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

– and –

IN THE MATTER OF

M.C.J.C. HOLDINGS INC.
AND MICHAEL COWPLAND

Hearing:	**October 20, 2003**		
Panel:	**Wendell S. Wigle, Q.C.**	**-**	**Commissioner (Chair of the Panel)**
	Paul K. Bates	**-**	**Commissioner**
	Robert W. Davis, FCA	**-**	**Commissioner**
Counsel:	**Matthew Britton**	**-**	**For the Staff of the Ontario Securities Commission**
	Steven Sofer **Scott Kugler**		**For the Respondents, M.C.J.C. Holdings Inc. and Michael Cowpland**

REASONS

I. The Proceeding

[1] This proceeding was a hearing under section 127 of the *Securities Act* R.S.O., 1990, Chapter S.5 (the Act) in the matter of M.C.J.C. Holdings Inc. (M.C.J.C.) and Michael Cowpland (Cowpland), collectively referred as the (respondents), pursuant to a notice of hearing dated October 19, 1999 and the related statement of allegations of staff (allegations), to consider whether it is in the public interest pursuant to subsection 127(1) of the Act to make one or more of the following orders:

> (a) an order that the respondents cease trading in securities, permanently or for such time as the Commission may direct;
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> (b) an order that the respondents be reprimanded; and/or
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> (c) such other order as the Commission may deem appropriate.

II. Overview of Staff's Allegations

[2] Staff alleged that M.C.J.C. and Cowpland acted contrary to Ontario securities laws and the public interest in that:

1) M.C.J.C. and Cowpland engaged in conduct described in the agreed statement of facts in that M.C.J.C. sold Corel Corporation (Corel) shares with knowledge from Cowpland of a material fact.

2) Cowpland was a director and officer of both Corel and M.C.J.C., and as such, was in a special relationship with Corel.

3) M.C.J.C. contravened sections 76(1) and 122(1) of the Act, and Cowpland contravened sections 76(2) and 122(1) of the Act. In addition, Cowpland, as a director, contravened section 122(3) of the Act.

4) Cowpland made misleading and untrue statements in a material respect to staff, but these allegations have since been withdrawn.

III. Background

[3] In February 2002, staff and the respondents reached an overall settlement of these allegations including quasi criminal charges laid by the Ontario Securities Commission before the Ontario Court of Justice and the notice of hearing. As part of the settlement, on February 11, 2002, M.C.J.C. pleaded guilty in the Ontario Court of Justice in Ottawa, Ontario to the offence of insider trading, with knowledge of an undisclosed material fact and was fined $1 million and the charges against Cowpland were withdrawn.

[4] On February 12, 2002 the settlement agreed between staff and the respondents with respect to the Commission hearing was brought before the Commission for approval but was not approved as there were insufficient facts for the panel to make a decision. Both staff and the respondents were invited to return with further factual disclosure.

[5] This hearing was brought forward on October 20, 2003 with additional factual disclosure which included the draft settlement agreement dated February 7, 2002 (Exhibit 1), an agreed statement of facts (Exhibit 2), additional agreed facts (Exhibit 3), and joint recommendations for an order. The parties agreed that if the joint recommendations are not accepted, that the Commission may make any order available to it under section 127, based on the agreed statement of facts presented to the panel on October 20, 2003.

[6] On October 28, 2003 the parties re-attended and filed further material requested by the panel, including the transcript of a teleconference call conducted by Corel on September 24, 1997 (Exhibit 4), three pages of TSE stock information (volume trades) for July, August and September 1997 (Exhibit 5), a transcript of the hearing at the Ontario Securities Commission on February 12, 2002 (Exhibit 6), and a graph of the Corel stock prices from October 1, 1995 to September 11, 1997 (Exhibit 7). The agreed statement of facts was amended to correct some inaccurate references to the "long weekend" in September 1997 as set out in paragraphs 37 and 38 of the agreed statement of facts. In addition we heard submissions with respect to sanctions relying on the *National Sea* case (1976) O.S.C.B. 149 (National Sea) and *Piergiorgio Donnini*, (2002) 25 O.S.C.B. 6225 (Donnini).

[7] On November 6, 2003, staff and the respondents made a further joint submission with respect to the Ontario Court of Appeal judgment in *Harper* [2003] O.J. No. 4196, which we have identified as Exhibit 8.

