



Ontario
Securities
Commission

Commission des
valeurs mobilières
de l'Ontario

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**IN THE MATTER OF
ELECTROVAYA INC. and SANKAR DAS GUPTA**

**ORAL REASONS FOR APPROVAL OF SETTLEMENT
(Subsection 127(1) of the
Securities Act, RSO 1990, c S.5)**

Hearing: June 30, 2017

Decision: June 30, 2017

Panel: Philip Anisman Commissioner and Chair of the Panel
William Furlong Commissioner
Frances Kordyback Commissioner

Appearances: Cullen Price For Staff of the Commission
Anna Huculak

Brad Moore For Electrovaya Inc. and Sankar Das
Gupta

ORAL REASONS FOR APPROVAL OF SETTLEMENT

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

- [1] Continuous disclosure by reporting issuers is a cornerstone of our securities regulatory regime. It is intended to provide, on an ongoing basis, the full and accurate information concerning all material facts and events relating to reporting issuers that is necessary for investors to have confidence in the fair and efficient operation of our securities markets. Accordingly, disclosures made by reporting issuers must be current, balanced and accurate.
- [2] A failure by a reporting issuer to meet these regulatory requirements is always significant, albeit to greater and lesser degrees. It is important, therefore, that such issuers have policies and procedures to ensure compliance with their disclosure obligations under securities laws and that their responsible officers ensure that these policies and procedures are observed.
- [3] This hearing concerns a settlement agreement (the “Settlement Agreement”) among Commission Staff (“Staff”), ElectroVaya Inc. (“Electrovaya”) and Dr. Sankar Das Gupta (together with ElectroVaya, the “Respondents”). As admitted in the Settlement Agreement, ElectroVaya, despite warnings from Staff, repeatedly published unbalanced and incomplete news releases and, contrary to Ontario securities law, failed to update forward-looking information contained in prior news releases and to accurately describe the development of its business in its annual information form resulting in overly optimistic disclosure. ElectroVaya’s disclosure contraventions were authorized, permitted or acquiesced in by Dr. Das Gupta, who is ElectroVaya’s president and CEO, the chair of its board of directors and a member of its disclosure committee and who is deemed under section 129.2 of the *Securities Act* to have also committed these contraventions.
- [4] Staff and the Respondents request approval of the settlement embodied in the Settlement Agreement. Settlements like this one, by avoiding the costs of a contested hearing, permit the Commission’s resources to be directed to other matters, thus increasing the Commission’s overall enforcement capabilities to the benefit of investors and the securities market. In addition, a settlement of this nature enables respondents to resolve the distractions that may accompany an enforcement proceeding and devote themselves to their legitimate business activities.
- [5] A settlement will ordinarily be approved, if the sanctions agreed to by the parties are within a reasonable range of appropriateness in light of the facts admitted in the settlement agreement, taking into account the settlement process and its benefits. It is important to note, however, that the agreed sanctions need not be the sanctions that the panel might have imposed after a hearing on the merits. A settlement is based on the facts admitted by the respondents and agreed to by Staff, which may or may not be the facts

that a Commission panel would have found after a contested hearing. Even on the same facts, other sanctions might have been imposed by a panel after a merits hearing.

- [6] A panel considering a proposed settlement necessarily relies on Staff’s negotiations in furtherance of their enforcement responsibilities, as the panel cannot know of facts that are not included in the settlement agreement or of the breadth of sanctions discussed by the parties. Its consideration is based only on the facts agreed to by Staff in the settlement agreement and any contextual information provided by the parties in a confidential settlement conference convened pursuant to the Commission’s *Rules of Procedure*.¹ While the panel’s reliance is necessarily deferential as a result, the standard of reasonableness that the panel applies is not the same as the deference that a court accords when reviewing decisions made by an administrative tribunal like the Commission or by corporate directors in exercising their business judgment, even though the standards applicable to such judicial review are based on similarly expressed concepts of reasonableness.
- [7] On judicial review of administrative action, a court considering the reasonableness of a decision made by a government body in the exercise of authority conferred on it by legislation is concerned with process, “the existence of justification, transparency and intelligibility within the decision-making process”, as much as with outcomes.² When considering corporate action, a court must evaluate a decision made by directors who were elected by shareholders to manage the corporation’s business and affairs, as mandated by corporate legislation.³ In both cases, the court is considering a decision made by another body, which is the primary decision-maker, and applies reasonableness standards that reflect the administrative or business context.
- [8] In the case of a settlement, a Commission panel is the primary decision-maker. It must be satisfied that the settlement is fair and reasonable⁴ and that approval of the settlement is in the public interest, based on the facts and sanctions agreed to by the parties, in light of applicable regulatory principles, prior Commission sanctions and the regulatory settlement process. The Commission’s role is recognized in the Commission’s *Rules of Procedure* concerning settlements⁵ and in *OSC Staff Notice 15-702 – Revised Credit for Cooperation Program*.⁶
- [9] The purpose of the Commission’s sanctioning authority is to protect investors and the fair operation of our securities markets and to deter, both specifically and generally, future conduct that is inconsistent with securities laws or the public interest. These goals are furthered through the adoption and implementation by reporting issuers of governance practices, policies and procedures designed to ensure fulfilment of their disclosure

¹ *OSC Rules of Procedure*, Rules 12.1-12.5. In this case, there were two such conferences.

