Ontario Securities Commission | Commission des valeurs mobilières de l'Ontario | P.O. Box 55, 19th Floor, 20 Queen Street West, Toronto ON M5H 3S8 | CP 55, 19e étage, 20, rue queen ouest, Toronto ON M5H 3S8

IN THE MATTER OF THE *SECURITIES ACT*

R.S.O. 1990, c. S.5, AS AMENDED

– AND –

IN THE MATTER OF ROGER D. ROWAN, WATT CARMICHAEL INC., HARRY J. CARMICHAEL, AND G. MICHAEL McKENNEY

REASONS AND DECISION ON SANCTIONS AND COSTS

Hearing: April 29-30, 2009

Decision: December 21, 2009

Panel:	Patrick J. LeSage, Q.C.	Commissioner (Chair of the Panel)
	Suresh Thakrar, FICB, ICD.D	Commissioner
	David L. Knight, FCA	Commissioner

Counsel:	Johanna Superina Alexandra Clark Usman Sheikh	for	Staff of the Ontario Securities Commission
	Nigel Campbell Ryder Gilliland Prof. Peter Hogg	for	Roger D. Rowan, Harry J. Carmichael, G. Michael McKenney, and Watt Carmichael Inc. (Respondents)
	S. Zachary Green	for	The Attorney General of Ontario

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REASONS AND DECISION ON SANCTIONS AND COSTS

I. BACKGROUND

[1] This was a bifurcated hearing before the Ontario Securities Commission (the "Commission") 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 is in the public interest to make an order with respect to sanctions and costs (the "Sanctions and Costs Hearing") against Roger D. Rowan ("Rowan"), Harry J. Carmichael ("Carmichael"), G. Michael McKenney ("McKenney") and Watt Carmichael Inc. ("Watt Carmichael") (collectively, the "Respondents").

[2] The hearing on the merits was held before the hearing panel (the "Hearing Panel") on June 18-22, 26-28 and September 6-7, 2007, and a decision was rendered on June 20, 2008 (*Re Rowan* (2008), 31 O.S.C.B. 6515 (the "Merits Decision")). The Sanctions and Costs Hearing was held on April 29-30, 2009.

[3] The individual respondents: Rowan who was the President and Chief Operating Officer ("COO") of Watt Carmichael; Carmichael who was the Chairman, Chief Executive Officer ("CEO") and also the Ultimate Designated Person ("UDP") of Watt Carmichael; and McKenney who was the Chief Compliance Officer ("CCO") and Chief Financial Officer ("CFO") of Watt Carmichael and Watt Carmichael, the corporate respondent (a broker and investment dealer registered under the Act), were all found by the Hearing Panel to have breached Ontario securities laws. The Hearing Panel found that the conduct of the Respondents was contrary to the public interest. The majority of the Hearing Panel found that four of the eight allegations had been proven by Staff.

[4] Staff of the Commission ("Staff') seeks sanctions against the Respondents which are set out below at paragraphs 15 to 18. In addition, Staff seeks costs as set out below at paragraph 20.

[5] The Respondents vigorously dispute the sanctions sought by Staff in this case. The Respondents also seek to challenge the constitutional validity of the administrative penalty provision of the Act, section 127(1)9 of the Act, which they claim infringes their rights under section 11 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.) 1982, c. 11 (the "Charter").

[6] A Notice of Constitutional Question was delivered by the Respondents to the Attorney General of Ontario (the "Attorney General"). The Attorney General intervened in the proceeding to make submissions and to adduce evidence in response to the Notice of Constitutional Question.

[7] The Respondents also assert that Staff is seeking to apply the administrative penalty to their conduct retrospectively. The Respondents submit that the findings by the Hearing Panel relate to acts that originated prior to April 7, 2003, which is the date of the coming into force of the Commission's administrative penalty provision. Accordingly, they submit that the presumption against retrospectivity applies, and that this Panel cannot order the Respondents to pay an administrative penalty.