IV. Agreed Statement of Facts (October 20, 2003)

[8] Cowpland is an individual who resides in Ontario and at all material times was a Director, President and Chief Executive Officer of Corel Corporation, which is a reporting issuer in Ontario.

[9] M.C.J.C. is a private Ontario company. M.C.J.C. is Cowpland's holding company in which he held his shares in Corel.

[10] Cowpland and M.C.J.C. were in a special relationship with Corel as defined in the Act.

[11] Corel is an Ottawa-based company that manufactures and sells computer hardware and software. Corel was a reporting issuer and its shares traded on the Toronto Stock Exchange.

[12] At all material times, Corel prepared targets for its annual and quarterly sales which were generally disclosed.

[13] Corel sold its software destined for the retail market through distributors. The distributors purchased product from Corel and then resold it to retail outlets which in turn sold to consumers. At all material times, the largest distributor of Corel product was Ingram Micro U.S.A. (Ingram),

accounting for approximately 60% of Corel's sales in the United States in 1996. In that year, sales in the United States represented approximately 40% of Corel's worldwide sales.

[14] At all material times, Corel recognized sales of retail software when it shipped product to its distributors net of a general provision for estimated product returns, exchanges and price protection. Pursuant to written agreements, distributors agreed to pay within 60 days. In practice, however, distributors did not pay Corel until the product was sold to the distributors' customers. In fact, it was standard practice that distributors could return and generally exchange unsold product to Corel at any time, including product returned from its retailers and consumers.

[15] It was submitted by the respondents that as the quarter end approaches, it was the common practice of many technology companies, including Corel, to "pull in" orders which might otherwise be made in the next quarter in order to increase the likelihood of meeting the sales target of the quarter at hand. This practice was known by both the distributors and Corel as a "buy-in".

[16] Distributors of technology products are aware that if they postpone major purchases from manufacturers, including Corel, until the end of the manufacturers' quarter, they may obtain more favourable terms than if the order was finalized earlier in the quarter. Accordingly, distributors of technology products may postpone major purchases to obtain such favourable terms.

[17] As a result, the sales of many technology companies, including Corel, were erratic within a quarter and often between 50-75% of a quarter's sales took place in the last few weeks of a quarter.

V. Corel's Third Quarter in 1997

[18] In 1997, Corel's third quarter started on June 1, 1997 and ended August 31, 1997. Its sales target for that particular period was USD $94 million.

[19] By the end of July 1997, Corel was behind where it expected to be at that point in the third quarter. Mark Alberdingk-Thijm (Alberdingk-Thijm), Corel's Vice President-Sales, expected that Corel would not make its sales target for the third quarter because he anticipated slower sales as distributors and retailers were heavy with inventory from previous quarters.

[20] On the evening of August 6, 1997, Alberdingk-Thijm left a voice mail message with Cowpland saying that based on his analysis, he believed that Corel would fall short of its third quarter target by approximately USD $32 million. Although retail sales were strong, the main reason Corel was not going to make the quarter target in North America was because of the high inventory in the channel.

[21] Cowpland responded to this by saying that Corel needed to work harder to achieve sales that were better than the numbers Alberdingk-Thijm had provided to him. He asked whether Corel could sell large quantities of certain products in an effort to capitalize on the potential upgrade market. He acknowledged that the level of sales described by Alberdingk-Thijm would be a disaster for the company. Cowpland suggested increasing inventory to the levels it reached in the fourth quarter of 1996.

[22] Alberdingk-Thijm responded and agreed that Corel's only option to achieve the third quarter sales target was to bring the inventory back to the levels where it was at the end of fourth quarter in 1996. He told Cowpland that Corel would need to provide distributors with favourable sales terms to get them to make a sufficiently large purchase because the products being offered had an established sales history.

[23] Cowpland responded by telling Alberdingk-Thijm that Corel had to get a good quarter this quarter even if we have to "perhaps sacrifice next quarter to the point where it wouldn't be a bonanza but at least there would be another good profitable quarter."

