Chapter 3

Reasons: Decisions, Orders and Rulings

3.1 Reasons for Decision

3.1.1 Wells Fargo Financial Canada Corporation

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

AND

IN THE MATTER OF
WELLS FARGO FINANCIAL CANADA CORPORATION

Hearing: Monday, January 24, 2005

Ontario Securities Commission Panel:

Paul M. Moore, Q.C.	-	Vice-Chair (Chair of the Panel)
David L. Knight	-	Commissioner
Suresh Thakrar	-	Commissioner

Counsel:

G. MacKenzie K. Manarin Joanne Ramirez	-	For Staff of the Ontario Securities Commission
Bruce O'Toole	-	On behalf of Wells Fargo

The following statement has been prepared for purposes of publication in the Ontario Securities Commission Bulletin and is based on the transcript of the hearing. The transcript has been edited, supplemented and approved by the chair of the panel for the purpose of providing a public record of the panel's decision in the matter.

ORAL REASONS FOR DECISION

CHAIR:

We have two matters scheduled this morning. One is a settlement hearing in the matter of Wells Fargo Financial Canada Corporation, the Ontario Securities Commission, and the second one is in the matter of Andrew Campbell.

MR. MACKENZIE:

Mr. Chair, these matters have been pursued by staff under a simplified process, which is a recent initiative by staff to prioritize cases and bring to a hearing quickly, cases that do not require a complicated investigation.

The two cases before you today involve facts that are relatively straightforward, and conduct that is easily identified. These proceedings were both commenced in December, 2004 and they are in respect of alleged misconduct that occurred, in the case of Wells Fargo, three months earlier, and in the case of Andrew Campbell, seven months earlier. These cases did not require extensive investigation. And with the assistance of the corporate finance branch, they were identified, assessed and expeditiously brought to a hearing before you today.

Staff wish to emphasize that the intent of the simplified process initiative is not to compromise, in any way, the rights and protections to which any respondents in an OSC proceeding is entitled. While the simplified process aims to bring certain matters to a hearing quickly, once the hearing commences we are, of course, in the hands of the Commission and it is expected that all of the normal rules, procedures and protections afforded to respondents continue to apply.

VICE-CHAIR MOORE:

[1] I'm going to announce our decision and give oral reasons for it. We reserve the right to edit these reasons and we will then have published in the bulletin a version that we are totally satisfied with.

[2] We approve the settlement agreement as being in the public interest.

[3] Wells Fargo Financial Canada Corporation is a public issuer in the markets in Ontario. Today we had a hearing under section 127 of the *Securities Act*, R.S.O. 1990, c. S.5, as amended to consider whether it is in the public interest to approve the settlement agreement dated January 20th, 2005 between staff and Wells Fargo and to make an order approving the sanctions agreed to by staff and Wells Fargo.

[4] Detailed facts in support of the proposed sanctions in this case are set out in the settlement agreement, part 3.

[5] Briefly, Wells Fargo, on four occasions between February, 2003 and October, 2004, failed to file prospectus supplements on time, as required by part 8 of Canadian Securities Administrators National Instrument 44-102 for shelf prospectus distributions, of medium-term notes, totalling $950 million.

[6] After default of eight months, in March, 2003, in response to a warning by staff of the Commission, representatives of Wells Fargo gave assurances that all future medium-term note pricing supplements would be filed on time. Furthermore, Wells Fargo advised staff at that time that it had prepared a plan to more effectively administer its MTN program so as to avoid further late filings.

[7] In November, 2003, the 2001 shelf prospectus lapsed. Wells Fargo filed a subsequent shortform-based shelf prospectus qualifying up to $1.5 billion of unsecured medium-term notes for distribution during the period ending November 30, 2005. It filed late (by a few days) two pricing supplements, after supposedly having a plan in place to prevent further late filings.

[8] Wells Fargo has admitted that its conduct was contrary to the public interest and contrary to requirements under Ontario securities law.

[9] In the settlement agreement, Wells Fargo sets out its position. Its position is as follows.

[10] First, the first two late filings of medium-term note pricing supplements in February, 2003 were inadvertent and occurred during a corporate reorganization at Wells Fargo, which included changes in management.

