

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

**- and -**

**IN THE MATTER OF THE DECISION OF THE HEARING PANEL OF  
MARKET REGULATION SERVICES INC. DATED JULY 15, 2003**

**- and -**

**IN THE MATTER OF THE UNIVERSAL MARKET INTEGRITY RULES**

**- and –**

**IN THE MATTER OF DONALD GRECO**

**Hearing:        June 24, 2004**

<b>Panel:</b>	<b>Paul M. Moore, Q.C.</b>	<b>Vice-Chair of the Commission (Chair of the Panel)</b>
	<b>Susan Wolburgh Jenah</b>	<b>Vice-Chair of the Commission</b>
	<b>Robert L. Shirriff, Q.C.</b>	<b>Commissioner</b>
<b>Counsel:</b>	<b>David C. Moore</b>	<b>For Donald Greco</b>
	<b>Kenneth G.G. Jones</b>	
	<b>Jane P. Ratchford</b>	<b>For Market Regulation Services Inc.</b>
	<b>Alexandra S. Clark</b>	<b>For Staff of the Commission</b>

## **DECISION AND REASONS**

[1] This matter comes before us as an application for a hearing and review of a decision of the hearing panel of Market Regulation Services Inc. (the RS Panel) dated July 15, 2003, pursuant to sections 21.7 and 8(2) of the Ontario Securities Act, R.S.O. 1990, c.S.5 (the Act). The moving party in this matter is Donald Greco (Greco) and the responding party is staff of Market Regulation Services Inc. (RS).

### **I. BACKGROUND**

#### **(a) The Allegation Against Greco**

[2] In a Notice of Hearing dated March 14, 2003, RS alleged that Greco contravened Rule 4-204(1) of the Rules of the Toronto Stock Exchange (the Exchange). The heart of the allegation is found in the second paragraph of the Notice of Hearing and reads as follows:

On November 22, 2001, with knowledge of an undisclosed client order for shares of Abitibi-Consolidated Inc. which order could reasonable [*sic*] be expected to affect the market price of such security, you traded in this security, where such trade could be expected to be affected by such change in the market price contrary to Rule 4-204(1) of the Rules of the Exchange.

[3] Rule 4-204(1) reads:

A Participating Organization, Approved Person or person associated with a Participating Organization shall not with knowledge of an undisclosed client order for a listed security or securities which order could reasonably be expected to affect the market price of such a security or securities trade in equities or derivatives on any stock exchange or market, including any over-the-counter market, where such trade could be expected to be affected by a change in the market price.

#### **(b) Agreed Facts**

[4] The parties agreed upon the following facts, both at the hearing before the RS Panel (the RS Hearing) and this hearing before the Commission.

[5] Greco has been employed as a registered trader with Griffiths McBurney & Partners (GMP) since 1997.

[6] Garrett Steven Prins (Prins) was employed as a registered trader with GMP from March 1999 to September 18, 2001, when he moved to Sprott Securities Inc. (Sprott). At Sprott, Prins worked as an institutional trader and dealt with institutional clients only. Prins knew Greco personally from his employment at GMP.

[7] On November 22, 2001, Prins was assigned several orders in the buy program of a Sprott client, AGF Funds Inc., one of which consisted of 10,100 shares of Abitibi-Consolidated Inc. (Abitibi). After receiving his assignments in the buy program from the head trader, Prins completed and time-stamped a ticket to buy 10,100 shares of Abitibi at 9:51 a.m.

[8] Between 9:51 and 10:35 a.m. that day, Prins and Greco discussed the Abitibi order.

[9] Greco entered a short sale at 10:35:51 a.m. for 10,100 shares of Abitibi. At 10:36:02 a.m. he entered a buy order for 8,000 shares of Abitibi at \$10.80, which was filled for a total of 6,800 shares at \$10.75, \$10.78, and \$10.80 from available offers. As a result, the remaining 1,200 shares from Greco's 8,000 share bid at \$10.80 became best bid and his offer for 10,100 shares at \$10.82 became the next best ask.

