Chapter 3

Reasons: Decisions, Orders and Rulings

3.1 OSC Decisions, Orders and Rulings

3.1.1 Darren Delage – ss. 127, 127.1

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

AND

IN THE MATTER OF
DARREN DELAGE

HEARING HELD PURSUANT TO SECTIONS 127 AND 127.1 OF THE ACT

SETTLEMENT HEARING RE: DARREN DELAGE

HEARING:	Thursday, January 15, 2009		
PANEL:	Suresh Thakrar	–	Commissioner and Chair of the Panel
	Kevin J. Kelly	–	Commissioner
APPEARANCES:	Jane Waechter	–	for Staff of the Ontario Securities Commission
	Matthew Scott	–	for Darren Delage

ORAL RULING AND REASONS

The following text has been prepared for the purpose of publication in the Ontario Securities Commission Bulletin and is based on excerpts of the transcript of the hearing. The excerpts have been edited and supplemented and the text has been approved by the Chair of the Panel for the purpose of providing a public record of the decision.

Chair:

[1] This was a hearing under sections 127 and 127.1 of the *Securities Act*, R.S.O. 1990, c. S.5, as amended, (the "Act") for the Ontario Securities Commission (the "Commission") to consider whether it is in the public interest to approve a proposed Settlement Agreement between Staff of the Commission ("Staff") and the respondent Darren Delage ("Delage").

[2] We have read Staff's written submissions, and heard the oral submissions and we, as a Panel, have decided to approve the Settlement Agreement as being in the public interest. These are our oral reasons in this matter which will be published in the Bulletin.

[3] The facts and circumstances agreed to by Staff and Delage are set out in the Settlement Agreement. These facts are not findings of fact by this Panel, rather, they are facts agreed to by Staff and Delage for purposes of this settlement. In approving the Settlement Agreement, we relied on the facts in the agreement and those facts represented to us at the hearing today.

[4] Delage was employed from April 2004 to July 15, 2005 by Polar Securities Inc. ("Polar Securities"), which is a registered Investment Dealer and Futures Commission Merchant, whose business included management of hedge funds. Polar Securities also managed an offshore non-prospectus qualified hedge fund, Polaris Energy Offshore Master Fund (the "the Polaris Fund").

[5] Delage, as an employee of Polar Securities, advised and traded on behalf of the Polaris Fund. During his employment; he executed the majority of the trades for the Polaris Fund. At the time of this trading, Delage was not registered with the

Commission in any capacity. He is currently registered with the Commission as an Associate Advising Officer and Trading Officer with another registered firm.

[6] This proceeding concerns the role of Delage in the trading activity conducted late in the trading day on six days in the period between June 27, 2005 and July 12, 2005 in shares of Environmental Applied Research Technology House-Earth (Canada) Corporation ("EAR"), which traded on the Canadian Venture Exchange or CDNX under the stock symbol EAR. Specifically, this proceeding concerns trading practices used by Delage that he knew, or ought to have known, could contribute to a misleading price for shares of EAR.

[7] On June 23, 2005, the Polaris Fund participated in a private placement of EAR units. The Polaris Fund purchased approximately 2.75 million units of EAR at a cost of $0.10 per share. Each unit consisted of one common share and one share purchase warrant exercisable for one common share at a price of $0.13. Pursuant to Ontario securities law, there was a four month restriction on the resale of these shares.

[8] In the Settlement Agreement, Delage admits that between June 27 and July 12, 2005 he entered into numerous purchases of freely-tradable EAR shares, which are reported on the public markets via CDNX, when he knew, or ought to have known, that the trading could contribute to a misleading price of EAR shares.

[9] The specific details of this trading activity over this period are set out in paragraphs nine to 16 of the Settlement Agreement.