[24] Between August 7, 1997 and August 18, 1997, Corel negotiated a "buy-in" with Ingram. Ingram agreed to purchase USD $70 million worth of product. It would return USD $18 million for a net buy of USD $52 million. As a result, Corel would make its sales target for the third quarter. In exchange, Ingram received an immediate credit of USD $5.2 million to be exercised over three months. Ingram could apply this amount to whatever it owed Corel. Ingram also received marketing incentives of USD $1.8 million for a total credit of approximately USD $7 million. Alberdingk-Thijm kept Cowpland up to date about negotiations with Ingram.

[25] When the deal concluded, Cowpland congratulated Alberdingk-Thijm on negotiating the deal for Corel and commenced discussions on sales opportunities for the fourth quarter. Alberdingk-Thijm also had a discussion with James Orban (Orban), Director for North American Sales, and another Corel employee about the Ingram deal where Orban and the other stated that the deal was great for Corel.

VI. The Trades

[26] By August 1997, the respondents had a significant amount of debt outstanding which was secured by Corel shares. While the principal of the debt was not called, one of the banks that held some of the debt had made a demand for some repayment.

[27] Between August 11, 1997 and August 14, 1997, Cowpland authorized a series of sales by M.C.J.C. totalling 2,431,200 Corel shares at an average price of $8.43. After each sale in the series, Cowpland's broker advised him that there was demand for Corel shares such that he could sell additional shares without affecting the market price. Insider reports with respect to the trades were filed in the time required. Most of the proceeds of the trades were used to reduce the debt that was outstanding and the remainder was used to pay taxes.

VII. Corel's Finance Department's Review

[28] On August 7, 1997, Mitch Desrochers (Desrochers), Corel's Controller, became aware of the proposed "buy-in" by Ingram. He was concerned about the Finance Department's ability to recognize all of the "buy-in" as sales. After speaking to the Alberdingk-Thijm on August 7, 1997, Desrochers was concerned about the size of the Ingram buy-in, and on August 8, 1997 he contacted Charles Norris (Norris), the Chief Financial Officer who was on holidays and advised him of the problem.

[29] Corel had always recognized sales when product was shipped. Desrochers was aware that such recognition was only proper if there was a reasonable likelihood of the product selling through the channel within the next quarter. While Corel had never before not recognized any part of any particular sale, Desrochers was concerned about the recognition of revenue from the Ingram buy-in because of its size and the type of product which would make up the buy-in. Desrochers thought that given the historic sales rates for the products that were to make up the buy-in, it was unlikely that all of the buy-in would be sold in a reasonable time.

[30] On August 14, 1997, Desrochers and Norris met Paul LaBarge (LaBarge), who was an officer and director of Corel and Cowpland's personal lawyer. At the meeting, Desrochers presented his analysis of the buy-in, in terms of anticipated sell-through rates.

[31] On August 19, 1997, Desrochers prepared a further analysis of the buy-in which concluded that approximately $28 million of it should not be recognized as revenue in the third quarter. On August 20, 1997, he presented his analysis to Norris and LaBarge.

[32] On August 20, 1997, Norris and LaBarge met with Cowpland and explained to him for the first time the view that some portion of the Ingram buy-in should not be recognized as sales unless support could be provided of likely sales through the channel over the next quarter. Cowpland claims and staff accept that this issue surprised Cowpland. He believed that Ingram would not accept delivery of a product that it did not believe it could sell through the channel during the next quarter.

[33] Even though the highest level of sales of Corel's products by distributors (such as Ingram) are likely to occur in the fourth quarter of Corel's fiscal year, Desrochers believed there was no reasonable likelihood of all of the product in the Ingram buy-in selling through the channel based on previous sales rates. Moreover, because Ingram could return the product to Corel and because of the incentives provided to Ingram, the buy-in was profitable for Ingram whether or not the product actually sold.

[34] In response to Norris and LaBarge, Cowpland asked Orban, the Director for North American Sales, to prepare an analysis to determine whether the product in the Ingram buy-in had a reasonable likelihood to sell through in the fourth quarter.

[35] As of August 20, 1997, Norris believed that there was a possible, but not a definite problem with respect to full revenue recognition of the Ingram buy-in. Norris and Cowpland agreed that the level of inventory making its way through the channel should be closely monitored.