[8] These are our Reasons and Decision as to the appropriate sanctions and costs that should be ordered against the Respondents.

II. KEY FINDINGS IN MERITS DECISION

[9] This matter arose out of a Notice of Hearing issued by the Commission on July 28, 2006 in relation to a Statement of Allegations issued by Staff on that same date with respect to the Respondents and Eugene N. Melnyk ("Melnyk").

[10] On June 5, 2007, an Amended Statement of Allegations was issued by Staff which withdrew the allegations against Melnyk. The reason for the withdrawal was that, on May 18, 2007, the Commission approved a Settlement Agreement between Staff and Melnyk, who had originally been named as a respondent in this proceeding (the "Melnyk Settlement").

[11] The Amended Statement of Allegations raised the following allegations against the Respondents with respect to their activities in relation to the trading of Biovail securities held by certain trusts in 2002, 2003 and 2004:

(a) while an insider of Biovail, Rowan executed numerous trades in Biovail in the Congor, Conset and Southridge Accounts in 2002, 2003, and 2004 and failed to file any insider reports in respect of these trades contrary to subsection 107(2) of the Act;

(b) contrary to the public interest and contrary to Ontario securities law, Rowan failed to provide complete and accurate information to Biovail concerning the number of Biovail common shares over which he exercised control or direction. As a result, the disclosure contained in Biovail's management proxy circulars in 2002, 2003 and 2004 was misleading or untrue or did not state facts that were required to be stated or that were necessary to make the statements in the circulars not misleading;

(c) contrary to the public interest, Rowan engaged in discretionary trading of Biovail securities in the Conset, Congor and Southridge Accounts in 2002 and 2003 during each of the Biovail blackout periods;

(d) Rowan traded Biovail securities held in the Congor, Conset and Southridge Accounts at times when he had knowledge of material undisclosed information contained in Biovail management reports contrary to subsection 76(1) of the Act;

(e) Rowan purported to exercise discretionary trading authority in the Southridge Account when he did not have such discretionary authority, contrary to the Know Your Client requirements set out in subsection 1.5(1) of OSC Rule 31-505 – Conditions of Registration, (1999), 22 O.S.C.B. 731 and (2003), 26 O.S.C.B. 7170, referred to as the "Know Your Client" rule ("OSC Rule 31-505"), and contrary to the public interest;

(f) contrary to the public interest, Rowan and Watt Carmichael provided responses to the IDA's request for information as to the identity of the beneficiaries of the Congor and Conset Trusts which they knew or ought to have known were misleading or untrue or did not state facts that were required to be stated to make their statements not misleading;

(g) contrary to the public interest, Rowan made statements to Staff as to the identity of the beneficiaries of the Conset Trust which he knew or ought to have known were misleading or untrue or did not state facts that were required to be stated to make his statements not misleading; and

(h) contrary to the public interest, Watt Carmichael did not adequately supervise Rowan's trading in Biovail securities in the Congor, Conset and Southridge Accounts. Contrary to the public interest, Carmichael, in his capacity as Chairman and CEO, and McKenney, in his capacity as CCO, failed to adequately supervise trading by Rowan and to address conflicts of interest despite indications that supervision was required.

(Merits Decision, *supra* at para. 10)

[12] The majority of the Hearing Panel made the following findings in its Merits Decision:

(a) Rowan breached section 107 of the Act by failing to file insider reports in respect of trades in Biovail securities that he executed in the Trust Accounts;

(b) Rowan engaged in conduct contrary to the public interest by failing to disclose to Biovail the Biovail securities held in the Trust Accounts over which he exercised control or direction;

(c) Rowan engaged in conduct contrary to the public interest by trading in Biovail securities in the Trust Accounts during Biovail's Blackout Periods;

(d) Rowan did not breach section 76 of the Act;

(e) Rowan did not contravene OSC Rule 31-505 (Know Your Client) by conducting unauthorized discretionary trading in the Southridge Account;

(f) Rowan and Watt Carmichael did not mislead the IDA;

(g) Rowan did not mislead the Commission;

(h) McKenney, Carmichael and Watt Carmichael failed to adequately supervise Rowan's trading in Biovail securities in the Trust Accounts; and

(i) the conduct of the Respondents with regards to paragraphs (a), (b), (c) and (h) was contrary to the public interest.

