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

- AND -

IN THE MATTER OF
JAMES PATRICK BOYLE, LAWRENCE MELNICK
AND JOHN MICHAEL MALONE

Motion Hearing:			February 23 and 27, 2006
Panel:	Paul M. Moore, Q.C.	-	Vice-Chair (Chair of the Panel)
	Robert W. Davis, FCA	-	Commissioner
	Carol S. Perry	-	Commissioner
Counsel:	Yvonne B. Chisholm	-	For Staff of the Ontario Securities Commission
	Joseph Groia Gavin Smyth Cullen Price Alistair Crawley	-	For James Patrick Boyle
	John A. Fabello Andrew Gray	-	For Lawrence Melnick

REASONS AND ORDER

The Motion

[1] On February 23 and 27, 2006, the respondents James Patrick Boyle ("Boyle") and Lawrence Melnick ("Melnick") sought an order dismissing the proceeding against the respondents on the basis that this proceeding was brought out of time in view of section 129.1 of the *Securities Act*, R.S.O. 1990, c. S.5, as amended (the "Act").

[2] The Statement of Allegations and the Notice of Hearing were issued on August 5, 2005. Therefore, the relevant limitation date is August 5, 1999.

The Issues

[3] The issues that we have to determine on the motion are as follows:

(a) Were payments received by Boyle or Melnick after August 5, 1999, and allegedly derived from sales of shares to broker dealers, part of the alleged course of conduct?

(b) Were sales in private transactions involving shares of Complex and Nucanolan, or certain transfers of shares of Complex or Nucanolan, in both cases after August 5, 1999, but in either case not involving broker dealers,

(i) part of the alleged course of conduct, or

(ii) when considered in isolation, alleged to constitute trading by the respondents without registration, or to be illegal distributions, or instances of improper or abusive reliance on exemptions from the registration or prospectus requirements of the Act?

(c) Should a hearing on the merits in this matter take place before we make a decision on the motion?

Allegations Relevant to the Motion

[4] Staff alleges in the Statement of Allegations that Boyle was the principal architect of a "course of conduct" involving the shares of three Ontario issuers: Complex Minerals Inc. ("Complex"), Nucanolan Resources Corp. ("Nucanolan"), and GoldMint Explorations Ltd. ("GoldMint"). Boyle allegedly conceived and designed transactions which he executed

primarily through nominees and accommodation parties (the "Nominee Shareholders"), including friends, associates and members of his family.

[5] It is alleged that Melnick and Malone acted in concert with Boyle.

[6] Staff alleges that the respondents engaged in unregistered trading and authorized or facilitated unlawful distributions of shares of Complex, Nucanolan and GoldMint in a series of transactions. It is alleged that the predominant purpose of the unlawful trading and distributions was to create tradeable securities for sale to the public. It is alleged that the creation of these tradeable shares was achieved through a series of non-cash transactions and improper and abusive reliance on the provisions of the Act, including exemptions to registration and prospectus requirements.

[7] Staff alleges that, in addition to breaching Ontario securities law, the respondents participated in a course of conduct that compromised the integrity of the capital markets, was abusive of Ontario's capital markets and was contrary to the public interest.

[8] The course of conduct alleged by Staff to be contrary to the public interest started with the formation of Complex, Nucanolan and GoldMint through three separate reverse takeovers and initial distributions to the Nominee Shareholders.

[9] Staff alleges that shares of Complex, Nucanolan and GoldMint received in the initial distributions were transferred by the Nominees Shareholders though three step processes (the "Three Step Process") to companies owned by Boyle and companies owned or controlled by persons who were nominees or accommodation parties of Boyle (the "Nominee Companies"). The first step of the process involved the sale of the "economic potential" of the shares by the Nominee Shareholders to First Mulmur Corporation ("FMC"). The second step involved the transfer of the "equity of redemption" of the shares from the Nominee Shareholders to the Nominee Companies. The third step involved the purchase by the Nominee Companies from FMC of the "economic potential" of the shares. The shares were then sold by the Nominee Companies to three broker dealers, namely A.C. MacPherson & Co Inc., J.M. Charter Securities Inc. and Arlington Securities Inc., who then sold the shares to the public. It is alleged that the principal effect of the Three Step Process was to manufacture debts to FMC. On the basis of these manufactured debts, funds generated from the sales of the shares to the public were ultimately directed to FMC and others, and then to Boyle, Melnick and others.