[36] On or about August 26, 1997, Orban presented his analysis to Desrochers and Norris which suggested that all of the products could be sold over the next quarter. Desrochers considered the analysis inadequate because the sales rates used were for products that were not included in the buy-in. He asked Orban to revise it. When Orban completed the revised analysis, Desrochers still considered that Orban's assessment was inadequate, and remained of the view that not all of the Ingram sale should be recognized as third quarter sales.

[37] On or about September 5, 1997, Norris reviewed the analysis that had been prepared. He

advised Cowpland that a news release should be issued because, in the absence of evidence of likely sell-throughs, the full amount of the buy-in should not be recognized as a sale in the third quarter. Cowpland suggested to Norris that Corel wait a couple of weeks to see how the inventory moved through the channel. Upon being advised by Norris that this was too long to wait, the two agreed to review the run rates after the weekend. They agreed that if the run rates did not show improvement, the news release, which would only be sent out after the weekend in any event, would be issued.

[38] On September 10, 1997, Corel issued a news release announcing that, notwithstanding having received and shipped orders for USD $96 million, it would recognize revenue for reporting purposes of USD $54 million for the third quarter in 1997 and would suffer a loss for the quarter of USD $32 million.

[39] To ensure that revenue recognition problems were avoided in the future, on September 12, 1997, Norris sent an email to many people at Corel where he explained that, effective immediately, at each quarter end, Finance would determine whether there was any excess inventory in the channel and, consistent with current practice, any excess would not be recognized as sales. Norris indicated in his email that:

> "With this policy in place there will be no need for quarter-end buy-ins in the future. This costly procedure for buying sales for the current quarter at the detriment of future quarters is not acceptable and will be discontinued immediately."

VIII. Market Reaction

[40] On September 9, 1997 which was prior to the news release, the price of Corel shares closed at $8.90 per share.

[41] On September 10, 1997, after the news release was issued, the price of Corel shares opened at $8.60 and closed at $7.85 per share on that particular day.

[42] On each of the next two days (September 11 & 12, 1997), Corel shares closed at $7.05 and $6.95 per share, respectively.

Chronology of the Events

July 1997	(End of the month) Corel's Vice-President of Sales (Alberdingk-Thijm) expected Corel would not make sales target for the third quarter.
August 6, 1997	(Evening) Corel's Vice-President of Sales (Alberdingk-Thijm) left voicemail message for Cowpland advising him of the problem in meeting the sales target.
August 7 – 18, 1997	Corel at Cowpland's request negotiated buy-in with Ingram to meet the sales target.
August 7, 1997	Corel's Controller (Desrochers) became aware of the proposed buy-in and spoke to the Vice-President of Sales (Alberdingk-Thijm).
August 8, 1997	Desrochers contacted Chief Financial Officer (Charles Norris) about the problem.
August 11- 14, 1997	M.C.JC. sold 2,431,200 shares at an average price of $8.43.
August 14, 1997	Desrochers and Norris met with LaBarge (Officer & Director) of Corel and Cowpland's personal lawyer.
August 19, 1997	Desrochers prepared analysis of buy-in concluding that $28 million should not be included in revenue in the third quarter.
August 20, 1997	Desrochers presented his analysis to Norris & LaBarge.
August 20, 1997	Norris & LaBarge met with Cowpland who was surprised with the analysis.
August 20, 1997	Cowpland asked the Director of North American Sales (James Orban) to prepare an analysis to determine whether the Ingram buy-in would reasonably sell in the fourth quarter.
August 26, 1997	Orban presented analysis which suggested all of the products would be sold over the fourth quarter. Desrochers considered Orban's analysis was inadequate.
September 5, 1997	Norris reviewed Orban's analysis and advised Cowpland that a

	news release should be issued. Norris rejected Cowpland's suggestion that they wait two weeks. As sales did not improve over the weekend.
September 9, 1997	Corel's shares closed at $8.90.
September 10, 1997	News release was issued showing a third quarter loss of USD $32 million.
September 10, 1997	After the news release was issued, shares opened at $8.60 and closed at $7.85 per share.
September 11 – 12, 1997	Corel shares close on each day at $7.05 and $6.95 respectively.
September 12, 1997	Norris announced internally, that effective immediately Finance would determine at the end of each quarter any excess in the channel which should not be recognized as sales.

