3.2.2 Piergiorgio Donnini v. Ontario Securities Commission (Ont. Div. Ct.)*

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DATE: 20030915

ONTARIO
SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

LANE, SOMERS, GREER JJ.

B E T W E E N:	)	
	)	
PIERGIORGIO DONNINI	)	*Alan J. Lenczner Q. C.* and *Colin Stevenson*
	)	for the Appellant
Appellant	)	
	)	
- and -	)	
	)	
ONTARIO SECURITIES COMMISSION	)	Johanna M. E. Superina and Yvonne B.
	)	Chisholm for the Respondent
Respondent	)	
	)	
	)	**HEARD:** June 9 and 10, 2003

Somers J.

REASONS FOR JUDGMENT

[1] This is an appeal from the decisions of the Ontario Securities Commission ("OSC") released on June 11, 2002 and September 12, 2002. On June 11, 2002, two of the members of the panel found that the appellant, Piergiorgio Donnini ("Donnini") breached section 76(1) of the *Ontario Securities Act*, R.S.0. 1990, c. S.5, (the "Act"), the insider trading provisions of the Act. The third member of the panel, while agreeing with the others' review of the evidence, concluded that Donnini had not engaged in insider trading, but had acted contrary to the public interest pursuant to the provisions of section 127.(1) of the Act. Section 76(1) of the Act reads as follows:

> 76.(1) No person or company in a special relationship with a reporting issuer shall purchase or sell securities of the reporting issuer with the knowledge of a material fact or material change with respect to the reporting issuer that has not been generally disclosed.

Section 127. (1) of the Act reads as follows:

> 127. (1) The Commission may make one or more of the following orders if in its opinion it is in the public interest to make the order or orders:
>
> 1. An order that the registration or recognition granted to a person or company under Ontario securities law be suspended or restricted for such period as is specified in the order or be terminated, or that terms and conditions be imposed on the registration or recognition.

[2] "Material Change" is defined in the Act as follows:

> "material change",
>
> where used in relation to the affairs of an issuer, means a change in the business, operations or capital of the issuer that would reasonably be expected to have a significant effect on the market price or value of any of the securities of the issuer, and includes a decision to implement such a change made by the board of directors or the issuer or by senior management of the issuer who believes that confirmation of the decision by the board of directors is probable.

* Source: Canadian Legal Information Institute.

[3] "Material Fact" is defined in the Act as follows:

> "material fact", where used in relation to securities issued or proposed to be issued, means a fact that significantly affects or would reasonably be expected to have a significant effect on the market price or value of the securities.

[4] On September 12, 2002, the OSC suspended Donnini's registration for a period of 15 years and ordered that he cease trading in securities, with the exception that he be permitted to trade in his personal accounts and in his registered retirement savings plans. They further ordered that he resign as, and be prohibited for 15 years from acting as, a director or officer of an issuer that is a registrant or that directly or indirectly holds more than a five percent interest in a registrant. In addition, it ordered him to pay the OSC's costs of investigation and hearing, which they fixed at $186,052.30. Donnini appeals from both the finding of liability and the penalty imposed, including the costs.

[5] On an appeal from the OSC to this court, the standard of review is reasonableness: *Pezim v. British Columbia (Superintendent of Brokers)* [1994] 2 S.C.R. 557, 589 - 596. We must, therefore, ask ourselves whether the Committee's assessment of credibility and application of the standard of proof to the evidence was unreasonable, in the sense of not being supported by reasons that can bear a somewhat probing examination: *Dr. Q. v. College of Physicians and Surgeons of British Columbia* [2003] S.C.J. No. 18.

