshun, as officers and directors of JV Raleigh, authorized, permitted or acquiesced in breaches of the BC Act by JV Raleigh. The BCSC Order imposed sanctions against the Respondents.

[4] In this written hearing, I have to decide whether the Respondents are subject to an order made by a securities regulatory authority in British Columbia that imposes sanctions on each of the respondents and whether it is in the public interest to make a reciprocal order in Ontario.

II. PRELIMINARY ISSUES

A. Written Hearing

[5] The Respondents were all served with the Notice of Hearing and Statement of Allegations. JV Raleigh and Smith did not appear on the return date of March 6, 2013, were not represented and, indeed, made no response of any kind. Eshun responded by email indicating that he was out of the country, that he intended to engage counsel and requested an adjournment until April 15, 2013.

[6] Rule 11 of the Commission's *Rules of Procedure* (2012), 35 O.S.C.B. 10071 (the *"OSC Rules of Procedure")* permits the Commission to conduct a proceeding by means of a written hearing. On March 6, 2013, the panel heard an application by Staff to convert the matter to a written hearing, in accordance with Rule 11.5 of the *OSC Rules of Procedure* and subsection 5.1(2) of the *Statutory Powers Procedure Act,* R.S.O. 1990, c. S.22, as amended (the **"SPPA").** On that date, the panel also considered the adjournment request made via email by Eshun, pursuant to Rule 9.2 of the *OSC Rules of Procedure.* On March 6, 2013 the panel issued an order which established a schedule for filing materials and permitted the Respondents the opportunity to object to the written hearing application on the date suggested by Eshun, April 15, 2013.

[7] On April 3, 2013, the Commission received email correspondence from Eshun requesting a further adjournment and on April 4, 2013 the panel dismissed his request and ordered that a hearing take place on April 15, 2013 for the sole purpose of determining whether the matter would proceed in writing. On April 15, 2013, Staff appeared and made submissions, but none of the Respondents appeared or made submissions. On that date, the panel granted Staff's application to conduct this hearing in writing, pursuant to Rules 11.4 and 11.5 of the *OSC Rules of Procedure* and provided the Respondents with an opportunity to serve and file a response by April 22, 2013.

B. Failure of the Respondents to Participate

[8] None of the Respondents filed evidence or made submissions. Subsection 7(2) of the SPPA authorizes a tribunal to proceed in the absence of a party when that party has been given notice of the hearing. The provision states:

> **[7.]**(2) Where notice of a written hearing has been given to a party to a proceeding in accordance with this Act and the party neither acts under clause 6 (4) (b) [to provide good reason for not holding a written hearing] nor participates in the hearing in accordance with the notice, the tribunal may proceed without the party's participation and the party is not entitled to any further notice in the proceeding.

[9] I am satisfied that Staff served all Respondents with the Notice of Hearing, Statement of Allegations and disclosure as evidenced by the Affidavits of Service of Lee Crann sworn February 28, 2013 and March 12, 2013. I also note that the Notice of Hearing and the Statement of Allegations were posted on the Commission's website, as were the Commission orders which set out the dates for service and filing of materials. I am therefore authorized to proceed in the absence of the Respondents in accordance with subsection 7(2) of the SPPA.

III. THE BRITISH COLUMBIA SECURITIES COMMISSION ORDER

[10] Staff relies upon paragraph 4 of subsection 127(10) of the Act to reciprocate the BCSC Order and to impose sanctions against the Respondents pursuant to paragraphs 2, 2.1, 7, 8, 8.1, 8.2 and 8.5 of subsection 127(1) of the Act.

[11] The BCSC Order imposes the following sanctions on the Respondents:

Eshun

1. under section 161(1)(b) of the [BC] Act, that Eshun permanently cease trading in, and be permanently prohibited from purchasing, securities and exchange contracts;
2. under sections 161(1)(d)(i) and (ii), that Eshun resign any position he holds as, and is permanently prohibited from becoming or acting as, a director or officer of any issuer or registrant;
3. under section 161(1)(d)(iii), that Eshun is permanently prohibited from becoming or acting as a registrant or promoter;

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

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

6. under section 161(1)(g), that Eshun pay to the Commission any amount obtained, or payment or loss avoided, directly or indirectly as a result of the respondents' contraventions of the [BC] Act, which we find to be not less than $5.7 million;

7. under section 162, that Eshun pay an administrative penalty of $750,000;

Smith

8. under section 161(1)(b) of the [BC] Act, that Smith permanently cease trading in, and be permanently prohibited from purchasing, securities and exchange contracts, except she may trade and purchase securities and exchange contracts through accounts in her own name at one registered dealer, provided that she gives a copy of this decision to the registered dealer;

9. under sections 161(1)(d)(i) and (ii), that Smith resign any position she holds as, and is permanently prohibited from becoming or acting as, a director or officer of any issuer or registrant;

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

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

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

13. under section 161(1)(g), that Smith pay to the Commission any amount obtained, or payment or loss avoided, directly or indirectly as a result of the respondents' contraventions of the [BC]

Act, which we find to be not less than $5.7 million;

14. under section 162, that Smith pay an administrative penalty of $500,000;

JV Raleigh

15. under section 161(1)(b), that all persons permanently cease trading in, and be prohibited from purchasing, securities of JV Raleigh;

16. under section 161(1)(g), that JV Raleigh pay to the Commission any amount obtained, or payment or loss avoided, directly or indirectly as a result of the respondents' contraventions of the [BC] Act, which we find to be not less than $5.7 million; and

Maximum disgorgement

17. the aggregate amount paid to the Commission under paragraphs 6, 13, and 16 not exceed the greater of $5.7 million and the actual amount obtained, or payment or loss avoided, directly or indirectly as a result of the respondents' contraventions of the [BC] Act.

(BCSC Order, *supra* at para. 45)

IV. LAW AND ANALYSIS

A. Subsection 127(10) of the Act

[12] Staff relies upon the inter-jurisdictional enforcement provisions of the Act, specifically paragraph 4 of subsection 127(10) of the Act and seeks an order from the Commission imposing similar sanctions and terms as were made against the Respondents by the BCSC.

[13] Subsection 127(1) of the Act provides:

> The Commission may make one or more of the following orders if in its opinion it is in the public interest to make the order or orders [...]

[14] Subsection 127(10) of the Act provides:

> Without limiting the generality of subsections (1) and (5), an order may be made under subsection (1) or (5) in respect of a person or company if any of the following circumstances exists:
>
> [...]
>
> 4. the person or company is subject to an order made by a securities regulatory authority, derivatives regulatory authority or financial regulatory authority, in any jurisdiction, that imposes sanctions, conditions, restrictions or requirements on the person or company.

[15] From a review of the BCSC Merits Decision and BCSC Order, I am satisfied that the BCSC had both personal jurisdiction and subject-matter jurisdiction over the Respondents. I am also satisfied that the requirements of paragraph 4 of subsection 127(10) of the Act have been met. The BCSC, a securities regulatory authority, has made orders that impose sanctions and restrictions on each of the Respondents.

[16] What is left to be determined is whether it is in the public interest in Ontario for a reciprocal order to be made against these Respondents. The decision of a foreign jurisdiction stands as a determination of fact for the purpose of the Commission's considerations under subsection 127(10) of the Act. The Commission's task is then to determine whether, based on those findings of fact, the sanctions proposed by Staff would be in the public interest in Ontario. An important factor to consider is, if the facts had occurred in Ontario, whether the respondent's conduct would have constituted a breach of the Act and been considered to be contrary to the public interest, such that it would attract the same or similar sanctions.

[17] As decided by the Supreme Court of Canada (the **"SCC"),** the purpose of an order under section 127 of the Act is protective and prospective. It is to restrain future conduct that is likely to be prejudicial to the public interest in fair and efficient capital markets. The SCC went on to state that "the role of the OSC under s. 127 is to protect the public interest by removing from capital markets those whose past conduct is so abusive as to warrant apprehension of future conduct detrimental to the integrity of the capital markets" *(Committee for Equal Treatment of Asbestos Minority Shareholders v. Ontario (Securities Commission),* [2001] 2 S.C.R. 132, at para. 43; *Re Mithras Management Ltd.* (1990), 13 O.S.C.B. 1600).

B. Relevant BCSC Findings

[18] I note from the BCSC Merits Decision the following:

> ¶ 5 JV [Raleigh] is a British Columbia company. Smith and Eshun incorporated it and were its sole directors during the relevant period. Each owned 50% of its shares. Smith is a resident of British Columbia.
>
> ¶ 6 JV [Raleigh] entered into agreements with the 81 investors. The agreements were titled "Loan Agreement". Under the loan agreements, the investors advanced funds to JV [Raleigh] in consideration for which JV [Raleigh] promised to use the funds for "purchasing consumer secured notes receivables." The agreements described the notes as follows: "these notes typically have a high yield. This is a form of factoring." There is no evidence that JV [Raleigh] used any of the funds for this purpose.
>
> ¶ 7 The loan agreements provided for monthly payments as a return of capital, a maturity date, and an "interest bonus payment". Nearly all of the loan agreements were signed on JV[Raleigh]'s behalf by Smith. There is no evidence that any investors received a return of capital or any interest.

> ¶ 8 JV [Raleigh] deposited the investors' advances under the loan agreements to bank accounts opened by Smith and Eshun. both had individual authority to withdraw funds from the accounts, and both did so. Eshun signed four cheques made payable to himself totalling $150,000. In closing a JV [Raleigh] credit union account, Smith received a bank draft in the amount of $2.7 million.
>
> [...]
>
> ¶ 10 None of the respondents was registered under the Act, nor did JV [Raleigh] file a prospectus, during the relevant period.
>
> [...]
>
> ¶ 24 Based on the findings above, as well as, in the case of JV [Raleigh] and Smith, the statement of admissions, we find that JV[Raleigh], Smith and Eshun traded in securities without being registered to do so, contrary to section 34 of the [BC] Act, and distributed those securities without filing a prospectus, contrary to section 61 of the [BC] Act, when they distributed JV [Raleigh] securities for proceeds of $5.7 million.
>
> ¶ 25 Smith and Eshun were JV[Raleigh]'s only two directors. Based on the conduct described above, we find that they authorized, permitted or acquiesced in JVR's contraventions of sections 34 and 61 of the [BC] Act. We find that they also contravened sections 34 and 61 under section 168.2 of the [BC] Act.
>
> (BCSC Merits Decision, *supra* at paras. 5-8, 10, 24 and 25)

[19] I also note from BCSC Order that:

> ¶ 7 We found that the respondents distributed securities for proceeds of $5.7 million without complying with the registration and prospectus requirements of the Act. In doing so, they engaged in the serious misconduct described in *Corporate Express.*
>
> ¶ 8 In addition to the inherent seriousness of a contravention of sections 34 and 61(1), there is no evidence that JV Raleigh used any of the funds to purchase "consumer secured notes receivables", or to invest in any form of factoring, as JV Raleigh promised in its loan agreements with the investors. To the contrary, it appears that investors' funds were withdrawn from JV Raleigh and given to companies of which Eshun and Smith were directors and officers.
>
> [...]
>
> ¶ 13 The respondents raised $5.7 million and produced no records to show how it was spent. They have no

evidence to show that any of it was spent in the manner promised in the loan agreements. In these circumstances, it is reasonable to conclude that the respondents were enriched to the extent of the entire amount they raised from investors.

¶ 14 At a minimum, we know, as we found, that Eshun signed four cheques payable to him totalling about $150,000.

¶ 15 We also know that money was transferred out of JV Raleigh's accounts to entities associated with Smith and Eshun:

- $1.9 million to Trem DY Group Inc., of which Eshun is president and a director
- $1.5 million to DSC Lifestyle Services, of which Eshun is president and a director
- $370,000 to 0747940 BC Ltd., of which Smith is sole director (the payments included those related to shareholder loans and management fees)
- $234,426 to Siboco Marketing Inc., of which Eshun and Smith are sole directors.

[...]

¶ 24 There is evidence of significant harm to investors. The respondents raised over $5.7 million form 81 investors, 49 of whom were residents of British Columbia who invested $3.2 million. There is no market for the securities the investors purchased, nor is there any evidence that their investments have any present or future value.

¶ 25 The executive director entered affidavits of investors from British Columbia. They suffered significant harm:

- a nurse lost over $75,000 and now works two jobs to pay the mortgage on her home she used to raise the funds to invest
- a hospital technician lost over $100,000, funded by mortgaging her home
- a hotel room attendant lost $50,000, funded by mortgaging her home
- a forklift operator lost $40,000, funded by mortgaging his home, and has since as a result been forced to sell his home
- a homecare worker lost nearly $160,000, funded by mortgaging her home

- a couple (the wife a dietary aid worker and the husband a shipper/receiver) lost $196,000, using a home equity loan and their daughter's education fund; they are not unable to fund their daughter's education and expect to have to sell their home to pay off the loan
- a retiree lost $49,000 from her RRSP savings
- a nurse lost $218,000, funded by mortgaging her home; her retirement plans are significantly curtailed
- a grocery store cashier lost over $275,000, funded by mortgaging her home and using the funds in her RRSP; she has no retirement savings left.

[...]

¶ 28 Eshun has a regulatory history. He admitted to the Manitoba Securities Commission in 2004 that he illegally traded securities without being registered and without filing a prospectus and was sanctioned.

¶ 29 Eshun is president and a director of GDC Investments Inc. GDC was cease-traded by the executive director in 2010 for attempting to distribute securities under an offering memorandum that did not comply with the [BC] Act.

[...]

¶ 31 The respondents have shown no contrition. Smith and JV Raleigh have acknowledged, through their counsel's submissions, that their contraventions are serious, but there is no evidence before us that would give us any comfort that they intend to alter their behaviour so as to remove any concern about the risk of their future misconduct in our capital markets. In our opinion, the respondents pose a serious risk to our capital market were they to be allowed to participate in them in any meaningful way.

(BCSC Order, *supra* at paras. 7, 8, 13-15, 24, 25, 28, 29 and 31)

C. Appropriate Sanctions

[20] In my view, the conduct of the Respondents described above was abusive of the capital markets fully warranting the sanctions imposed by the BCSC. Had such conduct occurred in Ontario, it would have constituted contraventions of the Act in Ontario. Given the past conduct, the lack of contrition, the absence of mitigating factors and the total failure to provide any rational explanation, it is clearly appropriate to make an order in the public interest to prevent the Respondents from accessing the capital markets in Ontario.

[21] The threshold for determining whether it is in the public interest to reciprocate an order from another regulatory authority is a low threshold. I acknowledge the British Columbia Court of Appeal's decision in *Lines* that concluded the BCSC must make its own determination of what is in the public interest in British Columbia "rather than make an order *automatically,* based on the order of the foreign jurisdiction" [emphasis in original] *(Lines v. British Columbia (Securities Commission)* (2012) BCCA 316, at para. 31). Nevertheless, it is also important that the Commission be aware of and responsive to an increasingly complex and interconnected cross-border securities industry. For some time, the courts have been attuned to the needs of business and interprovincial comity.

[22] In 1990, the SCC expounded new principles and a new approach to the recognition and enforcement of judgments between Canadian provinces. The SCC stated:

> The business community operates in a world economy and we correctly speak of a world community even in the face of decentralized political and legal power. Accommodating the flow of wealth, skills and people across state lines has now become imperative. Under these circumstances, our approach to the recognition and enforcement of foreign judgments would appear ripe for reappraisal. Certainly, other countries, notably the United States and members of the European Economic Community, have adopted more generous rules for the recognition and enforcement of foreign judgments to the general advantage of litigants.
>
> (*Morguard Investments Ltd. v. De Savoye,* [1990] S.C.J. No. 135, ***("Morguard")*** at para. 34)

[23] The SCC determined the issue in this way:

> As discussed, fair process is not an issue within the Canadian federation. The question that remains, then, is when has a court exercised its jurisdiction appropriately for the purposes of recognition by a court in another province? This poses no difficulty where the court has acted on the basis of some ground traditionally accepted by courts as permitting the recognition and enforcement of foreign judgments -- in the case of judgments in personam where the defendant was within the jurisdiction at the time of the action or when he submitted to its judgment whether by agreement or attornment. In the first case, the court had jurisdiction over the person, and in the second case by virtue of the agreement. No injustice results.
>
> (*Ibid.* at para. 43)

[24] Thirteen years later, in 2003, the SCC revisited the issue of recognition and enforcement of foreign judgments, including those from other countries. The SCC stated:

> The importance of comity was analysed at length in *Morguard, supra.* This doctrine must be permitted to evolve concomitantly with international business relations, cross-

> border transactions, as well as mobility. The doctrine of comity is:
>
> > grounded in the need in modern times to facilitate the flow of wealth, skills and people across state lines in a fair and orderly manner.
> >
> > (*Morguard, supra,* at p. 1096)
>
> This doctrine is of particular importance viewed internationally. The principles of order and fairness ensure security of transactions, which necessarily underlie the modern concept of private international law. Although *Morguard* recognized that the considerations underlying the doctrine of comity apply with greater force between the units of a federal state, the reality of international commerce and the movement of people continue to be "directly relevant to determining the appropriate response of private international law to particular issues, such as the enforcement of monetary judgments" (J. Blom, "The Enforcement of Foreign Judgments: *Morguard* Goes Forth Into the World" (1997), 28 *Can. Bus. L.J.* 373, at p. 375).
>
> [...]
>
> Like comity, the notion of reciprocity is equally compelling both in the international and interprovincial context. La Forest J. discussed interprovincial reciprocity in *Morguard, supra.* He stated (at p. 1107):
>
> > ... if this Court thinks it inherently reasonable for a court to exercise jurisdiction under circumstances like those described, it would be odd indeed if it did not also consider it reasonable for the courts of another province to recognize and enforce that court's judgment.
>
> In light of the principles of international comity, La Forest J.'s discussion of reciprocity is also equally applicable to judgments made by courts outside Canada. In the absence of a different statutory approach, it is reasonable that a domestic court recognize and enforce a foreign judgment where the foreign court assumed jurisdiction on the same basis as the domestic court would, for example, on the basis of a "real and substantial connection" test.
>
> (*Beals v. Saldanha,* [2003] S.C.J. No. 77, ***("Beals")*** at paras. 27 and 29)

[25] Most provinces now have legislation whereby judgments rendered in one common law province will be enforced in another common law province by the simple act of registration *(Reciprocal Enforcement of Judgments Act,* R.S.O. 1990, c. R.5).

[26] Although the application of subsection 127(10) of the Act does not involve the direct enforcement of a foreign judgment, the principles of comity and reciprocity

espoused in *Morguard* and in *Beals,* underlying the enforcement of interprovincial and foreign judgments should equally apply to provincial securities regulators. I acknowledge that the Commission's orders in the public interest involve more than monetary judgment enforcement. The Commission has the authority to impose a number of market prohibitions on the Respondents, only when it is in the public interest to do so. Comity requires that there not be barriers to recognizing and reciprocating the orders of other regulatory authorities when the findings of the foreign jurisdiction qualify under subsection 127(10) of the Act as a judgment that invokes the public interest. For comity to be effective and the public interest to be protected, the threshold for reciprocity must be low. The onus will rest with the Respondents to show that there was no substantial connection between him/her and the originating jurisdiction, that the order of the foreign regulatory authority was procured by fraud or that there was a denial of natural justice in the foreign jurisdiction.

V. CONCLUSION

[27] For the reasons above stated, it is in the public interest to issue the following orders:

1. against JV Raleigh that pursuant to paragraph 2 of subsection 127(1) of the Act, trading in any securities of JV Raleigh cease permanently;

2. against Smith that:

   (a) pursuant to paragraph 2 of subsection 127(1) of the Act, trading in any securities by Smith cease permanently, except that she may trade and purchase securities and exchange contracts through accounts in her own name at the registered dealer referred to in the order of BCSC Order, provided she gives a copy of the BCSC Order to that dealer;

   (b) pursuant to paragraph 2.1 of subsection 127(1) of the Act, the acquisition of any securities by Smith cease permanently, except that she may trade and purchase securities and exchange contracts through accounts in her own name at the registered dealer referred to in the order of BCSC Order, provided she gives a copy of the BCSC Order to that dealer;

   (c) pursuant to paragraph 7 of subsection 127(1) of the Act, Smith resign any positions that she holds as director or officer of an issuer;

   (d) pursuant to paragraph 8 of subsection 127(1) of the Act, Smith be prohibited permanently from becoming or acting as director or officer of an issuer;

   (e) pursuant to paragraph 8.1 of subsection 127(1) of the Act, Smith resign any positions that she holds as director or officer of a registrant;

   (f) pursuant to paragraph 8.2 of subsection 127(1) of the Act, Smith be prohibited permanently from becoming or acting as a director or officer of a registrant; and

(g) pursuant to paragraph 8.5 of subsection 127(1) of the Act, Smith be prohibited permanently from becoming or acting as a registrant or as a promoter; and

3. against Eshun that:

(a) pursuant to paragraph 2 of subsection 127(1) of the Act, trading in any securities by Eshun cease permanently;

(b) pursuant to paragraph 2.1 of subsection 127(1) of the Act, the acquisition of any securities by Eshun cease permanently;

(c) pursuant to paragraph 7 of subsection 127(1) of the Act, Eshun resign any positions that he holds as director or officer of an issuer;

(d) pursuant to paragraph 8 of subsection 127(1) of the Act, Eshun be prohibited permanently from becoming or acting as director or officer of an issuer;

(e) pursuant to paragraph 8.1 of subsection 127(1) of the Act, Eshun resign any positions that he holds as director or officer of a registrant;

(f) pursuant to paragraph 8.2 of subsection 127(1) of the Act, Eshun be prohibited permanently from becoming or acting as a director or officer of a registrant; and

(g) pursuant to paragraph 8.5 of subsection 127(1) of the Act, Eshun be prohibited permanently from becoming or acting as a registrant or as a promoter.

Dated at Toronto this 25th day of April, 2013.

"Alan Lenczner"

Alan J. Lenczner, Q.C.

Patricia McLean *Appellant*

v.

Executive Director of the British Columbia Securities Commission *Respondent*

and

Financial Advisors Association of Canada and Ontario Securities Commission *Interveners*

Patricia McLean *Appelante*

c.

Directeur général de la British Columbia Securities Commission *Intimé*

et

Association des conseillers en finances du Canada et Commission des valeurs mobilières de l'Ontario *Intervenantes*

Indexed as: McLean *v.* British Columbia (Securities Commission)

2013 SCC 67

File No.: 34593.

2013: March 21; 2013: December 5.