[10] In particular, Staff alleges that some of the proceeds from the sales of shares to the broker dealers were ultimately received by Boyle and Melnick after August 5, 1999.

[11] Staff alleges that shares of GoldMint and Nucanolan issued in the initial distributions were also sold to the broker dealers outside the Three Step Process.

[12] Staff alleges, at paragraph 58 of the Statement of Allegations, that in the course of the initial Complex distribution to the Nominee Shareholders, an aggregate of 7,200,016 Complex securities were issued to three individuals and that these securities were then transferred to a number of persons and companies in 2000.

[13] Further, Staff alleges at paragraph 60 of the Statement of Allegations, that in the course of the Nucanolan distribution to the Nominee Shareholders, 4.5 million Nucanolan shares were issued to Complex. The shares were disposed of in a private sale in December, 2000.

[14] Staff also alleges, at paragraph 61 of the Statement of Allegations, that after the Nucanolan distribution to the Nominee Shareholders in April, 1997, 4 million Nucanolan shares and 4 million Nucanolan warrants were issued to Welkin and that these shares were subject to an escrow agreement pursuant to which Boyle was the escrow agent. In November, 2000, on behalf of Welkin, Malone sold 4 million Nucanolan shares to Champion Natural and received 240,000 shares of Champion Natural. The Nucanolan shares were sold privately by Champion Natural in December, 2000.

The Evidence

[15] The evidence before us on this motion consists of the uncontroverted affidavit of Boyle sworn January 17, 2006, the uncontroverted affidavit of Melnick, sworn January 25, 2006 and the affidavit of Richard Radu, the senior Staff investigator on the file, sworn February 6, 2006. Mr. Radu was the subject of extensive cross-examination which focussed, for the most part, on his tracing of the flow of funds after the completion of the transactions set out in the Statement of Allegations.

[16] Uncontroverted evidence establishes that the sales of shares of Complex, GoldMint and Nucanolan to the broker dealers under the Three Step Process, and the sales of a number of GoldMint and Nucanolan securities to broker dealers outside of the Three Step Process occurred before August 5, 1999.

[17] The Statement of Allegations states that most of the proceeds of the sale of Complex, GoldMint and Nucanolan shares to the broker dealers was paid to Boyle's law firm in trust. These proceeds were then directed through Christopher DeGeer in trust for his client, FMC, as repayment of debt on behalf of the Nominee Companies.

[18] Radu admitted in cross-examination that proceeds of sales to the broker dealers received by Boyle or Melnick after August 5, 1999 were paid from a trust account under the direction and control of Boyle and that such proceeds were paid into the account by March 16, 1999, prior to the limitation date.

[19] Radu explains at paragraph 74 to 76 of his affidavit, that, as described at paragraph 58 of the Statement of Allegations, on October 19, 1995, the same day on which the Nominee Shareholders received Complex shares, an aggregate of 7,200,016 Complex securities were issued to Richard Sutcliffe, Natalia Rundkvist and Bowdidge who were then directors of Complex. They are not "Nominee Shareholders" as defined in the Statement of Allegations. In 2000, Rundkvist's 2,000,000 Complex shares were re-registered to Melnick's company, Gobitan. The remaining 5, 200,016 Complex shares held by Sutcliffe and Bowdidge were re-registered in November 2000.