BACKGROUND

[6] Donnini was a part owner of Yorkton Securities Inc. ("Yorkton") and in February of 2000 held the position there of head institutional trader. On February 10th and 11th, the investment banking side of Yorkton arranged financing for a company known as Kasten Chase Applied Research Limited ("KCA"), a high technology company. It raised $5,000,000 for KCA by issuing four million special units at $1.25 each. Each unit was made of up of one KCA share, and one-half of one common share purchase warrant and entitled the owner to buy one KCA share at $1.75 per share for every full warrant. These warrants were to be exercised six months from the time the Prospectus was cleared by the OSC. In February of 2000, the shares in high technology companies were enjoying substantial interest from the investing public. Scott Paterson ("Paterson"), the Chairman and Chief Executive Officer of Yorkton at the time, expressed the view at the OSC hearing that the market for such shares as those of KCA, was "unbelievable".

[7] Paterson was aware that, even with the cash infusion realized by Yorkton as a result of the earlier sale of the KCA units, the company was still in a precarious cash position. This, plus the wide acceptance in the market of the earlier issue, prompted him to speak to Michael Milligan ("Milligan"), the Chief Financial Officer of KCA, and propose to him that KCA initiate another financing. This conversation occurred at 9:25 a.m. on February 29, 2000. Milligan expressed some interest. He initially suggested doing so by offering the control block of KCA shares held by Temple Ridge (1996) Limited ("Temple Ridge"), a company owned by him and two fellow directors of KCA. He wanted to make some of the shares available to the public and to raise the funds that way. Milligan discouraged this idea and suggested that a new financing could best be arranged through a form of hedge fund. Milligan told Paterson that he was unfamiliar with the workings of such a fund and how it could be used to sell KCA stock in a further financing operation. Paterson told him that he should call Donnini, who would explain to him how hedge funds work and how one could be established to implement this additional financing. According to the evidence, Milligan did call Donnini, whom he had never met and with whom he had not spoken before. Although there is disagreement about this point, it appears that Donnini was aware that he could expect a subsequent call from Milligan. The conversation was not lengthy and was conceptual in nature. That is, Milligan asked Donnini to explain to him how a hedge fund worked because "I want to understand what Scott [Paterson] has tried to communicate with me". The evidence of both Milligan and Donnini appears to establish that the conversation was short, dealing in theories and generalities concerning this subject.

[8] KCA was well known to Donnini at this time. Between February 15th and February 28th, 2000, he traded for Yorkton's inventory account a total of 656,400 of its shares. This represented about 3.35 percent of the total volume for the trading in this company during that period of time. Approximately 355,000 of these trades were short sales.

[9] Later the same day, February 29, 2000, Paterson spoke to Milligan once again with a proposal for "another type of financing - a special warrants financing - for KCA". Many of the factors that would be involved in such a transaction were discussed and the conversation, according to telephone logs that were made exhibits at the hearing, extended over more than 20 minutes. Although no final agreement was reached between the two of them at that time, it was left that there would be further discussion very soon.

[10] Very shortly after that telephone conversation, Paterson called Donnini into his office to seek his views, as head liability trader, about the viability of the type of offering he had suggested to Milligan and whether or not it would meet with acceptance on the market. This sort of conversation, Paterson testified, is not unusual between an investment banker, such as himself and the company's head trader, such as Donnini. It was a brief meeting. Indeed Donnini claimed he could not recall it at all. He claimed that, especially during those times when the market was what he described as a "speculative bubble", he had many such conversations.

[11] A different version of that meeting was given by Mark McQueen ("McQueen"), a partner and director of Yorkton and the managing director of its investment banking group. He had been called into Paterson's office while he was talking on the phone with Milligan. This conversation was held on a speaker telephone and McQueen was able to recall and testify to the details discussed between them. The impression he was left with was that Milligan was very receptive to the idea on behalf of KCA and was going to recommend it to his partners. Following the conversation, after Donnini was called into the office, McQueen recalled what was said between Paterson, Donnini and him in these words,

> "It was about three minutes in length. Mr. Paterson reported .. outlined the discussion that we had had with Mr. Milligan. He advised Mr. Donnini of the potential size of the offering being $10,000,000, that the unit price was going to be $6.75 per unit, and that there would be a purchase warrant that would be at a price yet to be determined. Mr. Paterson advised Mr. Donnini that Temple Ridge was considering at the same time their own sale from their control block, and how that may or may not interplay with the treasury offering by KCA, and he asked Mr. Donnini whether or not the treasury offering would work."

