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 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 *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....
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> 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.

Dated as of February 12, 2002

Approved on behalf of the panel

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Paul M. Moore, Vice-Chair