Present: LeBel, Fish, Rothstein, Cromwell, Moldaver, Karakatsanis and Wagner JJ.

Répertorié : McLean *c.* Colombie-Britannique (Securities Commission)

2013 CSC 67

N° du greffe : 34593.

2013 : 21 mars; 2013 : 5 décembre.

Présents : Les juges LeBel, Fish, Rothstein, Cromwell, Moldaver, Karakatsanis et Wagner.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Administrative law — Securities — Standard of review — Limitation of actions — Appellant entering into settlement agreement with Ontario Securities Commission in respect to certain possible improper actions — B.C. Securities Commission initiating secondary proceedings based on settlement agreement — B.C. Securities Act establishing limitation period of six years from date of "events" giving rise to proceedings — Whether "events" triggering six-year limitation period are the underlying misconduct giving rise to the settlement agreement, or the settlement agreement itself — Whether the standard of review of the Commission's decision should be correctness or reasonableness — Having regard to the standard of review, whether there is any basis to interfere with the Commission's interpretation — Securities Act, R.S.B.C. 1996, c. 418, ss. 159, 161(6)(d).

EN APPEL DE LA COUR D'APPEL DE LA COLOMBIE-BRITANNIQUE

Droit administratif — Valeurs mobilières — Norme de contrôle — Prescription — Règlement intervenu entre l'appelante et la Commission des valeurs mobilières de l'Ontario relativement à de possibles irrégularités — Instance secondaire engagée par la Commission des valeurs mobilières de la C.-B. sur le fondement de ce règlement — Loi sur les valeurs mobilières de la C.-B. prévoyant un délai de prescription de six ans à compter de « l'événement » qui donne lieu à l'instance — L'« événement » à partir duquel commence à courir le délai de six ans correspond-il à l'inconduite qui est à l'origine du règlement ou au règlement lui-même? — La norme de contrôle applicable à la décision de la Commission est-elle celle de la décision correcte ou celle de la décision raisonnable? — Au regard de la bonne norme de contrôle, quelque élément justifie-t-il que l'on réforme l'interprétation de la Commission? — Securities Act, R.S.B.C. 1996, ch. 418, art. 159, 161(6)d).

On September 8, 2008, M entered into a settlement agreement with the Ontario Securities Commission in respect to misconduct that occurred in Ontario, in 2001 or earlier. The Ontario Securities Commission issued an order in the public interest barring her from trading in securities for five years and banning her from acting

Le 8 septembre 2008, M a convenu d'un règlement avec la Commission des valeurs mobilières de l'Ontario relativement à une inconduite survenue en Ontario au plus tard en 2001. La Commission des valeurs mobilières de l'Ontario a rendu dans l'intérêt public une ordonnance interdisant à M, pendant cinq ans, toute opération sur

as an officer or director of certain entities registered in Ontario for 10 years. On January 14, 2010, the respondent notified M that he was applying to the British Columbia Securities Commission for a public interest order against her based on s. 161(6)(d) of the *Securities Act*, R.S.B.C. 1996, c. 418. Section 161(6)(d) empowers the Commission to bring proceedings in the public interest against persons who have agreed with another jurisdiction's securities regulator, by way of a settlement agreement, to be subject to regulatory action. Section 159 of the *Securities Act* sets out that all proceedings under the Act "must not be commenced more than 6 years after the date of the events that give rise to the proceedings". The Commission issued a reciprocal order adopting the same prohibitions as are set out in the Ontario Securities Commission's order. In doing so, the Commission implicitly interpreted s. 159, as it applies to s. 161(6)(d), such that "the event" that triggered the six-year limitation period was M's entering into a settlement agreement and not the misconduct that occurred in 2001 or earlier. The Court of Appeal applied a correctness standard of review and upheld the Commission's implied decision that "the event" that gave rise to the proceedings in British Columbia under s. 161(6)(d) was the agreement in Ontario.

Held: The appeal should be dismissed

Per LeBel, Fish, Rothstein, Cromwell, Moldaver and Wagner JJ.: The question presented is whether, for purposes of s. 161(6)(d), "the events" that trigger the six-year limitation period in s. 159 are (i) the underlying misconduct that gave rise to the settlement agreement or (ii) the settlement agreement itself. A review of the ordinary meaning, the context, and the purpose of both ss. 159 and 161(6) of the *Securities Act* reasonably supports the Commission's conclusion that the event giving rise to a proceeding under s. 161(6)(d) is the fact of having agreed with a securities regulatory authority to be subject to regulatory action. The appropriate standard of review is reasonableness. Both parties proposed reasonable interpretations of s. 159 of the *Securities Act*, as it applies to s. 161(6)(d). However, under reasonableness review, courts defer to any reasonable interpretation adopted by an administrative decision maker, even if other reasonable interpretations may exist. Because the Commission's interpretation has not been shown to be an unreasonable one, there is no basis to interfere on judicial review.

valeurs mobilières et, pendant 10 ans, l'exercice de toute fonction de dirigeante ou d'administratrice au sein de certaines entreprises inscrites en Ontario. Le 14 janvier 2010, l'intimé a fait savoir à M qu'il demanderait à la Commission des valeurs mobilières de la C.-B. de rendre à son encontre une ordonnance d'intérêt public sur le fondement de l'al. 161(6)d) de la *Securities Act*, R.S.B.C. 1996, ch. 418. Cette disposition habilite la Commission à engager une instance dans l'intérêt public contre la personne qui consent par voie de règlement avec l'organisme de réglementation des valeurs mobilières d'un autre ressort à faire l'objet d'une mesure réglementaire. L'article 159 de la *Securities Act* dispose qu'« est irrecevable [toute] instance engagée sous le régime de la [Loi] plus de 6 ans après l'événement qui y donne lieu ». La Commission a rendu une ordonnance réciproque qui prévoyait les mêmes interdictions que l'ordonnance de la commission ontarienne. Ce faisant, elle a implicitement interprété l'art. 159, quant à son application à l'al. 161(6)d), de telle sorte que « l'événement » à partir duquel court le délai de prescription de six ans s'entende du règlement avec M, non de son inconduite datant de 2001 ou d'avant. La Cour d'appel a appliqué la norme de la décision correcte et confirmé la décision tacite de la Commission selon laquelle le règlement intervenu en Ontario constituait « l'événement » qui avait donné lieu à l'instance en Colombie-Britannique sur le fondement de l'al. 161(6)d).

Arrêt : Le pourvoi est rejeté.

Les juges LeBel, Fish, Rothstein, Cromwell, Moldaver et Wagner : La question en litige est celle de savoir si, pour l'application de l'al. 161(6)d), « l'événement » qui fait courir le délai de prescription de six ans prévu à l'art. 159 s'entend (i) de l'inconduite qui est à l'origine du règlement ou (ii) du règlement lui-même. Le sens ordinaire, le contexte et l'objet de l'art. 159 et du par. 161(6) de la *Securities Act* appuient raisonnablement la conclusion de la Commission selon laquelle l'événement qui donne lieu à une instance fondée sur l'al. 161(6)d) s'entend du fait de convenir avec un organisme de réglementation des valeurs mobilières de faire l'objet d'une mesure réglementaire. La bonne norme de contrôle est celle de la raisonnabilité. Les deux parties défendent des interprétations raisonnables de l'art. 159 de la *Securities Act* quant à son application à l'al. 161(6)d). Or, suivant la norme de la raisonnabilité, il faut déférer à toute interprétation raisonnable du décideur administratif, même lorsque d'autres interprétations raisonnables sont possibles. Le caractère déraisonnable de l'interprétation de la Commission n'ayant pas été démontré, rien ne permet d'intervenir dans le cadre d'un contrôle judiciaire.

The Court of Appeal erred by applying a correctness standard of review. It is presumed that courts will defer to an administrative decision maker interpreting its own statute or statutes closely connected to its function. This presumption is not rebutted in this case. Nor does the question fall within any exceptional category that warrants a correctness standard. Although limitation periods generally are of central importance to the fair administration of justice, the issue here is statutory interpretation in a particular context within the Commission's specialized area of expertise. The possibility that other provincial securities commissions may arrive at different interpretations of similar statutory limitation periods is a function of the Constitution's federalist structure and does not provide a basis for a correctness review. Finally, and most significantly, the modern approach to judicial review recognizes that courts may not be as qualified as an administrative tribunal to interpret that tribunal's home statute. In particular, the resolution of unclear language in a home statute is usually best left to the administrative tribunal because the tribunal is presumed to be in the best position to weigh the policy considerations often involved in choosing between multiple reasonable interpretations of such language.

The Commission's interpretation of the limitations period here is reasonable. The ordinary meaning of "the events" in s. 159 that give rise to a proceeding under s. 161(6)(d) is the fact of having agreed with a securities regulatory authority to be subject to regulatory action. Although s. 159 predates s. 161(6), and originally limitation periods were understood to run from the date of the underlying misconduct, that drafting history is not dispositive. The phrase "the events" is deliberately open-ended and applicable to a variety of contexts. As applied to s. 161(6)(d), it can mean the date the person "has agreed with a securities regulatory authority". Finally, allowing secondary jurisdictions to wait until the conclusion of a primary proceeding obviates the need for parallel and duplicative proceedings that will overburden securities commissions and the targets of proceedings. The Commission's interpretation thus furthers the legislative goal of improving interjurisdictional cooperation between provinces and territories.

La Cour d'appel a eu tort d'appliquer la norme de la décision correcte. Le tribunal administratif qui interprète sa propre loi constitutive ou une loi étroitement liée à son mandat est présumé avoir droit à la déférence judiciaire, une présomption qui n'est pas réfutée en l'espèce. La question en litige n'appartient pas non plus à une catégorie exceptionnelle qui justifie l'application de la norme de la décision correcte. Même si les délais de prescription revêtent généralement une importance capitale aux fins d'une saine administration de la justice, il s'agit en l'espèce d'interpréter la loi dans un contexte particulier qui relève du domaine d'expertise de la Commission. Le risque que les autres commissions des valeurs mobilières interprètent différemment leurs dispositions apparentées sur la prescription tient à notre Constitution de type fédéral et ne saurait justifier l'application de la norme de la décision correcte. Enfin, et surtout, l'approche moderne en matière de contrôle judiciaire reconnaît qu'une cour de justice n'est peut-être pas aussi qualifiée qu'un tribunal administratif pour interpréter la loi constitutive de ce dernier. En particulier, mieux vaut généralement laisser au tribunal administratif le soin de clarifier le texte ambigu de sa loi constitutive, car il est présumé être le plus à même de soupeser les considérations de politique générale qui président souvent au choix entre les différentes interprétations raisonnables possibles.

En l'espèce, la Commission interprète raisonnablement le délai de prescription. À l'article 159, suivant le sens ordinaire du terme, « l'événement » qui donne lieu à l'instance fondée sur l'al. 161(6)d) s'entend du fait de convenir avec un organisme de réglementation des valeurs mobilières de faire l'objet d'une mesure réglementaire. Bien que l'art. 159 ait existé avant l'adjonction du par. 161(6) et que, jusqu'alors, on ait considéré que le délai commençait à courir à compter de l'inconduite reprochée, cette évolution législative n'est pas déterminante. Le terme « l'événement » a manifestement un sens étendu et vise une foule de contextes. Pour les besoins de l'al. 161(6)d), il s'entend du moment où la personne « a convenu avec un organisme de réglementation des valeurs mobilières » de faire l'objet de certaines mesures. Enfin, permettre aux ressorts secondaires d'attendre le dénouement de l'instance principale rend inutiles les instances parallèles et répétitives qui auraient pour effet de surcharger les commissions des valeurs mobilières et d'infliger un fardeau excessif aux personnes visées. L'interprétation de la Commission va donc dans le sens de l'objectif législatif qui consiste à accroître la coopération entre les ressorts.

Although the Commission's interpretation significantly extends the duration of time for which a person may be subject to regulatory action, of itself, that is not offensive to the purpose of limitation periods. Limitation periods are always driven by policy choices that attempt to balance the interests of the parties. The Commission's interpretation strikes a reasonable balance between facilitation of interprovincial cooperation and the underlying purposes of limitation periods.

Per Karakatsanis J.: The Commission was reasonable in interpreting s. 159 to require that secondary proceedings under s. 161(6) must be initiated within six years of a person being sanctioned in another jurisdiction. However, the opposite interpretation — that the limitation period runs from the time of the underlying misconduct — is not reasonable. Such an interpretation would require duplicative proceedings in cases, like this one, where an investigation in another jurisdiction does not conclude within six years of the underlying misconduct. It is inconsistent with the legislative objective of facilitating interjurisdictional cooperation and it is at odds with a purposive interpretation. Consequently, it would not have been open to the Commission to interpret the limitations period as the appellant urges.

Cases Cited

By Moldaver J.

Distinguished: *Rogers Communications Inc. v. Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 35, [2012] 2 S.C.R. 283; **referred to:** *Committee for the Equal Treatment of Asbestos Minority Shareholders v. Ontario (Securities Commission)*, 2001 SCC 37, [2001] 2 S.C.R. 132; *McLean (Re)*, 2008 LNONOSC 660, 31 O.S.C.B. 8734; *Heidary (Re)*, 2000 LNONOSC 79, 23 O.S.C.B. 959; *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190; *Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557; *Dr. Q v. College of Physicians and Surgeons of British Columbia*, 2003 SCC 19, [2003] 1 S.C.R. 226; *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 S.C.R. 654; *City of Arlington, Texas v. Federal Communications Commission*, 133 S. Ct. 1863 (2013); *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2011 SCC 53, [2011] 3 S.C.R. 471; *Nor-Man Regional Health Authority Inc. v. Manitoba Association of Health Care Professionals*, 2011 SCC 59, [2011] 3 S.C.R. 616; *Communications, Energy and Paperworkers Union of*

Même si l'interprétation que défend la Commission prolonge sensiblement la période pendant laquelle une personne s'expose à une mesure réglementaire, il n'en résulte pas en soi d'atteinte à l'objectif d'un délai de prescription, lequel procède toujours de décisions de principe qui visent à établir un équilibre entre les intérêts des parties. L'interprétation de la Commission établit un équilibre raisonnable entre l'accroissement de la coopération des ressorts et les objectifs d'un délai de prescription.

La juge Karakatsanis : La Commission interprète raisonnablement l'art. 159 lorsqu'elle conclut qu'une instance secondaire fondée sur le par. 161(6) doit être engagée au plus tard six ans après que la personne en cause s'est vu infliger une sanction dans un autre ressort. Cependant, l'interprétation contraire — à savoir que le délai de prescription court à compter de l'inconduite reprochée — n'est pas raisonnable. Il en résulterait en effet un dédoublement des instances lorsque, comme dans la présente affaire, l'enquête dans l'autre ressort ne prend pas fin dans les six ans de l'inconduite. Pareille interprétation va à l'encontre de l'objectif législatif de faciliter la coopération entre les ressorts et de la démarche téléologique. Il n'était donc pas loisible à la Commission d'interpréter le délai de prescription de la manière que préconise l'appelante.

Jurisprudence

Citée par le juge Moldaver

Distinction d'avec l'arrêt : *Rogers Communications Inc. c. Société canadienne des auteurs, compositeurs et éditeurs de musique*, 2012 CSC 35, [2012] 2 R.C.S. 283; **arrêts mentionnés :** *Comité pour le traitement égal des actionnaires minoritaires de la Société Asbestos Ltée c. Ontario (Commission des valeurs mobilières)*, 2001 CSC 37, [2001] 2 R.C.S. 132; *McLean (Re)*, 2008 LNONOSC 660, 31 O.S.C.B. 8734; *Heidary (Re)*, 2000 LNONOSC 79, 23 O.S.C.B. 959; *Dunsmuir c. Nouveau-Brunswick*, 2008 CSC 9, [2008] 1 R.C.S. 190; *Pezim c. Colombie-Britannique (Superintendent of Brokers)*, [1994] 2 R.C.S. 557; *Dr. Q c. College of Physicians and Surgeons of British Columbia*, 2003 CSC 19, [2003] 1 R.C.S. 226; *Alberta (Information and Privacy Commissioner) c. Alberta Teachers' Association*, 2011 CSC 61, [2011] 3 R.C.S. 654; *City of Arlington, Texas c. Federal Communications Commission*, 133 S. Ct. 1863 (2013); *Canada (Commission canadienne des droits de la personne) c. Canada (Procureur général)*, 2011 CSC 53, [2011] 3 R.C.S. 471; *Nor-Man Regional Health Authority Inc. c. Manitoba Association of Health Care Professionals*, 2011 CSC 59, [2011] 3 R.C.S. 616; *Syndicat*

Canada, Local 30 v. Irving Pulp & Paper, Ltd., 2013 SCC 34, [2013] 2 S.C.R. 458; *British Columbia Securities Commission v. Bapty*, 2006 BCSC 638 (CanLII); *National Corn Growers Assn. v. Canada (Import Tribunal)*, [1990] 2 S.C.R. 1324; *Council of Canadians with Disabilities v. VIA Rail Canada Inc.*, 2007 SCC 15, [2007] 1 S.C.R. 650; *Construction Labour Relations v. Driver Iron Inc.*, 2012 SCC 65, [2012] 3 S.C.R. 405; *Woods (Re)*, 1997 LNBCSC 11 (QL); *Seto (Re)*, 2006 BCSECCOM 569 (CanLII); *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559; *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339; *Canadian Pacific Air Lines Ltd. v. Canadian Air Line Pilots Assn.*, [1993] 3 S.C.R. 724; *ATCO Gas and Pipelines Ltd. v. Alberta (Energy and Utilities Board)*, 2006 SCC 4, [2006] 1 S.C.R. 140; *Montréal (City) v. 2952-1366 Québec Inc.*, 2005 SCC 62, [2005] 3 S.C.R. 141; *Dennis (Re)*, 2005 BCSECCOM 65, 2004 LNBCSC 705 (QL); *Perka v. The Queen*, [1984] 2 S.C.R. 232; *Global Securities Corp. v. British Columbia (Securities Commission)*, 2000 SCC 21, [2000] 1 S.C.R. 494; *Novak v. Bond*, [1999] 1 S.C.R. 808; *Friedland (Re)*, 2010 BCSECCOM 654 (CanLII); *Nielsen (Re)*, 2013 LNONOSC 254, 36 O.S.C.B. 3478; *Robinson (Re)*, 2013 LNABASC 295, 2013 ABASC 317 (CanLII); *Maitland Capital Ltd. (Re)*, 2012 LNONOSC 95, 35 O.S.C.B. 1729; *M. (K.) v. M. (H.)*, [1992] 3 S.C.R. 6; *Cholmondeley v. Clinton* (1820), 2 Jac. & W. 1, 37 E.R. 527; *Lines v. British Columbia (Securities Commission)*, 2012 BCCA 316, 35 B.C.L.R. (5th) 281; *Roncarelli v. Duplessis*, [1959] S.C.R. 121; *Manitoba Metis Federation Inc. v. Canada (Attorney General)*, 2013 SCC 14, [2013] 1 S.C.R. 623; *Murphy v. Welsh*, [1993] 2 S.C.R. 1069; *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] 2 S.C.R. 559.

By Karakatsanis J.

Referred to: *Global Securities Corp. v. British Columbia (Securities Commission)*, 2000 SCC 21, [2000] 1 S.C.R. 494; *Reference re Securities Act*, 2011 SCC 66, [2011] 3 S.C.R. 837.

Statutes and Regulations Cited

Bill 20, *Securities Amendment Act, 2006*, 2nd Sess., 38th Parl., British Columbia (Third reading, April 25, 2006).

Bill 28, *Securities Amendment Act, 2007*, 3rd Sess., 38th Parl., British Columbia (Third reading, October 23, 2007).

canadien des communications, de l'énergie et du papier, section locale 30 c. Pâtes & Papier Irving, Ltée, 2013 CSC 34, [2013] 2 R.C.S. 458; *British Columbia Securities Commission c. Bapty*, 2006 BCSC 638 (CanLII); *National Corn Growers Assn. c. Canada (Tribunal des importations)*, [1990] 2 R.C.S. 1324; *Conseil des Canadiens avec déficiences c. VIA Rail Canada Inc.*, 2007 CSC 15, [2007] 1 R.C.S. 650; *Construction Labour Relations c. Driver Iron Inc.*, 2012 CSC 65, [2012] 3 R.C.S. 405; *Woods (Re)*, 1997 LNBCSC 11 (QL); *Seto (Re)*, 2006 BCSECCOM 569 (CanLII); *Bell ExpressVu Limited Partnership c. Rex*, 2002 CSC 42, [2002] 2 R.C.S. 559; *Canada (Citoyenneté et Immigration) c. Khosa*, 2009 CSC 12, [2009] 1 R.C.S. 339; *Lignes aériennes Canadien Pacifique Ltée c. Assoc. canadienne des pilotes de lignes aériennes*, [1993] 3 R.C.S. 724; *ATCO Gas and Pipelines Ltd. c. Alberta (Energy and Utilities Board)*, 2006 CSC 4, [2006] 1 R.C.S. 140; *Montréal (Ville) c. 2952-1366 Québec Inc.*, 2005 CSC 62, [2005] 3 R.C.S. 141; *Dennis (Re)*, 2005 BCSECCOM 65, 2004 LNBCSC 705 (QL); *Perka c. La Reine*, [1984] 2 R.C.S. 232; *Global Securities Corp. c. Colombie-Britannique (Securities Commission)*, 2000 CSC 21, [2000] 1 R.C.S. 494; *Novak c. Bond*, [1999] 1 R.C.S. 808; *Friedland (Re)*, 2010 BCSECCOM 654 (CanLII); *Nielsen (Re)*, 2013 LNONOSC 254, 36 O.S.C.B. 3478; *Robinson (Re)*, 2013 LNABASC 295, 2013 ABASC 317 (CanLII); *Maitland Capital Ltd. (Re)*, 2012 LNONOSC 95, 35 O.S.C.B. 1729; *M. (K.) c. M. (H.)*, [1992] 3 R.C.S. 6; *Cholmondeley c. Clinton* (1820), 2 Jac. & W. 1, 37 E.R. 527; *Lines c. British Columbia (Securities Commission)*, 2012 BCCA 316, 35 B.C.L.R. (5th) 281; *Roncarelli c. Duplessis*, [1959] R.C.S. 121; *Manitoba Metis Federation Inc. c. Canada (Procureur général)*, 2013 CSC 14, [2013] 1 R.C.S. 623; *Murphy c. Welsh*, [1993] 2 R.C.S. 1069; *Agraira c. Canada (Sécurité publique et Protection civile)*, 2013 CSC 36, [2013] 2 R.C.S. 559.