When asked what Donnini's response was, McQueen said, "The gist of the response was 'yes, it would work; it would sell; it would work.' " He also recalled further discussions between Paterson and Donnini in which Paterson asked for particulars of Yorkton' s present short position in KCA, and its average price. He also recalled some discussion about what would constitute an appropriate offering price. Later, Donnini, in his testimony, while he continued to profess that he had no recollection of what was said in this meeting, agreed that he could not dispute McQueen's evidence.

[12] This conversation would appear to have been pivotal in the minds of the members of the OSC panel. They noted that on February 29th, the pattern of trades in KCA made by Donnini changed dramatically. He had traded some 656,400 shares in the 13 days before February 28th, which represented 3.35 percent of the total volume traded. On February 29th, he traded 1,094,200 shares representing 29.3 percent of the total volume of KCA for that day and on March 1st, he traded a further 437,200 shares or 24.2 percent of the total volume for KCA for that day. Between 2:40 p.m. on February 29th and close of the market on March 1st, 2000, he sold short 539,700 KCA shares. All of these were jitneyed - a process by which other members of the Toronto Stock Exchange execute and clear the orders for the house actually making them. This has the effect of concealing the identity of the firm making the trades so that the transaction is not "transparent to the market".

[13] Donnini attempted to justify the high volume of trading he carried on February 29th and March 1st as a strategy to minimize risk and to avoid having Yorkton in a position of speculating on the shares. As to the jitney trades, he claimed that he did not want them to be identified as coming from his firm, since the principals of KCA would become upset at seeing these transactions going through.

[14] On the question of mitigating risk, the OSC said at paragraph 149 of the September 12, 2002 Reasons:

> Donnini consistently characterized his trading activities in KCA shares as mitigating risk and not speculating. However, once Yorkton's initial risk relating to the positions it acquired from the first special warrants financing had been fully mitigated, Donnini continued to short KCA's stocks subsequent to learning about the second special warrants financing and prior to its public announcement and went "naked short" i.e. he took the speculative position. Of course, he would not really have been "naked short" if his true intention (as we believed it was) had been to mitigate risk from an anticipated position of Yorkton in a second special warrants financing. In continuing to short the stock of KCA after the three minute meeting on February 29th and on March 1st, 2000, Donnini acted in the same manner that a hedge fund intending to participate in the second special warrants financing might have behaved. Donnini's pattern of trading gave us no reason to believe that he did not have the necessary knowledge of the material facts. To the contrary, as we stated above, it further confirmed that Donnini did indeed have the necessary knowledge.

[15] As to the jitney trades, we are inclined to agree with counsel for the OSC that they are simply another indication of the extent of Donnini's knowledge at the time the trades were made. Given Milligan's stated lack of familiarity with the whole concept of hedge funds, it is unlikely that he would have been sophisticated enough to conclude anything other than that they were being carried out pursuant to the strategy agreed upon.

[16] In the result, the OSC made the following finding of fact at paragraph 147 of its September 12, 2002 Reasons:

> ... Donnini had the following knowledge after the conversation with Paterson in the presence of McQueen on February 29th, 2000. Paterson had proposed a second transaction. Milligan was negotiating with Paterson. KCA was cash starved and by any reasonable standard could be expected to be enthusiastic about proceeding with the transaction. The market for shares of high technology companies, including shares of KCA was "unbelievable", "unprecedented" at that time. Paterson was comfortable with proceeding with the transaction. Hedge funds would be the principal purchaser.
>
> As we stated earlier in these reasons, we are satisfied that the evidence, without taking into account Donnini' s trading activities, were sufficient for us to find that Donnini had knowledge of the material facts in question. Donnini's trading

> on February 29th and March 1st, 2000 further confirmed our conclusion that Donnini indeed had knowledge of the material facts."