[20] At paragraph 85 of his affidavit, Radu describes the tracing of the shares in connection with paragraph 60 of the Statement of Allegations. He states that, in September 2000, Gobitan, on its own behalf and as a representative of other Nucanolan shareholders, granted to Ozz Utility Management Inc., an option to purchase 9,902,086 Nucanolan shares. At paragraph 86, he states that in October 2000, 4,500,000 Nucanolan shares were re-registered from Complex to Boyle & Co. in trust.

[21] At paragraphs 88-89 of his affidavit, Radu explains the tracing of shares in connection with paragraph 61 of the Statement of Allegations. He states that following the issuance of 4,000,000 Nucanolan shares and 4,000,000 Nucanolan warrants to Welkin Cohort Trade Corp. in April 1997, Malone and Ames, on behalf of Welkin, sold the 4,000,000 Nucanolan shares to Melnick's company, Champion Natural in November 2000.

[22] We were also provided with a letter dated July 10, 2002 from Kathryn Daniels, a litigation counsel with the Enforcement Branch of the Commission, to Robert Cook, President of the Canadian Trading and Quotation System Inc. This letter states:

> In general, Staff's current concerns relate to Mr. Boyle's repeated involvement in the activities of certain former broker dealers. In particular, Staff note his practice of organizing the sale into the inventories of certain dealers large blocks of securities which were then subsequently sold to clients of the broker dealers at excessive and unfair mark-ups.
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> …
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> Staff is not concerned with Mr. Boyle's activities as a lawyer; however, his personal and professional activities appear to be intertwined with those of the broker dealers, over and above the provision of legal advice.

Facts Uncontroverted in the Evidence

[23] All sales of shares of Complex, GoldMint and Nucanolan to the broker dealers and sales by broker dealers of such shares to the public were completed before August 5, 1999.

[24] All proceeds from sales of shares of Complex, GoldMint and Nucanolan to the broker dealers were paid by them prior to August 5, 1999 and the debts allegedly manufactured from the Three Step Process had been repaid by August 5, 1999.

[25] Proceeds from the sales of shares of Complex, GoldMint and Nucanolan and from the repayment of the debts allegedly manufactured through the Three Step Process were paid to the respondents or others, or into an account under the control and direction of Boyle, by August 5, 1999.

Argument of Staff

[26] Staff acknowledges that, once a respondent has raised the applicability of a limitation period in a proceeding under section 127 of the Act, the onus is on Staff to establish that "there is a triable issue to be determined during the full hearing on the merits" (*Belteco Holdings Inc. (Re)* (1997), 20 O.S.C.B. 2921 ("*Belteco*") at p. 2927).

[27] Staff submits that section 129.1 of the Act must be read in the context of the entire Act, in accordance with the object of the Act and the intention of the Legislature. Staff further refers to *Canadian Tire Corp. (Re)* (1987), 10 O.S.C.B. 857 at p. 26, where the Court held that no breach of the Act is required to trigger section 127 and the Commission's public interest jurisdiction.

[28] Staff submits that payments of proceeds to Boyle and Melnick and some private transactions involving of shares of Complex and Nucanolan, which occurred after August 5, 1999, are part of the alleged course of conduct.

[29] Staff argues that the payment of the proceeds to Boyle, Melnick and Gobitan is highly relevant to the motion, that it is an integral part of the course of conduct in respect of which sanctions are sought, and that it would defy reason to effectively "stop the clock" at the very point that funds from the public started to flow in, and were then paid out over several years to Boyle, Melnick and Gobitan. Staff submits that the receipt of proceeds is directly tied to the unregistered trading and unlawful distributions.

[30] Staff submits that distributions outside of the Three Step Process, which also yielded proceeds, are also relevant. The tracing of the shares issued on the initial distributions to the Nominee Shareholders, and the direct involvement of Boyle and Melnick are highly relevant to the case before the Commission and should not be severed or disregarded.