Citée par la juge Karakatsanis

Arrêts mentionnés : *Global Securities Corp. c. Colombie-Britannique (Securities Commission)*, 2000 CSC 21, [2000] 1 R.C.S. 494; *Renvoi relatif à la Loi sur les valeurs mobilières*, 2011 CSC 66, [2011] 3 R.C.S. 837.

Lois et règlements cités

Bill 20, *Securities Amendment Act, 2006*, 2nd Sess., 38th Parl., British Columbia (Third reading, April 25, 2006).

Bill 28, *Securities Amendment Act, 2007*, 3rd Sess., 38th Parl., British Columbia (Third reading, October 23, 2007).

Securities Act, C.C.S.M., c. S50, ss. 137, 148.4(1).
Securities Act, R.S.A. 2000, c. S-4, s. 198(1.1).
Securities Act, R.S.B.C. 1996, c. 418, ss. 127, 127.1, 140(a), 140.94, 159, 161(1), (6).
Securities Act, R.S.N.L. 1990, c. S-13, ss. 127(1.1), 129.
Securities Act, R.S.N.S. 1989, c. 418, s. 134(1A).
Securities Act, R.S.O. 1990, c. S.5, s. 127(10).
Securities Act, R.S.P.E.I. 1988, c. S-3.1, s. 60(3).
Securities Act, S.N.B. 2004, c. S-5.5, s. 184(1.1).
Securities Act, S.Nu. 2008, c. 12, s. 60(3).
Securities Act, S.N.W.T. 2008, c. 10, s. 60(3).
Securities Act, S.Y. 2007, c. 16, s. 60(3).
Securities Act, 1988, S.S. 1988-89, c. S-42.2, s. 134(1.1).
Securities Amendment Act, 2006, S.B.C. 2006, c. 32.

Loi sur les valeurs mobilières, C.P.L.M., ch. S50, art. 137, 148.4(1).
Loi sur les valeurs mobilières, L.N.-B. 2004, ch. S-5.5, art. 184(1.1).
Loi sur les valeurs mobilières, L.R.O. 1990, ch. S.5, art. 127(10).
Loi sur les valeurs mobilières, L.T.N.-O. 2008, ch. 10, art. 60(3).
Loi sur les valeurs mobilières, L.Y. 2007, ch. 16, art. 60(3).
Securities Act, R.S.A. 2000, ch. S-4, art. 198(1.1).
Securities Act, R.S.B.C. 1996, ch. 418, art. 127, 127.1, 140a), 140.94, 159, 161(1), (6).
Securities Act, R.S.N.L. 1990, ch. S-13, art. 127(1.1), 129.
Securities Act, R.S.N.S. 1989, ch. 418, art. 134(1A).
Securities Act, R.S.P.E.I. 1988, ch. S-3.1, art. 60(3).
Securities Act, S.Nu. 2008, ch. 12, art. 60(3).
Securities Act, 1988, S.S. 1988-89, ch. S-42.2, art. 134(1.1).
Securities Amendment Act, 2006, S.B.C. 2006, ch. 32.

Authors Cited

Canada. *A Provincial/Territorial Memorandum of Understanding Regarding Securities Regulation*, 2004 (online: http://www.securitiescanada.org/2004_0930_mou_english.pdf).
Côté, Pierre-André, in collaboration with Stéphane Beaulac and Mathieu Devinat. *The Interpretation of Legislation in Canada*, 4th ed. Toronto: Carswell, 2011.
Driedger, Elmer A. *Construction of Statutes*, 2nd ed. Toronto: Butterworths, 1983.
Sullivan, Ruth. *Sullivan on the Construction of Statutes*, 5th ed. Markham, Ont.: LexisNexis, 2008.
Teplitsky, Martin. "Standard of review of administrative adjudication: 'What a tangled web we weave . . .'" (2013), *Advocates' Soc. J.* 3.
Willis, John. "Statute Interpretation in a Nutshell" (1938), 16 *Can. Bar Rev.* 1.

Doctrine et autres documents cités

Canada. *Protocole d'entente provincial-territorial sur la réglementation des valeurs mobilières*, 2004 (en ligne : http://www.valeursmobilieres.org/2004_0930_mou_francais.pdf).
Côté, Pierre-André, avec la collaboration de Stéphane Beaulac et Mathieu Devinat. *Interprétation des lois*, 4e éd. Montréal : Thémis, 2009.
Driedger, Elmer A. *Construction of Statutes*, 2nd ed. Toronto : Butterworths, 1983.
Sullivan, Ruth. *Sullivan on the Construction of Statutes*, 5th ed. Markham, Ont. : LexisNexis, 2008.
Teplitsky, Martin. « Standard of review of administrative adjudication : "What a tangled web we weave . . ." » (2013), *J. plaideurs* 3.
Willis, John. « Statute Interpretation in a Nutshell » (1938), 16 *R. du B. can.* 1.

APPEAL from a judgment of the British Columbia Court of Appeal (Saunders, Chiasson and Neilson JJ.A.), 2011 BCCA 455, 312 B.C.A.C. 288, 531 W.A.C. 288, 343 D.L.R. (4th) 432, [2011] B.C.J. No. 2124 (QL), 2011 CarswellBC 2929, allowing an appeal from a decision by the British Columbia Securities Commission, 2010 BCSECCOM 262, 2010 LNBCSC 222 (QL). Appeal dismissed.

POURVOI contre un arrêt de la Cour d'appel de la Colombie-Britannique (les juges Saunders, Chiasson et Neilson), 2011 BCCA 455, 312 B.C.A.C. 288, 531 W.A.C. 288, 343 D.L.R. (4th) 432, [2011] B.C.J. No. 2124 (QL), 2011 CarswellBC 2929, qui a accueilli l'appel d'une décision de la British Columbia Securities Commission, 2010 BCSECCOM 262, 2010 LNBCSC 222 (QL). Pourvoi rejeté.

Christopher H. Wirth and *Fredrick Schumann*, for the appellant.

Stephen M. Zolnay, for the respondent.

Lou Brzezinski and *John Polyzogopoulos*, for the intervener the Financial Advisors Association of Canada.

Johanna M. Superina and *Usman M. Sheikh*, for the intervener the Ontario Securities Commission.

The judgment of LeBel, Fish, Rothstein, Cromwell, Moldaver and Wagner JJ. was delivered by

MOLDAVER J. —

I. Introduction

[1] In Canada, the individual provinces and territories bear primary responsibility for the regulation of stocks, bonds, and other securities. However, because modern securities markets transcend provincial and territorial borders, the provinces and territories have in recent years taken steps to harmonize their securities laws and to improve cooperation between their securities regulators.

[2] As a result of these efforts, the British Columbia Securities Commission (the "Commission"), like all of its provincial and territorial peers, has been empowered to bring proceedings in the public interest against persons who, among other things, have agreed with another jurisdiction's securities regulator, by way of a settlement agreement, to be subject to regulatory action; see s. 161(6)(d) of the *Securities Act*, R.S.B.C. 1996, c. 418. In the jargon of the industry, these proceedings are known as "secondary proceedings" because they piggyback on another jurisdiction's efforts. Subject to a few exceptions, all proceedings under the *Act* — secondary or otherwise — "must not be commenced more than 6 years after the date of the events that give rise to the proceedings" (s. 159).

Christopher H. Wirth et *Fredrick Schumann*, pour l'appelante.

Stephen M. Zolnay, pour l'intimé.

Lou Brzezinski et *John Polyzogopoulos*, pour l'intervenante l'Association des conseillers en finances du Canada.

Johanna M. Superina et *Usman M. Sheikh*, pour l'intervenante la Commission des valeurs mobilières de l'Ontario.

Version française du jugement des juges LeBel, Fish, Rothstein, Cromwell, Moldaver et Wagner rendu par

LE JUGE MOLDAVER —

I. Introduction

[1] Au Canada, la réglementation des actions, obligations et autres valeurs mobilières incombe au premier chef à chacune des provinces et à chacun des territoires. Or, de nos jours, les marchés financiers transcendent les frontières provinciales et territoriales. Les provinces et les territoires ont donc adopté ces dernières années des mesures visant à harmoniser leurs dispositions en la matière et à accroître la collaboration entre leurs organismes de réglementation respectifs.

[2] À l'instar de ses homologues provinciales et territoriales, la British Columbia Securities Commission (la « Commission »), est désormais habilitée à engager une instance dans l'intérêt public contre la personne qui, notamment, consent par voie de règlement avec l'organisme de réglementation des valeurs mobilières d'un autre ressort à faire l'objet d'une mesure réglementaire (voir l'al. 161(6)d) de la *Securities Act*, R.S.B.C. 1996, ch. 418). On parle dans le milieu d'« instance secondaire », celle-ci se greffant à la démarche d'un autre ressort. Sauf quelques exceptions, [TRADUCTION] « est irrecevable l'instance [secondaire ou autre] engagée sous le régime de la [*Loi*] plus de 6 ans après l'événement qui y donne lieu » (art. 159).

[3] At issue in this appeal is whether, for purposes of s. 161(6)(d), "the events" that trigger the six-year limitation period in s. 159 are (i) the underlying misconduct that gave rise to the settlement agreement or (ii) the settlement agreement itself. The Commission takes the position that the settlement agreement is the triggering event. On that basis, it commenced secondary proceedings against the appellant after she entered into a settlement agreement with another regulator, even though the underlying misconduct referred to in that agreement occurred roughly nine years earlier. Had the Commission adopted the alternative interpretation, as the appellant argues it should have, the secondary proceeding would have been commenced outside the six-year limitation period and thus been statute-barred.

[4] Applying the governing standard of review, which I consider to be reasonableness, I am satisfied that the Commission's interpretation is a reasonable construction of the relevant statutory language. Significantly, the Commission's conclusion supports the legislative objective of facilitating interjurisdictional cooperation in secondary proceedings and does so without undercutting the crucial role of limitation periods. Accordingly, I see no reason to interfere and would dismiss the appeal.

II. Facts

A. *The Primary Investigation and The Settlement Agreement*

[5] The facts are straightforward and undisputed. From March 1996 to June 2001, the appellant, Patricia McLean, served as a director of Hucamp Mines Ltd., a reporting issuer registered in Ontario under the *Securities Act*, R.S.O. 1990, c. S.5. Beginning in July 2001, the appellant began cooperating with the Ontario Securities Commission ("OSC") in respect of "certain possible improper actions at Hucamp" (Settlement Agreement Between OSC Staff and Patricia McLean, at para. 63 (A.R., at p. 45)). The particulars of the alleged misconduct are not relevant, but the timing is — the allegations pertain to conduct that occurred in 2001 or earlier.

[3] Nous sommes appelés à décider si, pour l'application de l'al. 161(6)d), « l'événement » qui fait courir le délai de prescription de six ans prévu à l'art. 159 s'entend (i) de l'inconduite qui est à l'origine du règlement ou (ii) du règlement lui-même. La Commission soutient qu'il s'agit du règlement lui-même. C'est pourquoi elle a engagé une instance secondaire contre l'appelante après que cette dernière a conclu un règlement avec un autre organisme de réglementation, et ce, même si l'inconduite en cause avait eu lieu quelque neuf ans auparavant. Suivant l'interprétation préconisée par l'appelante, la Commission a agi après l'expiration du délai de six ans et il y avait donc prescription.

[4] Au regard de la norme de contrôle applicable — celle de la raisonnabilité selon moi —, je suis convaincu que la Commission interprète raisonnablement le libellé de la disposition législative en cause. Qui plus est, sa conclusion va dans le sens de l'objectif législatif de faciliter la coopération intergouvernementale en matière d'instances secondaires, et ce, sans compromettre la fonction essentielle du délai de prescription. Par conséquent, je ne vois aucune raison de réformer la décision et suis d'avis de rejeter le pourvoi.

II. Les faits

A. *L'enquête principale et le règlement*

[5] Les faits sont simples et incontestés. De mars 1996 à juin 2001, l'appelante, Patricia McLean, a siégé au conseil d'administration de Hucamp Mines Ltd., un émetteur assujetti inscrit en Ontario sous le régime de la *Loi sur les valeurs mobilières*, L.R.O. 1990, ch. S.5. En juillet 2001, elle a entrepris de coopérer avec la Commission des valeurs mobilières de l'Ontario (« CVMO ») relativement à [TRADUCTION] « certaines irrégularités possibles chez Hucamp » (règlement entre le personnel de la CVMO et Patricia McLean, par. 63 (d.a., p. 45)). Le détail de l'inconduite alléguée importe peu, mais pas le moment où elle aurait eu lieu, soit, selon les allégations, au plus tard en 2001.

[6] On July 11, 2005, the OSC announced that it would hold a hearing under its public interest powers to sanction the appellant and certain others for their alleged misconduct at Hucamp; see *Securities Act*, ss. 127 and 127.1. Such powers, which exist in each of the provincial and territorial statutes, confer a "very wide discretion" to make whatever orders the OSC considers to be in the public interest (*Committee for the Equal Treatment of Asbestos Minority Shareholders v. Ontario (Securities Commission)*, 2001 SCC 37, [2001] 2 S.C.R. 132, at para. 39).

[7] Three years later, on September 8, 2008, the appellant entered into a settlement agreement with the OSC staff wherein she "consent[ed] to the making of [such] an order against her" (Settlement Agreement, at para. 2 (A.R., at p. 33)). On the same day, the OSC approved the settlement agreement and issued the agreed-upon order (*McLean (Re)*, 2008 LNONOSC 660, 31 O.S.C.B. 8734).

[8] In its pertinent parts, the OSC order barred the appellant for five years from trading in securities (with some exceptions) and banned her for ten years from acting as an officer or director of certain entities registered under the Ontario *Securities Act*. By virtue of the OSC's provincial jurisdiction, the reach of these sanctions did not extend beyond Ontario's borders. No one challenges the propriety of the OSC's order.

B. *The Secondary Investigation and the B.C. Order*

[9] All was quiet for the next 15 months — until January 14, 2010 to be exact — when the appellant was notified by the Executive Director of the B.C. Securities Commission (the respondent) that he was applying to the Commission under s. 161(1) of the *Act* for a "public interest" order against her based on s. 161(6)(d). For present purposes, the relevant aspects of those provisions are as follows:

[6] Le 11 juillet 2005, la CVMO a annoncé qu'elle tiendrait une audience en vue d'exercer son pouvoir, fondé sur l'intérêt public, de sanctionner l'appelante et d'autres personnes pour leur inconduite alléguée chez Hucamp; voir les art. 127 et 127.1 de la *Loi sur les valeurs mobilières*. Ce pouvoir accordé par toutes les lois provinciales et territoriales en la matière confère à la CVMO le « très vaste pouvoir discrétionnaire » de rendre toute ordonnance qu'elle estime être dans l'intérêt public (*Comité pour le traitement égal des actionnaires minoritaires de la Société Asbestos Ltée c. Ontario (Commission des valeurs mobilières)*, 2001 CSC 37, [2001] 2 R.C.S. 132, par. 39).

[7] Trois ans plus tard, soit le 8 septembre 2008, dans un règlement intervenu avec le personnel de la CVMO, l'appelante [TRADUCTION] « [a] consent[i] à ce qu'une [telle] ordonnance soit rendue contre elle » (règlement, par. 2 (d.a., p. 33)). Le même jour, la CVMO a approuvé le règlement et rendu l'ordonnance convenue (*McLean (Re)*, 2008 LNONOSC 660, 31 O.S.C.B. 8734).

[8] Dans ses passages pertinents, l'ordonnance de la CVMO interdit à l'appelante de réaliser toute opération sur valeurs mobilières pendant cinq ans (sauf quelques exceptions) et d'occuper le poste de dirigeante ou d'administratrice de certaines entreprises inscrites sous le régime de la *Loi sur les valeurs mobilières* de l'Ontario pendant dix ans. Étant donné la portée provinciale du pouvoir de la CVMO, ces sanctions ne s'appliquaient pas au-delà des frontières ontariennes. Cependant, nul ne conteste la validité de l'ordonnance de la CVMO.

B. *L'enquête secondaire et l'ordonnance de la C.-B.*

[9] L'affaire n'a connu aucun rebondissement au cours des 15 mois qui ont suivi, soit jusqu'au 14 janvier 2010 pour être exact, lorsque le directeur général de la Commission (l'intimé) a fait savoir à l'appelante qu'il demanderait à la Commission de rendre à son encontre l'ordonnance d'« intérêt public » visée au par. 161(1) de la *Loi* sur le fondement de l'al. 161(6)d). Les passages pertinents de ces dispositions sont les suivants :

[TRADUCTION]

159 [Limitation Period] Proceedings under this Act, other than an action referred to in section 140, must not be commenced more than 6 years after the date of the events that give rise to the proceedings.

. . .

161 (1) [Enforcement Orders] 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:

. . .

(b) that

. . .

(ii) the person or persons named in the order, . . .

. . .

cease trading in, or be prohibited from purchasing, any securities or exchange contracts, a specified security or exchange contract or a specified class of securities or class of exchange contracts;

. . .

(d) that a person

(i) resign any position that the person holds as a director or officer of an issuer or registrant,

(ii) is prohibited from becoming or acting as a director or officer of any issuer or registrant,

. . .

(6) The commission or the executive director may, after providing an opportunity to be heard, make an order under subsection (1) in respect of a person if the person

159 [Délai de prescription] Sauf celle visée à l'article 140, est irrecevable l'instance engagée sous le régime de la présente loi plus de 6 ans après l'événement qui y donne lieu.

. . .

161 (1) [Ordonnance d'exécution] Lorsqu'ils estiment dans l'intérêt public de le faire, la Commission ou le directeur général peuvent, après la tenue d'une audience, ordonner :

. . .

b) que

. . .

(ii) la ou les personnes nommées dans l'ordonnance . . .

. . .

cessent de réaliser des opérations sur valeurs mobilières ou d'acquérir des valeurs mobilières ou des contrats de change, une valeur mobilière donnée ou un contrat de change donné, ou encore, une catégorie précise de valeurs mobilières ou de contrats de change;

. . .

d) qu'une personne

(i) démissionne de son poste d'administrateur ou de dirigeant d'un émetteur ou d'une personne inscrite,

(ii) ne puisse plus devenir administrateur ou dirigeant d'un émetteur ou d'une personne inscrite,

. . .

(6) La Commission ou le directeur général peuvent, après avoir donné aux parties la possibilité de se faire entendre, rendre sur le fondement du paragraphe (1) une ordonnance visant une personne :

(a) has been convicted in Canada or elsewhere of an offence

(i) arising from a transaction, business or course of conduct related to securities or exchange contracts, or

(ii) under the laws of the jurisdiction respecting trading in securities or exchange contracts,

(b) has been found by a court in Canada or elsewhere to have contravened the laws of the jurisdiction respecting trading in securities or exchange contracts,

(c) is subject to an order made by a securities regulatory authority, a self regulatory body or an exchange, in Canada or elsewhere, imposing sanctions, conditions, restrictions or requirements on the person, or

(d) has agreed with a securities regulatory authority, a self regulatory body or an exchange, in Canada or elsewhere, to be subject to sanctions, conditions, restrictions or requirements.

a) déclarée coupable, au Canada ou à l'étranger :

(i) d'une infraction découlant d'une opération, d'une activité ou d'une conduite liée à des valeurs mobilières ou à des contrats de change, ou

(ii) d'une infraction à la législation du ressort en matière d'opérations sur valeurs mobilières ou sur contrats de change;

b) qu'un tribunal canadien ou étranger a jugée coupable d'une contravention à la législation du ressort en matière d'opérations sur valeurs mobilières ou sur contrats de change;

c) qui fait l'objet d'une ordonnance rendue par un organisme de réglementation des valeurs mobilières, un organisme d'autoréglementation ou une bourse, au Canada ou à l'étranger, lui imposant des sanctions, des conditions, des restrictions ou des exigences;

d) qui a convenu avec un organisme de réglementation des valeurs mobilières, un organisme d'autoréglementation ou une bourse, au Canada ou à l'étranger, de faire l'objet de sanctions, de conditions, de restrictions ou d'exigences.

[10] In asserting that it had authority to make an order under s. 161(1) based on s. 161(6)(d), the Commission relied on the appellant's settlement agreement with the OSC. And thus began the present case.

[11] There is no dispute that had the Commission proceeded *solely* under s. 161(1), the proceeding would have run afoul of s. 159. The respondent accepts that the six-year limitation period in s. 159 as applied to s. 161(1) alone begins to run from "the last event in the series of events which form the course of conduct" sanctioned by the order (R.F., at para. 79, citing *Heidary (Re)*, 2000 LNONOSC 79, 23 O.S.C.B. 959, at p. 961). By January 2010, it had been almost nine years since the last event described in the settlement agreement.

[12] The question in this case is whether the same conclusion holds true for secondary proceedings initiated using s. 161(6)(d). If it does, as the appellant contends, the Commission's order must be set aside for the same reason that an order based on

[10] La Commission a invoqué le règlement intervenu entre l'appelante et la CVMO comme fondement de son pouvoir de rendre l'ordonnance visée au par. 161(1) en application de l'al. 161(6)d). C'est ainsi qu'est né le présent litige.

[11] Nul ne conteste que si la Commission avait invoqué *uniquement* le par. 161(1), l'instance aurait contrevenu à l'art. 159. L'intimé reconnaît en effet que, dans le cas du seul par. 161(1), le délai de prescription de six ans prévu à l'art. 159 commence à courir à partir du [TRADUCTION] « dernier des événements qui constituent la conduite » sanctionnée par l'ordonnance (m.i., par. 79, citant *Heidary (Re)*, 2000 LNONOSC 79, 23 O.S.C.B. 959, p. 961). Or, en janvier 2010, il s'était écoulé près de neuf ans depuis le dernier événement mentionné dans le règlement.

[12] La question qui se pose en l'espèce est celle de savoir si la même conclusion vaut pour l'instance secondaire engagée aux termes de l'al. 161(6)d). Si tel est le cas, comme le prétend l'appelante, l'ordonnance de la Commission doit être annulée pour la

s. 161(1) alone would be — it had been almost nine years after the last event described in the settlement agreement and three years beyond the requisite limitation period. If, however, the clock under s. 161(6)(d) starts running on the date of the settlement agreement referred to in that provision, as the Commission concluded, the Commission's order must stand because the proceeding was commenced well within the six-year window prescribed by s. 159.