APPELLANT'S SUBMISSIONS

[17] Counsel for Donnini submitted that the board of directors of KCA did not approve the issuance of shares and warrants from treasury and reach agreement with Yorkton until either the afternoon of March 1st or the morning of March 2nd, 2000. Thus, counsel says, there was no material change at all on the days when Donnini made the impugned trades. He argued that the definitions of "material fact" and of "material change" in the Act are so similar that there cannot be a material change without a material fact. On the evidence, it was clear that there were still points to be negotiated between Yorkton and KCA. However, the definition of "material fact" includes a reference to "proposed to be issued" and to a fact that "would reasonably be expected to have a significant effect on the market place..." The definition of "material change" includes "a decision to implement such a change made by the board of directors of the issuer or by senior management of the issuer *who believe that the confirmation of the decision by the board of directors is probable."* [Emphasis added.] Both definitions refer to events in the future. Some might argue that until a deal has been fully agreed upon, it is not a fact. It is not possible to delineate with precision the line that divides intention from accomplished fact and each case will undoubtedly have to depend upon its own circumstances and facts. In the case at bar, the evidence suggests that the discussions had gone well beyond expressions of mutual interest and had got down to negotiating the very finest of points. The OSC held that the information Donnini held was factual and that his subsequent actions proved it.

[18] Nor in our view was it of assistance to the appellant to argue, as was the fact, that neither Donnini nor Yorkton profited by his trading. Prior to 1987, section 76(1) of the Act provided a statutory defence which permitted a respondent to prove that he or she did not make use of the material fact of which they had knowledge. Since the repeal of that section, it now is only necessary for the OSC to make an adverse finding under section 76 of the Act that:

> (1) the respondent is in a special relationship with the reporting issuer;
>
> (2) the respondent purchases or sells securities of that reporting issuer;
>
> (3) the respondent does so having knowledge of material information about the respondent issuer;
>
> (4) the material information has not been generally disclosed.

See: (*R. v. Plastic Engine Technology Corp.* (1994), 88 C.C.C. (3d) 287 (Ont. Gen. Div.); leave to appeal refused (1994), 89 C.C.C. (3d) 499 (Ont. C.A.)).

[19] As the OSC said at paragraph 113 of its Reasons:

> Accordingly, we did not need to find that Donnini used undisclosed material facts or that he benefited personally from the misuse of insider information. We needed only to find that he traded while in possession of undisclosed material facts.

In our view, there is ample evidence throughout the hearing record and the documents filed to support the findings of fact made by the OSC.

[20] Much of this appeal was based upon an attempt to have the Court reassess the findings made by the panel in the course of its Reasons. This of course is not the function of this court, unless it can be determined that there is no reasonable way in which the facts as presented could establish the conclusion drawn by the tribunal. This is particularly so in cases where the tribunal has a special expertise which it is called upon to apply during the course of its deliberations. The OSC must exercise its public interest jurisdiction under s. 127 of the Act. As stated by Iacobucci J. in *Committee for Equal Treatment of Asbestos Minority Shareholders v. Ontario (Securities Commission)*, [2001] 2 S.C.R. 132 at pp. 152 and 153,

> In this case, as in *Pezim*, it cannot be contested that the OSC is a specialized tribunal with a wide discretion to intervene in the public interest and that the protection of the public interest is a matter falling within the course of the OSC's expertise. Therefore, although there is no privative clause shielding the decisions of the OSC from review by the courts that body's relative expertise in the regulation of the capital markets, the purpose of the Act as a whole and section 127 (1) in particular, and the nature of the problem before the OSC all militate in favour of a higher degree of curial deference. However, as there is a statutory right of appeal from the decision of the OSC to the courts, when this factor is considered with all of the other factors, an intermediate standard of review is indicated. Accordingly, the standard of review in this case is one of reasonableness. See also *Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557.

