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

AND

IN THE MATTER OF ANDREW CHEUNG

HEARING:	April 26, 2005.	
PANEL:	Wendell S. Wigle, Q.C.	Commissioner (Chair of the Panel)
	Suresh Thakrar	Commissioner
	Carol S. Perry	Commissioner
COUNSEL:	Yvonne Chisholm	For Staff of the Commission
	Peter L. Biro Goodman & Carr	For the Respondent

REASONS

I. This Proceeding

[1] This proceeding was a hearing pursuant to sections 127 and 127.1 of the *Securities Act*, R.S.O. 1990, c. S.5, as amended (the "Act") to consider whether it was in the public interest to approve a settlement agreement entered into between Staff of the Commission ("Staff") and Andrew Cheung ("Cheung"), which agreement provided that:

a. pursuant to section 127(1) clause 9 of the Act, Cheung pay an administrative penalty of $5000;

b. pursuant to section 127.1 of the Act, Cheung pay $3500.00 toward the costs of the investigation and this proceeding.

[2] During the hearing we heard submissions from counsel for Cheung and from Staff. Mr. Cheung also answered questions from the Commission's panel. Upon being satisfied that it would be in the public interest to make the requested order, we made an order under sections 127 and 127.1 to approve the Settlement Agreement.

II. Agreed Facts and Admissions

[3] 01 Communiqué is a reporting issuer in Ontario. Cheung has been the president of 01 Communiqué since October 7, 1992. Cheung is the beneficial owner of a company called Global Genius Investments Ltd. ("GGI").

[4] Between November 14, 2003 and October 7, 2004, GGI executed 21 trades in 01 Communiqué Laboratory Inc.

[5] Section 107(2) of the Act required Cheung to file a report of each change in his direct or indirect beneficial ownership of the reporting issuer, 01 Communiqué. Section 107(2) required Cheung to file the reports within 10 days from the day the change took place.

[6] Cheung had not filed any section 107(2) reports in respect of those trades as of March, 2005, when this proceeding was commenced.

[7] As of April 19, 2005, Cheung has filed all reports in respect of the trades at issue.

[8] Cheung has admitted that he breached Ontario securities law and that his conduct was contrary to the public interest.

III. The Commission's Public Interest Mandate

[9] The Commission's mandate in upholding the purposes of the Act is set out at section 1.1:

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.

[10] In accordance with paragraphs 2.1(2)(i) and (iii) of the Act, the Commission is guided by certain fundamental principles in pursuing the purposes of the Act, including the requirement for "responsible conduct by market participants" and "timely, accurate and efficient disclosure of information." Further, the Commission has regard to the principle set out in subsection 2.1(3) of the Act, that "[e]ffective and responsible securities regulation requires timely, open and efficient administration and enforcement of this Act by the Commission."

[11] The role of the Commission in exercising its public interest jurisdiction is set out in *Mithras Management Ltd.* (1990), 13 O.S.C.B. 1600 at 1610-1611:

> …the role of the Commission is to protect the public interest by removing from the capital markets – wholly or partially, permanently or temporarily, as the circumstances may warrant – those whose conduct in the past leads us to conclude that their conduct in the future may well be detrimental to the integrity to those capital markets. 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. In so doing we must, of necessity, look to past conduct as a guide to what we believe a person's future conduct might reasonably be expected to be; we are not a prescient, after all.

IV. The Commission's Role in Reviewing Settlement Agreements

[12] The role of a Commission panel reviewing a settlement agreement is not to substitute the sanctions it would impose in a contested hearing for what is proposed in the settlement agreement, but rather to make sure the agreed sanctions are within acceptable parameters.

V. Relevant factors for Imposing Sanctions and Deterrence

[13] The factors to consider when imposing sanctions on a respondent are summarized as follows:

(a) the seriousness of the allegation proved;

(b) the respondent's experience in the marketplace;

(c) the level of a respondent's activity in the marketplace;

(d) whether or not there has been a recognition of the seriousness of the improprieties;

(e) the restraint of future conduct that is likely to be prejudicial to the public interest (with reference to past conduct)

(f) whether or not the sanctions imposed may serve to deter not only those involved in the case being considered, but any like-minded people from engaging in similar abuses of the capital markets;

(g) any mitigating factors;

(h) the size of any profits (or loss avoided) from the illegal conduct;

(i) the reputation and prestige of the respondent; and

(j) the remorse of the respondent.

[14] Appropriate sanctions should be determined by considering the specific circumstances of the case at issue and be proportionately appropriate. As set out in *Re M.C.J.C. Holdings and Michael Cowpland* (2002), 25 O.S.C.B. 1133 at 1134 (Carswell) at 3:

> […] We have a duty to consider what is in the public interest. To do that, we have to take into account what sanctions are appropriate to protect the integrity in the marketplace. […]
>
> In doing this, we have to take into account circumstances that are appropriate to the particular respondents. This requires us to be satisfied that proposed sanctions are proportionately appropriate with respect to the circumstances facing the particular respondents. […]

[15] Further, as stated by the Supreme Court of Canada in *Cartaway Resources Corp.* [2004] 1 S.C.R. 672 at paragraph 60, the Commission may impose sanctions which take into account the principle of general deterrence:

> …nothing inherent in the Commission's public interest jurisdiction 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 preventative.

[16] In *Re Wells Fargo Financial Canada Corporation*, (2005), 28 O.S.C.B. 1791 at page 1793, the Commission held that deterrence comes to the forefront in deciding the appropriate administrative penalty.

Application of Principles to this Case

[17] Applying the principles set out above, this panel found that the Settlement Agreement entered into by Cheung and the Staff was in the public interest.

[18] The panel acknowledged that Cheung's failure to file insider reports was contrary to the public interest. There should be no doubt that this Commission considers a failure to comply with the reporting requirements of the Act respecting insider trading is a serious breach of the Act. These obligations are essential to that purpose of the Act which is to foster fair markets and confidence in the capital markets. At least in the view of this panel, failure to meet these obligations should result in serious consequences.

[19] In assessing whether the proposed sanctions are appropriate, the panel considered the extent of the respondent's cooperation with Staff. Cheung cooperated actively with Staff in the course of arriving at the settlement agreement. Cheung's cooperation enabled Staff to bring this matter to a hearing within one month from the issuance of the Notice of hearing.

[20] Cheung's admissions eliminated the need for a full hearing and his agreement to pay $3,500.00 towards the costs of the Commission.

[21] At the hearing, Staff made extensive submissions that Cheung was not likely to be involved in similar violations of the Act. The panel accepted these submissions as to the likelihood of future violations by Cheung. Further, the panel recognized that the imposition of a $5,000.00 administrative penalty and a $3,500.00 costs award should be a deterrent to others failing to file insider reports.

Conclusion

[22] For these reasons, we are satisfied that the sanctions are in the public interest because they meet the purposes of the Act; they are proportionately appropriate in light of the circumstances of this case; and they will act both as a specific and general deterrent.

Dated at Toronto this 10th day of May, 2005

"Wendell Wigle"
Wendell S. Wigle, Q.C.

"Suresh Thakrar"
Suresh Thakrar

"Carol S. Perry"
Carol S. Perry