[31] Staff relies on *Re Heidary* (2000), 23 O.S.C.B. 959 which they submit makes it clear that the respondents' course of conduct, and not specified breaches of Ontario securities law, is determinative of the "last event on which the proceeding is based." Staff refers to paragraph 23 of the decision:

> In accordance with Commission practice, we ruled that the second branch should be dealt with at the conclusion of the hearing on the merits, and after all of the evidence was in, so that we could deal with the complete factual record in reaching a decision.

[32] Staff also relies on *Duggan Re* (1994), 17 O.S.C.B. 2103 at pp. 2104-2105, where the Commission held that:

> The better procedure is to allow Commission Staff to put in all of its evidence in the same proceeding and to determine the limitation period question at the end of the hearing and on the basis of all of the facts presented.

Argument of Boyle

[33] Counsel submits that all of the transactions in issue occurred prior to August 5, 1999.

[34] Counsel submits that the receipt of funds by Boyle after March 1999 from an account under his direction and control was not part of a course of conduct and that sales in private transactions, or transfers of shares, after August 1999 were isolated transactions about which there were in the Statement of Allegations no allegations of unregistered trading or unlawful distributions, and that they were not part of the course of conduct described in the Statement of Allegations.

[35] Boyle states at paragraph 13 of his affidavit:

> As far as I can determine from the Statement of Allegations, there are no allegations of breaches of securities laws or conduct contrary to the public interest that pertain to any transactions other than the abovementioned transactions which culminated in the sales of shares to broker dealers and which all occurred over 6 years prior to the issuance of the Notice of hearing. References to events post August 5, 1999 in the Statement of Allegations are gratuitous references to discrete and separate transactions from those that are the subject matter of the proceeding.

[36] Counsel submits that Staff does not make any allegations of breaches of securities law, or conduct contrary to the public interest that pertain to any transactions other than those surrounding the reverse takeovers which culminated in the sales of share to broker dealers and all of which occurred over six years prior to the issuance of the Notice of Hearing.

[37] Counsel argues that references to events post August 5, 1999 in the Statement of Allegations are separate transactions from those that are the subject of the proceeding. The Statement of Allegations contains references to transactions involving shares of Complex, GoldMint and Nucanolan, some of which occurred before August 5, 1999 and others afterwards. However, counsel points out that it remains unclear from the Statement of Allegations what relevance these transactions have to the proceedings because there are no allegations in the Statement of Allegations that the transactions referred to in paragraphs 56 to 61 (post August 5, 1999 events) were not in compliance with the Act.

[38] Counsel refers to the purpose of limitations period and the wording of section 129.1 of the Act and submits that the expression "last event" must be a fact on which a proceeding can be based and connotes an element of materiality. Counsel relies on *Ontario (Securities Commission) v. International Containers Inc.* [1989] O.J. No. 1007 where Carruthers J. held at pp. 4-5 that the similar concept of "facts upon which the proceeding is based" included only "the essential or material averments required by law."

[39] Counsel argues that giving a broader interpretation to section 129.1 of the Act and allowing "bootstrapping", would render the purpose of that section nugatory. On that point, counsel for Boyle made interesting remarks at the motion hearing:

> … the Commission cannot have been intending to suggest that what the Staff can do by simply finding any event within a limitation period [would] cause this Commission to hold a hearing. That would allow Staff to have the power to essentially overrule section 129.1. Because it would be a rare case, indeed, of any misconduct that one could imagine where there would not be a way of finding some basis to suggest the conduct continues.
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> The insider trader kept the money, reinvested it in the market: course of conduct. Person engaged in an illegal distribution, took the money, invested it in real estate, lives in the house: course of conduct. Any case that one would imagine that could be out of time, the Staff could simply make it be in time by alleging a course of conduct of any kind whatsoever, no matter how farfetched, and then be able to argue, well, you have to hear all the evidence in order to be able to assess whether this case is in time or not.
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> (Transcript, corrected to accord with the panel's recollection dated February 23, 2006 at p. 212)

Argument of Melnick

[40] In his affidavit, Melnick states that his involvement with the transactions at issue came to an end long before August 5, 1999 and was therefore outside the six-year limitation period. He states that he was involved in some sales of shares after August 5, 1999 but that those sales were unrelated to the former transactions and that there are no allegations in the Statement of Allegations that these transactions were contrary to the Act.