[11] Secondly, following its second late filing and a warning by staff, Wells Fargo prepared and implemented a plan and established certain procedures to more effectively administer its MTN program. As part of this plan, Wells Fargo relied on outside legal counsel in Canada to file the MTN pricing supplements.

[12] Thirdly, the third and fourth late filings of MTN pricing supplements occurred while the plan was in place. These late filings were due to outside legal counsel's failure to properly adhere to the plan and Wells Fargo's failure to properly monitor the plan.

[13] Our first comment relates to the question of inadvertence. We do not think inadvertence is an excuse. We are not sure what it means. We don't know how to distinguish it from a "don't care" attitude, carelessness, negligence or disorganization. We don't give much weight to the fact that these late filings were inadvertent.

[14] Secondly, we accept staff's submission that the buck stops with the reporting issuer. The reporting issuer may choose to rely on outside counsel, but it is no excuse if outside counsel fails to perform tasks that the reporting issuer is responsible for. We don't give any weight to the fact that outside counsel may have dropped the ball with respect to implementing the plan.

[15] As acknowledged in the revised plan, questions should have been asked by Wells Fargo when things weren't done. There should have been proper monitoring of tasks counsel undertook to do for Wells Fargo.

[16] The Commission's mandate in upholding the purposes of the Ontario *Securities Act* is:

(a) to provide protection to investors from unfair, improper or fraudulent practices; and

(b) to foster fair and efficient capital markets and confidence in capital markets.

Securities Act, R.S.O. 1990 c. S.5, as amended, s. 1.1

[17] The Commission is guided by certain fundamental principles in pursuing the purposes of the Act. The principle most relevant to this case is the "requirements for the maintenance of high standards of fitness and business conduct to ensure honest and responsible conduct by market participants."

Securities Act, s. 2.1(2)(iii)

[18] In addition, section 2.1 of the Act provides that the Commission shall have regard to the fundamental principle that "effective and responsive securities regulation requires timely, open and efficient administration and enforcement of this Act by the Commission."

Securities Act, s. 2.1 (3)

[19] The principles which guide the Commission in exercising its public interest jurisdiction are reflected in the following words of the Commission in *Re Mithras Management Ltd.* (1990), 13 O.S.C.B. 1600 at 1610 (Ont. Securities Comm.), and I quote:

> We are here to restrain, as best we can, future conduct that is likely to be prejudicial to the public interest, in having capital markets that are both fair and efficient.

[20] In *Re Belteco Holdings* (1998), 21 O.S.C.B. 7743 (Ont. Securities Comm.) (*Belteco*) and *Re M.C.J.C. Holdings Inc.* (2002), 25 O.S.C.B. 1133 (Ont. Securities Comm.), this Commission set out several factors that are relevant to take into consideration when imposing sanctions on a respondent.

[21] It is clear from past cases, including *Belteco*, and *Re Donnini* (2002), 25 O.S.C.B. 6225 (Ont. Securities Comm.), that this Commission considers it has authority to take into account not only specific deterrence for a particular respondent, but general deterrence, in setting sanctions. LeBel J. of the Supreme Court of Canada in *Re Cartaway Resources Corp.* (2004), 1 S.C.R. 672, at para. 60 (S.C.C.), stated:

> In my view, nothing inherent in the Commission's public interest jurisdiction, as it was considered in *Asbestos, supra,* prevents the Commission from considering general deterrence in making an order. To the contrary, it is reasonable to view general deterrence as an appropriate, and perhaps necessary, consideration in making orders that are both protective and preventive.

[22] It is clear from the cases that the jurisdiction of this Commission, in issuing section 127 orders, is preventive and protective, and not punitive or remedial.

[23] When it comes to administrative penalties, the fact that we are preventive and protective and not punitive or remedial is very relevant. Deterrence comes to the forefront in deciding the appropriate administrative penalty.

[24] This settlement is the first case to come before the Commission, which I am aware of, where we have been asked to issue an order providing for an administrative penalty.

