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IN THE MATTER OF
DENNIS WING

Oral Reasons For Approval of a Settlement
(Sections 127 and 127.1 of the *Securities Act*, RSO 1990, c S.5)

Hearing:	May 24, 2018	
Reasons:	May 24, 2018	
Panel:	Philip Anisman	Commissioner
Appearances:	Matthew H. Britton	For Staff of the Ontario Securities Commission
	David Barbaree	For Dennis Wing

Oral Reasons For Approval of a Settlement

The following reasons have been prepared for publication in the Ontario Securities Commission Bulletin, based on the reasons delivered orally at the hearing, and as edited and approved by the Panel, to provide a public record.

I. INTRODUCTION

[1] In furtherance of its mandate to protect investors and the integrity of the securities market,[1] the Ontario Securities Commission has been granted authority to impose a wide array of sanctions[2] to prevent conduct that is contrary to securities law or the public interest.[3] The dominant goal of these sanctions is thus deterrence, both specific and general.[4] Non-compliance with Commission orders undermines this goal by diminishing their general deterrent effect and erodes confidence in the regulatory process and the securities market.[5]

[2] The seriousness of such non-compliance is reflected in the fact that Commission orders are "Ontario securities law",[6] a failure to comply with which is subject to prosecution and a fine of up to $5,000,000, imprisonment for up to five years, or both.[7]

[3] This hearing was convened to obtain approval of a settlement agreement (the **Settlement Agreement**) between enforcement staff of the Commission (**Staff**) and the respondent, Dennis Wing (**Wing**). As stated in the Settlement Agreement, Wing was subject to an order of the Commission dated June 24, 2015 that prohibited him permanently from trading in securities and otherwise participating in the securities market, ordered that he be reprimanded and imposed administrative penalties and costs totalling $2,570,916.[8] Approximately two months later, Wing sold securities from his account in order to obtain funds to repay a personal debt. In December, 2016, he made a proposal to his creditors, which resulted in an assignment in bankruptcy in July, 2017.[9] Despite his bankruptcy, Wing has agreed in the Settlement Agreement to a further administrative penalty of $120,000, costs of $5,000 and the imposition of a second reprimand.

II. Standard for Approval

[4] The Commission has long applied a standard of reasonableness when considering approval of a settlement,[10] reflecting that settlements involve compromise on the facts and sanctions agreed to by the parties and permit the early resolution of

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[1] *Securities Act*, RSO 1990, c S.5, s 1.1 (the **Act**).
[2] Act, s 127(1); *Quadrexx (Re)* (2018), 41 OSCB 1023, 2018 ONSEC 3 at paras 16-18.
[3] *Committee for the Equal Treatment of Asbestos Minority Shareholders v Ontario (Securities Commission)*, 2001 SCC 37 at paras 39-45.
[4] *Cartaway Resources Corp. (Re),* 2004 SCC 26.
[5] *Duic (Re)* (2008), 31 OSCB 9531, 2008 ONSEC 20 at para 50 (***Duic***); *Cadman (Re)*, 2015 ABASC 836 at para 26 (***Cadman***); *Spaetgens (Re)*, 2017 ABASC 38 at para 27 (***Spaetgens***); *Malone (Re)*, 2016 BCSECCOM 334, para 7 (***Malone***).
[6] Act, s 1(1): "Ontario securities law" (the Act, the regulations and "in respect of a person or company, a decision of the Commission or a Director to which the person or company is subject").
[7] Act, s 122(1).
[8] Settlement Agreement at para 6; *Agueci* (*Re)* (2015), 38 OSCB 5967, Order at para 2.
[9] Settlement Agreement at paras 10-23.
[10] *Koonar (Re)* (2002), 25 OSCB 2691, 2002 LNONOSC 249.

proceedings, thus reducing costs, allowing more efficient use of the Commission's resources and enhancing the Commission's enforcement capacity.[11] In this case, for example, the settlement involves an innovative compromise to resolve whether the agreed monetary penalty will be treated as a claim in Wing's bankruptcy or paid separately to the Commission[12] and will make four days of hearing unnecessary.[13]

[5] A settlement will be approved, if the sanctions agreed to are within a reasonable range of appropriateness, taking into account the settlement process and its benefits, even though the Commission might have imposed other sanctions had the same facts been found after a hearing on the merits.[14] This standard reflects the Commission's responsibility to make an order that is fair and reasonable based on its determination of the public interest.[15]

[6] It has been suggested that the standard recently adopted by the Supreme Court of Canada with respect to joint sentencing submissions in criminal proceedings may be applicable to Commission approval of settlements.[16] In its *Anthony-Cook* decision, the Supreme Court rejected a reasonableness test like the Commission's and expressly adopted a "more stringent" standard.[17] It expressed the standard for rejection of a joint sentence submission as "whether the proposed sentence would bring the administration of justice into disrepute", that is, whether it is "so unhinged from the circumstances of the offence and the offender that its acceptance would lead reasonable and informed persons, aware of all the relevant circumstances, including the importance of promoting certainty in resolution discussions, to believe that the proper functioning of the justice system had broken down."[18]