[10] Four seconds after Greco's offer became the best ask, Prins hit the offer for 10,100 shares, thereby filling his client's buy order at \$10.82 per share.

[11] Greco earned a profit of \$511 trading the 10,100 shares. He received 50% of this amount; GMP received the other 50%.

[12] Greco had not traded Abitibi previously in October or November of 2001. He had not entered a trade in Abitibi on November 22, 2001 until he offered the 10,100 shares at 10:35:51 that day. Apart from the Abitibi trades he made that day, he did not trade in Abitibi again until December 18, 2001.

### **(c) Contested Facts**

[13] At the RS Hearing, as well as this hearing, Greco contested the alleged facts and inferences surrounding the substance of his conversation with Prins on the morning of November 22, 2001. Greco submitted that the proper inference to be drawn from the evidence on the record is that Prins asked Greco to facilitate the trade in Abitibi because he was too busy with his client's other buy orders to conduct the trade himself. RS responded that there is no evidence to support this inference.

[14] Greco did not call any witnesses and did not testify at the RS Hearing. His counsel advised the RS Panel that Greco had no recollection of a conversation with Prins on the morning in question. Prins did testify; however, he too had no recollection of the conversation. RS called expert witness Gordon Neil Winchester (Winchester), a retired manager of market surveillance at the Exchange, who wrote a report on the trading activity and gave expert evidence on the Abitibi trade.

### **(d) The Prins Settlement**

[15] On March 7, 2003, Prins settled the RS matter against him in respect of the Abitibi share transaction of November 22, 2001.

[16] At the RS Hearing, Prins confirmed the following agreed fact in the settlement agreement:

On November 22, 2001, Prins acted contrary to just and equitable principles in violation of Exchange Rule 7-106(1)(b) when he informed an inventory trader, Donald Greco, a registered trader at another Participating Organization, of a client order in Abitibi-Consolidated Inc., thereby enabling Donald Greco to buy shares in this security which Prins then bought from Donald Greco for the client order.

[17] Under the terms of the settlement agreement, Prins agreed to pay RS a fine of \$10,000, to be suspended from the Exchange for three months, and to pay \$15,000 towards costs of the RS investigation.

## II. THE RS PROCEEDING

[18] The RS Panel heard the matter on July 15, 2003, and delivered its decision and reasons orally. The reasons of RS Panel are set out here in their entirety:

The Panel finds that, on the evidence, Mr. Prins got an order to buy 10,100 Abitibi, that a conversation occurred thereafter between himself and Mr. Greco about this order.

Mr. Greco put in a short sale for this exact amount of 10,100 Abitibi at \$10.82. Within seconds he bought all of the existing offering of 6,800, which would exist in the market. Some four seconds later Mr. Prins hits his offering at \$10.82. We note that Mr. Prins did not bid prior to this. Mr. Greco then filled the rest of his order – he covered the rest of his short position, I should say, in the market. Prior to this Mr. Greco had no position in the stock and had not recently been active in the stock.

We have heard much discussion about risk and disadvantaging the client, but we note that neither of these is an element in the offence set out in Rule 4-204(1).

*“The offence as charged was on November 22nd, 2001, with knowledge of an undisclosed client order for shares of Abitibi Consolidated Inc., which order could reasonably be expected to affect the market price of such security, you traded in this security where such trade could be expected to be affected by such change in the market price contrary to Rule 4-204(1) of the Rules of the Exchange.”*  
[emphasis in the original transcript]

We find that this charge has been established, and I observe in passing that the essential evidence in this case has been agreed and we are satisfied that it meets the clear and cogent requirement for a conviction. We therefore find Mr. Greco guilty as charged.

[19] The RS Panel made the following endorsement on the Notice of Hearing:

For oral reasons, we find Mr. Greco guilty as charged. As to penalty, we impose a fine of \$15,000.00, \$10,000.00 for costs, disgorgement of \$250.00 and suspension of 1 month commencing immediately.