(Merits Decision, *supra* at para. 354)

[13] We must consider the findings of the majority of the Hearing Panel carefully when determining the appropriate sanctions to impose on the Respondents in this case.

III. SANCTIONS REQUESTED BY STAFF

[14] In their submissions, Staff requested that the following orders be made against the Respondents.

Rowan

[15] With respect to Rowan:

(a) his registration should be suspended for a period of one to two years;

(b) at the conclusion of his suspension of registration, his registration should be subject to a condition that he not be approved or act in any supervisory role for a further period of 2 to 4 years;

(c) he should be required to resign any position that he currently holds as a director or officer of a reporting issuer or registrant;

(d) he should be prohibited from becoming or acting as a director or officer of a reporting issuer or an affiliate of a reporting issuer for a period of 8 to 10 years;

(e) he should be prohibited from becoming or acting as a director or officer of a registrant for a period of 3 to 5 years;

(f) he should receive a reprimand; and

(g) he should be required to pay an administrative penalty in the amount of $750,000 to $1,000,000.

Carmichael

[16] With respect to Carmichael:

(a) he should be required to resign any position that he currently holds as a director or officer of a registrant;

(b) he should be prohibited from becoming or acting as a director or officer of a registrant for a period of 6 to 12 months;

(c) he should have a condition imposed on his registration that he not be approved in or act in any supervisory role for a period of 6 to 12 months;

(d) he should receive a reprimand; and

(e) he should be required to pay an administrative penalty in the amount of $300,000 to $500,000.

McKenney

[17] With respect to McKenney:

(a) he should be required to resign any position that he currently holds as a director or officer of a registrant;

(b) he should be prohibited from becoming or acting as a director or officer of a registrant for a period of 6 to 12 months;

(c) he should have a condition imposed on his registration that he not be approved in or act in any supervisory role for a period of 6 to 12 months; and

(d) he should receive a reprimand.

Watt Carmichael

[18] With respect to Watt Carmichael:

(a) it should be required to undergo an independent review of its compliance structure as well as its procedures relating to the handling of confidential information and conflicts of interest. This review should encompass the following points:

(i) it should be conducted by an independent party approved by Staff;

(ii) it should be conducted at Watt Carmichael's expense;

(iii) Watt Carmichael should be required to implement any changes recommended by the expert within reasonable times frames set out by the expert after consultation with Watt Carmichael and Staff; and

(iv) Watt Carmichael should provide Staff with a copy of the report and recommendations of the expert and with progress reports concerning the implementation of the report's recommendations;

(b) it should receive a reprimand; and

(c) it should be required to pay an administrative penalty in the amount of $850,000 to $1,000,000.

[19] Staff argues that the requested sanctions are both proportionate and appropriate in light of the Respondents' serious breaches of Ontario securities law and their conduct contrary to the public interest.

[20] Staff is also requesting that the Respondents be ordered, on a joint and several basis, to pay a portion of the costs of the hearing on the merits amounting to $283,691.40.

IV. THE ISSUES

[21] The matter before us raises the following issues as we review the appropriate sanctions and costs against the Respondents:

A. Does section 11 of the Charter apply to proceedings when administrative penalties are sought under section 127(1)9 of the Act?

B. If the provision does not infringe the Charter, is Staff seeking to impose an administrative penalty retrospectively in this case?

C. What are the appropriate sanctions in this case?

D. What are the appropriate costs in this case?

V. ANALYSIS

A. Does Section 11 of the Charter Apply to Proceedings When Administrative Penalties are Sought Under Section 127(1)9 of the Act?