IX. Agreed Statement of Facts (Cowpland's Conduct)

[43] At the time of the trades it was Cowpland's position that he honestly believed that Corel would achieve its third quarter sales target. Based upon his discussions with Alberdingk-Thijm and others, he was confident that Corel would sell and deliver sufficient product to Ingram so that Corel would achieve its third quarter sales target. The issue regarding whether Corel could recognize the revenue generated from the sale to Ingram was only first brought to Cowpland's attention on August 20, 1997. For that reason, by the date of the trades he did not believe the information he received from Alberdingk-Thijm on August 6, 1997 was accurate or material.

[44] Staff was satisfied that it was Cowpland's honest belief as to the materiality of the information he received from Alberdingk-Thijm; however, it is staff's position that this belief was not reasonable in the circumstances in that:

> (i) the product "sold" to Ingram in the buy-in had established sales records. It was unreasonably optimistic for Cowpland to believe that this product could be sold by Ingram in the fourth quarter and there existed a high probability that some product would be returned or exchanged; and
>
> (ii) even if the Ingram buy-in was recognized as sales for the third quarter, it would likely adversely affect the fourth quarter sales. Cowpland subjectively, but over optimistically, believed that Corel's fourth quarter sales targets would still be achieved despite the buy-in because he anticipated that Corel's sales of new products or new versions of products would increase in the fourth quarter.

[45] The agreed statement of facts dated October 20, 2003, supplemented by staff and the

respondents which is currently before the panel presents a more complete account of the details than the agreed statement of facts provided on February 12, 2002.

[46] The October 20, 2003 agreed statement of facts provide the following incremental information:

> Paragraphs 9 – 14 & Paragraphs 28 – 36:
>
> New and detailed information that introduces and explains Corel's sales targeting practices, together with their disclosure and Corel's approach to revenue recognition. Further, information is provided regarding Corel's relationship with Ingram Micro USA and the degree of importance that Corel placed on its relationship with Ingram, together with the share of sales volume attributable to the United States in general and Ingram in particular. Further, information is provided that places Corel's revenue recognition practices in the context of general practice in the sector.
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> Paragraphs 15 - 27:
>
> These paragraphs also provided us with detailed information surrounding the sales estimation process, together with the importance of the negotiation with Ingram in the late part of Corel's third fiscal quarter of 1997. These paragraphs described the various roles, activities of, and interactions between senior members of Corel's sales department, senior members of Corel's finance department, an officer and director of the company, and Cowpland. These paragraphs, supported by submissions by both staff's counsel and counsel for Cowpland and M.C.J.C., provided us with a detailed account of relevant actions and conversations that occurred between August 6 and September 12, 1997 including the period August 11 – 14, 1997, when M.C.J.C. sold 2,431,200 shares of Corel at an average price of $8.43. We were also provided here with information regarding the stated reasons for which M.C.J.C. sold shares in Corel at the time under examination.
>
> Paragraphs 37-40:
>
> New and expanded information has been provided here that introduces and explains the events, conversations and actions that occurred between September 5 and 9, 1997, at which point a press release was prepared for issue prior to the stock market opening on September 10, 1997.
>
> Paragraphs 41 - 43:
>
> These paragraphs provided us with both new information and an expansion of information provided to the panel on February 12, 2002 regarding the specific price action of Corel shares during the four trading sessions following the press release that detailed the company's fiscal third quarter 1997 financial performance.

[47] It is also submitted that if the proposed settlement is approved, Cowpland will have repaid a

significant portion, if not more, than the loss avoided. Mr. Britton submitted at the hearing on October 20, 2003, that "Mr. Sofer can and will provide a case that the loss avoided starts from a range of no loss avoided to $1.3 million, and I have no evidence to refute his submission on this point." If one assumes that M.C.J.C. should have sold all its shares at $8.60 there would in fact have been no loss avoided because the actual shares were sold at $8.43. If, and I submit to you it's a more reasonable assumption, that all the shares ought to have been sold at an average price of $7.85, some may be above, some may be below, but in those circumstances, the loss avoided would be approximately $1.39 million."