## III. POSITIONS OF THE PARTIES BEFORE THE COMMISSION

### (a) Greco

#### (i) Fairness

[20] Counsel for Greco submits that Greco was denied procedural fairness and natural justice. Greco was prejudiced, his counsel argues, because the matter was decided upon a fundamentally different basis from that on which it was presented. He submits that RS framed the allegation in its Notice of Hearing and argued the matter in such a way that Greco believed that intention to disadvantage the client was an element of Rule 4-204(1). Greco responded to the allegations on that basis. The RS Panel did not decide the matter on that basis, holding that neither risk nor disadvantage to the client is an element of the offence set out in the Rule. Greco, therefore, did not have notice of the actual case that he had to meet.

[21] Counsel for Greco quotes several passages from the RS Hearing transcript in which counsel for RS spoke of “taking advantage of a client order” and acting “to the disadvantage of a client order.”

(ii) *Error of Law in Interpreting Rule 4-204(1)*

[22] Counsel for Greco submits that the RS Panel erred in law in its interpretation of frontrunning under Rule 4-204(1). His submission is two-fold. First, the RS Panel erred by finding that risk and disadvantage to the client are not “elements of the offence” in Rule 4-204(1). Second, as a result of that finding, the RS Panel erred in failing to consider an inference that could have been made from evidence on the record that the contact between Prins and Greco may have been for the proper purposes of facilitating a trade at a fair price for the benefit of Prins’ client.

[23] Counsel for Greco submits that Rule 4-204(1) must be interpreted within the context in which it developed, and not only its current wording. Rule 4-204(1), he concedes, does not contain the phrase “taking advantage”; however, the phrase is found in several past and present commentaries and policies to which he referred us:

- from the *Toronto Stock Exchange Equities Trading Manual* (1998), section 11.19A *Frontrunning*: “a member shall not take advantage of a client order by trading ahead of it in the same or a related market.”
- from the commentary on frontrunning in the same *Manual*: “Frontrunning occurs if a member...executes or causes to be executed any transaction described below to take advantage of non-public information concerning imminent transactions that can reasonably be expected to change prices. The following exceptions are covered: ...if a transaction is made for the benefit of a client for whose account the imminent transaction is being made, or for purposes of entering into a bona fide hedge of a position that a member has assumed or agreed to assume in facilitating the execution of a client order.”
- from the same commentary, this note about tipping: “if a person associated with a member tips another person...about a material order to be executed for one of the member’s clients, that person has breached a legal duty to the client and would be considered to have engaged in conduct that is unbecoming or inconsistent with just and equitable principles of trade, which is a violation of the General By-law. If a person associated with a member takes advantage of undisclosed material market information based on a tip received from another person concerning an order to be executed for the tipper’s client by trading ahead in the same or a related manner, the tippee would be in violation of the prohibition on frontrunning.”
- from the *Toronto Stock Exchange Policies* (1999): “Section 11.19A prohibits members, approved persons and persons associated with a member from taking advantage of non-public information concerning imminent transactions ... if the trade would reasonably be expected to move the market in which the frontrunning trade is made. ... Members, approved members and persons associated with a member are prohibited from taking advantage of a client’s order from trading ahead of it in the same or related market.”
- from *The Toronto Stock Exchange Policies* (2000): “Rule 4-204 prohibits Participating Organizations, Approved Persons and persons associated with a Participating Organization from taking advantage of non-public material information concerning imminent transactions in equities options for futures markets. ... Participating

Organizations, approved persons and persons associated with the Participating Organization are prohibited from taking advantage of a client's order by trading ahead of it in the same or related market.”

- from the *Trader Training Course* of the Canadian Securities Institute: “No one is allowed to take advantage of a client's order by trading ahead of it. This includes traders of both the firm accepting the order and any trader of a competing firm with advance knowledge of the order. This applies to trades in the same security or a related security such as a convertible or option, trading ahead of, and to the disadvantage of a client order is known as frontrunning.”

