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

AND

IN THE MATTER OF
THE DECISION OF THE COMMISSION DATED APRIL 23, 2003
IN THE MATTER OF
JACK BANKS a.k.a. JACQUES BENQUESUS

Hearing:	**June 12, 2003**		
Panel:	**Paul M. Moore, Q.C.**	**-**	**Vice-Chair (Chair of the Panel)**
	M. Theresa McLeod	**-**	**Commissioner**
	H. Lorne Morphy, Q.C.	**-**	**Commissioner**
Counsel:	**Karen Manarin**	**-**	**For Staff of the Ontario Securities Commission**
	David Stratas	**-**	**For Jack Banks**
	Vanessa Christie		

DECISION

We dismiss the application.

REASONS

By Commissioners Morphy and McLeod

On April 23, 2003, the Commission released a decision in which it was determined that Mr. Banks had acted contrary to the public interest in that it was in the public interest to direct certain sanctions under section 127 of the Securities Act (the "Act").

At the time the decision was released, the Commission understood that counsel for staff and Mr. Banks had completed all of their submissions. The basis for that understanding was that it is not the usual the practice of the Commission in a section 127 hearing to divide the argument into two parts (i.e., whether it is in the public interest to make a section 127 order and if so, what the order should be). There are occasions when counsel has requested that it be in two parts but no such request was made in this instance. As a result, when counsel, near the conclusion of the hearing on February 12, 2003 advised that they would complete their submissions that day, the Commission understood that all submissions had been heard.

It now appears that there was a misunderstanding. Following the release of the decision on April 23, counsel for Mr. Banks advised staff counsel that the understood that he would have an opportunity to make submissions on sanctions if the Commission decided to make a section 127 order.

This apparently led to the Executive Director of the Commission making an application under section 144 of the Act which gives to the Commission the power to revoke or vary a decision. Following the filing of the application, counsel for staff in correspondence with counsel for Mr. Banks, advised that staff did not intend to make any submission that the order should be varied. On the return of the application, staff counsel submitted that the Commission should proceed with the application but was not asking that the order be revoked or varied. The position of Mr. Banks on this application was that he had the option of proceeding by way of appeal or section 144 and that he had chosen the former.

It is a fundamental principle of justice that any party who appears before the Commission should be given full opportunity to be heard. Any party who feels deprived of that opportunity has the right to make an application either under section 144 of the Act or Rule 9 of the Rules of Practice.

However, as it now appears, notwithstanding the filing of the application under section 144 of the Act, that neither staff nor Mr. Banks is asking for any relief under section 144, the application will be dismissed.

Dated at Toronto this 23rd day of June, 2003

"H. L. Morphy"	**"M. T. McLeod"**
H. Lorne Morphy	M. Theresa McLeod

By Vice-Chair Moore

I. The Proceeding

[1] This proceeding is a hearing as to whether the Commission should proceed with the application (application) made by the Executive Director under section 144 of the Securities Act (the Act) for an order revoking or varying the decision of the Commission made on April 23, 2003 in the matter of Jack Banks a.k.a. Jacques Benquesus (the original decision).

[2] The original hearing in the matter took place on January 8 and 9, 2003. A number of documents were filed with the Commission, with the consent of Banks, in lieu of calling witnesses. Paul Stein was the only witness called by staff of the Commission.

[3] Between January 9, 2003 and February 12, 2003, staff and counsel for Banks filed detailed written submissions with the Commission. As well, staff filed a reply.

[4] On February 14, 2003, staff and counsel for Banks made oral closing submissions.

[5] In its original decision, the Commission determined that Banks had acted contrary to the public interest and that it was in the public interest to make certain orders under section 127 of the Act. The original decision was accompanied by an order of the Commission of the same date (the original order).

[6] After the original decision of the Commission was released, counsel for Banks advised counsel for staff that he had understood that there would have been an opportunity for him to make submissions on sanctions prior to the decision of the Commission.

[7] On April 25, 2003 staff of the Commission advised counsel for Banks that the Executive Director would be making application to the Commission pursuant to section 144 to consider whether the Commission should make an order revoking or varying the original decision and that staff would be requesting that staff and counsel for Banks be provided with the opportunity to make submissions with respect to sanctions. The application was filed with the Commission on April 25, 2003.

[8] On May 9, 2003 counsel for staff told counsel for Banks that the Executive Director was considering withdrawing the application because, according to counsel for Banks, Banks intended to appeal the original order, or according to counsel for staff, because counsel for Banks had requested the withdrawal.