[48] On October 28, 2003, the panel received Exhibit 7 and heard further arguments from counsel. In addition, Mr. Sofer submitted at the October 28, 2003 hearing that "well, I think I just wanted the panel to recognize that the first date we gave you was July 2nd of 1997, and the price is nine dollars. But I think it is important for the panel to recognize that this is nine dollars on the way down from $25." The position of no loss to $1.3 million could be understood, but one could also argue from the average price (i.e. between the board high and the board low) on each of September 10, 11 and 12, 1997 and the volume of shares traded on each of those dates one might derive a loss avoided of up to $3,500,000.

X. Order in the Public Interest

[49] In considering what order should be made, the panel must look at the conduct of the parties and the underlying facts and circumstances. It should also be remembered that M.C.J.C. has been charged before the Ontario Court of Justice, and has plead guilty and paid a fine, although the charges against Cowpland have been dismissed.

[50] In April 2003, additional powers were granted to the Ontario Securities Commission under section 127. In view of the fact that the trades in question took place in 1997, the notice of hearing in 1999, and the settlement in 2002, and the delay in this hearing not coming forward earlier was not solely attributable to the respondents. Staff considered that it would be unfair to consider whether or not the new powers were retroactive in the circumstances of this case. In these special circumstances, unique to this case, the panel agreed that the appropriate order would be made under the powers that existed at the time of the offence in 1997 without entertaining argument that some of the new powers might be retroactive.

[51] Although M.C.J.C. and Cowpland are the respondents, for all intents and purposes it is the conduct of Cowpland, the directing mind of the holding company and the President and Chief Executive Officer of Corel, whose conduct must be examined.

[52] We must look at Cowpland's conduct at the material time and subsequent to that. It must be taken into consideration that Cowpland admits that trading took place with knowledge of material undisclosed facts and that Cowpland authorized those trades. He admits that his belief as to the materiality of the information was not reasonable in the circumstances. The respondents admit that insider trading is always a serious matter. Counsel for Cowpland submits that his client has been as close to a pariah as one can come in the business community since the charges were first laid in 1999 and because of this, has suffered a penalty far greater than anything that could be imposed.

[53] Cowpland has participated in the Ontario capital markets for over 20 years. His conduct has not previously been a concern for staff. Staff have reviewed all trading of Corel shares since the issuance of the notice of hearing by the respondents pursuant to a written undertaking by the respondents and none of these trades has raised a concern.

[54] In considering section 127, it must be kept in mind that it is a regulatory provision, the purpose of which is neither punitive or remedial but rather protective and preventative, intended to be exercised to prevent likely future harm to Ontario's capital markets, see *Committee for the Treatment of Asbestos Minority Shareholders* [2001] 2 S.C.R. 132 at paragraph 42. As stated by Iacobucci J., the Commission's role under section 127 "is to protect the public interest by removing from the capital markets those whose past conduct is so abusive as to warrant apprehension of future conduct detrimental to the integrity of the capital markets." In addition, it was stated at page 1610 in *Re Mithras Management Ltd.* (1990), 13 O.S.C.B.1600, that "in so doing we must, of necessity look to the past conduct as a guide to what we believe a person's future conduct might reasonably expected to be..."

[55] In *Re Belteco Holdings Inc.* (1998), 21 O.S.C.B. 7743 at 7746, recently approved by the Divisional Court in *Erikson* v. *Ontario Securities Commission* (2003) 26 O.S.C.B. 1622 (Erikson), the various factors to be considered in a public interest violation are:

> 1. The seriousness of the violations proved;
> 2. The respondents experience in the marketplace;
> 3. The level of the respondent's activity in the marketplace;
> 4. Whether there has been recognition of the seriousness of the improprieties; and
> 5. Whether the sanctions imposed may serve to deter not only those involved in the case being considered but also any like-minded people from engaging in similar abuses of the capital markets.

It should also be considered whether these violations were isolated or recurrent.

[56] In the *Erikson* case, it was emphasized that the sanctions imposed should reflect the Commission's assessment of the measures necessary to achieve those objectives. There must be a relationship between the seriousness of the violation and the sanctions selected to achieve compliance with the law. Sanctions should invariably be fair, proportional to the degree of participation and should have regard to any mitigating factors which may be present. In this sense, sanctions are custom-made to fit the circumstances of the particular case or to sanction a precise problem or breach. At the time of this transaction, the Commission did not have power to order reimbursement or any payment other than costs.