[22] We must consider whether the imposition of an administrative penalty pursuant to section 127(1)9 of the Act would be a violation of section 11 of the Charter.

i. Respondents' Submissions

[23] The Respondents challenge the constitutional validity of section 127(1)9 of the Act, which gives the Commission power to impose an administrative penalty of not more than $1,000,000 per breach of the Act. They argue that a penalty of such magnitude is a "true penal consequence" and brings into play section 11 of the Charter which deals with "Proceedings in Criminal and Penal Matters".

[24] The Respondents point out that the Supreme Court of Canada in *R. v. Wigglesworth*, [1987] 2 S.C.R. 541 (QL version) ("*Wigglesworth*") considered the breadth of section 11 of the Charter to those charged with an offence. At paragraph 21, Wilson J. established that there are two circumstances where "a matter could fall within s. 11 either because by its very nature it is a criminal proceeding or because a conviction in respect of the offence may lead to a true penal consequence".

[25] The Respondents submit that the administrative penalty provided for in section 127(1)9 (maximum $1 million for each failure to comply) is penal in nature, or at least a true penal consequence. Consequently, proceedings under section 127(1)9 are entitled to all the safeguards provided to an accused in a criminal or quasi-criminal proceeding, including protections under section 11 of the Charter.

[26] Professor Peter W. Hogg who made submissions regarding the constitutional validity of section 127(1)9 of the Act for the Respondents, puts it this way: that a $1 million administrative penalty for any regulatory violation, no matter what it may be called, is plainly and simply a "fine", and a very large fine at that. It is, he submits, "word play" to call it anything other than a fine. This is especially so with the legislation which not only has a $1 million maximum administrative penalty but provides for a $1 million administrative penalty for "each failure to comply". He says that this means the legislation permits Staff in this factual allegation to seek an administrative penalty of $1 million on each of the 7,410 trades found to be "offside" the regulations. Professor Hogg submits that just because Staff is treating all trades as a continuing breach would not prevent them in another such case as this from seeking an administrative penalty of over $7 billion. How could anyone conclude that a $1 million administrative penalty, let alone a $7 billion administrative penalty, be anything other than a "punitive fine"? This is the very thing Wilson J. speaks of in *Wigglesworth.* He also notes that in paragraph 24 Wilson J. refers to not only the size or amount of the fine, but also to the possibility of having an unlimited power to impose a fine:

> …that if a body or an official has an unlimited power to fine, and if it does not afford the rights enumerated under s. 11, it cannot impose fines designed to redress the harm done to society at large. Instead, it is restricted to the power to impose fines in order to achieve the particular private purpose.

[27] In addition, Professor Hogg emphasizes that the purpose of the fine and the use of it or how the body is to dispose of the fines it collects is also relevant. Relying on paragraph 24 of *Wigglesworth*, Professor Hogg submits that if the fines do not form part of the Consolidated Revenue Fund, then they are less likely to attract section 11 Charter protection. He submits that in Ontario, although monies received may be specifically designated, in the absence of a specific designation, they do in fact, go to the Consolidated Revenue Fund and therefore section 11 Charter protections are triggered.

[28] The Respondents further submit that the tenor of the submissions and the enormity of the administrative penalty sought by Staff in this case, is no different than if all of this occurred in a criminal court.

ii. The Attorney General's Submissions

[29] The Attorney General intervenes in this proceeding on the constitutional question raised by the Respondents. The Attorney General filed in evidence an affidavit by Poonam Puri sworn on January 16, 2009 (the "Puri Affidavit"). The Puri Affidavit provides expert evidence on the purpose of administrative penalties in the capital markets.

[30] The Attorney General takes no position on the quantum of any administrative penalty that might be imposed on the Respondents, nor does it take any position on whether any administrative penalty should be imposed. However, the Attorney General does submit that section 127(1)9 of the Act, which allows the Commission to make an order in the public interest requiring a person to pay an administrative penalty of not more than $1 million does not attract section 11 Charter scrutiny.