[7] The relevance of the standard in *Anthony-Cook* has not been considered in a Commission decision, but it has been addressed in the securities regulatory context by hearing panels of the Investment Industry Regulatory Organization of Canada (**IIROC**). Although the traditional standard for acceptance of a settlement by an IIROC hearing panel is essentially the same as the Commission's,[19] a few decisions have applied *Anthony-Cook.*[20] Other decisions have rejected *Anthony-Cook* as not appropriate in the self-regulatory context, concluding that it "seems wise to stick with the *Milewski* test, which has stood the test of time".[21]

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[11] *Electrovaya Inc. (Re)* (2017), 40 OSCB 5795, 2017 ONSEC 25 at para 4 (***Electrovaya***).
[12] Settlement Agreement at para 27.
[13] *Wing (Re)* (2018), 41 OSCB 3241 (Order).
[14] *Sentry Investments Inc. (Re)* (2017), 40 OSCB 3435, 2017 ONSEC 7 at paras 5-7 (***Sentry***); *Electrovaya* at para 5.
[15] *Electrovaya* at para 8.
[16] See *R v Anthony-Cook*, 2016 SCC 43 (***Anthony-Cook***); see also *Nadal (Re)* (2018), 41 OSCB 1863, 2018 ONSEC 9 at paras 19 and 33-35 (***Nadal***).
[17] *Anthony-Cook* at paras 30-31.
[18] *Anthony-Cook* at paras 5, 32 and 34.
[19] See *Milewski (Re)*, [1999] IDACD No 17; *Dykeman (Re)*, 2017 IIROC 49 at paras 15-18.
[20] *Cavalaris (Re)*, 2017 IIROC 04 at paras 15-20 (adopting *Anthony-Cook* standard); *Laurentian Bank Securities (Re)*, 2017 IIROC 38 at paras 10-11 and 38-39 (applying *Anthony-Cook* standard); *Scotia Capital Inc. (Re)*, 2017 IIROC 48 at paras 7-12 (*Milewski* and *Anthony-Cook* "so close as to be in substance identical").
[21] See *Jacob (Re)*, 2017 IIROC 17 at paras 20-30 (***Jacob***); *St-John (Re)*, 2018 IIROC 04 at paras 25-30 (***St-John***); see also *Ho (Re)*, 2018 MFDA, File No 2017120 at paras 24-26 (***Ho***).

[8] The reasoning of the decisions that reject the standard in *Anthony-Cook* reflects the contextual and other differences between the securities regulatory and criminal processes. As stated in *Jacob*:

> The Supreme Court of Canada was trying to solve a serious and difficult problem of congested courts and unreasonable delay in the criminal justice system, which can and does result in the dismissal of charges under the Charter of Rights and Freedoms. The issue has proven to be hard to solve legislatively or administratively, in part because of the many participants in various levels of government that have an interest in the process. The Supreme Court's recent case of *R v. Jordan* 2016 SCC 27, dealing with time limits for trials, can be seen as a companion attempt to deal effectively with the issue of congestion and delay in the criminal justice system in Canada.[22]

[9] These difficulties have not been evident in the securities regulatory process, in which the standard that has consistently been applied and the concomitant possibility that a settlement may be rejected encourage Staff and other parties to craft reasonable settlements.[23]

[10] The conclusion in *Re Jacob* is particularly apt in the context of the Commission's process. Settlements of Commission enforcement proceedings require approval by the Commission, as highlighted in OSC Staff Notice 15-702 – *Revised Credit for Cooperation Program*.[24] As approval of a settlement is granted under authority implicit in section 127 of the Act,[25] it must be based on a determination by the Commission that the settlement is in the public interest.[26] This requires a less reticent review of a settlement agreement than *Anthony-Cook* suggests and informs the approval process adopted by the Commission to facilitate settlement of Commission proceedings by limiting the adverse effects of a public rejection.[27]

[11] The Commission's rules of procedure require a settlement to be considered by a panel of commissioners in a confidential settlement conference before a public approval hearing may be convened.[28] In the course of reviewing a proposed settlement in a settlement conference, a panel may identify public interest concerns that would lead it to question a settlement and adjourn to permit the parties to address them and amend the settlement agreement, if they so agree.[29] On occasion, more than one settlement conference may be held.[30] If the Commission ultimately concludes that the terms of a proposed settlement