III. Proceedings Below

A. *British Columbia Securities Commission, 2010 BCSECCOM 262 (CanLII)*

[13] After receiving notice of the secondary proceeding, the appellant "made extensive written submissions on the limitation period issue" to the Commission arguing that it lacked authority to make an order against her by virtue of s. 159 (A.F., at para. 10). She raised no other issues or arguments.

[14] The Commission implicitly rejected the appellant's limitations argument by issuing what it termed a "reciprocal order" that was substantially identical to the OSC order. In particular, the Commission barred the appellant from trading in securities under s. 161(1)(b) (except for those trades permitted under the OSC order) and prohibited her from acting as an officer or director of certain entities registered under the *Act* under s. 161(1)(d)(i) and (ii). The prohibitions expired on the same day as the OSC order — that is, five years and ten years, respectively, from September 8, 2008.

[15] As a consequence of the twin orders from the Ontario and B.C. Commissions, the appellant was prohibited from engaging in substantially identical conduct in both Ontario and British Columbia for identical periods of time.

même raison que le serait une ordonnance fondée sur le seul par. 161(1), à savoir que près de neuf ans se sont écoulés depuis le dernier événement mentionné dans le règlement, soit trois de plus que le délai de prescription prévu. Toutefois, si comme le conclut la Commission, pour les besoins de l'al. 161(6)d), le délai commence à courir le jour du règlement auquel renvoie la disposition, l'ordonnance doit être confirmée puisque l'instance a été introduite bien avant l'expiration du délai de six ans imparti à l'art. 159.

III. Les décisions des juridictions inférieures

A. *British Columbia Securities Commission*, *2010 BCSECCOM 262 (CanLII)*

[13] Une fois informée de l'instance secondaire, l'appelante [TRADUCTION] « a présenté [à la Commission], au sujet du délai de prescription, des observations écrites détaillées » dans lesquelles elle prétendait que l'organisme n'avait pas le pouvoir de rendre une ordonnance contre elle en raison de l'art. 159 (m.a., par. 10). Elle n'a pas soulevé d'autres questions, ni formulé d'autres prétentions.

[14] La Commission a implicitement rejeté la thèse de la prescription avancée par l'appelante en rendant ce qu'elle a appelé une [TRADUCTION] « ordonnance réciproque » et qui était essentiellement identique à l'ordonnance de la CVMO. La Commission interdisait notamment à l'appelante, suivant l'al. 161(1)b), de réaliser des opérations sur valeurs mobilières (sauf celles autorisées dans l'ordonnance de la CVMO) et, suivant les sous-al. 161(1)d)(i) et (ii), d'occuper le poste de dirigeante ou d'administratrice de certaines entreprises sous le régime de la *Loi*. Les interdictions prenaient fin le même jour que celles faites dans l'ordonnance de la CVMO, soit respectivement cinq ans et dix ans après le 8 septembre 2008.

[15] Avec le prononcé des ordonnances jumelles en Ontario et en Colombie-Britannique, l'appelante se voyait interdire essentiellement les mêmes actes dans les deux provinces, pendant les mêmes périodes.

B. *British Columbia Court of Appeal, 2011 BCCA 455, 312 B.C.A.C. 288*

[16] On appeal, the appellant reiterated her limitations argument. The B.C. Court of Appeal concluded that "generally the interpretation of a limitation period provision in a statute by an administrative tribunal will engage the standard of correctness" (para. 15). Applying that standard, it nonetheless found in favour of the Commission. On a "plain reading", the court concluded that "although the acts which gave rise to the Ontario proceedings obviously occurred before the agreement was made, the event that gave rise to the [B.C.] proceedings under s. 161(6)(d) was the agreement in Ontario" (para. 20). The interpretation put forward by the appellant "would eliminate the effective operation of s. 161(6)(d) which cannot have been the intention of the Legislature" (*ibid.*).

[17] The appellant also challenged the Commission's failure to give reasons for its order, both as to the limitation period and as to why the order was in the public interest. As regards the limitation argument, the court held that "although it might have been of assistance" had the Commission given reasons for its interpretation of s. 159, reasons were not essential because the question was one of law reviewable on a standard of correctness (para. 27). With respect to the order being in the public interest, the court concluded that "the complete absence of reasons makes appellate review of the public interest aspect of the decision and the sanctions imposed impossible" (para. 30). Hence, the court remitted the matter to the Commission for a "brief explanation" (para. 31). The Commission subsequently provided such an explanation (2012 BCSECCOM 50 (CanLII)), and that aspect of its decision is not challenged before this Court.

IV. Issues

[18] At issue in this appeal is the proper interpretation of the limitation period in s. 159 as it relates to public interest orders made under s. 161(6)(d) of the *Act*. The following two questions arise:

B. *Cour d'appel de la Colombie-Britannique, 2011 BCCA 455, 312 B.C.A.C. 288*

[16] L'appelante a de nouveau allégué la prescription devant la Cour d'appel de la C.-B., qui a conclu que [TRADUCTION] « l'interprétation d'un délai de prescription légal par un tribunal administratif commande généralement l'application de la norme de la décision correcte » (par. 15). Au regard de cette norme, elle a néanmoins tranché en faveur de la Commission. Selon le « sens ordinaire » des termes employés par le législateur, la Cour d'appel estime que « même si les actes qui ont donné lieu à l'instance en Ontario se sont évidemment produits avant le règlement, l'événement qui a donné lieu à l'instance [en C.-B.] suivant l'al. 161(6)d) était le règlement en Ontario » (par. 20). À son avis, l'interprétation préconisée par l'appelante « empêcherait dans les faits l'application de l'al. 161(6)d), ce qui ne saurait être l'intention du législateur » (*ibid.*).

[17] L'appelante a également reproché à la Commission son omission de motiver l'ordonnance tant en ce qui concerne le respect du délai de prescription que le prononcé de l'ordonnance dans l'intérêt public. S'agissant de la prescription, la Cour d'appel statue que [TRADUCTION] « bien qu'il eût été utile » que la Commission motive son interprétation de l'art. 159, ce n'était pas essentiel puisqu'il s'agissait d'une décision sur une question de droit susceptible de contrôle selon la norme de la décision correcte (par. 27). Quant à savoir si l'ordonnance servait l'intérêt public, elle opine que « l'absence de tout motif empêche d'examiner en appel si la décision et les sanctions sont dans l'intérêt public » (par. 30). Elle renvoie donc l'affaire à la Commission en vue d'obtenir une « brève explication » (par. 31) — que la Commission lui a subséquemment fournie (2012 BCSECCOM 50 (CanLII)) —, et ce volet de sa décision n'est pas contesté devant notre Cour.

IV. Questions en litige

[18] Le pourvoi a pour objet la juste interprétation du délai de prescription prévu à l'art. 159 lorsqu'il s'applique à l'ordonnance d'intérêt public rendue aux termes de l'al. 161(6)d) de la *Loi*, ce qui soulève deux questions :

(1) What is the standard of review for the Commission's interpretation of s. 159 as it applies to s. 161(6)(d)?

(2) Having regard to the applicable standard of review, is there any basis to interfere with the Commission's interpretation?

V. Analysis

A. *Standard of Review*

(1) The Presumption of Reasonableness Review for Home Statutes

[19] As noted, the Court of Appeal was of the view that the standard of review was correctness. Before this Court, the parties and the intervener, the OSC, disagreed on that issue. For the reasons that follow, I am satisfied that the standard of review is reasonableness.

[20] Before turning to my analysis, I pause to note that the standard of review debate is one that generates strong opinions on all sides, especially in the recent jurisprudence of this Court. However, the analysis that follows is based on this Court's existing jurisprudence — and it is designed to bring a measure of predictability and clarity to that framework.[1]

[21] Since *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, this Court has repeatedly underscored that "[d]eference will usually result where a tribunal is interpreting its own statute or statutes closely connected to its function, with which it will have particular familiarity" (para. 54).[2] Recently, in an attempt to further simplify matters, this Court held that an administrative decision

1 For a critique of the present framework, see M. Teplitsky, "Standard of review of administrative adjudication: 'What a tangled web we weave . . .'" (2013), *Advocates' Soc. J.* 3.

2 Although technically a statutory appeal and not an application for judicial review, general administrative law principles still apply (*Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557, at pp. 591-92 and 598-99; *Dr. Q v. College of Physicians and Surgeons of British Columbia*, 2003 SCC 19, [2003] 1 S.C.R. 226, at para. 21).

(1) Quelle est la norme de contrôle applicable à la décision de la Commission concernant l'interprétation de l'art. 159 en liaison avec l'al. 161(6)d)?

(2) Compte tenu de la norme de contrôle applicable, y a-t-il lieu de reformer la décision de la Commission?

V. Analyse

A. *La norme de contrôle*

(1) Présomption d'application de la norme de la raisonnabilité à la loi constitutive

[19] Comme je l'indique précédemment, la Cour d'appel estime que la norme de contrôle applicable est celle de la décision correcte. Devant notre Cour, les parties et l'intervenante la CVMO sont partagées sur ce point. Pour les motifs qui suivent, je suis convaincu que la bonne norme de contrôle est celle de la raisonnabilité.

[20] Mais avant de passer à l'analyse, je signale que le débat sur les normes de contrôle donne lieu à des opinions bien tranchées, particulièrement dans les arrêts récents de notre Cour. L'analyse qui suit prend toutefois appui sur la jurisprudence actuelle de notre Cour et vise à favoriser la prévisibilité et la clarté en la matière[1].

[21] Depuis l'arrêt *Dunsmuir c. Nouveau-Brunswick*, 2008 CSC 9, [2008] 1 R.C.S. 190, notre Cour a maintes fois rappelé que « [l]orsqu'un tribunal administratif interprète sa propre loi constitutive ou une loi étroitement liée à son mandat et dont il a une connaissance approfondie, la déférence est habituellement de mise » (par. 54)[2]. Récemment, dans un souci de simplicité accrue, notre

1 Pour une critique du cadre actuel, voir M. Teplitsky, « Standard of review of administrative adjudication : "What a tangled web we weave . . ." » (2013), *J. plaideurs* 3.

2 Bien que le présent pourvoi constitue, à proprement parler, un appel prévu par la loi et non une demande de contrôle judiciaire, les principes généraux de droit administratif s'appliquent tout de même (*Pezim c. Colombie-Britannique (Superintendent of Brokers)*, [1994] 2 R.C.S. 557, p. 591-592 et 598-599; *Dr. Q c. College of Physicians and Surgeons of British Columbia*, 2003 CSC 19, [2003] 1 R.C.S. 226, par. 21).

maker's interpretation of its home or closely-connected statutes "should be presumed to be a question of statutory interpretation subject to deference on judicial review" (*Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 S.C.R. 654, at para. 34).

[22] The presumption endorsed in *Alberta Teachers*, however, is not carved in stone. First, this Court has long recognized that certain categories of questions — even when they involve the interpretation of a home statute — warrant review on a correctness standard (*Dunsmuir*, at paras. 58-61). Second, we have also said that a contextual analysis may "rebut the presumption of reasonableness review for questions involving the interpretation of the home statute" (*Rogers Communications Inc. v. Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 35, [2012] 2 S.C.R. 283, at para. 16). The appellant follows both these routes in urging us to accept a correctness standard. I propose to deal with her second argument first as it can be dispensed with quickly.

(2) The Presumption of Reasonableness Review Is Not Rebutted

[23] The appellant contends that the presumption of reasonableness review has been rebutted. She relies on our recent decision in *Rogers*, where we held that a correctness standard was appropriate because of a statutory scheme under which both an administrative tribunal and the courts had concurrent jurisdiction at first instance in interpreting the relevant statute.

[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 added)). Here, the legal question is the interpretation of s. 159 as it applies to s. 161(6)(d)

Cour a statué qu'« il convient de présumer que l'interprétation par un tribunal administratif de "sa propre loi constitutive ou [d']une loi étroitement liée" [. . .] est une question d'interprétation législative commandant la déférence en cas de contrôle judiciaire » (*Alberta (Information and Privacy Commissioner) c. Alberta Teachers' Association*, 2011 CSC 61, [2011] 3 R.C.S. 654, par. 34).

[22] Or, la présomption adoptée dans *Alberta Teachers* n'est pas immuable. D'abord, notre Cour reconnaît depuis longtemps que certaines catégories de questions, même lorsqu'elles emportent l'interprétation d'une loi constitutive, sont susceptibles de contrôle selon la norme de la décision correcte (*Dunsmuir*, par. 58-61). Ensuite, elle affirme également qu'une analyse contextuelle peut « écarter la présomption d'assujettissement à la norme de la raisonnabilité de la décision qui résulte d'une interprétation de la loi constitutive » (*Rogers Communications Inc. c. Société canadienne des auteurs, compositeurs et éditeurs de musique*, 2012 CSC 35, [2012] 2 R.C.S. 283, par. 16). L'appelante emprunte les deux avenues pour nous presser d'appliquer la norme de la décision correcte. Je propose d'examiner d'abord sa deuxième prétention puisqu'elle peut être écartée rapidement.

(2) Non-réfutation de la présomption d'application de la norme de la raisonnabilité

[23] L'appelante prétend que la présomption d'application de la norme de la raisonnabilité est réfutée. Elle s'appuie sur le récent arrêt *Rogers*, où notre Cour conclut qu'il convient d'appliquer la norme de la décision correcte étant donné que, suivant le régime législatif en cause, tant un tribunal administratif qu'une cour de justice ont compétence concurrente en première instance pour interpréter la loi applicable.

[24] Or, la présente affaire est différente. Comme le dit clairement le juge Rothstein dans l'arrêt *Rogers*, le fait qu'un tribunal administratif et une cour de justice « peuvent être respectivement appelé[s] à statuer en première instance sur un même point de droit [. . .] a pour effet d'écarter la présomption selon laquelle la décision [. . .]

— 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.

(3) The Question Does Not Fall Into an Exceptional Category

[25] I return then to the appellant's first argument — that the question presented falls into an exceptional category warranting "correctness" review. Post-*Dunsmuir*, it has become fashionable for counsel to argue that the question before an administrative decision maker falls into one of the few recognized exceptional categories. One wave of cases focuses on whether the question raised is a "true" question of *vires* or jurisdiction; see *Alberta Teachers*, at paras. 37-38 (citing various cases). In that case, the Court expressed serious reservations about whether such questions can be distinguished as a separate category of questions of law, but ultimately left the door open to the possibility (para. 34).[3]

[26] A second wave — the one which the appellant now rides — focuses on "general questions of law that are both of central importance to the legal system as a whole and outside the adjudicator's specialized area of expertise" (*Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2011 SCC 53, [2011] 3 S.C.R. 471 ("*Mowat*"), at para. 22, referring to *Dunsmuir*, at para. 60); see also *Nor-Man Regional Health Authority Inc. v. Manitoba Association of Health Care Professionals*, 2011 SCC 59, [2011] 3 S.C.R. 616; *Communications, Energy and Paperworkers*

3 I note that the U.S. Supreme Court has recently shut this door; see *City of Arlington, Texas v. Federal Communications Commission*, 133 S. Ct. 1863 (2013) ("the distinction between 'jurisdictional' and 'nonjurisdictional' interpretations is a mirage" because "a separate category of 'jurisdictional' interpretations does not exist" (pp. 1868 and 1874)).

est assujettie à la norme de la raisonnabilité » (par. 15 (je souligne)). En l'espèce, le point de droit réside dans l'interprétation de l'art. 159 eu égard à son application à l'al. 161(6)d), et son examen en première instance ressortit *seulement* à la Commission. Il est donc impossible que la question en litige donne lieu à des interprétations divergentes, de sorte que le raisonnement qui sous-tend *Rogers* ne vaut pas.

(3) Non-appartenance de la question à une catégorie exceptionnelle

[25] Je reviens maintenant à la première prétention de l'appelante, à savoir que la question en litige appartient à une catégorie exceptionnelle qui justifie l'application de la norme de la « décision correcte ». Depuis l'arrêt *Dunsmuir*, les avocats font couramment valoir que la question soumise à un décideur administratif appartient à l'une des quelques catégories exceptionnelles reconnues. Une première vague jurisprudentielle s'attache à la question de savoir s'il s'agit d'une question touchant « véritablement » à la compétence; voir *Alberta Teachers*, par. 37-38 (citant diverses décisions). Dans cet arrêt, la Cour dit douter sérieusement que la question appartienne à une catégorie distincte de questions de droit, mais elle admet finalement que ce puisse être le cas (par. 34)[3].

[26] Une deuxième vague jurisprudentielle — sur laquelle surfe maintenant l'appelante — s'attache aux « questions de droit générales qui revêtent une importance capitale pour le système juridique dans son ensemble et qui sont étrangères au domaine d'expertise de l'organisme juridictionnel » (*Canada (Commission canadienne des droits de la personne) c. Canada (Procureur général)*, 2011 CSC 53, [2011] 3 R.C.S. 471 (« *Mowat* »), par. 22, renvoyant à *Dunsmuir*, par. 60); voir également *Nor-Man Regional Health Authority Inc. c. Manitoba Association of Health Care Professionals*, 2011 CSC 59, [2011]

3 Signalons que la Cour suprême des É.-U. a récemment exclu cette possibilité; voir *City of Arlington, Texas c. Federal Communications Commission*, 133 S. Ct. 1863 (2013) ([TRADUCTION] « la distinction entre l'interprétation qui touche à la compétence et celle qui n'y touche pas est illusoire », car il n'existe pas de « catégorie distincte d'interprétations touchant à la compétence » (p. 1868 et 1874)).

Union of Canada, Local 30 v. Irving Pulp & Paper, Ltd., 2013 SCC 34, [2013] 2 S.C.R. 458. In each of these cases, this Court unanimously found that the question presented did not fall into this exceptional category — and I would do so again here.

[27] The logic underlying the "general question" exception is simple. As Bastarache and LeBel JJ. explained in *Dunsmuir*, "[b]ecause of their impact on the administration of justice as a whole, such questions require uniform and consistent answers" (para. 60). Or, as LeBel and Cromwell JJ. put it in *Mowat*, correctness review for such questions "safeguard[s] a basic consistency in the fundamental legal order of our country" (para. 22).

[28] Here, the appellant's arguments in support of her contention that this case falls into the general question category fail for three reasons. First, although I agree that limitation periods, as a conceptual matter, are *generally* of central importance to the fair administration of justice, it does not follow that the Commission's interpretation of *this* limitation period must be reviewed for its correctness. The meaning of "the events" in s. 159 is a nuts-and-bolts question of statutory interpretation confined to a particular context. Indeed, the arguably complex legal doctrines such as discoverability that the appellant says demand correctness review (see A.R.F., at para. 9) have been specifically *excluded* from any application to s. 159. The appellant recognizes this fact elsewhere in her submissions (A.F., at para. 25, citing *British Columbia Securities Commission v. Bapty*, 2006 BCSC 638 (CanLII), at para. 28). Accordingly, there is no question of law of central importance to the legal system as a whole, let alone one that falls outside the Commission's specialized area of expertise.

3 R.C.S. 616; *Syndicat canadien des communications, de l'énergie et du papier, section locale 30 c. Pâtes & Papier Irving, Ltée*, 2013 CSC 34, [2013] 2 R.C.S. 458. Dans chacun de ces arrêts, notre Cour conclut unanimement que la question soulevée n'appartient pas à cette catégorie exceptionnelle et, en l'espèce, je suis enclin à faire de même.

[27] Le raisonnement qui sous-tend l'exception prévue à l'égard de la « question de droit générale » est simple. Comme l'expliquent les juges Bastarache et LeBel dans *Dunsmuir*, « [p]areille question doit être tranchée de manière uniforme et cohérente étant donné ses répercussions sur l'administration de la justice dans son ensemble » (par. 60). Autrement dit, comme le précisent les juges LeBel et Cromwell dans *Mowat*, cette question est assujettie à la norme de la décision correcte « dans un souci de cohérence de l'ordre juridique fondamental du pays » (par. 22).

[28] Toutefois, les arguments invoqués par l'appelante pour soutenir que la question considérée en l'espèce appartient à la catégorie des questions de droit générales ne peuvent être retenus, et ce, pour trois raisons. Premièrement, même si je conviens que, sur le plan théorique, les délais de prescription revêtent *généralement* une importance capitale aux fins d'une saine administration de la justice, il ne s'ensuit pas que l'interprétation par la Commission du délai applicable *en l'espèce* doit être contrôlée selon la norme de la décision correcte. Ainsi, le sens du terme « l'événement » employé à l'art. 159 constitue un point technique d'interprétation législative dans un contexte très précis. En effet, les notions juridiques que l'on peut qualifier de complexes (telle la possibilité de découvrir le préjudice) et qui, selon l'appelante, commandent la norme de la décision correcte (voir m.r.a., par. 9) sont expressément *exclues* aux fins de l'application de l'art. 159. L'appelante le reconnaît dans d'autres éléments de sa plaidoirie (m.a., par. 25, citant *British Columbia Securities Commission c. Bapty*, 2006 BCSC 638 (CanLII), par. 28). Par conséquent, il n'y a pas de question de droit qui revêt une importance capitale pour le système juridique dans son ensemble, et encore moins de question qui est étrangère au domaine d'expertise de la Commission.

[29] Second, while it is true that reasonableness review in this context necessarily entails the possibility that other provincial and territorial securities commissions may arrive at different interpretations of their own statutory limitation periods, I cannot agree that such a result provides a basis for correctness review — and thus judicially mandated "consisten[cy] . . . across the country" (A.R.F., at para. 13). No one disputes that each of the provincial and territorial legislatures can enact entirely different limitation periods. Indeed, one of them has; see Manitoba's *Securities Act*, C.C.S.M., c. S50, s. 137 (providing an eight-year period, instead of the six-year norm). By the same token, it may be the case that provincial and territorial securities regulators come to differing (but nonetheless reasonable) interpretations of those limitation periods (though that has yet to occur). If there is a problem with such a hypothetical outcome, it is a function of our Constitution's federalist structure — not the administrative law standards of review.

[30] Third, and most significantly, the problem with the appellant's argument is her narrow view of the Commission's expertise. In particular, the appellant argues that limitation periods "are not in themselves part of substantive securities regulation, the area of the [Commission's] specialised expertise" (A.R.F., at para. 9). The argument presupposes a neat division between what one might call a "lawyer's question" and a "bureaucrat's question". The logic seems to be that because the meaning of "the events" in s. 159 cannot possibly require any great technical expertise — there is, after all, no specialized "bureaucratese" to interpret — why should the matter be left to the Commission?