[21] There are a number of instances in its Reasons where the expertise of the panel was made apparent. A chart of Donnini's transactions involving KCA from February 15th to March 2nd, 2000, in spreadsheet form, was presented in four sheets to the OSC. The OSC provided its own analysis of the trades where they found that the short sales being conducted by Donnini were indeed for the purpose of mitigating the risk of Yorkton's long position in KCA stock held after the completion of the first special warrants financing on February 24th, 2000. Such sales continued after the risk had been mitigated. However, as they said at paragraph 116 of their Reasons:

> A logical conclusion is that at some point the short positions being placed were to mitigate risk associated with the second special warrants financing. Corroborating evidence supports this conclusion. Yorkton did not require a reconfirmation clause in the second special warrants financing to protect it from overnight risk, a normal "out clause" included in such financings. Evidence showed that the order book was checked before the final engagement letter was signed and the risk mitigating reconfirmation clause was dropped. We noted that such a risk mitigating reconfirmation clause was required in the first special warrants financing. Second, Yorkton retained 650,000 units from the second special warrants financing for its own account despite being unable to fill all client orders.

[22] It was also reasonable for the OSC to imply, as this panel did, from the fact that Paterson had arranged for McQueen to be present during the 2:45 p.m. meeting, that Yorkton's corporate finance group was obviously involved with Paterson in moving the second special warrants financing forward. Materiality is at the core of the OSC's expertise.

[23] Another example of this application of special expertise can be found at paragraph 143 of the OSC's Reasons, where the panel expressed the view that it would have been reasonable to conclude that the second special warrants financing would add significantly to the intrinsic value of KCA's shares. These factors were among the grounds upon which they concluded that the proposed second special warrants financing and the negotiations surrounding it were material facts.

[24] Having considered all of the evidence to which we were referred, we conclude that the OSC committed no reversible error in its finding that Piergiorgio Donnini was guilty of a breach of sections 76(1) and 127(1) of the Act. There was clear and cogent evidence before the OSC to support their findings. The appeal from liability therefore is dismissed.

PENALTIES

[25] As mentioned above, the OSC imposed a penalty on Donnini by suspending his registration for a period of 15 years and directed that he cease trading in securities, with the exception of his personal accounts and those in his registered retirement savings plans. He was also required to resign as a director or officer of Yorkton and prohibited from acting in that capacity for any company that is an issuer, that is a registrant. It, in addition, ordered him to pay costs in the amount of $186,052.30.

[26] In December 2001, following an 18-month investigation into the affairs of Yorkton, five senior officials, including Donnini were charged with various offences, including conflict of interest charges relating to personal and corporate trading.

[27] Paterson did reach a settlement agreement with the OSC by making a $1,000,000 "voluntary payment" and receiving a two-year ban from serving as a director, executive or owner in the securities business. The OSC is not empowered to impose fines.

[28] There were a number of factors involving the penalty imposed on Donnini, which have caused us to examine it particularly carefully. The first factor is that one member of the three-person panel, while agreeing with the summary of the evidence made by the chairman, did not feel that Donnini was guilty of insider trading, but felt that he should not have traded until he checked whether the information he had about the planned warrant issue was indeed material. His failure to do so was, in his view, against the public interest. This does suggest that to one member, at least, the offence committed by Donnini was less reprehensible than many and not deserving of a suspension for such an extended period of time.

[29] A second factor is the comment made by the chairman of the panel in his Reasons following the liability hearing, but before the penalty hearing was convened. Speaking about Donnini, he said, "He has been unrepentant and unwilling to acknowledge that his conduct was not becoming a registrant and contrary to the public interest." In our view, any person charged with a crime in the criminal courts or an offence before a tribunal, which has the power to impose penalties, is entitled to deny his guilt and call upon the prosecution to establish it. Criminal courts have always recognized, when imposing sentence, that consideration should be given to an accused who pleads guilty and expresses remorse. The reverse of this situation, however, is not appropriate. An accused not pleading guilty is not and should not be subject to increased penalties simply because he has chosen to defend himself.