[9] On May 13, 2003 counsel for Banks filed with the Divisional Court a notice of appeal of the original order.

[10] On May 15, 2003 counsel for staff indicated to counsel for Banks that the Executive Director would be proceeding with the application.

II. Submissions of Counsel for Staff

[11] Staff makes, in essence, two submissions.

[12] First, staff submits that further submissions on sanctions by counsel for Banks and by staff would be new material information not available to the Commission at the time it made the original decision. Accordingly, it should act on the application by accepting further submissions from counsel and revoking or varying the original decision after considering the further submissions, if appropriate.

[13] Second, staff submits that the Commission has jurisdiction to deal with the application because the criteria of section 144 will be met. These criteria are:

(1) There must be a decision of the Commission. The original decision is a decision of the Commission.

(2) The application must be made by the Executive Director or an affected person. The application has been made by the Executive Director.

(3) The application must be to revoke or vary a decision of the Commission. That is the substance of the application.

(4) The Commission must conclude that it would not be prejudicial to the public interest to revoke or vary the decision. The Commission should be able to reach this conclusion because submissions on sanctions may constitute new information which is considered germane to a decision by the Commission to grant the application.

[14] Counsel for staff referred us to: *In the Matter of Ultramar PLC and LASMO PLC* (1991), 14 OSCB 5221; *In the Matter of CW Shareholding Inc., Shaw Communications Inc., Shaw Requisitions Inc. and WIC Western International Communication Ltd.* (1998), 21 OSCB 2910; and *In the matter of Universal Settlements International Inc* (2003), 26 OSCB 2345.

III. Submissions of Counsel for Banks

[15] Counsel for Banks makes, in essence, six submissions.

[16] First, the Commission cannot deal with the application because it is functus.

[17] Second, the Commission has no jurisdiction to proceed with the application because the application is not an application for revocation or variation of the original decision. No specific revocation or change is requested and staff has acknowledged that it is not seeking and does not want any revocation or variation of the original decision. Therefore, the application is a "nothing".

[18] Third, the Executive Director is not acting for himself but on behalf of Banks. Accordingly, the application is not really made by the Executive Director or a person affected by the decision.

[19] Fourth, it was Banks choice to appeal or to proceed under section 144. He chose to appeal. The grounds of appeal are far broader than the one issue of failure to provide Banks with an opportunity to make submissions on sanctions. Banks does not want the Commission to deal with this one issue. The original order is before the Divisional Court. Accordingly, even if the Commission had jurisdiction under section 144, it is not appropriate to exercise that jurisdiction.

[20] Fifth, staff's conduct in advising counsel that the application would be withdrawn and, subsequently, that the application would proceed amounts to an abuse of process. Accordingly, the Commission should not proceed with the application even if it had jurisdiction.

[21] Sixth, since the sole purpose of the application is, according to staff, to permit Banks to make further submissions, and since Banks does not want to proceed with the application, the proper course of action even if the Commission had jurisdiction, is to refuse to proceed with the application.

IV. Analysis

The Law

[22] Section 144 of the Securities Act states as follows:

> **144. (1) Revocation or variation of decision** – The Commission may make an order revoking or varying a decision of the Commission, on the application of the Executive Director or a person or company affected by the decision, if in the Commission's opinion the order would not be prejudicial to the public interest.
>
> **(2) Terms and conditions** – The order may be made on such terms and conditions as the Commission may impose.

Submissions of Counsel for Staff

[23] With regard to the first submission of counsel for staff, information within the knowledge or control of counsel at the time of the hearing that could have formed part of counsel's submissions is not material new information of the nature referred to in the cases cited by counsel for staff.

[24] Counsel for Banks had the opportunity to make full answer and defence to the allegations and the request for orders to be made under section 127 as outlined in the notice of hearing.

[25] Counsel for Banks never requested an opportunity to make further submissions. As the end of the original hearing was approaching on February 14 all parties were attempting to finish by 4:30. The chair of the hearing stated:

> "Mr. Greenspan, I want you to know, in spite of the fact that we are trying to accommodate your finishing by 4:30, you should not feel rushed. In fact, staff may well want to reply as well, so you judge what you need. If you can accommodate us….But we would like to break today. But certainly we would not be adverse at all in making sure that you don't feel rushed. We've been questioning you and stopping you from proceeding maybe as fast you would otherwise. I will leave it in your hands."