[31] While such a view may have carried some weight in the past, that is no longer the case. The modern approach to judicial review recognizes that courts "may not be as well qualified as a given agency to provide interpretations of that agency's constitutive statute that make sense given the broad policy

[29] Deuxièmement, il est vrai que l'application de la norme de la raisonnabilité dans ce contexte suppose forcément que d'autres commissions provinciales ou territoriales des valeurs mobilières puissent interpréter différemment leurs dispositions établissant un délai de prescription. Mais je ne saurais convenir qu'une telle éventualité justifie l'application de la norme de la décision correcte et, par conséquent, une [TRADUCTION] « uniformité [imposée par les tribunaux] à la grandeur du pays » (m.r.a., par. 13). Nul ne conteste qu'un législateur provincial ou territorial peut prévoir un délai de prescription différent de ceux applicables dans les autres ressorts. C'est d'ailleurs ce que fait l'un d'eux; voir l'art. 137 de la *Loi sur les valeurs mobilières* du Manitoba, C.P.L.M., ch. S50 (délai de huit ans au lieu des six ans habituels). Dans le même ordre d'idées, il se peut que les organismes provinciaux et territoriaux de réglementation des valeurs mobilières interprètent différemment (mais raisonnablement) ces délais de prescription (même si ce n'est encore jamais arrivé). Toute difficulté liée à ce risque éventuel tient à notre Constitution de type fédéral, et non aux normes de contrôle en droit administratif.

[30] Troisièmement, la principale faille de l'argumentaire de l'appelante réside dans la conception étroite de l'expertise de la Commission qui le sous-tend. L'appelante prétend notamment que le délai de prescription [TRADUCTION] « ne fait pas partie en soi des dispositions substantielles sur les valeurs mobilières et échappe au domaine d'expertise de la [Commission] » (m.r.a., par. 9). Or, le bien-fondé de sa prétention suppose une distinction nette entre ce qui relève du juriste et ce qui relève du fonctionnaire. Parce que l'interprétation du terme « l'événement » employé à l'art. 159 ne saurait exiger de grandes connaissances d'ordre technique — après tout, il ne s'agit pas d'un terme « administratif » —, il semble logique de se demander pourquoi il faudrait confier à la Commission la tâche d'en déterminer le sens.

[31] Bien qu'un tel point de vue ait pu avoir un certain fondement dans le passé, ce n'est plus le cas. L'approche moderne en matière de contrôle judiciaire reconnaît qu'une cour de justice « [n'est] peut-être pas aussi bien qualifié[e] qu'un organisme administratif déterminé pour donner à la loi

context within which that agency must work" (*National Corn Growers Assn. v. Canada (Import Tribunal)*, [1990] 2 S.C.R. 1324, at p. 1336, *per* Wilson J.; see also *Council of Canadians with Disabilities v. VIA Rail Canada Inc.*, 2007 SCC 15, [2007] 1 S.C.R. 650, at para. 92; *Mowat*, at para. 25).

[32] In plain terms, because legislatures do not always speak clearly and because the tools of statutory interpretation do not always guarantee a single clear answer, legislative provisions will on occasion be susceptible to multiple *reasonable* interpretations (*Dunsmuir*, at para. 47; see also *Construction Labour Relations v. Driver Iron Inc.*, 2012 SCC 65, [2012] 3 S.C.R. 405). Indeed, that is the case here, as I will explain in a moment. The question that arises, then, is *who gets to decide among these competing reasonable interpretations?*

[33] The answer, as this Court has repeatedly indicated since *Dunsmuir*, is that the resolution of unclear language in an administrative decision maker's home statute is usually best left to the decision maker. That is so because the choice between multiple reasonable interpretations will often involve policy considerations that we presume the legislature desired *the administrative decision maker* — not the courts — to make. Indeed, the exercise of that interpretative discretion is part of an administrative decision maker's "expertise".

B. *The Commission's Interpretation of Section 159 Was Reasonable*

(1) Overview

(a) *The Appellant's Position*

[34] In a nutshell, the appellant argues that s. 161(6) merely "codifies the [Commission's] already-existing ability to rely on convictions, findings, orders, or agreements as *evidence* of a person's conduct contrary to the public interest" (A.F.,

constitutive de cet organisme des interprétations qui ont du sens compte tenu du contexte des politiques générales dans lequel doit fonctionner cet organisme » (*National Corn Growers Assn. c. Canada (Tribunal des importations)*, [1990] 2 R.C.S. 1324, p. 1336, la juge Wilson; voir également *Conseil des Canadiens avec déficiences c. VIA Rail Canada Inc.*, 2007 CSC 15, [2007] 1 R.C.S. 650, par. 92; *Mowat*, par. 25).

[32] En clair, une disposition législative fera parfois l'objet de plusieurs interprétations *raisonnables*, car le législateur ne s'exprime pas toujours de manière limpide et les moyens d'interprétation législative ne garantissent pas toujours l'obtention d'une seule solution précise (*Dunsmuir*, par. 47; voir également *Construction Labour Relations c. Driver Iron Inc.*, 2012 CSC 65, [2012] 3 R.C.S. 405). Tel est effectivement le cas en l'espèce, comme je l'explique ci-après. Il faut donc se demander *à qui il appartient de choisir entre ces interprétations divergentes raisonnables*.

[33] Comme l'a maintes fois rappelé notre Cour depuis l'arrêt *Dunsmuir*, mieux vaut généralement laisser au décideur administratif le soin de clarifier le texte ambigu de sa loi constitutive. La raison en est que le choix d'une interprétation parmi plusieurs qui sont raisonnables tient souvent à des considérations de politique générale dont on présume que le législateur a voulu confier la prise en compte *au décideur administratif* plutôt qu'à une cour de justice. L'exercice de ce pouvoir discrétionnaire d'interprétation relève en effet de l'« expertise » du décideur administratif.

B. *Caractère raisonnable de l'interprétation de l'art. 159 par la Commission*

(1) Aperçu

a) *La thèse de l'appelante*

[34] L'appelante prétend en somme que le par. 161(6) ne fait que [TRADUCTION] « légaliser la possibilité qu'avait déjà la [Commission] de prendre appui sur une déclaration de culpabilité, une conclusion, une ordonnance ou un règlement pour

at para. 40 (emphasis in original)). The law is clear that the Commission could — and did — issue reciprocal orders using its existing power under s. 161(1) on the strength of factual findings in other jurisdictions prior to the introduction of s. 161(6); see, e.g., *Woods (Re)*, 1997 LNBCSC 11 (QL), at p. 5 (where the Commission relied on "the findings of fact and law of the Ontario courts, and the enforcement orders made by the Ontario Securities Commission"); *Seto (Re)*, 2006 BCSECCOM 569 (CanLII), at para. 4 (where the Commission drew the facts "solely from the decision and order of the [Alberta Securities Commission] and the judgment of the Alberta Provincial Court").

[35] In those earlier cases, "the events" meant the underlying misconduct — and no one suggests otherwise. As such, the Commission's choice to rely on the "procedural shortcut" reflected in s. 161(6)(d) does not change the nature of the proceedings such that the *agreement* becomes *the event* (A.F., at para. 40). Rather, because s. 161(6)(d) must be fused with s. 161(1), the proceedings remain s. 161(1) proceedings — and "the events" must thus remain the underlying misconduct.

(b) *The Respondent's Position*

[36] The respondent says that the appellant's argument is untenable because the plain wording of s. 161(6) says nothing about decisions, orders, or settlement agreements being admissible as "evidence". Rather, "the provisions empower the Commission to make an order in specific circumstances (*i.e.*, if a person is subject to another regulator's order or has agreed to be subject to sanctions)" (R.F., at para. 53). Because securities investigations do not always conclude within the six-year window, the purpose of s. 161(6)(d) would be undermined if the Commission were "barred from making an order in any case where the extra-provincial proceeding concludes more than six

prouver que la conduite d'une personne est contraire à l'intérêt public » (m.a., par. 40 (en italique dans l'original)). Il est clairement établi en droit que, avant l'adoption du par. 161(6), la Commission pouvait rendre — et a effectivement rendu — des ordonnances réciproques dans l'exercice du pouvoir que lui conférait le par. 161(1), sur la foi de conclusions de fait tirées dans d'autres ressorts (voir, p. ex., *Woods (Re)*, 1997 LNBCSC 11 (QL), p. 5, où la Commission s'appuie sur [TRADUCTION] « les conclusions de fait et de droit des cours de justice de l'Ontario et les ordonnances d'exécution de la Commission des valeurs mobilières de l'Ontario », et *Seto (Re)*, 2006 BCSECCOM 569 (CanLII), par. 4, où la Commission établit les faits [TRADUCTION] « uniquement à partir de la décision et de l'ordonnance de l'[Alberta Securities Commission] et du jugement de la Cour provinciale de l'Alberta »).

[35] Dans ces décisions antérieures, le terme « l'événement » s'entendait de l'inconduite en cause, et nul ne le conteste. Ainsi, le choix de la Commission de se servir du « raccourci procédural » offert à l'al. 161(6)d) ne change pas la nature de l'instance de telle sorte que le *règlement* devienne *l'événement* (m.a., par. 40). Au contraire, comme l'al. 161(6)d) doit s'appliquer de pair avec le par. 161(1), l'instance demeure fondée sur le par. 161(1), et les mots « l'événement » continuent donc de s'entendre de l'inconduite en cause.

b) *La thèse de l'intimé*

[36] Pour l'intimé, la prétention de l'appelante ne peut être retenue car aucun élément du libellé clair du par. 161(6) n'indique que les décisions, les ordonnances ou les règlements sont admissibles comme « éléments de preuve ». Au contraire, [TRADUCTION] « la disposition habilite la Commission à rendre une ordonnance dans certaines situations précises lorsqu'une personne est visée par l'ordonnance d'un autre organisme de réglementation ou qu'elle a accepté de faire l'objet de sanctions » (m.i., par. 53). Étant donné que, dans le domaine des valeurs mobilières, une enquête ne prend pas toujours fin avant l'expiration du délai de six ans, l'objectif de l'al. 161(6)d) serait compromis

years after the date of the wrongdoer's misconduct" (R.F., at para. 84). Put simply, on the appellant's interpretation, the limitation period could expire before the event referred to in s. 161(6)(d) ever occurs — and that would all but defeat the purpose of the provision.

si la Commission [TRADUCTION] « ne pouvait plus rendre d'ordonnance dès le moment où une instance extraprovinciale n'est pas menée à terme au plus tard six ans après l'inconduite » (m.i., par. 84). Plus simplement, selon l'interprétation de l'appelante, le délai de prescription pourrait expirer avant que l'événement visé à l'al. 161(6)d) ne se produise, ce qui contrecarrerait dans les faits l'objectif de la disposition.

(c) *The Choice Between the Two Interpretations*

c) *Le choix entre les deux interprétations*

[37] For the reasons that follow, I conclude that both interpretations are reasonable. Here, the statutory language is less than crystal clear. Or, as Professor Willis once put it, "the words are ambiguous enough to induce two people to spend good money in backing two opposing views as to their meaning" (J. Willis, "Statute Interpretation in a Nutshell" (1938), 16 *Can. Bar Rev.* 1, at pp. 4-5, cited in *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559, at para. 30).

[37] Pour les motifs qui suivent, j'estime que les deux interprétations sont raisonnables. Le libellé de la loi n'est pas parfaitement limpide. Comme le dit le professeur Willis, [TRADUCTION] « le texte est suffisamment ambigu pour inciter deux personnes à dépenser des sommes considérables pour faire valoir deux interprétations divergentes » (J. Willis, « Statute Interpretation in a Nutshell » (1938), 16 *R. du B. can*. 1, p. 4-5, cité dans *Bell ExpressVu Limited Partnership c. Rex*, 2002 CSC 42, [2002] 2 R.C.S. 559, par. 30).

[38] It will not always be the case that a particular provision permits multiple reasonable interpretations. Where the ordinary tools of statutory interpretation lead to a single reasonable interpretation and the administrative decision maker adopts a different interpretation, its interpretation will necessarily be unreasonable — no degree of deference can justify its acceptance; see, e.g., *Dunsmuir*, at para. 75; *Mowat*, at para. 34. In those cases, the "range of reasonable outcomes" (*Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339, at para. 4) will necessarily be limited to a single reasonable interpretation — and the administrative decision maker must adopt it.

[38] Une disposition ne se prête pas toujours à plusieurs interprétations raisonnables. Lorsque les méthodes habituelles d'interprétation législative mènent à une seule interprétation raisonnable et que le décideur administratif en retient une autre, celle-ci est nécessairement déraisonnable, et nul droit à la déférence ne peut justifier sa confirmation (voir, p. ex., *Dunsmuir*, par. 75; *Mowat*, par. 34). Dans ce cas, les « issues raisonnables possibles » (*Canada (Citoyenneté et Immigration) c. Khosa*, 2009 CSC 12, [2009] 1 R.C.S. 339, par. 4) se limitent nécessairement à une seule, que le décideur administratif doit adopter.

[39] But, as I say, this is not one of those clear cases. As between the two possible interpretations put forward with respect to the meaning of s. 159 as it applies to s. 161(6)(d), both find some support in the text, context, and purpose of the statute. In a word, both interpretations are *reasonable*. The litmus test, of course, is that if the Commission had adopted the other interpretation — that is, if the Commission had agreed with the appellant —

[39] Mais, je le répète, nous ne sommes pas saisis de l'un de ces cas clairs. Les deux interprétations possibles de l'art. 159 avancées eu égard à son application à l'al. 161(6)d) trouvent un certain appui dans le texte, le contexte et l'objet de la loi. En un mot, les deux interprétations sont *raisonnables*. Bien entendu — et là réside le critère décisif —, si la Commission avait retenu l'autre interprétation et donné raison à l'appelante, j'ai peine à imaginer

I am hard-pressed to conclude that we would have rejected its decision as unreasonable.

[40] The bottom line here, then, is that the Commission holds the interpretative upper hand: under reasonableness review, we defer to *any* reasonable interpretation adopted by an administrative decision maker, *even if* other reasonable interpretations may exist. Because the legislature charged the administrative decision maker rather than the courts with "administer[ing] and apply[ing]" its home statute (*Pezim*, at p. 596), it is the decision maker, first and foremost, that has the discretion to resolve a statutory uncertainty by adopting any interpretation that the statutory language can reasonably bear. Judicial deference in such instances is itself a principle of modern statutory interpretation.

[41] Accordingly, the appellant's burden here is not only to show that her competing interpretation is reasonable, but also that the Commission's interpretation is *unreasonable.* And that she has not done. Here, the Commission, with the benefit of its expertise, chose the interpretation it did. And because that interpretation has not been shown to be an unreasonable one, there is no basis for us to interfere on judicial review — even in the face of a competing reasonable interpretation.

(2) Ordinary Meaning

[42] Beginning with the ordinary meaning of "the events", on the surface it would appear that "the even[t]" giving rise to a proceeding under s. 161(6)(d) is the fact of "ha[ving] agreed with a securities regulatory authority" to be subject to regulatory action. By ordinary meaning, I refer simply to the "natural meaning which appears when the provision is simply read through" (*Canadian Pacific Air Lines Ltd. v. Canadian Air Line Pilots Assn.*, [1993] 3 S.C.R. 724, at p. 735). The ordinary meaning would thus appear to support the Commission's interpretation.

que nous aurions rejeté sa décision au motif qu'elle était déraisonnable.

[40] L'élément décisif en l'espèce réside dans le privilège dont jouit la Commission en matière d'interprétation : suivant la norme de la raisonnabilité, nous devons déférer à *toute* interprétation raisonnable du décideur administratif, *même lorsque* d'autres interprétations raisonnables sont possibles. Le législateur ayant confié au décideur administratif, et non à une cour de justice, le mandat d'« appliquer » sa loi constitutive (*Pezim*, p. 596), c'est avant tout à ce décideur qu'appartient le pouvoir discrétionnaire de lever toute incertitude législative en retenant une interprétation que permet raisonnablement le libellé de la disposition en cause. La déférence judiciaire constitue alors en elle-même un principe d'interprétation législative moderne.

[41] Partant, il incombe à l'appelante de prouver non seulement que son interprétation divergente est raisonnable, mais aussi que celle de la Commission est *déraisonnable*. Elle ne l'a pas fait. Forte de son expertise, la Commission a opté pour une interprétation en particulier. Et comme le caractère déraisonnable de celle-ci n'a pas été démontré, rien ne nous permet d'intervenir dans le cadre d'un contrôle judiciaire même si une autre interprétation raisonnable est possible.

(2) Sens ordinaire

[42] Considérons d'abord le sens ordinaire de « l'événement ». À première vue, l'événement qui donne lieu à l'instance fondée sur l'al. 161(6)d) paraît être le fait, pour la personne en cause, de [TRADUCTION] « [convenir] avec un organisme de réglementation des valeurs mobilières » de faire l'objet d'une mesure réglementaire. J'entends seulement par sens ordinaire le « sens naturel qui se dégage de la simple lecture de la disposition » (*Lignes aériennes Canadien Pacifique Ltée c. Assoc. canadienne des pilotes de lignes aériennes*, [1993] 3 R.C.S. 724, p. 735). Le sens ordinaire semble donc étayer l'interprétation de la Commission.

[43] However, satisfying oneself as to the ordinary meaning of the phrase "is not determinative and does not constitute the end of the inquiry" (*ATCO Gas and Pipelines Ltd. v. Alberta (Energy and Utilities Board)*, 2006 SCC 4, [2006] 1 S.C.R. 140, at para. 48). Although it is presumed that the ordinary meaning is the one intended by the legislature, courts are obliged to look at other indicators of legislative meaning as part of their work of interpretation. That is so because

> [w]ords that appear clear and unambiguous may in fact prove to be ambiguous once placed in their context. The possibility of the context revealing a latent ambiguity such as this is a logical result of the modern approach to interpretation.

(*Montréal (City) v. 2952-1366 Québec Inc.*, 2005 SCC 62, [2005] 3 S.C.R. 141, at para. 10)

[44] That possibility is realized here. Though the ordinary meaning seems apparent enough, digging deeper into the context and purpose of the provision casts some doubt on that conclusion — and introduces the possibility of another reasonable interpretation.

(3) Drafting History

[45] The limitation period in s. 159 predates the addition of s. 161(6) by roughly a decade. Before s. 161(6) was introduced by the *Securities Amendment Act, 2006*, S.B.C. 2006, c. 32, it was clear that s. 159 ran from the date of the underlying misconduct; see, e.g., *Dennis (Re)*, 2005 BCSECCOM 65, 2004 LNBCSC 705 (QL), at para. 38; *Bapty*, at para. 28. As mentioned, the parties do not contend otherwise.

[46] It was only with the addition of s. 161(6) that the start date for the limitations clock became unclear. Given that the legislature chose not to change the wording of s. 159 after it added s. 161(6), it stands to reason that the legislature intended "the events" in s. 159 to continue to refer to the misconduct at issue, regardless of the addition of s. 161(6). In other words, the original meaning of "the events" did not change overnight. And

[43] Toutefois, arrêter le sens ordinaire du terme « n'est pas déterminant et ne met pas fin à l'analyse » (*ATCO Gas and Pipelines Ltd. c. Alberta (Energy and Utilities Board)*, 2006 CSC 4, [2006] 1 R.C.S. 140, par. 48). Même si le sens ordinaire est présumé être celui voulu par le législateur, une cour de justice doit tenir compte d'autres éléments pour interpréter un texte législatif, et ce, pour la raison suivante :

> Des mots en apparence clairs et exempts d'ambiguïté peuvent, en fait, se révéler ambigus une fois placés dans leur contexte. La possibilité que le contexte révèle une telle ambiguïté latente découle logiquement de la méthode moderne d'interprétation.

(*Montréal (Ville) c. 2952-1366 Québec Inc.*, 2005 CSC 62, [2005] 3 R.C.S. 141, par. 10)

[44] Cette possibilité se réalise en l'espèce. Bien que le sens ordinaire semble assez manifeste, un examen approfondi du contexte de la disposition et de son objet suscite un certain doute quant à cette interprétation et permet d'envisager l'existence d'une autre interprétation raisonnable.

(3) L'historique de la disposition

[45] Le délai de prescription prévu à l'art. 159 existait depuis environ 10 ans lors de l'adjonction du par. 161(6) en 2006 (*Securities Amendment Act, 2006*, S.B.C. 2006, ch. 32). Il ne faisait jusqu'alors aucun doute que ce délai commençait à courir à compter de l'inconduite reprochée (voir, p. ex., *Dennis (Re)*, 2005 BCSECCOM 65, 2004 LNBCSC 705 (QL), par. 38; et *Bapty*, par. 28). Rappelons que les parties en conviennent.

[46] Ce n'est qu'avec l'adjonction du par. 161(6) que le moment auquel débutait la computation du délai est devenu incertain. Comme le législateur a décidé de ne pas modifier l'art. 159 après cette adjonction, on peut seulement lui prêter l'intention que les mots « l'événement » employés à l'art. 159 continuent de s'entendre de l'inconduite en cause. Autrement dit, le sens initial de « l'événement » n'a pas changé du jour au lendemain. Et comme

as Dickson J. (as he then was) observed, "words must be given the meanings they had at the time of enactment" (*Perka v. The Queen*, [1984] 2 S.C.R. 232, at p. 265, citing E. A. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 163). If one accepts this line of reasoning, it lends support to the appellant's interpretation.

[47] On the other hand, one could argue that the original meaning of "the events" never changed — all that did was what qualified as an "event" in a particular context. It is important to distinguish between these two concepts. As Professor Sullivan has explained, "even though the meaning of a word remains constant, the things or events that fall within its ambit may change dramatically over time" (R. Sullivan, *Sullivan on the Construction of Statutes* (5th ed. 2008), at p. 149; see also P.-A. Côté, in collaboration with S. Beaulac and M. Devinat, *The Interpretation of Legislation in Canada* (4th ed. 2011), at pp. 287-88). This argument, which lends support to the Commission's interpretation, is best illustrated by a contextual reading of s. 159, to which I now turn.

(4) The Provision Read in Context

[48] The use of the phrase "the events that give rise to the proceedings" in s. 159 is relatively open-ended, as can be seen when contrasted with the language used in other limitations provisions in the *Act*. For example, s. 140(a), which provides for limitation periods for actions for rescission, speaks of "180 days after the date of the transaction that gave rise to the cause of action". Section 140.94, which concerns actions related to secondary market disclosure, speaks of "3 years after the date on which the document containing the misrepresentation was first released".