[24] Counsel for Greco argues that we must determine the nature of the underlying harm that the prohibition against frontrunning is intended to address. He submits that it is meant to cover situations where there has been impropriety. Specifically, counsel for Greco argues that frontrunning necessitates an element of obtaining an improper advantage by trading to the disadvantage of the client.

[25] Counsel for Greco asserts that there was no such impropriety in this case. He submits that the purpose of Greco’s involvement was to facilitate the trade in Abitibi for Prins’ client at a reasonable price because Prins was too busy dealing with the other buy orders for the same client. Although there was no direct evidence on this point, he argues that there was sufficient evidence and argument on the record for the RS Panel to have inferred the above scenario, or at least consider it as a possibility.

[26] Counsel for Greco argues that there was no evidence that Prins had time or inclination to engage in the Abitibi trade himself. The Panel did not make a finding on this point. Prins conceded during the RS Hearing that it was possible that he did not have time due to the number of client buy orders that he was assigned that morning.

[27] Counsel for Greco refers us to several passages of cross-examination in the transcript in which he presented hypothetical conversations based on the above inference to Prins and Winchester. Prins agreed that this type of conversation sometimes takes place between traders looking to accommodate each other. Prins also said that the following hypothetical statements could have been part of his conversation with Greco:

- “I’ve just received a series of allocations of orders that I’ve got to deal with in some way and would you be interested in doing a trade involving Abitibi?”
- “I’ve got a bunch of different things on my plate which I’ve got to attend to, if you’re willing – if you’re a seller of Abitibi that would facilitate a transaction that I want to enter into.”
- “Abitibi may be trending upwards, I don’t have time to engage in the detailed trading myself, I’m looking for a position of the amount in question, if you’re a seller at the low 10.80’s that’s a transaction I’ll be content to proceed with.”
- “I’ve got a number of things on my plate, one of them involves Abitibi, there’s some stock available apparently in the low 10.80’s, but not all, if you’re a seller in the low 10.80’s that would be a reasonable price as far as I’m concerned.”

[28] Counsel for Greco put the following hypothetical situation to Winchester during cross-examination:

And a reason in this context, I'm talking about the trading pattern and evidence in the case, where a conversation might take place, I suggest to you, would be if Mr. Prins was up to his eyeballs with other orders, he was not in a position to follow Abitibi, to deal with Abitibi, he was approaching a colleague to see if there was any interest on being on the other side of the trade; isn't that a possibility?

[29] Winchester agreed with counsel for Greco that the hypothetical situation was possible.

[30] Counsel for Greco submitted that the element of risk in Greco's trade further supports the likelihood of the inference and is evidence of the lack of impropriety, his counsel contends. He maintains that when Greco sold short 10,100 shares of Abitibi he "had assumed a risk, and it was entirely possible that he might have lost on the trading activity, and it was done in order to facilitate an appropriate request from Mr. Prins to assist him. [That] is the antithesis of the underlying gravamen of the offence of frontrunning."

[31] Counsel for Greco distinguishes Greco's trade from what he calls "classic frontrunning" in *In the Matter of Biscotti et al.* (1992), 16 O.S.C.B. 31 (*Biscotti*). In *Biscotti*, he argues, the respondent's frontrunning trades were risk-free because Biscotti "went long on a stock, knew that an order was going to be filled at a higher price, and just crossed the block and pocketed a guaranteed profit." Greco did not act that way. In order to facilitate the trade for Prins' client, his counsel contends, he sold short and took a risk that he would lose on the transaction.

[32] Counsel for Greco also distinguishes *Biscotti* as a case where there was impropriety in trading due to the use of jitneys and other mechanisms for concealing the illicit trades. There was no such impropriety in Greco's trade.