[31] The criminal and quasi-criminal rights of section 11 of the Charter only apply to persons "charged with an offence." The Respondents are not persons "charged with an offence" within the meaning of section 11 of the Charter and cannot therefore rely on that section. Section 11 of the Charter does not apply to administrative proceedings such as these.

[32] However, should the Commission conclude that an administrative penalty of that magnitude would, in the circumstance of this case, constitute a true penal consequence for the Respondents, the appropriate action would be to impose a lesser administrative penalty that does not constitute a true penal consequence, and not to find that section 127(1)9 of the Act is unconstitutional. This disposition would allow the Commission to exercise its discretion in a constitutionally valid manner without any need to opine on the constitutional validity of the Act itself. Further, the *Report of the Fairness Committee to the Ontario Securities Commission* states:

> …the level of fine to be imposed is a matter of discretion for the Commission in each case. Provided the Commission exercises that discretion in such a way that is in keeping with the notion of an administrative penalty rather than a penal

> sanction, there may be no problem. The possibility that it might be used for impermissible purposes should not expose the section to section 11 of the Charter.
>
> (C. A. Osborne, Q.C., D. J. Mullan and B. Finlay, Q.C., *Report of the Fairness Committee to the Ontario Securities Commission*, dated March 5, 2004 at 57)

[33] The Attorney General further submits that should we find that the impugned section of the Act infringes the Charter, such infringement is demonstrably justified under section 1 of the Charter. The Attorney General submits that the enforcement of market rules and the maintenance of high standards of fitness and market conduct by market participants are clearly pressing and substantial legislative objectives. The administrative penalty is rationally connected to its purpose, and given the importance of certainty and finality in enforcing market rules, any infringement would be saved pursuant to section 1 of the Charter.

iii. Staff's Submissions

[34] Staff submits that section 11 of the Charter does not apply to proceedings before the Commission pursuant to section 127 of the Act. An administrative penalty does not amount to a "true penal consequence." The administrative penalty is a protective and preventative tool used to fashion appropriate remedies in light of the realities of the Ontario capital markets.

[35] The range of an administrative penalty provided is carefully designed taking into consideration the context of Ontario's capital markets as well as the need to allow for flexible deterrence which would not simply be viewed as a "cost of doing business." The same range of administrative penalty has also been enacted by numerous legislatures and self-regulatory organizations throughout Canada.

iv. Analysis

Commission Proceedings are Regulatory and not Criminal

[36] The *Wigglesworth* decision distinguished between matters which are "…of a public nature, intended to promote public order and welfare within a public sphere of activity…", and "…private, domestic or discipline matters which are regulatory, protective or corrective…" (*Wigglesworth*, *supra* at para. 23). As explained by the Supreme Court of Canada, the latter are "…primarily intended to maintain discipline, professional integrity and professional standards or to regulate conduct within a private sphere of activity…" (*Wigglesworth*, *supra* at para. 23). As a result, section 11 of the Charter does not apply to private, domestic or discipline matters which are regulatory, protective or corrective.

[37] Proceedings under section 127 of the Act are "intended to regulate conduct within a private sphere of activity". In reviewing examples of such regulatory proceedings, the *Wigglesworth* decision itself cites two cases involving securities commissions, including the Commission. Both of these cases affirmed that securities commission proceedings are regulatory in nature and are therefore not subject to section 11 of the Charter (See: *Re Malartic Hygrade Gold Mines (Canada) Ltd. and Ontario Securities Commission* (1986), 54 O.R. (2d) 544, (H.C.J.); and *Barry v. Alberta (Securities Commission)*, (1986), 25 D.L.R. (4th) 730 (Alta. C.A.)).