[41] Counsel submits that with respect to allegations involving sales of shares of Complex and Nucanolan that occurred after August 5, 1999, no particular allegations of wrongdoing or of breaches of securities law were made against Melnick. These sales are unrelated to the transactions prior to August, 1999 in which Melnick was involved, and were not part of his course of conduct.

[42] With respect to payments made to Melnick after August 1999, counsel submits that none of the payments are traceable to the Three Step Process or the allegedly related transactions with broker dealers.

[43] Counsel relies on *Re Heidary*, where the Commission put restrictions on what can be alleged as part of a course of conduct. In particular, the Commission held that unrelated events cannot bring a "course of conduct" within the limitation period. Counsel argues that the prohibition against "bootstrapping" implicit to section 129.1 of the Act is made explicit in *Re Heidary*.

Analysis

(a) The Law

[44] Section 129.1 of the Act provides:

> Except where otherwise provided in this Act, no proceeding under this Act shall be commenced later than six years from the date of the occurrence of the last event on which the proceeding is based.

[45] A proceeding is commenced under section 127 of the Act on the date on which the Notice of Hearing and Statement of Allegations are issued by the Office of the Secretary of the Commission. In this case, the proceeding was commenced on August 5, 2005. Therefore, the limitation date is August 5, 1999.

[46] The purposes of limitation periods are to provide certainty to ensure that the evidence available for a proceeding does not deteriorate or disappear with the passage of time, to ensure that public resources are spent on hearings that can be properly adjudicated, and to ensure that matters are adjudicated in accordance with standards applicable at the time that the events in issue actually occurred (see G. Mew, *The Law of Limitations*, 2nd ed. Markham, Ont.: LexisNexis, 2004 at 12-13).

[47] In *Re Heidary* cited above at paragraphs 20-22 of the decision, the Commission said:

> [I]n determining what constitutes "the occurrence of the last event on which the proceeding is based", it will normally be necessary to look at the course of conduct of the respondent, as alleged by Staff and proved in evidence, and to determine just what is the last event in the course of conduct alleged and proved.
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> When the first breach occurred in a series of breaches of Ontario securities law is not, as argued by the Applicants, the touchstone. Nor, if some breaches in a series of breaches occurred before, and some during, the limitation period, is it appropriate to proceed only with respect to those breaches which occurred during the limitation period. Indeed, some or all of the "events" alleged and proved may not, as we have said, be breaches of Ontario securities law at all.
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> Rather, "the last event on which the proceeding is based" referred to in section 129.1 of the Act is the last event in the series of events which form the course of conduct on the basis of which subsection 127(1) sanctions are requested by Staff.
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> (Emphasis added)

[48] The Commission in *Re Heidary* did not define “course of conduct”. However, “course of conduct” is used as a legal expression in other jurisdictions and has been defined to include three elements: (i) a pattern of conduct composed of a series of acts, (ii) over a period of time, (iii) evidencing a continuity of purpose. A continuity of purpose requires that the subsequent acts be similar to the original act and in line with a person’s original intent (See *People v. Payton*, 612 N.Y.S. 2d 815 (1994)).

[49] The Statement of Allegations in the “overview” section makes it clear that the primary purpose of the respondents’ alleged abuse of registration and distribution requirements of the Act was to create tradeable securities for sale to the public. Events alleged to have occurred after August 5, 1999 must be analysed in light of this alleged purpose.