[30] In the material filed by the counsel for the OSC, a newspaper article recounts that at the time other officials from Yorkton who were facing unrelated charges were making their settlements, Donnini was offered a penalty of a five-year trading ban, which he refused. This raises a third factor, mainly the difference between the penalty imposed by the OSC on Paterson of 2 years and the 15-year ban imposed on Donnini. Paterson, after all, was the person in charge of this entire deal and was

responsible for ensuring that it went through. He was the one who gave instructions to Donnini even asking him, after telling him about the terms of the transaction, what Yorkton's short position was on KCA stock. He admitted to the OSC that he ought to have exercised a greater degree of management and control of Donnini's activities, but it seems to us that he played a more significant role in all that took place in what was the subject matter of this particular part of the over all investigation. Whether or not it was the intention of the OSC to do so, it has generated a message, through its actions, that the OSC will agree to lesser sanctions when an accused person has the "good sense" to admit liability and make a substantial "voluntary payment". Donnini did neither of these. Given Donnini's present age, he, in reality, faces a lifetime ban from participating in the investment business. We are of the view that this is wrong in principle. Whether a person charged by the OSC settles or requires the hearing to take place, such person should be treated in an even manner. Donnini was entitled to defend himself.

[31] When discussing sanctions, the OSC in this case referred to the earlier case of *MCJC Holdings Inc. and Michael Cowpland* (2002), 25 O.S.C.B. 1133. In that case at page 1136, it states one of the factors which the OSC would take into account was "the size of any profit (or loss avoided) from the illegal conduct." The OSC refused to accept any assertion made by Donnini's counsel that Donnini and Yorkton did not benefit from the trading complained of. Certainly we were not referred to any evidence that suggested that Donnini was a recipient of any benefit. All trades were carried out in the name of Yorkton (with, of course, the exception of the jitney trades.)

[32] Counsel for the OSC referred us to the case of *Woods (Re)* (1995), 18 O.S.C.B. 4625 (Farley J.) as support for the 15-year suspension imposed upon Woods. It does not appear to be an apt comparison because there were repeated offences for which Woods was ultimately charged criminally and convicted of. Of interest in that case is the reference to the argument by counsel for Woods that a 15-year suspension would mean a lifetime ban. The OSC on that occasion indicated that since Woods was a young man, he would be able to return to the business after the suspension had run its course. This indicates that they specifically wished to avoid imposing a permanent ban. However, when considering the same situation in Donnini's case, the OSC said, "Donnini' s entire working experience has been in the securities industry. He is approximately half way through a typical 35-year working life in the securities industry. Securities trading by house professionals is becoming more and more a career for younger persons." This apparently was the OSC's way of suspending Donnini for life without actually doing so.

[33] In our view, there is an unreasonable disparity between the suspension meted out to Paterson by way of settlement and that meted out to Donnini, notwithstanding that Donnini did not make or was unable to make any sort of "voluntary payment" of the sort made by Paterson. As indicated earlier, we are conscious of the obligation of this Court to yield curial deference to the findings of an administrative tribunal, which has an acknowledged special expertise. This is particularly so where in addition it has a disciplinary function. This does not mean, however, that the Court must accept whatever the tribunal concludes. It ought not to disturb the penalty imposed and substitute its judgment for that of the panel unless there is an error in principle or as Robins J. A. said in *Takahashi v. College of Physicians and Surgeons* (1979), 26 O.R. (2nd) 353 (Div. Ct.):

> Unless the punishment clearly does not fit the crime so to speak.

[34] The OSC has, in earlier decisions, indicated its espousal of the principle that there should be a reasonable balance between sanctions imposed on other participants in an impugned action and those meted out subsequently. In *Belteco Holdings Inc. (Re)*, [2002] 21 O.S.C.B. 7743, the OSC reached a settlement with some of the participants which included certain sanctions. After setting out the terms of the resulting order in its Reasons dealing with the remaining participants, the OSC said at 7746:

> We set out the terms of that order here principally because we accept the agreement ... that whatever sanctions are to be imposed should be fair and should be proportional to the sanctions imposed by the Commission on others who were participants in the scheme which is the subject of these proceedings...