[38] Subsequent decisions of the Supreme Court of Canada have confirmed the broad regulatory goals of the Act. In *Pezim*, for example, the Court stated:

> It is important to note from the outset that the Act is regulatory in nature. In fact, it is part of a much larger framework which regulates the securities industry throughout Canada. Its primary goal is the protection of the investor but other goals include capital market efficiency and ensuring public confidence in the system…
>
> (*Pezim v. British Columbia (Superintendant of Brokers)*, [1994] 2 S.C.R. 557 ("*Pezim*"), at para. 59)

[39] Both the British Columbia Supreme Court and the British Columbia Court of Appeal have examined whether the addition of an administrative penalty power converts a regulatory proceeding into a criminal one. In both cases the Courts found that, even with this potential sanction in place, the British Columbia *Securities Act* "remains a regulatory statute" (*Johnson v. British Columbia (Securities Commission)* (2001), 206 D.L.R. (4th) 711 (B.C. C.A.) at para. 42; and *British Columbia (Securities Commission) v. Simonyi-Gindele*, [1992] B.C.J. No. 2893 (S.C.) at 3 (Q.L.))c.

[40] Based on the analysis above, a hearing under section 127 of the Act, including a hearing in which an administrative penalty is sought, is fundamentally regulatory. It does not meet the "criminal by nature" characterization of an offence.

The Administrative Penalty is not a Penal Consequence

[41] Having determined that section 127(1)9 of the Act does not meet the "criminal by nature" characterization of an offence, we must now determine whether an administrative penalty prescribed by section 127(1)9 of the Act may impose "true penal consequences" on the Respondents. In *Wigglesworth*, a true penal consequence was characterized as follows:

> … a true penal consequence which would attract the application of s. 11 is imprisonment or a fine which by its magnitude would appear to be imposed for the purpose of redressing the wrong done to society at large rather than to the maintenance of internal discipline within the limited sphere of activity.
>
> (*Wigglesworth, supra* at para. 24)

[42] The question is thus whether an administrative penalty of up to $1,000,000 per breach is a sanction of sufficient magnitude to be deemed "penal". That question does not always permit a simple or easy answer. As stated by Wilson J. in *Wigglesworth*:

> …if a particular matter is of a public nature, intended to promote public order and welfare within a public sphere of activity, then that matter is the kind of matter which falls within s. 11. It falls within the section because of the kind of matter it is. <u>This is to be distinguished from private, domestic or disciplinary matters which are regulatory, protective or corrective and which are primarily intended to maintain discipline, professional integrity and professional standards or to regulate conduct within a limited sphere of activity</u>…

(*Wigglesworth, supra,* at para. 23 [emphasis added])

[43] The underlined portion of the quote above fits squarely with section 127 of the Act including section 127(1)9. We therefore conclude that the administrative penalty in question, notwithstanding its quantum, has for its primary purpose, the protection of investors as well as specific deterrence to the Respondents to prevent them from engaging in similar conduct in the future.

[44] These goals were clearly articulated by an advisory committee appointed under s. 143.12 of the Act to review the legislation, regulations and rules relating to matters dealt with by the Commission and the legislative needs of the Commission, which recommended adding the present administrative penalty provision to the Act (the "Five Year Review Committee"):

> In our view, the maximum amount for an administrative fine must be sufficient to allow the Commission to send an appropriate deterrent message, having regard to both the gravity of the conduct under consideration and the respondents that are the subject of the proceedings.
>
> (*Five Year Review Committee Draft Report – Reviewing the Securities Act (Ontario)* (2002), 25 O.S.C.B. (Supp) at 122)

[45] The protective and deterrent functions served by the administrative penalty in our capital markets have been acknowledged and emphasized by this Commission:

> The purpose of an administrative penalty is to deter the particular respondents from engaging in the same or similar conduct in the future and to send a clear deterrent message to other market participants that the conduct in question will not be tolerated in Ontario capital markets.
>
> (*Re Limelight Entertainment Inc.* (2008), 31 O.S.C.B. 12030 at para. 67)