[49] The distinctive diction of s. 159 arguably makes sense in context. Unlike ss. 140 and 140.94, which refer to specific proceedings in the *Act*, s. 159 is a residual limitation provision applicable to *all* other proceedings. Thus, it stands to reason that "the

l'a signalé le juge Dickson (plus tard Juge en chef), « les termes [. . .] doivent recevoir le sens qu'ils avaient au moment de [l']adoption » de la loi (*Perka c. La Reine*, [1984] 2 R.C.S. 232, p. 265, citant E. A. Driedger, *Construction of Statutes* (2e éd. 1983), p. 163). Ce raisonnement, si on y adhère, appuie l'interprétation de l'appelante.

[47] En revanche, on peut prétendre que le sens initial de « l'événement » n'a jamais changé, la modification ayant uniquement visé ce qui constituait « l'événement » dans un contexte particulier. Il importe d'ailleurs de distinguer les deux. Comme l'explique la professeure Sullivan, [TRADUCTION] « même si le sens d'un terme demeure inchangé, les choses ou les événements qu'il vise peuvent changer radicalement avec le temps » (R. Sullivan, *Sullivan on the Construction of Statutes* (5e éd. 2008), p. 149; voir également P.-A. Côté, avec la collaboration de S. Beaulac et M. Devinat, *Interprétation des lois* (4e éd. 2009), p. 310-311). La validité de cette prétention favorable à l'interprétation de la Commission est d'autant plus évidente lorsque l'on considère l'art. 159 dans son contexte, ce que je fais ci-après.

(4) Interprétation de la disposition dans son contexte

[48] Le libellé [TRADUCTION] « l'événement qui [. . .] donne lieu [à l'instance] » figurant à l'art. 159 est assez large par comparaison à celui d'autres dispositions de la *Loi* qui établissent un délai de prescription. Par exemple, l'al. 140a), qui prévoit le délai pour intenter une action en annulation, accorde « 180 jours à compter de l'opération qui fait naître la cause d'action ». L'article 140.94, portant sur l'action relative à l'obligation d'information sur le marché secondaire, précise que le délai est de « 3 ans à compter de la publication initiale du document qui renferme la déclaration inexacte ».

[49] On peut soutenir que la formulation particulière de l'art. 159 fait sens dans le contexte. Contrairement aux art. 140 et 140.94, qui renvoient à des actions précises prévues par la *Loi*, l'art. 159 établit par défaut le délai de la prescription pour

events" is a deliberately open-ended phrase because it must be capable of applying to a variety of different contexts. As applied to s. 161(1)(a)(i), "the events" read in its ordinary sense means the date of the misconduct whereby a person was "contravening . . . a provision of [the] Act". That, of course, was the interpretation as understood prior to the introduction of s. 161(6). But it is also easy to see how, as applied to s. 161(6)(a), "the events" can mean the date the person "has been convicted . . . of an offence". And as applied to s. 161(6)(d), the provision at issue here, "the events" can mean the date the person "has agreed with a securities regulatory authority [. . .] to be subject to sanctions, conditions, restrictions or requirements".

[50] What the appellant asks the Commission to do is to interpret "the events that give rise to the proceedings" restrictively as "the *misconduct* that gives rise to the proceedings". Indeed, that is essentially how Manitoba's general limitation provision reads; see *Securities Act*, s. 137 ("the proceedings to prosecute a person or company for an offence under this Act shall not be commenced after eight years after the date on which the offence was committed"). It cannot be said, however, that a contextual reading of s. 159 points toward such a restrictive interpretation. Rather, a flexible reading of "the events" — capable of adapting to the various provisions to which it is applied, including new provisions added over time, such as s. 161(6)(d) itself — makes more sense in context. Accordingly, and setting aside whatever quibbles one might have with the significance of the provision's drafting history, a contextual reading of s. 159 supports the Commission's interpretation.

(5) The Nature of Secondary Proceedings

[51] For better or worse, securities regulation in Canada remains largely a matter of provincial and territorial jurisdiction. However, given the reality of

toute autre instance. Il est donc logique que le législateur ait voulu conférer un sens assez large au terme « l'événement » afin qu'il puisse s'appliquer à différentes situations. Pour les besoins du sous-al. 161(1)a)(i), le sens ordinaire de « l'événement » s'entend de l'inconduite et renvoie au jour où la personne [TRADUCTION] « a contrevenu [. . .] à une disposition de [la] Loi ». Telle était assurément l'interprétation qui avait cours avant l'adjonction du par. 161(6). Mais on constate aussi aisément que, pour l'application de l'al. 161(6)a), « l'événement » peut renvoyer au jour où la personne [TRADUCTION] « a été déclarée coupable [. . .] d'une infraction ». Pour les besoins de l'al. 161(6)d) — la disposition en cause dans la présente affaire —, « l'événement » peut s'entendre du moment où la personne « a convenu avec un organisme de réglementation des valeurs mobilières [. . .] de faire l'objet de sanctions, de conditions, de restrictions ou d'exigences ».

[50] L'appelante demande à la Commission de ne voir dans « l'événement qui [. . .] donne lieu [à l'instance] » que « *l'inconduite* qui donne lieu à l'instance ». C'est d'ailleurs essentiellement dans cette optique qu'est rédigée la disposition générale manitobaine sur la prescription : voir la *Loi sur les valeurs mobilières*, art. 137 (« la poursuite contre une personne ou une compagnie pour infraction à la présente loi se prescrit par huit ans à compter de la date à laquelle l'infraction a été commise »). Toutefois, on ne saurait affirmer qu'une interprétation contextuelle de l'art. 159 milite en faveur de cette interprétation restrictive. En effet, il est plus logique, dans le contexte, d'interpréter « l'événement » avec souplesse, de manière que le terme puisse s'adapter aux diverses dispositions auxquelles l'article s'applique, y compris celles ajoutées au fil du temps, comme l'al. 161(6)d). Par conséquent, et sans égard aux désaccords éventuels sur l'importance de l'historique de la disposition, l'interprétation contextuelle de l'art. 159 appuie l'interprétation retenue par la Commission.

(5) La nature de l'instance secondaire

[51] Pour le meilleur ou pour le pire, au Canada, la réglementation des valeurs mobilières relève largement de la compétence des provinces et des territoires.

interprovincial, if not international, capital markets, "[t]here can be no disputing the indispensable nature of interjurisdictional co-operation among securities regulators today" (*Global Securities Corp. v. British Columbia (Securities Commission)*, 2000 SCC 21, [2000] 1 S.C.R. 494, at para. 27). That is where provisions such as s. 161(6)(d) come in.

[52] In 2004, recognizing the inefficiencies of the existing framework, all the provinces and territories (except Ontario, for reasons that are not relevant here) signed a memorandum of understanding ("MOU"); see *A Provincial/Territorial Memorandum of Understanding Regarding Securities Regulation* (online). The MOU set up a "passport system" for securities regulation, which provides a single window of access to market participants. Under this passport system,

> [h]ost jurisdictions will rely on the securities regulator in the primary jurisdiction of a market participant for the enforcement of the requirements of securities laws applicable to those areas covered by the passport system.
>
> - The securities regulator in a host jurisdiction that receives a complaint about a market participant will conduct a preliminary assessment of the complaint and refer the complaint along with their findings and the documents compiled to the primary jurisdiction for further investigation and, if appropriate, enforcement action.
>
> - The host securities regulator will await the outcome of the primary securities regulator's investigation and will undertake its own investigation and, if appropriate, enforcement action if it is in the public interest to do so or if the primary securities regulator has referred the matter back to the host securities regulator for further action. [Emphasis added; para. 5.6.]

[53] Not long after the MOU was signed, the B.C. legislature introduced legislation to implement its provisions, including the secondary proceeding

Toutefois, étant donné la nature interprovinciale, voire internationale, des marchés financiers, « [i]l ne fait pas de doute que, de nos jours, la coopération des organismes de réglementation de divers ressorts est indispensable » (*Global Securities Corp. c. Colombie-Britannique (Securities Commission)*, 2000 CSC 21, [2000] 1 R.C.S. 494, par. 27). C'est dans cette optique que sont adoptées des dispositions comme l'al. 161(6)d).

[52] En 2004, reconnaissant les éléments d'inefficacité du cadre législatif d'alors, toutes les provinces et tous les territoires (sauf l'Ontario, pour des raisons qui ne sont pas pertinentes en l'espèce) ont signé le *Protocole d'entente provincial-territorial sur la réglementation des valeurs mobilières* (en ligne) (« protocole »). Le protocole établit, aux fins de la réglementation des valeurs mobilières, un « régime de passeport » doté d'un guichet unique pour les participants du marché :

> Les juridictions hôtes s'en remettront à l'organisme de réglementation des valeurs mobilières de la juridiction principale du participant du marché quant à l'application des dispositions de la législation sur les valeurs mobilières relatives aux éléments concernés par le régime de passeport.
>
> - L'organisme de réglementation des valeurs mobilières d'une juridiction hôte qui reçoit une plainte au sujet d'un participant du marché effectuera une évaluation préliminaire, puis adressera la plainte, ainsi que ses observations et les documents pertinents, à l'organisme de réglementation principal, qui poursuivra l'enquête et prendra des mesures en conséquence, s'il y a lieu.
>
> - L'organisme de réglementation des valeurs mobilières de la juridiction hôte attendra les résultats de l'enquête de l'organisme de réglementation principal pour effectuer ses propres vérifications et, s'il le juge nécessaire, prendra ses propres mesures s'il est dans l'intérêt public de le faire ou si l'organisme de réglementation principal renvoie l'affaire à l'organisme de réglementation de la juridiction hôte pour que des mesures soient prises. [Je souligne; par. 5.6.]

[53] Peu après la signature du protocole, le législateur de la C.-B. a proposé des mesures législatives en vue de mettre en œuvre ses dispositions, y

powers now found in s. 161(6); see Bill 20, *Securities Amendment Act, 2006*; Bill 28, *Securities Amendment Act, 2007*. Section 161(6)(d), of course, recognizes settlement agreements in other jurisdictions; other provisions speak to convictions for securities-related offences (s. 161(6)(a)), judicial findings as to securities laws (s. 161(6)(b)), and regulatory orders (s. 161(6)(c)).

[54] As a consequence of these legislative amendments, while the Commission cannot abrogate its responsibility to make its own determination as to whether an order is in the public interest, one could argue, as the respondent does, that s. 161(6) obviates the need for inefficient parallel and duplicative proceedings in British Columbia by expressly providing a new basis on which to initiate proceedings. In other words, s. 161(6) achieves the legislative goal of facilitating interprovincial cooperation by providing a triggering "event" *other than the underlying misconduct*. The corollary to this point must be the ability to actually rely on that triggering event — that is, the other jurisdiction's settlement agreement (or conviction or judicial finding or order, as the case may be) — in commencing a secondary proceeding. But the appellant's reading of s. 159 as it applies to s. 161(6) leads to the troublesome conclusion that the Commission could be time-barred from proceeding under this provision *before the triggering event even exists*.

[55] The appellant's response is that where there is a risk that the six-year limitation window could expire before the primary jurisdiction has completed its proceeding, British Columbia and every other secondary province and territory should initiate their own proceedings in reliance on s. 161(1) alone — or, in the case of another province or territory, their provincial or territorial equivalent of that section — with the possibility that s. 161(6) or its equivalent could be invoked

compris le pouvoir d'intenter une instance secondaire que confère désormais le par. 161(6) (voir le projet de loi 20 intitulé *Securities Amendment Act, 2006*, et le projet de loi 28 intitulé *Securities Amendment Act, 2007*). Bien entendu, l'al. 161(6)d) reconnaît le règlement intervenu dans un autre ressort; les autres alinéas visent la déclaration de culpabilité d'une infraction liée aux valeurs mobilières (al. 161(6)a)), les conclusions d'une cour de justice sur l'application des dispositions sur les valeurs mobilières (al. 161(6)b)) et l'ordonnance d'un organisme de réglementation (al. 161(6)c)).

[54] Par suite de cette modification législative, et bien que la Commission ne puisse renoncer à son pouvoir de décider elle-même si une ordonnance est dans l'intérêt public, on pourrait prétendre, comme le fait d'ailleurs l'intimé, que le par. 161(6) rend inutiles en Colombie-Britannique les instances parallèles et répétitives — d'où leur caractère inefficace — en offrant expressément un nouveau fondement à l'introduction d'une instance. En d'autres termes, le par. 161(6) réalise l'objectif législatif d'une coopération interprovinciale accrue en prévoyant un autre « événement » déclencheur *en sus de l'inconduite en cause*. Dès lors, pour engager une instance secondaire, il faut être en mesure d'invoquer effectivement pareil événement déclencheur, à savoir le règlement dans l'autre ressort (ou, selon le cas, la déclaration de culpabilité, le jugement ou l'ordonnance). Or, l'interprétation de l'art. 159 que préconise l'appelante pour les besoins du par. 161(6) mène à la conclusion embêtante que la prescription pourrait être opposable à toute démarche de la Commission fondée sur ce paragraphe *avant même que l'événement déclencheur ne se produise*.

[55] L'appelante réplique que dans les cas où le délai de prescription de six ans risque d'expirer avant la fin de l'instance engagée dans le ressort principal, la Colombie-Britannique et chacun des autres ressorts secondaires doivent introduire leur propre instance sur le fondement du seul par. 161(1) (ou, dans le cas des autres ressorts, de la seule disposition provinciale ou territoriale équivalente), sous réserve de la possibilité d'invoquer le par. 161(6) (ou la disposition équivalente) ultérieurement. De

later on. Of course, the implication of this approach is clear: the appellant says that s. 161(6) does not change anything with respect to the timing of when a secondary proceeding must begin.

[56] The facts of this case, however, illustrate how problematic the appellant's interpretation can prove in practice. Though the OSC was first alerted to the issues at Hucamp in 2001, it did not commence formal proceedings until 2005 (four years later). A settlement agreement was not reached until 2008 (a further three years later, and a full seven years after the last event of misconduct). No one suggests this lengthy period reflects any foot-dragging on the OSC's part. And yet, on the appellant's view, as the calendar turned to 2007, the B.C. Commission should have commenced its own proceeding under s. 161(1) so as to preserve its ultimate authority to make an order using both ss. 161(1) and 161(6)(d). If that had been done, the appellant seems to accept that the Commission could then have waited until the conclusion of the OSC's proceeding to make its actual order.

[57] The difficulty with the appellant's approach is that if each province and territory has to initiate proceedings before its limitations clock runs out — instead of relying on the outcome of the proceedings in the primary jurisdiction — overlapping cases would clog up the legal system and overburden the securities commissions. A multiplicity of simultaneous proceedings would also place a high burden on the target of the proceedings, who could well face multiple proceedings all across the country, all needing to be defended simultaneously.

[58] On the other hand, allowing secondary jurisdictions to use s. 161(6) such that they can wait until the *conclusion* of the primary proceeding avoids some of these complications. That can happen only if the secondary jurisdictions are allowed to begin their work (and their limitation clocks start ticking) once the original proceeding has actually concluded — and no earlier. As such, it can be said that *the very purpose of s. 161(6) is to provide a*

toute évidence, sa thèse suppose nettement que le par. 161(6) ne modifie en rien le délai dans lequel l'instance secondaire doit être engagée.

[56] Toutefois, les faits de la présente affaire montrent à quel point l'interprétation de l'appelante peut se révéler problématique dans la réalité. Bien que la CVMO ait été informée initialement des irrégularités chez Hucamp en 2001, elle n'a engagé l'instance qu'en 2005 (soit quatre ans plus tard). Le règlement n'est intervenu qu'en 2008 (encore trois ans plus tard, et sept années complètes après la dernière inconduite). Nul ne laisse entendre que ce long délai est imputable à quelque inaction de la CVMO. Et pourtant, à l'aube de l'année 2007, la Commission de la C.-B. aurait dû, selon l'appelante, se pourvoir aux termes du par. 161(1) afin de préserver son pouvoir ultime de rendre une ordonnance sur le fondement à la fois du par. 161(1) et de l'al. 161(6)d). Si elle l'avait fait, la Commission aurait alors pu — selon ce que l'appelante semble reconnaître — attendre la conclusion de l'instance de la CVMO avant de rendre sa propre ordonnance.

[57] La difficulté que pose l'interprétation de l'appelante est que si chacun des ressorts doit introduire une instance avant l'expiration de son délai de prescription — au lieu de s'en remettre à l'issue de l'instance dans le ressort principal —, le chevauchement des instances aura pour effet d'engorger le système de justice et de surcharger les commissions des valeurs mobilières. En outre, un lourd fardeau sera imposé aux personnes visées, car elles pourront alors faire l'objet de nombreuses instances introduites à la grandeur du pays et dans lesquelles elles devront se défendre simultanément.

[58] En revanche, permettre aux ressorts secondaires d'invoquer le par. 161(6) et d'attendre le *dénouement* de l'instance principale écarte certaines de ces complications. Cela n'est possible que s'il leur est permis d'entreprendre leurs démarches (et de faire ainsi en sorte que leurs délais de prescription commencent à courir) une fois que l'instance initiale a bel et bien été menée à terme, pas avant. Par conséquent, on peut affirmer que *l'objet*

new limitation clock. Unless it is interpreted in this manner, s. 161(6) is no solution to the challenges inherent in the decentralized structure of securities regulation in Canada.

[59] In the end, the Commission's interpretation is a reasonable one because it furthers the legislature's manifest goal of improving interprovincial cooperation. The appellant's interpretation, by contrast, fits uneasily with the broader indicators of legislative intent available to us. In reducing s. 161(6) to a belts-and-suspenders codification of what is already common practice, her interpretation does little to improve interprovincial cooperation. I do not say that the appellant's interpretation is inconsistent with such efforts — only that it does not further them to the same extent as the Commission's interpretation.

(6) The Purpose of Limitation Periods

[60] I would be wary of focussing only on the legislative purpose of secondary provisions while overlooking the legislative purpose of limitation periods. Instead, regard must also be had for the legislative purpose of both s. 161(6)(d) *and* s. 159.

[61] The appellant fears that the Commission's interpretation undermines two of the three purposes of limitation periods, namely, allowing for repose and encouraging diligence (*Novak v. Bond*, [1999] 1 S.C.R. 808, at para. 67). Most notable is the possibility that allowing the limitations clock to start with each new proceeding would allow a string of secondary proceedings, piggy-backing on each other, which could stretch for decades. We are told that "[w]ith twelve jurisdictions having such provisions, a person could be subject to serial proceedings for *seventy-four years*" (A.F., at para. 54 (emphasis in original)).

[62] There is also a related concern with respect to s. 161(6)(c), which provides that the Commission may commence a proceeding so long as a person is

même du par. 161(6) est de prévoir un nouveau délai de prescription. À défaut d'une telle interprétation, le par. 161(6) n'apporte pas de solution aux difficultés inhérentes à la réglementation décentralisée des valeurs mobilières au Canada.

[59] En définitive, l'interprétation de la Commission est raisonnable en ce qu'elle favorise une coopération interprovinciale accrue, ce qui correspond à l'objectif manifeste du législateur. À l'opposé, celle de l'appelante ne cadre pas bien avec les indices généraux qui nous permettent de cerner l'intention du législateur. En réduisant l'adoption du par. 161(6) à la légalisation prudente d'une pratique existante, l'interprétation que préconise l'appelante contribue peu à accroître la coopération interprovinciale. Ce n'est pas que son interprétation soit incompatible avec l'objectif, mais elle ne favorise pas autant sa réalisation que celle retenue par la Commission.

(6) L'objectif d'un délai de prescription

[60] Je me garde de m'attacher au seul objectif législatif des dispositions relatives à l'instance secondaire et de négliger celui du délai de prescription. Il faut plutôt tenir compte de l'objectif législatif de l'al. 161(6)d) *et* de celui de l'art. 159.

[61] L'appelante dit craindre que l'interprétation de la Commission ne compromette la réalisation de deux des trois objectifs d'un délai de prescription, à savoir assurer la tranquillité d'esprit et encourager la diligence (*Novak c. Bond*, [1999] 1 R.C.S. 808, par. 67). Mais surtout, permettre que le délai commence à courir dès l'introduction de chaque nouvelle instance entraînerait une cascade d'instances secondaires se greffant les unes aux autres et se succédant ainsi pendant des décennies. Selon l'appelante, [TRADUCTION] « [l]es douze ressorts étant dotés de telles dispositions, une personne pourrait faire l'objet d'instances successives pendant *soixante-quatorze ans* » (m.a., par. 54 (en italique dans l'original)).

[62] L'appelante s'inquiète également de ce que l'al. 161(6)c) permet à la Commission d'engager une instance tant que la personne « fait l'objet

"subject to an order" by another regulator. Public interest orders may last 20 years or more; see, e.g., *Friedland (Re)*, 2010 BCSECCOM 654 (CanLII) (20 years); *Nielsen (Re)*, 2013 LNONOSC 254, 36 O.S.C.B. 3478 (25 years); *Robinson (Re)*, 2013 LNABASC 295, 2013 ABASC 317 (CanLII) (permanent); *Maitland Capital Ltd. (Re)*, 2012 LNONOSC 95, 35 O.S.C.B. 1729 (permanent). Were the Commission able to commence a secondary proceeding six years *after* a person is no longer "subject to" such a primary order, that approach could radically expand the length of the limitation period — even beyond 74 years.

[63] Such concerns, in my view, are not idle. Limitations periods exist for good reasons, two of which deserve mention here. First, "[t]here comes a time . . . when a potential defendant should be secure in his reasonable expectation that he will not be held to account for ancient obligations" (*M. (K.) v. M. (H.)*, [1992] 3 S.C.R. 6, at p. 29). Second, at some point "[i]t is better that the negligent [plaintiff], who has omitted to assert his right within the prescribed period, should lose his right, than that an opening should be given to interminable litigation" (*Cholmondeley v. Clinton* (1820), 2 Jac. & W. 1, 37 E.R. 527, at p. 577; see also *M. (K.)*, at p. 30).

[64] Against those rationales, the appellant's interpretation has something to it. Manifestly, the Commission's reading significantly extends the duration of time for which a person may be subject to regulatory action. Common sense suggests that the authorities will always want more time to go after law-breakers, but fairness demands their chase eventually come to an end. Absent more, regard for the purpose of limitation periods thus counsels in favour of the appellant's interpretation.