Mr. Greenspan replied:

> "Is there any suggestion as to, if we were to come back – and I was literally eliminating things

in order to try to accommodate my finishing by 4:30, forgetting that my friend may have something to submit after the fact."

The chair of the hearing responded:

"I don't want to pressure anybody. It's just, if we could wrap it up today that would be wonderful. If not, we should really come back, and I don't think anybody should feel rushed."

Mr. Greenspan replied:

"Alright. I will do my best to finish today."

At the end of the hearing the chair of the hearing stated:

"We will retire to consider this matter and come up with a decision in due course."

[26] The Commission's jurisdiction under section 127 is not to determine liability and then to punish for violations of law, but to make one or more of the orders provided for in the public interest to prevent or protect against likely future harm determined with reference to the respondent's past conduct. At the original hearing no violation of securities law was alleged and the sole focus throughout the hearing was on determining the public interest.

[27] Our usual procedure in a section 127 hearing is not to divide the hearing into two parts to deal separately with the merits of the allegations and sanctions, without an agreement or understanding on the part of the Commission and counsel. No such agreement or understanding existed or was even contemplated in the original hearing or in the written submissions.

[28] Nevertheless, it now appears that counsel for Banks understood that there would follow a subsequent session to deal with submissions on sanctions. I was prepared to accept this fact as an extenuating factor, to accept further submissions, and to revoke or vary the original decision under section 144, if appropriate after considering any further submissions.

[29] I agree with staff's second submission. The paramount consideration for any order under section 144 is that it would not be prejudicial to the public interest to make the order.

[30] If in fact counsel for Banks believed that he would have an opportunity to make further submissions, and if making further submissions would not in any way harm or prejudice Banks or any one else, then proceeding with the application would be the proper course of action.

[31] The Commission is an administrative tribunal charged with acting in the public interest. Section 127 (and Rule 9 of the Commission's Rules of Practice) are remedial tools that enable the Commission to act in the public interest. There is no reason to restrict the broad wording in section 144 to limit our jurisdiction.

Submissions of Counsel for Banks

[32] With respect to the first submission of counsel for Banks, Section 144, when used, makes

inapplicable the legal doctrine of functus with respect to a final decision of the Commission.

[33] With respect to the second submission of counsel for Banks, applications are initiated under section 144 by notice of application filed with the Commission. They are perfected when the Commission convenes to deal with the notice of application. It is evident that the motivating factor for the application is to allow counsel for Banks to make further submissions and to allow the Commission to revoke or vary the original decision after considering such submissions. If further submissions were made, it might become clear what variation of the original decision is appropriate or whether it should be revoked.

[34] The fact that staff opposes any variation or revocation of the original decision does not change the nature of the application: for the Commission to order a revocation or variation after hearing further submissions, if the Commission (not staff) considers it would not be contrary to the public interest for it to do so. The application is not a "nothing".

[35] With respect to the third submission, the Executive Director is an officer of the Commission and should always act in the public interest. When the notice of application was first filed with the Commission, staff was of the view that the application would allow both staff and Banks the opportunity of making further submissions. Even if the Executive Director acted to benefit Banks, it does not follow that the application is not being made by the Executive Director or that the action of the Executive Director is not motivated by the public interest.

[36] I agree with the fourth submission.

[37] With respect to the fifth submission, even if the actions of counsel for staff in advising counsel for Banks that the Executive Director was considering withdrawing the application and, subsequently, that the application would proceed, amounted to an abuse of process, it is not clear that such conduct was prejudicial to Banks in respect of this application.

[38] I agree with the sixth submission.

V. Conclusion

[39] Section 144 permits the Commission to make an order revoking or varying a decision of the Commission if in the Commission's opinion the order would not be prejudicial to the public interest. There is nothing in the provision limiting its application in terms of time or applicability.

[40] Section 144 of the Act provides an expeditious means, consistent with administrative law principles, to allow the Commission to rectify any decision of the Commission. In using section 144 the Commission may permit the parties to make further submissions as to sanction, in order to determine whether to revoke or vary the original decision.

[41] In the final analysis, however, it is not appropriate to proceed under section 144 for the sole purported benefit of Banks in the face of Banks'objection. The original order is before the Divisional Court.

Dated at Toronto this 23rd day of June, 2003

"Paul M. Moore"

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Paul M. Moore