² *Dunsmuir v. New Brunswick*, [2008] 1 SCR 190, 2008 SCC 9, para. 47 (“a range of possible, acceptable outcomes which are defensible”).

³ See *BCE Inc. v. 1976 Debentureholders*, [2008] 3 SCR 560, 2008 SCC 69, paras. 40 and 99 (“deference to a business decision, so long as it lies within a range of reasonable alternatives”).

⁴ See, e.g., *Re Ernst & Young LLP* (2014), 37 OSCB 9227, para. 7.

⁵ *OSC Rules of Procedure*, Rule 12.1 provides that the purpose of a settlement conference is to enable the parties to obtain guidance on whether a proposed settlement would be in the public interest.

⁶ (2014), 37 OSCB 2583, para. 19 (settlement agreements “will be subject to the adjudicative discretion of an independent Commission hearing panel whether to approve any” settlement.)

obligations and by recognition by the issuers' officers of their responsibility to ensure compliance.

- [10] In this case, approval of the Settlement Agreement with Electrovaya and Dr. Das Gupta is in the public interest because on the basis of the agreed facts, the agreed sanctions are within a reasonable range of appropriate sanctions.
- [11] Prior to entering the Settlement Agreement, Electrovaya appointed an independent director to its disclosure committee and revised its disclosure policy to require review of all continuous disclosure by its legal counsel. Under the Settlement Agreement, it and Dr. Das Gupta have agreed to take further remedial steps, first, by retaining a consultant agreed to by Staff to review and report on (i) its corporate governance framework, including the position and role of the chair of its board of directors and the composition of its disclosure committee, (ii) its corporate disclosure policies, and (iii) the policies, processes, reports and systems relating to its disclosure controls and procedures and, following this review, by instituting changes that are recommended by the consultant and accepted by Staff.
- [12] The consultant's process will be subject to Staff oversight and the consultant will oversee and report to Staff on Electrovaya's implementation of its recommendations. This process must be completed within approximately one to one and one half years and Electrovaya must disclose the results of the consultant's reviews and the implementation of its recommendations.
- [13] In addition, although Dr. Das Gupta may continue as a director and officer of Electrovaya, the Respondents have undertaken immediately to appoint an independent director as chair of Electrovaya's board of directors, to restructure its disclosure committee to have an equal number of management and independent directors and to ensure that all of the disclosure committee's decisions are approved by the independent directors. These processes will remain in place for twenty months and will thus extend beyond the completion of the consultant's review and reports. In the panel's view, these remedial obligations are a reasonable way of addressing the conduct of Electrovaya and protecting investors during the period of the consultant's work.
- [14] Dr. Das Gupta will be prohibited for a year from acting as a director or officer of any reporting issuer, other than Electrovaya or an affiliate of Electrovaya. He has agreed to pay and has paid a monetary penalty of \$250,000. In addition, he has undertaken personally to pay the entire costs of the consultant's services and to participate in a course on corporate governance at his own expense. He has undertaken, as well, that all of the payments to be made by him will be without recourse to any insurance or indemnity agreement or similar compensatory arrangement that might otherwise have been available.
- [15] The administrative penalty that has been paid and these undertakings make manifest Dr. Das Gupta's acceptance of responsibility for Electrovaya's admitted disclosure failings and their correction and for its ongoing governance and continuous disclosure obligations. This acceptance is highlighted by Dr. Das Gupta's agreement, in the Settlement Agreement, to attend at this hearing and be reprimanded. Dr. Das Gupta, I ask

you to stand before this panel. We impose this reprimand on you to emphasize your responsibility, as a senior officer of a reporting issuer, to ensure that Electrovaya complies with its disclosure and other obligations under securities laws. To this end, this panel reprimands you. You may now be seated.

- [16] For all of these reasons, the panel has determined to approve the settlement and will sign an order substantially in the form of the order in Schedule “A” to the Settlement Agreement. With that, the panel wishes to thank all counsel for their helpful submissions in the settlement conferences that preceded this hearing and in this hearing. The hearing is now concluded.

“Philip Anisman”

Philip Anisman

“William Furlong”

William Furlong

“Frances Kordyback”

Frances Kordyback