

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

– and –

**IN THE MATTER OF
X Corp**

Hearing: October 27, 2004

Panel:	Robert L. Shirriff, Q.C. Robert W. Davis Wendell S. Wigle, Q.C.	Chair of Panel Commissioner Commissioner
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Counsel:	Alan J. Lenczner Linda L. Fuerst	For the applicant, X Corp.
	Judy Cotte Kathryn Daniels Brian Reny	For the responding party, Staff of the Ontario Securities Commission

MOTION BROUGHT BY X CORP

PURSUANT TO SECTION 144

FOR AN ORDER REVOKING A SECTION 11 INVESTIGATION ORDER

AND TERMINATING AN INVESTIGATION

REASONS

I. The Proceedings

[1] This is a motion brought by X Corp pursuant to section 144 of the Ontario *Securities Act*, R.S.O. 1990, c. S.5, as amended, (the “Act”), for an order revoking a section 11 investigation order made by the Ontario Securities Commission (the “Commission”) on April 21, 2004 and for an order terminating an investigation commenced by the Commission in April of 2003.

[2] This motion was brought *in camera* because X Corp is subject to the provisions of section 16 of the Act; however, at the conclusion of the hearing of this motion, both the applicant and the staff of the Commission (“staff”) petitioned this panel to provide written reasons which could be made public while still protecting the anonymity of the corporate applicant.

[3] The panel consented to the joint request and issues these reasons accordingly, identifying the corporate applicant as “X Corp” and omitting reference to any names or specific facts that could identify the applicant.

II. Factual Background to the Proceedings

[4] X Corp is a corporation subject to the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44, as amended, and is a reporting issuer in Ontario. Its shares are listed on the Toronto Stock Exchange.

[5] On May 16, 2003, by a letter to X Corp, Staff of the Commission requested production of certain materials in connection with an investigation that it was carrying out regarding sales of X Corp shares by two senior officers of X Corp that had occurred early in January of 2003 (the “Investigation”). X Corp complied with this request.

[6] Subsequently, X Corp refused to provide further documents requested by the Staff on grounds of confidentiality. As a result, on April 21, 2004, the Commission issued a section 11 order in the matter of X Corp in connection with the Investigation.

[7] X Corp has recently negotiated an agreement (the “Share Purchase Agreement”) with the shareholders of another corporation for the purchase of all of the shares of that corporation.

[8] The Share Purchase Agreement requires an unconditional financing commitment from X Corp’s financiers.

[9] On October 21, 2004, X Corp brought a motion *in camera* before a panel of the Commission for an order permitting it to disclose the fact of the Investigation to the shareholder vendors, financiers, underwriters and other parties privy to the Share Purchase Agreement in order to fulfill certain disclosure obligations on X Corp. Staff consented to this motion and the order was granted by the panel that same day following a hearing held via teleconference.

[10] On October 25, 2004, staff confirmed in writing that the subjects of the Investigation were senior officers of X Corp, including its Chief Executive Officer and Chief Operating Officer, and not the Corporation itself.

[11] Following disclosure of the existence of the Investigation, the financiers declined to provide unconditional financing for the share purchase contemplated by the Share Purchase Agreement.

[12] X Corp now brings a motion pursuant to section 144 of the Act to revoke the section 11 investigation order and to terminate the Investigation by the Commission.

III. The Issue

[13] This motion raises several issues for the panel:

- a) Does a panel of the Commission have jurisdiction pursuant to section 144 of the Act to revoke or vary a section 11 investigation order on the grounds asserted? and
- b) Does a panel of the Commission have the jurisdiction to terminate an investigation by the Commission?

IV. Jurisdiction

1. The Applicant's Position

[14] The applicant submits that a section 11 investigation order is a “decision” that may be revoked or varied pursuant to section 144 of the Act:

s. 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.

[15] The Applicant also submits that X Corp is a person or company affected by the “decision”.