[10] As an example of this trading activity, on June 27, 2005, which is four days after the Polaris Fund participated in the private placement of EAR shares, Delage entered 11 purchase orders for a total of 210,000 EAR shares, starting at approximately 3:32 p.m. Trading on CDNX closes at 4:00 p.m. each week day and after hours trading is permitted until 5:00 p.m. at the closing price of the shares. These buy orders entered by Delage were also limit orders. The various fills for these orders resulted in 10 upticks, that is, the share purchases for each buy order are at a price higher than the last reported trade. The fills, on that day, also resulted in a new high for 2005 for EAR shares. During the time of Delage's trading, based on the last board lot traded prior to Delgae's first trade, the share price increased from $0.15 to $0.24.

[11] This kind of trading pattern or activity, with purchase orders entered late in the day just prior to closing; with limit orders and the resulting upticks, were repeated by Delage on June 28, June 29, June 30, July 11 and July 12, 2005.

[12] During the period June 27 to July 12, 2005, Delage entered over 25 purchase orders mostly with limit orders, for a total of approximately 490,000 EAR shares. The fills for the orders resulted in about 20 upticks.

[13] In addition, this trading affected the volume of trading of EAR shares. As stated in paragraph 16 of the Settlement Agreement:

> On June 27 and 28, 2005, Delage's trading dominated the volume of trading in EAR shares in the last 30 minutes of trading. On June 29 and 30, 2005 and July 12, 2005, Delage's trading represented 100 per cent of the volume of trading in EAR shares in the last 30 minutes of trading.

[14] On July 6, 2005, as a result of inquiries initiated by an employee, Polar Securities commenced an investigation into Delgage's trading activity in EAR shares at the end of June 2005. Delage's employment with Polar Securities was terminated, effective July 15, 2005.

[15] By facts agreed to in the Settlement Agreement, Delage admits that he traded EAR shares and that those trades included upticking the share prices late in the trading day. This contributed to a misleading appearance as to the market price of EAR shares and was contrary to the public interest.

[16] We also take note that in the Settlement Agreement, Delage admits at paragraph 26 that he:

> engaged in an intentional pattern of trading in EAR shares … in circumstances where he knew or ought to have known that the trading could contribute to a misleading price for EAR shares.

[17] Also, by entering into the Settlement Agreement, Delage has recognized the seriousness of his misconduct and admits that he engaged in conduct that was contrary to the public interest. Delage has accepted sanctions, including a suspension of his registration together with a contemporaneous cease trade, and subsequent supervision of his trading thereafter.

[18] The Commission's mandate in upholding the purposes of the Act, as set of in section 1.1 of the 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 the capital markets.

[19] Further, in accordance with paragraph 2.1(2)(ii) of the Act, the Commission is guided by certain fundamental principles in pursuing the purposes of the Act, including the "restrictions on fraudulent and unfair market practices and procedures".

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

[21] Before we go to our order, we would like to briefly refer to the law as it applies to the consideration of the Settlement Agreement before the panel.

[22] We are guided by the sanctioning factors listed in *Re M.C.J.C. Holding and Michael Cowpland* (2002), 25 O.S.C.B. 1133 and *Re Belteco Holdings Inc.* (1998), 21 O.S.C.B. 7743, which Staff referred us to in their submissions.

[23] In addition, appropriate sanctions need to take into account the specific circumstances of each case (*Re M.C.J.C. Holding and Michael Cowpland*, *supra* at pp. 1134-1135).

[24] In this case we took into account a number of mitigating factors as set out in the Settlement Agreement at paragraphs 19 to 25, such as Delage's limited work experience in the securities industry in Canada and that he has never been the subject of any prior disciplinary proceeding. In addition, Delage's admissions eliminate the need for a full hearing, which was scheduled for next month, and thus conserves the resources of the Commission.

[25] It was also established in *Re Sohan Singh Koonar et al.* (2002), 25 O.S.C.B. 2691, that the role of the Commission Panel in reviewing a settlement agreement is not to substitute its own sanctions for what is proposed in the settlement agreement. Instead, the Commission should ensure that the agreed sanctions in the settlement agreement are within acceptable parameters.

[26] This is what we as a Panel have done in approving this Settlement Agreement. In considering the respondent's position as stated in the Settlement Agreement, we are of the view that the sanctions set out in the Settlement Agreement are within the acceptable parameters.