[50] The words “last event on which the proceeding is based” in section 129.1 of the Act suggest that, to include in a proceeding events occurring before a limitation date, an event that

occurred after the limitation date must be related in a significant way to those events. The event must be a material element of the allegation of wrongdoing in the Statement of Allegations and not a mere fact not constituting a material element of such wrongdoing. In other words, a subsequent event, such as the movement of moneys after the limitation date, needs to be more than part of the evidence, showing purpose, or reasons for the wrongdoing, or rewards, or identifying actors. It must be integral to the wrongdoing.

[51] In a section 129.1 challenge, the Commission needs to distinguish between allegations in a Statement of Allegations which are of fact and those which are of wrongdoing, and then needs to determine if an alleged event that is a material element of an allegation of wrongdoing occurred after the limitation date.

[52] The Commission may in appropriate circumstances properly form an opinion that results in sanctions pursuant to section 127 of the Act based on events constituting elements of conduct that is contrary to the public interest without there also having occurred an event that constitutes a breach of the Act (see *Canadian Tire Corp. (Re)* (1987), 10 O.S.C.B. 857 (O.S.C.) at p. 26 and *Re C.T.C. Dealer Holdings Ltd. et al. and Ontario Securities Commission et al.* (1987), 59 O.R. (2d) 79 (Div. Ct.) at p. 16; leave to appeal refused (1987), 35 B.L.R. xx (Ont. C.A.)).

[53] However, the words "on which the proceeding is based" in section 129.1 of the Act suggest that for an allegation that an event that allegedly occurred (for example, that Boyle was a director of Ursa Major Minerals Inc. after August 5, 1999) to constitute an allegation of wrongdoing, and not a mere assertion of a conclusion that Staff believes the Commission should reach (for example, that a course of conduct is contrary to the public interest), some element of wrongdoing (for example, an event of misrepresentation or fraudulent behaviour) must be alleged as a basis for the assertion.

[54] If a subsequent isolated event is alleged in a Statement of Allegations to constitute a breach of the Act, but it is not an integral element of the wrongdoing relating to events prior to the limitation period, only the allegation based on the isolated event would survive a section 129.1 challenge.

[55] However, in our case, we have determined that events subsequent to the limitation date are not only not an integral element of the wrongdoing alleged for events prior to August 5, 1999, but that, in addition, there are no separate allegations of wrongdoing in the Statement of Allegations relating to events subsequent to August 5, 1999. Such events were payments, private sales, transfers of shares, and acting as a director or officer of one or more companies after August 5, 1999.

[56] The alleged course of conduct ended with the alleged illegal distributions to the broker dealers. One may argue that the receipt of funds by the respondents from funds derived by the

broker dealers from sales to the public also should be included in the respondents' alleged course of conduct. However, even on this argument, such receipt, in effect, was accomplished when the last funds were paid into the trust account under Boyle's control, i.e., by March 16, 1999.

[57] We see no benefit in delaying our decision on the motion until after a hearing on the merits. There are no facts relevant to the motion that are in dispute or that need to be clarified through further evidence.

[58] Unlike in *Heidary*, where the Commission determined to hear evidence in a hearing on the merits before deciding the limitation question, we have concluded that, even if the evidence in a hearing on the merits were to prove all the events referenced in the Statement of Allegations, that would not change the reality that the allegations of wrongdoing in the Statement of Allegations are not based on a last event subsequent to the limitation date.

ORDER

[59] For these reasons, the motion brought by the respondents Boyle and Melnick for an order quashing the Statement of Allegations issued by Staff and the Notice of Hearing on August 5, 2005, and to dismiss the proceeding against them is granted.

[60] The Statement of Allegations issued by Staff and the Notice of Hearing dated August 5, 2005 are hereby quashed and the proceeding against the respondents Boyle and Melnick is dismissed.

Dated at Toronto this 12th day of April, 2006

"Paul M. Moore "
Paul M. Moore

"Robert W. Davis"
Robert W. Davis

"Carol S. Perry"
Carol S. Perry