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[22] *Jacob* at para 28; see also *St-John* at para 29; *Ho* at para 26.
[23] See also, e.g., *Jacob* at para 26.
[24] (2014), 37 OSCB 2583, para 19 (approval of settlement agreements "will be subject to the adjudicative discretion of an independent Commission hearing panel").
[25] C*f. Eco Oro Minerals Corp. (Re)* (2017), 40 OSCB 5321, 2017 ONSEC 23 at paras 238-273; see also *AIC Ltd. v Fischer*, 2013 SCC 69 at para 54 ("no question … OSC had jurisdiction to approve the settlement agreement").
[26] See, e.g., *Electrovaya* at para 8.
[27] See, e.g., *M.C.J.C. Holdings Inc. (Re)* (2002), 25 OSCB 1133 (rejection); *M.C.J.C. Holdings Inc.* (2003), 26 OSCB 8206 (approval).
[28] *Ontario Securities Commission Rules of Procedure and Forms* (2017), 40 OSCB 8988 (**OSC Rules**), r 32. This process is described in *Nadal* at paras 23-24.
[29] See *Techocan International Co. Ltd. (Re)* (2017), 40 OSCB 10123, 2017 ONSEC 44 at para 52.
[30] See, e.g., *Sentry* at para 20; *Electrovaya* at para 16.

agreement are not within a reasonable range of appropriateness, a settlement approval hearing is not convened. The Commission's public interest mandate and its settlement process thus contemplate a standard that permits it to address proposed settlements in light of its regulatory responsibilities.

[12] For these reasons, the Commission's traditional reasonableness standard for approving a settlement agreement is more appropriate in the context of the Commission's process and was applied in this case.

III. THE SETTLEMENT AGREEMENT

[13] Approval of the Settlement Agreement and making the agreed order are in the public interest.

[14] In contravening the Commission's earlier order, Wing engaged in serious, prohibited conduct. No mitigating factors are identified in the Settlement Agreement. He has agreed to pay an administrative penalty of $120,000 and costs of $5,000. Sanctions for similar conduct in prior decisions of the Commission and other securities commissions include monetary penalties and costs ranging from $40,000 to approximately $125,000; most of these decisions also impose extensions of market prohibitions for longer periods than those imposed by the earlier order that was contravened.[31]

[15] Such complementary sanctions are not available in this case, as the order Wing contravened permanently prohibits his trading in securities. Although this and the other permanent prohibitions of his participation in the securities market continue, they cannot be extended. Thus, the only effective sanction available to the Commission under section 127 is an administrative penalty. The closest Ontario precedent differs from this Settlement Agreement in view of the fact that the respondent in it relied on legal advice that he misunderstood and he self-reported his contravention when he realized his error.[32]

[16] The penalty and costs agreed to in the Settlement Agreement are therefore within a reasonable range of appropriate sanctions. They make clear the importance of compliance with Commission orders, are sufficient to deter Wing from future contraventions and are likely, as well, to deter others who might consider engaging in similar conduct.

[17] The deterrent effect of these sanctions is reinforced by other provisions of the Settlement Agreement. The Settlement Agreement provides that if Wing fails to comply with the agreed order, Staff will be entitled to bring proceedings against him on the basis of his contravention of both the earlier order and the current one.[33] This leaves open to Staff any proceedings they think necessary and appropriate in the circumstances, including a prosecution under section 122 of the Act.[34] Wing's acknowledgement of this potential is also relevant to the reasonableness of the Settlement Agreement.

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[31] See, e.g., *Duic* ($40,000); *Cadman* ($122,500, plus extended bans); *Spaetgens* ($105,000, plus extended bans); *Malone* ($60,000, plus extended bans); *Jardine (Re)*, 2016 BCSECCOM 82 ($40,000, plus extended bans).

[32] See *Duic* at paras 12, 14, 19 and 55-59.

[33] Settlement Agreement at paras 29-31.

[34] See, e.g., *Ontario Securities Commission v DaSilva* (2017), 139 OR (3d) 598, 2017 ONSC 4576.

[18] Wing's agreement to receive a second reprimand is significant, as well. Although a reprimand may be a less onerous sanction than a monetary penalty or a prohibition against trading, his agreement to it indicates his recognition of the impropriety of his selling shares when he was subject to a cease trade order and his acceptance of his responsibility to comply with both the order to be issued today and the prior order, which continues in effect.[35] It, too, contributes to the reasonableness of the settlement.

[19] For these reasons, I shall issue an order today substantially in the form agreed to in the Settlement Agreement.

[20] Mr. Wing is present by video. Mr. Wing, will you please stand. You may consider yourself reprimanded.

[21] Before concluding this hearing, I wish to thank counsel for both parties for their efforts in achieving this settlement and for their helpful submissions in the settlement conference and this hearing.

Dated at Toronto this 24th day of May, 2018.

"Philip Anisman"
Philip Anisman

[35] See, e.g., *Hutchinson (Re)* (2018), 41 OSCB 3841, 2018 ONSEC 22 at para 11.