In the result, the OSC imposed sanctions on the remaining participants, which in their words "paralleled" those imposed earlier.

[35] While recognizing that the OSC is not bound strictly to follow its own precedents, we are of the view that its penalty decisions should generally adhere to some recognizable pattern. We adopt the view expressed by Braidwood J.A. in the British Columbia Court of Appeal case of *Cartaway Resources Corp. (Re)*, [2002] B.C.J. 2115 (C.A.) at paragraphs 93 and 94:

> … Counsel for Hartvikson submits that this creates a sense that Hartvikson received a greater punishment because he chose to contest his innocence in a hearing.
>
> Certainly, it is not appropriate that access to the Commission threaten to heighten a potential penalty so radically. While the Commission may not be bound by all of the technical rules of stare decisis to the same extent as the courts, I am in agreement with counsel for Hartvikson that fairness requires that it generally follow its past decisions in order to avoid the appearance of arbitrariness. No doubt the decision of parties to pursue their rights before the Commission, rather than enter into settlements, will be based in part on their assessment of precedents of the Commission and published settlements. If the Commission can issue penalties which do not correspond with its previous decisions, then

those engaged in the Commission's disciplinary process will be unable to intelligently assess whether to settle or proceed to a hearing. This result is undesirable.

[36] We agree with Donnini's counsel that the penalty imposed on him does not stand up to a somewhat probing analysis.

[37] We are, of course, bound to acknowledge that Donnini has a record of prior trading violations of CDNX and TSC regulations and has received prior warnings from the market surveillance department of the TSC. He also had some internal discipline problems with Yorkton as well. However, taking all of these factors into consideration, we are of the opinion that the period of suspension should be reduced to four years effective September 12, 2002.

COSTS

[38] Towards the end of the hearing itself, OSC counsel produced a bill of costs of OSC staff in a total amount of $186,052.30. The figures that go to make up this amount fill a total of only six lines on the page. Counsel for Donnini objected to the document indicating, among other things, that there were no particulars given and of course, no opportunity for him to examine any supporting material to verify the bald statements made in this very brief synopsis. A subsequent document entitled "Submissions on Costs Staff of the Ontario Securities Commission" was then produced. The same abbreviated bill was produced, plus a two-page argument on the OSC s right to be paid costs. The main objection raised by Donnini's counsel concerning this approach is that he was denied the opportunity to review any back-up material to the bill and if necessary, cross-examine the bill's proposer. The panel simply said in that regard, "We do not believe it desirable in this case to examine dockets or a summary of dockets for staff." In our view, a claim for costs in this amount justifies a more intense and searching examination than the OSC is prepared to allow.

[39] We are of the view that the OSC erred in this regard. An order for costs is simply a fine by another name, unless it is a true reflection of the actual and reasonable costs of the nature specified as recoverable in section 127.2 of the Act. These are questions of fact and, like all such questions, must be resolved upon evidence, disclosure, documents and including cross-examination. Accordingly, we direct that the matter of costs be referred back to the OSC to conduct an inquiry into the extent of the bill and to make available for counsel for Donnini all dockets, time dockets, journal and/or diary entries and other back-up material in support of it, and to make available all of the participants whose names appear on it for cross-examination by counsel for Donnini at a mutually convenient time.

[40] In the result, therefore, the appeal from liability is dismissed, the appeal from the sanctions imposed by the OSC pursuant to that finding is allowed and the term of suspension is reduced to four years from September 12,2002. Finally, on the appeal from the cost order, this matter is returned to the OSC to conduct a hearing for a purpose of reviewing the extent of the amount of costs imposed.

[41] So far as the costs of this application are concerned, we view success as being divided. Accordingly in the exercise in the discretion of this court, we rule that there be no costs.

SOMERS J.

I agree

LANE J.

I agree

GREER J.

Released: September 15, 2003