(iii) *Sanction*

[33] Counsel for Greco submits that the sanction imposed by the RS Panel was excessive because the RS Panel did not conclude that Greco had benefited from or disadvantaged Prins' client. Unlike in *Biscotti*, there was no morally blameworthy conduct. He argues that the appropriate sanction would be a reprimand.

**(b) RS**

(i) *Standard of Review*

[34] Counsel for RS submits that the standard for review of an RS decision is that set out in *In the Matter of Taylor Shambleau* (2002), 25 O.S.C.B. 1850 (*Shambleau*). She submits that the RS Panel did not proceed on an incorrect principle, err in law, or overlook material evidence. There is no new or compelling evidence presented to the Commission, and RS' perception of the public interest did not conflict with that of the Commission.

(ii) *Fairness*

[35] Counsel for RS responds that there was no unfairness in this case. The RS Panel, she argues, heard evidence in the form of witnesses, agreed facts, and documents. It held that evidence relating to risk and disadvantage to the client was not relevant to the determination it had to make with respect to a breach under Rule 4-204(1). She notes that the Notice of Hearing tracks the language of Rule 4-204(1). She submits that the process was not unfair: Greco knew the case he had to meet and the evidence he should call to meet that case.

[36] Counsel for RS further submits that she did not argue that this case is based on disadvantaging, advantaging, or risk at the RS Hearing. She says that disadvantage to Prins' client was alleged as a fact in the case, and that evidence was led that Prins' client overpaid for the Abitibi shares by \$202 due to the involvement of Greco.

(iii) *Error of Law in Interpreting Rule 4-204(1)*

[37] Counsel for RS submits that the RS Panel properly determined that risk and disadvantage to the client are not legal requirements for establishing a breach of Rule 4-204(1). She asserts that Rule 4-204(1) does not require the trade in question to be risk-free, nor does it require disadvantage to the client or profit for the trader. She submits, citing the evidence of Winchester, that Greco's manner of trading actually minimized risk in this case. In response to the submissions on *Biscotti*, she argues that Rule 4-204(1) also does not require the use of a jitney or an attempt to hide the trades. Furthermore, *Biscotti* is not helpful because it was a decision under the *Securities Act*, R.S.O. 1990, c.5 (the Act) and not under Rule 4-204(1).

[38] Counsel for RS acknowledges that a defence to frontrunning is available under subsection (3) of Rule 4-204. She concedes that if a transaction caught by Rule 4-204(1) is made solely for the benefit of the client, then there is no frontrunning. She submits, however, that there was no evidence presented to the RS Panel that would allow Greco to avail himself of that defence. She argues that any inference about the conversation advanced by counsel for Greco is pure speculation.

[39] Counsel for RS submits that the reasonableness of the inference that counsel for Greco is advocating must be evaluated by examining the trade and the market. She maintains that, as per Winchester's expert evidence, there was no reason for Greco's intervention. First, Prins did not need to ask Greco to facilitate the trade because there were sufficient shares of Abitibi in the market at the time. All Prins needed to do was place the order. Second, there was no reason for Prins to think that Greco might be interested in selling him shares in Abitibi. Greco had not traded in Abitibi in October or November of 2001, and he was not in the market for Abitibi that morning. Third, Greco was not the registered trader for Abitibi, the type of person that an institutional trader like Prins would contact if he could not find shares to fill the order. In any case, there would be no reason to do so here because, as the trading records in evidence show, Abitibi was a very actively traded stock.

[40] Counsel for RS contends that the cross-examination of Winchester is not evidence that would support the inference. She submits that the passage quoted to us by counsel for Greco was taken out of context. She refers us to several pages earlier in the cross-examination transcript, where Winchester was asked about the situations in which one trader would speak to another about facilitating a trade. He replied that registered traders should not discuss or break up client trades. A trader who learns about a client order is prohibited from trading ahead of that order in any significant volume. Winchester then qualified his statement, noting two situations where it is permissible to speak to another registered trader. First, a registered trader may contact the registered trader responsible for a particular stock issue when no other stock can be found to fill an order. Second, under similar conditions, an institutional trader may contact another institutional trader who has been active in selling the stock in question.