[65] There is, however, a simple answer to the disquieting hypotheticals raised by the appellant. Although securities commissions are conferred with broad discretion to make orders in the public interest, their authority "is not unlimited" (*Asbestos*

d'une ordonnance » rendue par un autre organisme de réglementation. La durée d'une ordonnance rendue dans l'intérêt public peut atteindre 20 ans, voire plus (se reporter, p. ex., à *Friedland (Re)*, 2010 BCSECCOM 654 (CanLII) (20 ans); *Neilsen (Re)*, 2013 LNONOSC 254, 36 O.S.C.B. 3478 (25 ans); *Robinson (Re)*, 2013 LNABASC 295, 2013 ABASC 317 (CanLII) (en permanence); *Maitland Capital Ltd. (Re)*, 2012 LNONOSC 95, 35 O.S.C.B. 1729 (en permanence)). Si la Commission pouvait introduire une instance secondaire six ans *après* qu'une personne a cessé de « faire l'objet » de l'ordonnance principale, le délai de prescription pourrait en être substantiellement accru et même dépasser 74 ans.

[63] À mon avis, ces préoccupations ne sont pas futiles. Les délais de prescription existent pour de bonnes raisons, dont deux valent d'être mentionnées en l'espèce. Premièrement, « [i]l arrive un moment [. . .] où un éventuel défendeur devrait être raisonnablement certain qu'il ne sera plus redevable de ses anciennes obligations » (*M. (K.) c. M. (H.)*, [1992] 3 R.C.S. 6, p. 29). Deuxièmement, arrivé à un certain point, [TRADUCTION] « [i]l vaut mieux que le [demandeur] négligent, qui n'a pas fait valoir son droit dans le délai prescrit, perde ce droit, que de laisser la porte ouverte à des litiges interminables » (*Cholmondeley c. Clinton* (1820), 2 Jac. & W. 1, 37 E.R. 527, p. 577; voir également *M. (K.)*, p. 30).

[64] Au vu de ces raisons d'être, l'interprétation de l'appelante a un certain fondement. De toute évidence, l'interprétation que défend la Commission a pour effet de prolonger considérablement la période pendant laquelle une personne s'expose à une mesure réglementaire. Les autorités réclameront toujours plus de temps pour réprimer les contraventions à la loi, mais l'équité commande que les contrevenants ne puissent plus être poursuivis après un certain temps. À défaut d'autres considérations, l'objectif d'un délai de prescription milite donc en faveur de l'interprétation de l'appelante.

[65] Les inquiétudes exprimées par l'appelante peuvent cependant être aisément écartées. Bien que les commissions des valeurs mobilières soient investies d'un grand pouvoir discrétionnaire pour rendre des ordonnances dans l'intérêt public, leur

Minority Shareholders, at para. 41). Accordingly, no order — secondary or otherwise — is immune from appellate review for its reasonableness; see, e.g., *Lines v. British Columbia (Securities Commission)*, 2012 BCCA 316, 35 B.C.L.R. (5th) 281 (where the court found the Commission's order under s. 161(6)(d) unreasonable because it imposed a severe sanction in sole reliance on another jurisdiction's settlement agreement in which no wrongdoing was admitted).

[66] "[T]here is always a perspective within which a statute is intended to operate" (*Roncarelli v. Duplessis*, [1959] S.C.R. 121, at p. 140). And keeping the appellant's concerns in mind, it seems to me that a regulator that sought to act on these scenarios would run afoul of the legislative purpose of limitation periods and distort the purpose of secondary proceeding provisions.

[67] To his credit, the respondent acknowledges as much in his oral and written submissions (see transcript, at p. 55; R.F., at para. 90). In what I believe is a reasonable and responsible approach, he accepts the following three propositions:

1. Regardless of which of the four secondary proceeding clauses in s. 161(6) is at issue, "the events" refers to the date the relevant action first occurred. Accordingly, if a settlement agreement is entered into on January 1, 2013 and terminates on January 1, 2015, it is the *first* date, not the second, which starts the clock.

2. A secondary proceeding may not be commenced under s. 161(6) if the period of the original order has already lapsed. In other words, using the same example, the Commission could not commence a secondary proceeding on February 1, 2015, because the original order would no longer be in place at that time.

compétence à cet égard « n'est toutefois pas illimitée » (*Actionnaires minoritaires de la Société Asbestos*, par. 41). Par conséquent, nulle ordonnance — secondaire ou autre — n'échappe au contrôle de sa raisonnabilité en appel; voir, p. ex., *Lines c. British Columbia (Securities Commission)*, 2012 BCCA 316, 35 B.C.L.R. (5th) 281 (où la cour conclut que l'ordonnance de la Commission rendue en application de l'al. 161(6)d) est déraisonnable parce qu'elle inflige une sanction sévère sur le seul fondement du règlement intervenu dans un autre ressort sans aveu de quelque inconduite).

[66] [TRADUCTION] « [U]ne loi est toujours censée s'appliquer dans une certaine optique » (*Roncarelli c. Duplessis*, [1959] R.C.S. 121, p. 140). Gardant présentes à l'esprit les craintes formulées par l'appelante, il me semble que l'organisme de réglementation qui chercherait à agir de la manière que redoute l'appelante contrecarrerait l'objectif législatif du délai de prescription et dénaturerait l'objectif des dispositions prévoyant l'introduction d'une instance secondaire.

[67] L'intimé le reconnaît dans sa plaidoirie orale et dans son mémoire — et c'est tout à son honneur (voir la transcription, p. 55; m.i., par. 90). Selon une approche qui me paraît à la fois raisonnable et responsable, il convient de la justesse des trois assertions suivantes :

1. Peu importe que l'on applique l'un ou l'autre des quatre alinéas du par. 161(6) qui donnent ouverture à l'instance secondaire, « l'événement » renvoie à l'acte lorsqu'il se produit pour la première fois. Par conséquent, si un règlement intervient le 1er janvier 2013 et expire le 1er janvier 2015, c'est à la *première* date, non à la seconde, que le délai de prescription commence à courir.

2. Une instance secondaire ne peut être introduite aux termes du par. 161(6) lorsque l'ordonnance initiale a déjà expiré. Autrement dit, si nous poursuivons avec le même exemple, la Commission ne pourrait engager d'instance secondaire le 1er février 2015, car l'ordonnance initiale ne serait plus applicable.

3. Any order initiated using s. 161(6) must be based on an *original* proceeding in the primary jurisdiction. Secondary proceedings cannot be "stacked" on top of one another in the manner feared by the appellant.

Although this is not the case to put our stamp of approval on these concessions, to my mind, they make eminent good sense. Thus, to the extent that regulators commence secondary proceedings in these situations, they must, as always, be prepared to defend the reasonableness of their decisions on appellate review.

[68] While it is true that the application of s. 159 to the secondary proceeding provisions such as s. 161(6)(d) will have the effect, as a practical matter, of extending the period under which the cloud of potential regulatory action hangs over a person, that, of itself, is not offensive to the legislative purpose of limitation provisions. Limitations periods are always "driven by specific policy choices of the legislatures" (*Manitoba Metis Federation Inc. v. Canada (Attorney General)*, 2013 SCC 14, [2013] 1 S.C.R. 623, at para. 230, *per* Rothstein J., dissenting), as they attempt to "balance the interests of both sides" (*Murphy v. Welsh*, [1993] 2 S.C.R. 1069, at p. 1080).

[69] The Commission's interpretation strikes a reasonable balance between facilitation of interprovincial cooperation and the underlying purposes of limitation periods. Thus, notwithstanding the appellant's reasonable concerns, I am unable to conclude that the Commission's interpretation is rendered unreasonable in light of the purpose of limitation periods.

(7) Conclusion on the Commission's Interpretation

[70] A review of the ordinary meaning, the context, and the purpose of both ss. 159 and 161(6) reasonably supports the conclusion that "the even[t]" giving rise to a proceeding under s. 161(6)(d) is the fact of "ha[ving] agreed with a securities regulatory authority" to be subject to regulatory action. That is not to say that the appellant's interpretation

3. Toute ordonnance rendue aux termes du par. 161(6) doit être fondée sur une instance *initiale* dans le ressort principal. Les instances secondaires ne peuvent se « succéder» les unes aux autres comme le craint l'appelante.

Point n'est besoin d'avaliser ou non ces concessions, mais elles me paraissent éminemment sensées. Ainsi, l'organisme de réglementation qui introduit une instance secondaire dans les situations considérées doit toujours être prêt à défendre la raisonnabilité de sa décision lors d'un contrôle en appel.

[68] L'application de l'art. 159 à l'instance secondaire engagée par exemple sur le fondement de l'al. 161(6)d) a certes l'effet concret de prolonger la période pendant laquelle une personne peut craindre de faire l'objet de mesures réglementaires, mais il n'en résulte pas en soi d'atteinte à l'objectif législatif du délai de prescription. Les délais de prescription « procèdent [toujours] de décisions de principe arrêtées par le législateur » (*Manitoba Metis Federation Inc. c. Canada (Procureur général)*, 2013 CSC 14, [2013] 1 R.C.S. 623, par. 230, le juge Rothstein, dissident) puisqu'ils visent à « établir un équilibre entre les intérêts des deux parties » (*Murphy c. Welsh*, [1993] 2 R.C.S. 1069, p. 1080).

[69] L'interprétation de la Commission établit un équilibre raisonnable entre l'accroissement de la coopération interprovinciale et les objectifs d'un délai de prescription. Par conséquent, malgré les craintes concevables de l'appelante, je ne puis conclure que l'interprétation de la Commission soit déraisonnable eu égard à l'objectif d'un délai de prescription.

(7) Conclusion sur l'interprétation de la Commission

[70] Le sens ordinaire, le contexte et l'objet de l'art. 159 et du par. 161(6) permettent de conclure raisonnablement que « l'événement » qui donne lieu à une instance fondée sur l'al. 161(6)d) s'entend du fait de « conven[ir] avec un organisme de réglementation des valeurs mobilières » de faire l'objet d'une mesure réglementaire. Je ne dis pas que

is not a reasonable alternative. But as I have said, when faced with two competing reasonable interpretations that result from a lack of clarity in its home statute, the Commission, with the benefit of its expertise, is entitled to choose between them. Courts must respect that choice.

C. *The Commission's Failure to Give Reasons*

[71] Briefly, I note that the Commission here failed to give reasons for its interpretation of s. 159. Instead, the Commission issued its order and, in doing so, impliedly decided that the proceeding was not time-barred. As noted in *Alberta Teachers*, "deference under the reasonableness standard is best given effect when administrative decision makers provide intelligible and transparent justification for their decisions" (at para. 54; see also *Dunsmuir*, at para. 47). Nonetheless, "when a reasonable basis for the decision is apparent to the reviewing court, it will generally be unnecessary to remit the decision to the tribunal" (at para. 55; see also *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] 2 S.C.R. 559, at para. 58).

[72] Unlike *Alberta Teachers*, in the case at bar, we do not have the benefit of the Commission's reasoning from its decisions in other cases involving the same issue (see paras. 56-57). However, a basis for the Commission's interpretation is apparent from the arguments advanced by the respondent, who is also empowered to make orders under (and thus to interpret) s. 161(1) and (6). These arguments follow from established principles of statutory interpretation. Accordingly, though reasons would have been preferable, there is nothing to be gained here from requiring the Commission to explain on remand what is readily apparent now.

VI. Disposition

[73] For these reasons, I would dismiss the appeal with costs.

l'interprétation de l'appelante n'est pas raisonnable, mais, je le répète, lorsque deux interprétations raisonnables divergentes sont possibles à cause d'une ambiguïté de la loi constitutive, la Commission, forte de son expertise, peut opter pour l'une ou l'autre, à son gré. Les cours de justice doivent respecter son choix.

C. *L'absence de motifs*

[71] Je signale brièvement que, dans la présente affaire, la Commission ne motive pas son interprétation de l'art. 159. Elle rend plutôt son ordonnance et, de ce fait, conclut tacitement que l'instance n'est pas prescrite. Comme le dit la Cour dans l'arrêt *Alberta Teachers*, « la déférence inhérente à la norme de la raisonnabilité se manifeste optimalement lorsqu'une décision administrative est justifiée de façon intelligible et transparente » (par. 54; voir également *Dunsmuir*, par. 47). Néanmoins, « lorsque la décision a un fondement raisonnable manifeste, il n'est généralement pas nécessaire de renvoyer l'affaire au tribunal administratif » (par. 55; voir également *Agraira c. Canada (Sécurité publique et Protection civile)*, 2013 CSC 36, [2013] 2 R.C.S. 559, par. 58).

[72] Dans le présent dossier, contrairement à l'affaire *Alberta Teachers*, nous ne disposons pas du raisonnement de la Commission dans d'autres affaires portant sur le même point (voir les par. 56-57). Toutefois, le bien-fondé de l'interprétation de la Commission ressort de l'argumentaire de l'intimé, lequel est également habilité à rendre des ordonnances suivant les par. 161(1) et (6) (et donc à interpréter ces dispositions). De plus, ces arguments s'appuient sur des principes d'interprétation législative établis. Par conséquent, bien qu'il eût été préférable que la Commission motive son ordonnance, il n'y a aucun avantage en l'espèce à lui renvoyer l'affaire pour qu'elle explique ce qui est déjà manifeste.

VI. Dispositif

[73] Pour ces motifs, je suis d'avis de rejeter le pourvoi, avec dépens.

The following are the reasons delivered by

[74] Karakatsanis J. — I agree with Justice Moldaver's proposed disposition of this appeal and with much of his analysis. I accept his conclusion that the British Columbia Securities Commission was reasonable in interpreting the limitation period contained in s. 159 of the British Columbia *Securities Act*, R.S.B.C. 1996, c. 418, to require that secondary proceedings under s. 161(6) of the Act must be initiated within six years of a person being sanctioned in another jurisdiction, not within six years of the underlying misconduct.

[75] However, I part company with my colleague when he suggests that the opposite interpretation urged by the appellant — that the limitation period runs from the time of the underlying misconduct, not the Ontario Securities Commission order — is also reasonable. I do not agree.

[76] While the text of the provision, or its drafting history, might bear different interpretations if considered in a vacuum, the legislative objective of facilitating interjurisdictional cooperation weighs heavily against the appellant's interpretation.

[77] Here, legislatures across Canada have enacted similar provisions to permit secondary proceedings in furtherance of interjurisdictional cooperation and consistency in securities regulation and enforcement across the country.[4] These objectives are also reflected in the *Provincial/Territorial Memorandum of Understanding Regarding Securities Regulation*. As my colleague notes, this Court has recognized

4 See *Securities Act*, R.S.A. 2000, c. S-4, s. 198(1.1); *Securities Act*, R.S.B.C. 1996, c. 418, s. 161(6); *The Securities Act*, C.C.S.M., c. S50, s. 148.4(1); *Securities Act*, S.N.B. 2004, c. S-5.5, s. 184(1.1); *Securities Act*, R.S.N.L. 1990, c. S-13, s. 127(1.1); *Securities Act*, R.S.N.S. 1989, c. 418, s. 134(1A); *Securities Act*, S.N.W.T. 2008, c. 10, s. 60(3); *Securities Act*, S.Nu. 2008, c. 12, s. 60(3); *Securities Act*, R.S.O. 1990, c. S.5, s. 127(10); *Securities Act*, R.S.P.E.I. 1988, c. S-3.1, s. 60(3); *The Securities Act, 1988*, S.S. 1988-89, c. S-42.2, s. 134(1.1); *Securities Act*, S.Y. 2007, c. 16, s. 60(3).

Version française des motifs rendus par

[74] La juge Karakatsanis — Je souscris au dispositif que propose le juge Moldaver en l'espèce, ainsi qu'à une grande partie de son analyse. Je conviens avec lui que la British Columbia Securities Commission interprète raisonnablement l'art. 159 de la *Securities Act* de la Colombie-Britannique, R.S.B.C. 1996, ch. 418, lorsqu'elle conclut que le délai de prescription qui y est prévu fait en sorte qu'une instance secondaire fondée sur le par. 161(6) de la Loi doit être engagée au plus tard six ans après que la personne en cause s'est vu infliger une sanction dans un autre ressort, et non dans les six ans de son inconduite.

[75] Cependant, je ne partage pas son avis selon lequel l'interprétation contraire préconisée par l'appelante — à savoir que le délai de prescription court à compter de l'inconduite, et non du prononcé de l'ordonnance de la CVMO — est également raisonnable. Je ne suis pas d'accord.

[76] Bien que le libellé de la disposition en cause ou son historique puissent donner lieu à des interprétations différentes dans l'abstrait, l'objectif législatif de faciliter la coopération entre les ressorts milite fortement contre l'interprétation avancée par l'appelante.

[77] Au moyen de dispositions apparentées, les différentes législatures provinciales et territoriales ont doté leurs organismes de réglementation du pouvoir d'engager des instances secondaires[4]. Elles l'ont fait aux fins de la coopération intergouvernementale, de l'uniformité de la réglementation des valeurs mobilières et de l'application de celle-ci à la grandeur du pays, des objectifs qui sous-tendent

4 Voir *Securities Act*, R.S.A. 2000, ch. S-4, par. 198(1.1); *Securities Act*, R.S.B.C. 1996, ch. 418, par. 161(6); *Loi sur les valeurs mobilières*, C.P.L.M., ch. S50, par. 148.4(1); *Loi sur les valeurs mobilières*, L.N.-B. 2004, ch. S-5.5, par. 184(1.1); *Securities Act*, R.S.N.L. 1990, ch. S-13, par. 127(1.1); *Securities Act*, R.S.N.S. 1989, ch. 418, par. 134(1A); *Loi sur les valeurs mobilières*, L.T.N.-O. 2008, ch. 10, par. 60(3); *Securities Act*, S.Nu. 2008, ch. 12, par. 60(3); *Loi sur les valeurs mobilières*, L.R.O. 1990, ch. S.5, par. 127(10); *Securities Act*, R.S.P.E.I. 1988, ch. S-3.1, par. 60(3); *The Securities Act, 1988*, S.S. 1988-89, ch. S-42.2, par. 134(1.1); *Loi sur les valeurs mobilières*, L.Y. 2007, ch. 16, par. 60(3).

that interjurisdictional cooperation is "indispensable" to securities regulation: *Global Securities Corp. v. British Columbia (Securities Commission)*, 2000 SCC 21, [2000] 1 S.C.R. 494, at para. 27. It is particularly important in light of *Reference re Securities Act*, 2011 SCC 66, [2011] 3 S.C.R. 837.

[78] On the appellant's reading, the British Columbia Securities Commission may only initiate secondary proceedings against a person if it does so within six years of the underlying misconduct. This would mean that in cases — like this one — where an investigation in another jurisdiction does not conclude in an order or settlement within six years of the underlying misconduct, the Commission could not use its secondary proceedings power unless it had already started proceedings before the six year clock had elapsed. The appellant's solution, that the Commission could instead initiate its own primary proceedings before the other jurisdiction's had concluded, strikes me as duplication that is inconsistent with the objectives of the secondary proceedings regime.

[79] In this context, I am not persuaded that it would have been open to the Commission to reasonably interpret the limitation period as the appellant urges. It is at odds with a purposive interpretation.

[80] My colleague's conclusion that both interpretations are reasonable would permit securities commissions in different jurisdictions across the country to come to completely opposite conclusions about the application of essentially equivalent statutory provisions enacted for the same purposes. Such a result has the potential to thwart the legislative objectives of consistency and cooperation that underlie the secondary proceedings regime.

également le *Protocole d'entente provincial-territorial sur la réglementation des valeurs mobilières.* Comme le signale mon collègue, la Cour a reconnu que la coopération intergouvernementale est « indispensable » à la réglementation des valeurs mobilières (*Global Securities Corp. c. Colombie-Britannique (Securities Commission)*, 2000 CSC 21, [2000] 1 R.C.S. 494, par. 27). Cette coopération revêt une importance particulière eu égard au *Renvoi relatif à la Loi sur les valeurs mobilières*, 2011 CSC 66, [2011] 3 R.C.S. 837.

[78] Selon l'interprétation que préconise l'appelante, la British Columbia Securities Commission ne peut introduire une instance secondaire contre une personne que dans les six ans de l'inconduite en cause. Dès lors, lorsque — comme dans la présente affaire — l'enquête dans l'autre ressort ne débouche pas sur une ordonnance ou un règlement dans les six ans de l'inconduite, la Commission ne pourrait exercer son pouvoir d'introduire une instance secondaire que si elle avait déjà engagé une instance avant l'expiration du délai de prescription de six ans. Je vois dans cette solution — que la Commission introduise plutôt sa propre instance principale avant la conclusion de l'enquête dans l'autre ressort — un dédoublement incompatible avec les objectifs du régime qui permet l'introduction d'instances secondaires.

[79] Dans ce contexte, je ne suis pas convaincue qu'il aurait été raisonnable pour la Commission d'interpréter le délai de prescription comme nous y exhorte l'appelante. Pareille interprétation serait allée à l'encontre de la démarche téléologique.

[80] La conclusion de mon collègue selon laquelle les deux interprétations sont raisonnables fait en sorte que les commissions des valeurs mobilières des différents ressorts canadiens pourront tirer des conclusions diamétralement opposées relativement à l'application de dispositions législatives qui sont essentiellement équivalentes et qui visent les mêmes objectifs. Pareil résultat risque de contrecarrer les objectifs d'uniformité et de coopération qui sous-tendent le régime des instances secondaires.

[81] As my colleague notes, the disposition of this appeal does not require us to decide whether the appellant's alternative interpretation is reasonable.

[82] Accordingly, with this reservation regarding my colleague's reasons, I too would dismiss the appeal.

Appeal dismissed with costs.

Solicitors for the appellant: Stockwoods, Toronto.

Solicitor for the respondent: British Columbia Securities Commission, Vancouver.

Solicitors for the intervener the Financial Advisors Association of Canada: Blaney McMurtry, Toronto.

Solicitor for the intervener the Ontario Securities Commission: Ontario Securities Commission, Toronto.

[81] Comme le souligne mon collègue, statuer sur le présent pourvoi n'exige pas que nous décidions si l'interprétation proposée par l'appelante est raisonnable ou non.

[82] En conséquence, mise à part cette réserve à l'égard des motifs de mon collègue, je suis également d'avis de rejeter le pourvoi.

Pourvoi rejeté avec dépens.

Procureurs de l'appelante : Stockwoods, Toronto.

Procureur de l'intimé : British Columbia Securities Commission, Vancouver.

Procureurs de l'intervenante l'Association des conseillers en finances du Canada : Blaney McMurtry, Toronto.

Procureur de l'intervenante la Commission des valeurs mobilières de l'Ontario : Commission des valeurs mobilières de l'Ontario, Toronto.