[25] We've considered the various factors that have been listed in the cases to take into account in applying sanctions generally. But we believe, when it comes to deterrence and an administrative penalty, it is important to address factors such as willfulness, negligence, carelessness, warnings that may have been issued, repeated violations, and also to look at the actual practice of Commission staff in the past in pursuing violations of the nature before us.

[26] While precedent, where available, may be helpful in setting sanctions, precedent is not necessary or determinative in any case. This is because the various factors we have to take into account will rarely be identical in each case. Sanctions must be tailored to the facts. This is almost self-evident when it comes to specially tailored orders such as a cease trading order, but it is equally applicable in applying monetary sanctions, in the form of administrative penalties, which are not meant to be penal or remedial, but are meant to be protective and preventive.

[27] The case before us is novel. It's the first one for an administrative penalty. It also represents a departure, in the sense that staff have indicated to us, and by their action today have shown, that they intend in the future to vigorously enforce late filings to the extent they haven't in the past.

[28] Therefore, this case is a signal to the marketplace of the increased vigilance on the part of staff and the danger to market participants in failing to comply with these technical, but necessary, requirements of our law.

[29] We note that the offences today are a first offence on the part of Wells Fargo. We also note that there is a certain shame factor. We are aware that the first time that a violation of a particular nature is enforced, perhaps it would be unjust to come forth with a huge administrative penalty, and, therefore, although $20,000 as the agreed amount appears on the light side,

we think it is appropriate in this particular case.

[30] The street should not take this as a precedent and the indication of a scale that might be applied in the future. The warning signal has been given. Let the street take note.

[31] So in conclusion, we are approving the settlement agreement and the proposed sanctions because the proposed sanctions in this particular case provide a specific deterrent to Wells Fargo regarding future late filing of financial information. The proposed sanctions also signal to market participants the importance of timely filing of financial information, as required by Ontario law.

[32] Wells Fargo and other market participants who use the short form prospectus mechanism for raising money in the capital markets are, in some sense, a privileged few. They do not have to comply with the more lengthy prospectus requirements.

[33] We expect this group to be especially vigilant and to police themselves and to monitor themselves and their outside counsel so that they do comply with the law and not to be careless with respect to the privilege that has been extended to them through the short form prospectus mechanism.

[34] By agreeing to the proposed sanctions, Wells Fargo has acknowledged and accepts responsibility for fulfilling its obligations to make timely filing of financial information. By following the plan set forth as a schedule to the settlement agreement, we are satisfied that there shouldn't be problems in the future. For those reasons, we have approved the settlement.

[35] Commissioner Knight, I believe you have a few comments you wish to make.

COMMISSIONER KNIGHT:

[36] I do. Thank you. First I must say that I do concur with what my colleague has had to say. As was evident, I think, from my questions during this hearing, I am troubled by the inadvertence that extended over a period of eight-and-a-half months in connection with the second distribution under the 2001 shelf prospectus. I'm even more troubled by the fact that a year-and-a-half later, when either Wells Fargo or its agent knew of a requirement for timely filing, as evidenced by the filing in connection with the second distribution under the 2003 shelf prospectus, that even though they were aware of the requirement for timely filing, when the third distribution under the 2003 prospectus was made only 12 days later, there was still a further failure to make timely filing in connection with that third distribution.

[37] Clearly, someone was aware of the filing requirements, and they weren't met. But in spite of my concerns, I do concur. I do approve the settlement agreement. But I add that I would anticipate – I would expect, rather – there be no repetition of these failures in the future, and I join my colleague in hoping that the market participants generally will respect filing deadlines in the future.

VICE-CHAIR MOORE:

[38] Thank you. And Commissioner Thakrar.

COMMISSIONER THAKRAR:

[39] Thank you, Mr. Chair. Given the stellar reputation of Wells Fargo, the four instances of late filing, Wells Fargo being in a select group of reporting issuers, and that this is a group that doesn't require policing for late filing, I do consider the penalty of $20,000 as a relatively modest settlement. However, given the novel context of the settlement and the various comments made by Vice-Chair Moore, on behalf of the panel, I do concur with the approval of the settlement agreement.

Approved.

"Paul M. Moore"