[41] Counsel for RS submits that neither of these situations applied in this case. Greco was not in the market as a seller of Abitibi until Prins contacted him. Greco's assistance was also not required, according to Winchester, because there were 10,100 shares of Abitibi available in the

market for Prins to buy on his own. For the same reasons, counsel for RS submits that the hypothetical conversations posed by counsel for Greco to Prins cannot be supported.

[42] Accordingly, counsel for RS submits, there was no evidence before the RS Panel to allow it to make the inference proposed by counsel for Greco.

(iv) *Sanction*

[43] Counsel for RS submits that the sanction imposed by the RS Panel was warranted because of the serious nature of frontrunning. She argues that the dollar amounts in this case may be small, but that should not be the determining factor because of the potential harm that frontrunning poses to the market. She submits that the sanction is proportional to those in other frontrunning cases and is appropriate from the perspective of general and specific deterrence.

#### **IV. ANALYSIS**

##### **(a) Standard of Review**

[44] We agree with the submission of counsel for RS and Commission staff that the appropriate standard of review is that set out in *Shamblau*. Commission staff also refers us to the lengthier discussion of the standard of review found in the recent decision of this Commission in *In the Matter of Dimitrios Boulieris* (2004), 27 O.S.C.B. 1597 (*Boulieris*).

[45] In *Boulieris*, the Commission noted that it exercises original jurisdiction under a section 21.7 hearing and review. The Commission may “confirm the decision under review or make such other decision as the Commission considers proper.” However, the Commission will accord deference to the factual determinations central to the RS Panel’s specialized competence, and will not substitute its own view of the evidence for that taken by the RS Panel just because the Commission might have reached a different conclusion.

[46] In practice, the Commission may interfere with a decision of the RS Panel:

- (a) if the RS Panel proceeded on an incorrect principle;
- (b) if the RS Panel erred in law;
- (c) if the RS Panel overlooked material evidence;
- (d) if new and compelling evidence is presented to the Commission that was not presented to the RS Panel;
- (e) if the RS Panel’s perception of the public interest conflicts with that of the Commission.

[47] We have reviewed the reasons of the RS Panel, the record of the RS Hearing, the factums and argument on behalf of the parties and Commission staff before us. We agree with the decision of the RS Panel.

##### **(b) Fairness**

[48] We disagree with counsel for Greco that there was any unfairness to Greco at the RS Hearing. The Notice of Hearing set out the proper basis for the proceeding, namely the alleged breach of Rule 4-204(1). We note that the wording of the allegation in the Notice of Hearing closely parallels the wording the Rule. Greco knew the allegation that he had to answer and the legal basis upon which the allegation was grounded. He had notice of the case he had to meet.

[49] We further disagree with counsel for Greco that the RS Panel decided the matter upon a different basis from that which was argued by the parties. Our view from reading the transcript of that proceeding and hearing argument of counsel before us is that RS did not argue that disadvantage to Prins' client was an element of the breach of Rule 4-204(1). There were no new allegations or surprises in RS' arguments at the RS Hearing. However, even if RS had argued its case in that way, it was open to Greco to present his case and call evidence in a manner that addressed Rule 4-204(1) and established a defence under subsection (3). It appears that this did not occur.

[50] The RS Panel's reasons expressly refer to the allegation in the Notice of Hearing. The RS Panel did not decide the matter on a novel ground. The RS Panel simply did not accept Greco's arguments. There was no unfairness in that. Accordingly, we reject counsel for Greco's argument that the conclusions of the RS Panel raise issues of unfairness or a breach of natural justice.

**(c) Error of Law in the Interpretation of Rule 4-204(1)**

[51] The RS Panel did not err in law in interpreting Rule 4-204(1). The RS Panel properly based its interpretation on the wording of the current Rule, rather than on the past rule, policies, and commentaries to which counsel for Greco referred us. We agree with its finding that risk and disadvantage to the client are not elements of a breach of Rule 4-204(1). We also agree with counsel for RS that *Biscotti* is not determinative in interpreting Rule 4-204(1), because it was brought and decided under the general duty found in the Regulation to the Act.