Ontario Securities Commission | Commission des valeurs mobilières de l'Ontario | P.O. Box 55, 19th Floor 20 Queen Street West Toronto ON M5H 3S8 | CP 55, 19e étage 20, rue Queen Ouest Toronto ON M5H 3S8

Citation: New Futures Trading International Corporation et al., 2013 ONSEC 21
Date: 2013-05-31

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

– AND –

IN THE MATTER OF
NEW FUTURES TRADING INTERNATIONAL CORPORATION and
FERNANDO HONORATE FAGUNDES also known as HENRY ROCHE

REASONS AND DECISION
(Subsections 127(1) and 127(10) of the *Securities Act)*

Decision:	May 31, 2013		
Panel:	Alan J. Lenczner, Q.C.	-	Commissioner and Chair of the Panel
Submissions:	Donna E. Campbell	-	For Staff of the Ontario Securities Commission

TABLE OF CONTENTS

REASONS AND DECISION

I. BACKGROUND

[1] This was a hearing, in writing, before the Ontario Securities Commission (the **"Commission")** pursuant to subsections 127(1) and (10) of the *Securities Act,* R.S.O. 1990, c. S.5, as amended (the **"Act")** to consider whether it is in the public interest to make an order imposing sanctions New Futures Trading International Corporation **("New Futures")** and Fernando Honorate Fagundes, also known as Henry Roche, **("Fagundes")** (collectively, the **"Respondents").**

[2] A Notice of Hearing was issued by the Commission on March 18, 2013 (the **"Notice of Hearing"),** in relation to a Statement of Allegations filed by Staff of the Commission ("Staff") on the same day (the **"Statement of Allegations").**

[3] Staff relies on the final judgments of the United States District Court of New Hampshire **("U.S. Court")** dated May 24, 2012 *(Securities and Exchange Commission v. New Futures Trading International Corporation and Henry Roche,* Civil Action No. 11 CV 532-JL (D. N.H. 2012) (the **"U.S. Final Judgments")),** which followed a summary order of April 20, 2012 *(Securities and Exchange Commission v. New Futures Trading International Corporation and Henry Roche,* Civil Action No. 11 CV 532-JL – Opinion No. 2012 DNH 073 (the **"U.S. Summary Order")).** The U.S. Final Judgments accepted as true the factual allegations in the Complaint filed by the United States Securities and Exchange Commission (the **"SEC")** on November 16, 2011 (the **"SEC Complaint")** and imposed sanctions against the Respondents.

[4] Staff relies upon paragraph 3 of subsection 127(10) of the Act to reciprocate the U.S. Court Order and to impose sanctions against the Respondents pursuant to paragraphs 2, 2.1, 3, 7, 8, 8.1, 8.2, 8.4 and 8.5 of subsection 127(1) of the Act.

[5] In this written hearing, I have to decide whether the Respondents have been found by a court in any jurisdiction to have contravened the laws of the jurisdiction respecting the buying or selling of securities or derivatives and whether it is in the public interest to make a reciprocal order in Ontario.

II. PRELIMINARY ISSUES

A. Service

[6] Rule 1.5.3 of Commission's *Rules of Procedure* (2012), 35 O.S.C.B. 10071 (the *"OSC Rules of Procedure")* provides:

> **1.5.3 Inability to Effect Service** – **(1)** If a person required to serve a document is unable to serve it by one of the methods described in Rule 1.5.1, the person may apply to a Panel for an order for substituted, validated or waived service.
>
> **(2) Application for an Order for Substituted, Validated or Waived Service** – The application shall be filed with an affidavit setting out the efforts already made to serve the person and stating:
>
> (a) why the proposed method of substituted service is likely to be successful; or

(b) why a Panel should validate or waive service on that person.

(3) Substituted, Validated or Waived Service – A Panel may give directions for substituted service or, where necessary, may validate or waive service if it considers it appropriate.

[7] On April 3, 2013, I received the service affidavit of Raymond Daubney **("Daubney"),** sworn on March 22, 2013, outlining his attempts to serve Fagundes. On April 9, 2013, I granted a motion to waive service of process on Fagundes, pursuant to Rule 1.5.3 of the *OSC Rules of Procedure* and gave reasons for my decision on the same day *(Re New Futures Trading International Corporation and Fernando Honorate* (2013), 36 O.S.C.B. 3896 (the **"April 9 Order")** and 3925).

[8] On April 17, 2013, I received the second service affidavit of Daubney, sworn on April 16, 2013, outlining his attempts to serve New Futures. By order of April 18, 2013, I found that New Futures had been served with the Notice of Hearing and Statement of Allegations and acknowledged that counsel accepting service had advised Daubney that he would not respond or file materials on behalf of New Futures in this proceeding *(Re New Futures Trading International Corporation and Fernando Honorate* (2013), 36 O.S.C.B. 4445 (the **"April 18 Order")).** As a result, the April 18 Order waived future service on New Futures, pursuant to subrule 1.5.3(3) of the *OSC Rules of Procedure.*

B. Written Hearing

[9] Rule 11 of the *OSC Rules of Procedure* permits the Commission to conduct a proceeding by means of a written hearing. On April 3, 2013, the panel heard an application by Staff to convert the matter to a written hearing, in accordance with Rule 11.5 of the *OSC Rules of Procedure* and subsection 5.1(2) of the *Statutory Powers Procedure Act,* R.S.O. 1990, c. S.22, as amended (the **"SPPA").** In the April 9 Order, I granted the application to proceed by way of written hearing, established a schedule for filing materials and permitted the Respondents the opportunity to serve and file a response by May 17, 2013.

C. Failure of the Respondents to Participate

[10] Neither of the Respondents filed evidence or made submissions. Section 7 of the SPPA authorizes a tribunal to proceed in the absence of a party when that party has been given notice of the hearing. I note that the Notice of Hearing and the Statement of Allegations were posted on the Commission's website, as were the Commission orders which set out the dates for service and filing of materials. Having waived service on Fagundes and finding that New Futures was served with the Notice of Hearing and Statement of Allegations, but chose not to participate in the proceeding, I am satisfied that I may proceed in the absence of the Respondents in accordance with section 7 of the SPPA.

III. FINAL JUDGMENTS OF THE U.S. COURT

[11] The U.S. Court accepted that between December 1, 2010 and May 11, 2011 (the **"Material Time")** the Fagundes raised $1.3 million from the offer and sale of high-yield promissory notes in the name of New Futures to at least fourteen investors, including residents of Ontario (SEC Complaint at para. 1). Furthermore, the U.S. Court accepted that the Respondents engaged in:

(i) fraud in the offer and sale of securities in violation of section 17(a) of the United States *Securities Act of 1933* (the **"U.S. Securities Act")** [15 U.S.C. §§ 17q(a)];

(ii) fraudulent or deceptive conduct in connection with the purchase or sale of securities in violation of section 10(b) of the Untied States *Securities and Exchange Act of 1934* (the **"U.S. Exchange Act")** [15 U.S.C. § 78j(b)] and Rule 10b-5 thereunder [17 C.F.R. § 240.10b-5]; and

(iii) the offer and sale of unregistered securities in violation of sections 5(a) and (c) of the U.S. Securities Act [15 U.S.C. §§ 77e(a) and (c)].

(U.S. Final Judgments, *supra* at 2; SEC Complaint at para. 2)

[12] The U.S. Final Judgments impose the following sanctions on the Respondents:

1. the Respondents are permanently restrained from violating, directly or indirectly, section 10(b) of the U.S. Exchange Act [15 U.S.C. § 78j(b)] and Rule 10b-5 promulgated thereunder [17 C.F.R. § 240.10b-5], by using any means in connection with the purchase and sale of any security to: (a) defraud, (b) make an untrue statement of a material fact or to omit to state a material fact, or (c) engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person;

2. the Respondents are permanently restrained from violating section 17(a) of the U.S. Securities Act [15 U.S.C. § 77q(a)] in the offer and sale of a security by the use of any means, directly or indirectly, to: (a) defraud, (b) obtain money or property by means of any untrue statement of a material fact pr any omission of a material fact, or (c) engage in any transaction, practice or course of business which operates or would operate as a fraud or deceit upon the purchaser;

3. the Respondents are permanently restrained from violating section 5 of the U.S. Securities Act [15 U.S.C. § 77e] by, directly or indirectly, in the absence of an exemption: (a) unless a registration statement is in effect as to a security, making use of any means to sell such security, (b) unless a registration statement is in effect as to a security, carrying or causing to be carried, by any means, any such security for the purpose of sale or for delivery after sale, or (c) making use of any means to offer to sell or offer to buy any security, unless a registration statement was filed with the SEC as to such security or while the registration statement is the subject of a refusal order or stop order or any public proceeding or examination under section 8 of the U.S. Securities Act [15 U.S.C. § 77h];

4. the Respondents are liable for disgorgement of $1,242,972, representing profits gained as a result of the conduct alleged in the SEC Complaint, together with prejudgment interest of $40,917.47 and a civil penalty of $150,000 pursuant to section 20(d)(2) of the U.S. Securities Act [15 U.S.C. § 77t(d)(2)] and section 21(d)(3) of the U.S. Exchange Act [15 U.S.C. § 78(u)(d)(3)].

(U.S. Final Judgments, *supra* at 2-5)

IV. LAW AND ANALYSIS

A. Subsection 127(10) of the Act

[13] Staff relies upon the inter-jurisdictional enforcement provisions of the Act, specifically paragraph 3 of subsection 127(10) of the Act and seeks an order from the Commission imposing what Staff submits are similar sanctions and terms as were made against the Respondents by the U.S. Court.

[14] Subsection 127(1) of the Act provides:

> The Commission may make one or more of the following orders if in its opinion it is in the public interest to make the order or orders [...]

[15] Subsection 127(10)3 of the Act provides:

> Without limiting the generality of subsections (1) and (5), an order may be made under subsection (1) or (5) in respect of a person or company if any of the following circumstances exists:
>
> [...]
>
> 3. The person or company has been found by a court in any jurisdiction to have contravened the laws of the jurisdiction respecting the buying or selling of securities or derivatives [...]

[16] From a review of the U.S. Final Judgments, the U.S. Summary Order and the SEC Complaint, I am satisfied that the U.S. Court had jurisdiction over the Respondents. I am also satisfied that the requirements of paragraph 3 of subsection 127(10) of the Act have been met. The U.S. Court has found that both of the Respondents contravened the U.S. Securities Act and U.S. Exchanges Act respecting the buying or selling of securities.

[17] What is left to be determined is whether it is in the public interest in Ontario for a reciprocal order to be made against the Respondents. The decision of a foreign jurisdiction stands as a determination of fact for the purpose of the Commission's considerations under subsection 127(10) of the Act. The Commission's task is then to determine whether, based on those findings of fact, the sanctions proposed by Staff would be in the public interest in Ontario. An important factor to consider is, if the facts had occurred in Ontario, whether the respondent's conduct would have constituted a breach of the Act and been considered to be contrary to the public interest, such that it would attract the same or similar sanctions.

[18] As decided by the Supreme Court of Canada (the **"SCC"),** the purpose of an order under section 127 of the Act is protective and prospective. It is to restrain future conduct that is likely to be prejudicial to the public interest in fair and efficient capital markets. The SCC went on to state that "the role of the OSC under s. 127 is to protect the public interest by removing from capital markets those whose past conduct is so abusive as to warrant apprehension of future conduct detrimental to the integrity of the capital markets" *(Committee for Equal Treatment of Asbestos Minority Shareholders v. Ontario (Securities Commission),* [2001] 2 S.C.R. 132, at para. 43; *Re Mithras Management Ltd.* (1990), 13 O.S.C.B. 1600).

B. Relevant Findings of the U.S Final Judgments

[19] The U.S. Final Judgments accepted as true the factual allegations in the SEC Complaint against the Respondents, who had defaulted. I note from the SEC Complaint the following:

> 1. From at least December 2010, Roche raised at least $1.3 million from the offer and sale of high-yield promissory notes (5% to 10% monthly return) in the name of New Futures to at least fourteen investors, most of which has now been dissipated. The fourteen investors included residents of nine states: California, Florida, Massachusetts, Kansas, South Carolina, Washington, Colorado, Illinois and Texas as well Ontario, Canada. The vast majority of the funds raised by Roche were funneled into a Ponzi scheme he was running. Roche represented to some investors that funds supplied would be invested in bonds, treasury notes and/or 10 year Treasury note futures contracts, while representing to others that the funds would be invested directly in New Futures, an on-line futures day-trading education and training business Roche operated out of Canada. Instead of using the funds in either manner, Roche used approximately $937,000 provided by investors to make Ponzi "interest" payments to prior investors in the scheme. In addition, Roche misappropriated another $359,000 to support his lifestyle and to operate a horse breeding ranch in Kendal, Ontario, Canada.
>
> [...]
>
> 8. New Futures Trading International Corporation is a New Hampshire corporation formed in November 2010 with a principal place of business in Bedford, NH.
>
> 9. Henry Roche, age approximately 51, is a resident of Kendal, Ontario, Canada. Although not listed as an officer of New Futures, he controlled the business by directing the actions of Vice President and Treasurer, Ryan Fontaine. Roche solicited funds on behalf of New Futures.
>
> [...]
>
> 12. Roche operated the online training program using at least three different names. Beginning in 2009, the

> program was offered through Masters Palace, Inc. Sometime in 2010, Roche changed the name ofthe entity or otherwise created a successor entity called Third Realm, Inc. Online Third Realm is also referred to as the "Third Realm Institute." Finally, in the fall of 20 I 0, Roche created New Futures Trading after soliciting a former student of his program, Ryan Fontaine ("Fontaine"), to form a New Hampshire-based corporation "New Futures Trading International, Corporation."
>
> 13. While Roche was not listed as an officer or director in New Futures' incorporation documents, Roche directed Fontaine to form the corporation and serve as its Vice President and Secretary, while naming Roche's wife, Emilia Elnasin (a/k/a Emilia Elnasin Roche or Lian Roche) (hereinafter "Elnasin") as a shareholder and officer along with Fontaine. Roche retained *defacto* control over the operation. Such control included directing Fontaine to pay various expenses related to his horse-breeding business as well as paying "interest" to investors in prior entities. Fontaine also provided Roche with blank New Futures checks that Roche could use for any purpose.
>
> [...]
>
> 15. Students in Roche's training seminars had the option of viewing online presentations or attending in-person training sessions in Toronto, Canada. Certain students who participated in the training sessions were later contacted by Roche and solicited to make additional, more substantive investments in either the online stock and futures day-trading business or were solicited by Roche to invest additional money with him.
>
> 16. Roche represented to investors that he would trade stocks and bonds or futures contracts for them on an individual basis through his New Futures business. He would pay them "interest" out of the net profits obtained through the trading.
>
> 17. In return for the investment, in many instances Roche had promissory notes drafted, executed and issued to the investors.
>
> (SEC Complaint, *supra* at paras. 1, 8-9, 12-13 and 15-17)

[20] I also note from the SEC Complaint that:

> 20. From December 1, 2010 to May 11,2011, Roche and New Futures issued at least eighteen promissory notes to fourteen investors in the amount of $1.3 million. The promissory notes were similar to one another and typically included an interest or return provision that would pay investors between 5-10% per month. The promissory notes also included a provision whereby the investor could demand

> the principal and/or any accrued interest be returned within 45 days. In some, but not all, there was an additional provision in which the investor could choose to leave the investment in place for a definitive period of time (usually 14 months) whereby the investor would then be awarded a 200% return in addition to the original investment amount.
>
> [...]
>
> 22. Much of New Futures investors' money was used for two primary purposes: payments to persons who are likely investors in one of Roche's prior schemes (Masters Palace and/or Third Realm) or Roche's equestrian related expenses. In total, from November 2010 to June 2011, at least $884,000 was paid out to individuals who are, on information and belief, prior investors in Roche-related entities, while at least another $350,000 was used to pay the costs of Roche's horse breeding ranch in Kendal, Ontario, Canada-Majestic Horses. Monies were also sent directly to Third Realm, one of Roche's prior entities.
>
> (SEC Complaint, *supra* at paras. 20 and 22)

C. Appropriate Sanctions

[21] In my view, the conduct of the Respondents described above was abusive of the capital markets fully warranting the sanctions imposed by the U.S. Court. Had such conduct occurred in Ontario, it would have constituted contraventions of the Act. Given the past conduct, the absence of mitigating factors and the failure to provide any rational explanation, it is appropriate to make an order in the public interest to prevent the Respondents from accessing the capital markets in Ontario.

[22] The threshold for determining whether it is in the public interest to reciprocate an order from another regulatory authority is a low threshold. I agree with the Commission's conclusion in *Euston* that subsection 127(10) of the Act can be grounds for an order in the public interest under subsection 127(1) of the Act, based on the decision and order in another jurisdiction *(Re Euston Capital Corp.* (2009), 32 O.S.C.B. 6313 (***"Euston")*** at para. 46).

[23] It is important that the Commission be aware of and responsive to an increasingly complex and interconnected cross-border securities industry. For some time, the courts have been attuned to the needs of business and inter-jurisdictional comity. In 1990, the SCC expounded new principles and a new approach to the recognition and enforcement of judgments between Canadian provinces. The SCC stated:

> The business community operates in a world economy and we correctly speak of a world community even in the face of decentralized political and legal power. Accommodating the flow of wealth, skills and people across state lines has now become imperative. Under these circumstances, our approach to the recognition and enforcement of foreign judgments would appear ripe for reappraisal. Certainly, other countries, notably the United States and members of

> the European Economic Community, have adopted more generous rules for the recognition and enforcement of foreign judgments to the general advantage of litigants.
>
> (*Morguard Investments Ltd. v. De Savoye,* [1990] S.C.J. No. 135, (***"Morguard")*** at para. 34)

[24] The SCC determined the issue in this way:

> As discussed, fair process is not an issue within the Canadian federation. The question that remains, then, is when has a court exercised its jurisdiction appropriately for the purposes of recognition by a court in another province? This poses no difficulty where the court has acted on the basis of some ground traditionally accepted by courts as permitting the recognition and enforcement of foreign judgments -- in the case of judgments in personam where the defendant was within the jurisdiction at the time of the action or when he submitted to its judgment whether by agreement or attornment. In the first case, the court had jurisdiction over the person, and in the second case by virtue of the agreement. No injustice results.
>
> (*Ibid.* at para. 43)

[25] Thirteen years later, in 2003, the SCC revisited the issue of recognition and enforcement of foreign judgments, including those from other countries. The SCC stated:

> The importance of comity was analysed at length in *Morguard, supra.* This doctrine must be permitted to evolve concomitantly with international business relations, cross-border transactions, as well as mobility. The doctrine of comity is:
>
> > grounded in the need in modern times to facilitate the flow of wealth, skills and people across state lines in a fair and orderly manner.
> >
> > (*Morguard, supra,* at p. 1096)
>
> This doctrine is of particular importance viewed internationally. The principles of order and fairness ensure security of transactions, which necessarily underlie the modern concept of private international law. Although *Morguard* recognized that the considerations underlying the doctrine of comity apply with greater force between the units of a federal state, the reality of international commerce and the movement of people continue to be "directly relevant to determining the appropriate response of private international law to particular issues, such as the enforcement of monetary judgments" (J. Blom, "The Enforcement of Foreign Judgments: *Morguard* Goes Forth Into the World" (1997), 28 *Can. Bus. L.J.* 373, at p. 375).
>
> [...]

> Like comity, the notion of reciprocity is equally compelling both in the international and interprovincial context. La Forest J. discussed interprovincial reciprocity in *Morguard, supra.* He stated (at p. 1107):
>
> > ... if this Court thinks it inherently reasonable for a court to exercise jurisdiction under circumstances like those described, it would be odd indeed if it did not also consider it reasonable for the courts of another province to recognize and enforce that court's judgment.
>
> In light of the principles of international comity, La Forest J.'s discussion of reciprocity is also equally applicable to judgments made by courts outside Canada. In the absence of a different statutory approach, it is reasonable that a domestic court recognize and enforce a foreign judgment where the foreign court assumed jurisdiction on the same basis as the domestic court would, for example, on the basis of a "real and substantial connection" test.
>
> (*Beals v. Saldanha,* [2003] S.C.J. No. 77, **("*Beals*")** at paras. 27 and 29)

[26] Most provinces now have legislation whereby judgments rendered in one common law province will be enforced in another common law province by the simple act of registration *(Reciprocal Enforcement of Judgments Act,* R.S.O. 1990, c. R.5).

[27] Although the application of subsection 127(10) of the Act does not involve the direct enforcement of a foreign judgment, the principles of comity and reciprocity espoused in *Morguard* and in *Beals,* underlying the enforcement of interprovincial and foreign judgments should equally apply to securities regulators. I acknowledge that the Commission's orders in the public interest involve more than monetary judgment enforcement. The Commission has the authority to impose a number of market prohibitions on the Respondents, only when it is in the public interest to do so. Comity requires that there not be barriers to recognizing and reciprocating the orders of other regulatory authorities when the findings of the foreign jurisdiction qualify under subsection 127(10) of the Act as a judgment that invokes the public interest. For comity to be effective and the public interest to be protected, the threshold for reciprocity must be low. The onus will rest with the Respondents to show that there was no substantial connection between the Respondent and the originating jurisdiction, that the order of the foreign regulatory authority was procured by fraud or that there was a denial of natural justice in the foreign jurisdiction.

V. CONCLUSION

[28] For the reasons stated above, it is in the public interest to issue the following orders:

(a) pursuant to paragraph 2 of subsection 127(1) of the Act, trading in any securities of New Futures cease permanently;

(b) pursuant to paragraph 2 of subsection 127(1) of the Act, trading in any securities or derivatives by the Respondents cease permanently;

(c) pursuant to paragraph 2.1 of subsection 127(1) of the Act, the acquisition of any securities by the Respondents cease permanently;

(d) pursuant to paragraph 3 of subsection 127(1) of the Act, that any exemptions contained in Ontario securities law do not apply to the Respondents permanently;

(e) pursuant to paragraphs 7, 8.1 and 8.3 of subsection 127(1) of the Act, that Fagundes shall resign any positions that he holds as director or officer of an issuer, registrant or investment fund manager;

(f) pursuant to paragraphs 8, 8.2 and 8.4 of subsection 127(1) of the Act, that Fagundes is prohibited permanently from becoming or acting as director or officer of any issuer, registrant or investment fund manager; and

(g) pursuant to paragraph 8.5 of subsection 127(1) of the Act, that Fagundes is prohibited permanently from becoming or acting as a registrant, investment fund manager or as a promoter.

Dated at Toronto this 31st day of May, 2013.

Alan Lenczner

Alan J. Lenczner, Q.C.