[16] As authority for the proposition that a section 11 order is a “decision” such that it may be revoked or varied pursuant to section 144, the applicant cites *Re Universal Settlements* (2003), 26 OSCB 2345 (March 21, 2003), (“*Universal Settlements*”), where Vice Chair Moore states on page 2346:

There were three decisions referred to in the application. The first was the

Commission's decision to make an order under section 11. The second was the issuance of a summons by a person in the Commission pursuant to that section 11 order. The third was the decision of staff of the Commission to issue Notice 44, giving staff's views on viatical settlements.

We are satisfied that the first decision, namely the decision to make a section 11 order, was a decision of the Commission. It was made by one commissioner as permitted under the Act, which provides that the action of the Commission may be made by one commissioner with respect to a section 11 order.

[17] The applicant also submits that this panel has the jurisdiction to revoke the section 11 order issued in the matter of X Corp on April 21, 2004 on the grounds that delay in the conduct of the Investigation is manifest (it is still in progress after eighteen months) and its continuation will terminate a very important acquisition that the Corporation wishes to make pursuant to the Share Purchase Agreement.

[18] The applicant submits that this acquisition is very important to the shareholders of X Corp because it would double the market capitalization of X Corp and put the Corporation on the competitive edge of the market. The applicant maintains that if the section 11 order and underlying Investigation continue, X Corp's bankers will not provide unconditional financing, which is an essential requirement of the vendor, and X Corp and its shareholders will suffer "irrevocable" harm.

2. Staff's Position

[19] Staff concedes that a section 11 investigation order is a "decision" within the context of section 144 of the Act and does not dispute that X Corp is a person or company affected by this decision.

[20] However, staff submits that alleged prejudice to an issuer while its senior officers are undergoing an insider trading investigation is not proper grounds for the revocation or variance of a section 11 order.

[21] Staff refers to *Universal Settlements* and submits that if, after careful consideration, the Commission concludes that a section 11 order was properly issued then it cannot be revoked or varied unless new facts or evidence come to light or new legislation is enacted.

[22] Staff submits that the section 11 order was properly issued on April 21, 2004 and that the alleged length of the Investigation and prejudice to X Corp and its shareholders do not constitute new facts or evidence permitting the Commission to tamper with the section 11 order.

[23] Staff also submits that neither a panel nor the Chair of the Commission has the power to terminate an investigation being carried out by the Commission.

3. Reasons for Decision

[24] In *Universal Settlements*, staff of the enforcement branch of the Commission believed there may have been a violation of sections 25 and 53 of the Act in connection with the sale of “viatical settlements”, and a section 11 investigation order was issued by the Commission. The order was challenged by a party who contended that it was not properly issued because the Commission had not decided in advance of the issuance of the order whether viatical settlements were, in fact, securities as defined in the Act.

[25] In that case, the panel decided that the purpose of a section 11 order is to ascertain facts. At that time there was at least one other jurisdiction that considered viatical settlements to be securities. As there had been a controversy surrounding other transactions with the same “viatical” label, the panel concluded that as long as there had been a “colour of fact” behind the Commission’s decision to invoke a section 11 order, the order was properly issued.

[26] In the motion before us, the applicant has conceded that the trades in the shares of X Corp by the two insiders did take place in circumstances which could lead to a conclusion of insider trading. However, we note that since the investigation is continuing and no Notice of Hearing and Statement of Allegations have been issued, we assume that the circumstances remain to be determined. What is important is that we are satisfied that the section 11 order in this case was issued upon a proper foundation or “colour of fact” as required by the *Universal Settlements* case.

[27] In our analysis of whether the section 11 order should be varied or revoked pursuant to the power granted by section 144, we are guided by Vice Chair Moore on page 2346 of the *Universal Settlements* case to consider whether new facts or legislation have arisen since the issuance of the order:

Section 144 is appropriate to be used to vary or revoke a decision of the Commission when new facts come to light, or new law is enacted, making it desirable to change the decision that has been rendered.