[27] Therefore, we order that:

(a) The Settlement Agreement is hereby approved;

(b) The registration granted to the Respondent under Ontario securities law is suspended for a period of 4 months commencing on the date of this order, and the following term and condition be imposed on the Respondent's registration thereafter: the Respondent shall be subject to supervision by a registered officer (advising and trading) in the category of investment counsel and portfolio manager for a period of 2 years;

(c) Trading in any securities by the Respondent shall cease for a period of 4 months commencing on the date of the Commission's order, except that the Respondent may trade in securities in one RRSP account wholly beneficially owned by the Respondent and held at a full service registered dealer (which account the Respondent will identify in writing to the Staff of the Ontario Securities Commission), if the securities are:

(i) securities referred to in clause 1 of subsection 35(2) of the Act;

(ii) in the case of securities other than those referred to in paragraph (i) above:

1. the securities are listed and posted for trading on The Toronto Stock Exchange or the New York Stock Exchange; and

2. the Respondent does not own directly or indirectly through another person or company or through any person or company acting on his behalf, more than one (1) percent of the outstanding securities of the class or series of the class in question;

(d) The Respondent is reprimanded;

(e) The Respondent shall complete the Conduct and Practices course of the Canadian Securities Institute within one year of the date of the Commission's order;

(f) The Respondent shall pay the costs of the Commission's investigation, in the amount of $7,000.00.

[28] We note that Delage has committed to initiating the Conduct and Practices course of the Canadian Securities Institute as soon as possible.

[29] We also note that, as stated in paragraph 31 of the Settlement Agreement, Delage undertakes to consent to a regulatory order made by any provincial or territorial securities authority in Canada containing any or all of the prohibitions set out under sub-paragraphs (b) and (c) of the Order pertaining to registration and trading.

[30] In conclusion, we find that together, all the sanctions imposed in this matter provide adequate specific and general deterrence, which the Supreme Court has established is an important regulatory objective for securities commissions (*Re Cartaway Resources Corp.*, [2004] 1 S.C.R. 672). The sanctions strike a balance between the mitigating factors present in this case and the need for an order which will serve the preventive and protective objectives of the Act.

[31] Specifically, there is a remedial aspect to the Settlement which provides that Delage shall be subject to supervision by a registered officer (advising and trading) in the category of investment counsel and portfolio manager for a period of 2 years and that Delage shall complete the Conduct and Practices course of the Canadian Securities Institute within one year of the date of the Commission's order. This will ensure that Delage has proper supervision, education and training and this will lead to responsible trading practices in the future.

[32] In Summary, the proposed sanctions: (a) reflect an appropriate outcome for Delage and deter any future misconduct of this nature; (b) encourages responsible trading practices in accordance with Ontario securities law; and (c) contribute to the fair and efficient operation of the capital markets.

[33] It is important in matters such as this, and as stated by the Alberta Securities Commission in *Re Podorieszach*, that:

> Investors must have confidence that they can trade in a marketplace in which the available information properly reflects genuine trading activity. Investors in the capital market base their behaviour and their investment decisions on posted trading prices. They are entitled to assume that the posted prices reflect bona fide transactions in a market operating free of improper influence. Their own transactions are then reflected in subsequent prices. If any investor makes an investment decision in reliance on a posted price that does not reflect genuine trading activity, that investor may be harmed. Subsequent transactions could also be materially affected by that single instance of a misleading posted price. The result could be harm to investors generally and the undermining of investor confidence in the marketplace. (Re *Podorieszach* [2004] A.S.C.D. No. 360 at para. 87)

[34] Though the regulatory sanctions agreed to in the Settlement Agreement may be below what we might have imposed after a hearing on the merits, we note this was not a hearing on the merits. There is no certainty as to the outcome of any such hearing. We also note that Delage should be given credit for cooperation with Staff and that by settling, Commission resources have been conserved. Therefore, we find that the sanctions are acceptable and fall within acceptable parameters.

[35] Therefore, we approve the Settlement Agreement as being in the public interest.

Approved by the Chair of the Panel on January 29, 2009.

"Suresh Thakrar"