[57] The panel also took into consideration the matter of Larry Woods (Woods). Woods was a director of Plastic Engine Technology Corporation, who was found guilty of the criminal charge of insider trading and was sentenced to jail for a period of 90 days. see *R.* v. *Woods*, [1994] O.J. No. 392. This decision by the trial judge was subsequently upheld in the Ontario Court of Appeal. see *Woods* v. *Ontario* [1994] O.J. No. 651. The Court of Appeal reasoned at paragraph 2 that "there are

clear findings that the appellant plotted, acted throughout with intention to sell securities, and was, in fact, selling them. I do not see it as even arguable that s. 75(1) could be interpreted as excluding this conduct." The panel agrees that the *Woods* case distinguishes itself from this particular case in that the *Woods* case deals with far greater egregious conduct. The members of the panel at the OSC later suspended his trading rights for 15 years. see *In the Matter of Larry Woods* (1995) 18 O.S.C.B. 4630.

[58] It is submitted on behalf of Cowpland that, (1) the insider trading was unintentional, (2) there was no use of the undisclosed information, (3) it was an honest mistake, but was not a reasonable one in the circumstances, (4) the respondents recognize and admit the seriousness of the violation, and (5) staff from conduct past and current, have no concern that the conduct will be repeated. It must also be kept in mind that Cowpland was not a novice in the marketplace who slipped into error through inexperience; he has participated in Ontario capital markets for over 20 years. He was aware of the prohibition against insider trading and in fact reported the trades that were made.

[59] Cowpland has not acted as an officer or director of any reporting issuer since February 2002. It was submitted on Cowpland's behalf in distinguishing this case from the *Donnini* case, that he was not a registrant, he expressed remorse (realized the seriousness of the action), did not make use of undisclosed information, that staff is not concerned about future violations, the trade was transparent (not hidden), no previous violations of the *Securities Act* and there was no direct profit from his actions. In *Donnini*, the panel's sanctions of a 15-year prohibition from trading were reduced to 4 years by the Divisional Court. This judgment is now under appeal.

[60] The staff and the respondents submit that if the recommended sanctions are approved it sends a very clear message to the public that insider trading is a strict liability offence and that even an honest mistake, unless it is clearly a reasonable one, is no defence. In addition, insider trading deals require consideration of not only business, but accounting issues. Insider trading without the appropriate public disclosure is a very serious matter.

[61] We are mindful of and have carefully reviewed the cases cited by both staff and the respondents. The conduct in those cases was egregious and of the lowest possible denomination. But we must consider that in this particular case we are dealing with someone who is well known, intelligent and of such a high profile that he should be setting an example to others of appropriate corporate governance.

[62] Pursuant to Section 127(1) (6) of the Act, the panel has the power to reprimand anyone who is in breach of the Act. Mr Cowpland is before the panel because of an egregious error in making a trade without disclosing knowledge of a material fact. No matter what the explanation or how an honest a mistake could have occurred, it was his responsibility to see that this kind of "error" not

occur. Instead of being a model and example for corporate governance, Mr. Cowpland has brought a

shadow over himself, and his enterprises. This panel however, is of the view that, had this conduct taken place after the amendments to the Ontario *Securities Act* in April 2003, in view of the new powers to order administrative penalties and to order the disgorgement of amounts obtained as a result of non-compliance (new sections 127 (3.1), 129.2 and 143(2) of the Act), the sanctions ordered by this panel may have been much more severe.

[63] After lengthy and difficult deliberations and in view of all the circumstances, the panel accepts the joint recommendations of counsel as in the public interest, which are as follows:

[64] The respondents will pay $500,000 to the Investor Education Fund.

[65] Pursuant to section 127(1) (8) of the Act, Michael Cowpland is hereby prohibited from becoming or acting as a Director of a reporting issuer for two (2) years from the date hereof.

[66] M.C.J.C. Holdings Inc. and Michael Cowpland are hereby reprimanded.

[67] Pursuant to Section 127(1)(2)(a) and (b) of the Act, M.C.J.C. Holdings Inc. is ordered to pay $75,000 to the Commission in respect of a portion of the Commission's costs with respect to this matter.

DATED at Toronto this 12th day of December, 2003.

"Wendell Wigle" "Paul Bates"

Wendell S. Wigle Paul K. Bates

"Robert Davis"

Robert W. Davis