[52] We note, as the RS Panel did, that the agreed facts and concessions before the RS Panel comprise the mechanics of the trade between Greco and Prins. The evidence was clear and convincing.

[53] Did the Panel err by overlooking material evidence on the record in that it failed to consider the inference about the substance of the conversation between Greco and Prins? The bulk of Greco's arguments, both before the RS Panel and the Commission, related to the risk taken by Greco to execute the trade and the lack of disadvantage to Prins' client. They were aimed at supporting the inference that the substance of the conversation was to set up a trade for the benefit of Prins' client and not for the purposes of frontrunning. We note that both arguments were put forward by counsel for Greco. The RS Panel did consider and refer to Greco's arguments when it stated: "[w]e have heard much discussion about risk and disadvantaging the client, but we note that neither of these is an element in the offence set out in Rule 4-204(1)."

[54] Rule 4-204(1) sets out a strict-liability offence, and the agreed facts of this case are sufficient for a finding of liability. Greco's arguments are more relevant to subsection (3) of the same rule, which provides for a defence where a breach of Rule 4-204(1) has been established. Rule 4-204(3) provides:

Rules 4-204(1) and (2) shall not apply to a transaction that is made solely for the purpose of providing a benefit to a client for whom the imminent transaction is made, or to enter into a hedge of a position that the Participating Organization has assumed or agreed to assume from a client where the hedge is commensurate with the risk assumed by the Participating Organization.

[55] At the Commission hearing, we asked counsel for Greco whether his arguments were not more properly framed under Rule 4-204(3). He maintained that they were applicable to the interpretation of Rule 4-204(1) and did not refer to Rule 4-204(3) or to a defence *per se*.

[56] Neither Greco nor RS presented new evidence at the Commission hearing.

[57] The hypothetical conversations put to Prins and Winchester by counsel for Greco were speculation unsupported by evidence. Winchester's expert evidence was more convincing. Winchester not only described situations in which communications between traders is appropriate and likely, but also dealt with the specific circumstances of this case. In his opinion, which we were given no reason to question, the timing of the trade and market conditions were such that Prins would not have needed Greco's assistance to facilitate the trade for the benefit of his client.

[58] Weighing the evidence, we find that the inference proposed by counsel for Greco, that the purpose of the conversation between Greco and Prins was in furtherance of a trade solely for the benefit of Prins' client, is not a reasonable one in the circumstances. We draw the opposite inference: the purpose of the conversation was for Prins to advise Greco about a client order in Abitibi that could reasonably have been expected to affect the market price in this stock. Greco traded ahead of this order contrary to Rule 4-204(1).

[59] Accordingly, a defence under Rule 4-204(3) to a breach of Rule 4-204(1) was not established.

**(e) Conclusion**

[60] We affirm the decision of the RS Panel. The RS Panel did not proceed on an incorrect principle, did not err in law in its interpretation of Rule 4-204(1), and did not overlook material evidence in failing to make the inference proposed by Greco. There was no new and compelling evidence presented to us that was not before the RS Panel. Finally, there is no basis to conclude that the RS Panel's perception of the public interest conflicted with that of the Commission.

[61] We confirm the sanction order of the RS Panel. The sanction imposed by the RS Panel was warranted because of the serious nature of frontrunning. A reprimand would not be sufficient.

[62] For the reasons above, we deny the application of Greco to set aside the order of the RS Panel in this matter.

Dated at Toronto this 29<sup>th</sup> day of July, 2004

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"Paul M. Moore"

Paul M. Moore, Q.C.

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"Susan Wolburgh Jenah"

Susan Wolburgh Jenah

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"Robert L. Shirriff"

Robert L. Shirriff, Q.C.