[28] The applicant submits that Staff has taken too long to perform an investigation upon a set of facts which the applicant maintains are simple and straightforward. It submits that this delay plus the irrevocable harm to the shareholders of X Corp due to the loss of an opportunity to make a valuable acquisition are new facts which entitle us to quash the section 11 order and the investigation itself.

[29] Staff submits that (i) with respect to a revocation or variation of a section 11 order, *Universal Settlements* mandates that a panel should consider only whether the order was properly made and, if it so finds, it should not interfere with it, and (ii) with respect to terminating an investigation, there is absolutely no authority in the Act that grants a panel of the Commission the right to do so, as a panel of the Commission has no ongoing supervisory jurisdiction over an investigation. Staff also submits that the quashing of an investigation prior to the expiration of the six year limitation prescribed by section 129.1 of the Act would constitute an improper imposition of a judicially created limitation.

[30] Staff further submits that the prejudice alleged by X Corp is not something the panel should consider when determining whether a section 11 order should be revoked. In staff's opinion the existence of an investigation of the officers of an issuer will always cause some prejudice to that issuer. The paramount consideration for the panel is the public interest in allowing a *prima facie* case of a violation of the Act to continue to be investigated fully.

[31] In our view, the submission of staff ignores the plain meaning of section 144. Section 144 permits the Commission to make an order revoking or varying a decision of the Commission. *Universal Settlements* confirms that a section 11 order is a decision of the Commission and that it may be revoked or varied pursuant to a section 144 proceeding if new facts or legislation come to light. *Universal Settlements* does not confine these facts to ones existing at the time the order was made. Rather it objects to the use of such a proceeding to determine the veracity of the facts which are to be ascertained by the investigation launched by the order. Thus in our view all relevant facts, past or present, other than those that are to be ascertained by the investigation, could be considered.

[32] For this panel to make an order revoking or varying the section 11 order issued on April 21, 2004 it must be of the opinion that to do so would not be prejudicial to the public interest. In forming such an opinion the panel must consider balancing all of the objectives of the Act: the protection of investors, including the shareholders of X Corp, along with the fostering of fair and efficient capital markets and public confidence in those capital markets. This includes bearing in mind that a staff investigation into the actions of officers of an issuer will always cause some prejudice to it.

[33] We do not consider that a revocation of a section 11 order under section 144 cannot issue prior to the expiry of the limitation period in section 129.1 of the Act. We consider that a revocation under section 144 mandates a balancing of the public interests involved and a consideration of its effect in light of section 129.1 becomes part of that mandate.

[34] The section 11 order was issued on April 21, 2004. Only after the issuance of this order did staff obtain the further productions it had requested from X Corp.

[35] The affidavit evidence presented to the panel by the applicant outlined the effects of the continuing investigation on X Corp and its shareholders. However, the evidence was slim and unprobed and left a number of unanswered questions.

[36] The matters being investigated are serious and, having regard to length of time since the section 11 order was issued and full production was made to Staff, we consider that on balance it remains in the public interest for the investigation being conducted under the section 11 order to continue.

[37] Based on the evidence before us we are unable to conclude that the section 11 order was improperly issued or that the new facts which have arisen since its issuance permit us to form an opinion that a revocation or variation of the section 11 order would not be prejudicial to the public interest.

VI. The Decision

[38] In the circumstances we decline to grant the revocation of the section 11 order that the applicant seeks.

[39] Having reached this decision, and although the position of staff on the issue is troubling, it is not necessary to decide the question whether the Chair of the Commission, a panel of the Commission, or the Commission at large has the jurisdiction to terminate an investigation.

[40] We therefore dismiss this motion.

DATED at Toronto this 7th day of December, 2004.

“Robert L. Shirriff”

Robert L. Shirriff, Q.C.

“Wendell S. Wigle”

Wendell S. Wigle, Q.C.

“Robert W. Davis”

Robert W. Davis