[46] The Supreme Court of Canada has confirmed general deterrence is an appropriate regulatory objective for securities regulators. In *Re Cartaway Resources Corp.*, [2004] 1 S.C.R. 672 ("*Cartaway*") the Court considered the British Columbia Securities Commission's administrative penalty power. In confirming that administrative penalties may be used to send a message of general deterrence, Le Bel J. wrote:

> … it is reasonable to view general deterrence as an appropriate, and perhaps necessary, consideration in making orders that are both protective and preventative. …
>
> The *Oxford English Dictionary* (2nd ed. 1989), vol XII, defines "preventive" as "[t]hat anticipates in order to ward against; precautionary; that keeps from coming or taking place; that acts as a hindrance or obstacle". A penalty that is meant to deter generally is a penalty that is designed to keep an occurrence from happening; it discourages similar wrongdoing in others. In a word, a general deterrent is preventative.
>
> (*Cartaway, supra* at paras. 60 and 61)

[47] Is an administrative penalty of up to $1,000,000 per failure to comply with Ontario securities law proportionate to the legislative goals of general deterrence and investor protection, particularly in the context in which the administrative penalty is sought to be applied?

[48] In order to determine whether section 127(1)9 imposes "true penal consequences" on the Respondents, we must take a contextual approach. The importance of a contextual analysis was referred to as early as 1991 when the Supreme Court in *R. v. Wholesale Travel Group Inc.*, [1991] 2 S.C.R. 154 stated:

> A contextual approach is particularly appropriate in the present case to take account of the regulatory nature of the offence and its place within a larger scheme of public welfare legislation. This approach requires that the rights asserted by the appellant be considered in light of the regulatory context in which the claim is situated, acknowledging that a *Charter* right may have different scope and implications in a regulatory context than in a truly criminal one.
>
> (*R. v. Wholesale Travel Group Inc.*, *supra* at para. 150)

[49] With respect to the regulatory context, this Commission regulates Ontario's capital markets which represents a significant proportion of Canada's capital markets and economic activity. For example:

> (a) In 2004, of the 1,222 issuers listed on the Toronto Stock Exchange, 577 issuers were headquartered in Ontario representing 47% of the market capitalization of the TSX;
>
> (b) Ontario is headquarters to a significant number of relatively larger issuers with relatively high market capitalizations, e.g. in 2004, of the 243 Financial Services issuers listed on the TSX, 193 issuers (almost 80%) were headquartered in Ontario. These Ontario based financial services issuers, regulated by the Commission, had a combined market capitalization of nearly $222 billion, representing 76% of the market capitalization of all financial services issuers listed on the TSX.
>
> (c) In 2007, four of the top five most profitable public companies in Canada were headquartered in Ontario, including Royal Bank of Canada ($4.7 billion), Toronto-Dominion Bank ($4.6 billion), Manulife Financial ($3.9 billion), and Bank of Nova Scotia ($3.6 billion).
>
> (See: Puri Affidavit at paras. 14, 16 and 17)

[50] The scale of Ontario's capital markets frequently finds its reflection in the scale of the matters that come before the Commission. For example, in a recent proceeding, certain directors and officers of a public company engaged in improper back-dating and repricing of stock options issued under the company's stock option plans. The potential shortfall to the company's treasury resulting from these practices was calculated at approximately $66 million as set out in the settlement agreement (See: *Re Research in Motion Ltd.* (2009), 32 O.S.C.B. 1421).

[51] The realities of Ontario's capital markets were critical to the Five Year Review Committee's recommendation that the Commission be empowered to impose an administrative penalty of up to $1,000,000 per contravention. The Committee sought to ensure that the

administrative penalty would not simply be viewed as a "cost of doing business" or a "licensing fee" for market participants:

> Giving the Commission the power to impose an administrative fine will enable it to tailor sanctions to suit the particular circumstances of a case. The administrative fine that the Commission is able to impose should not be viewed merely as a "cost of doing business" or a licensing fee. … In our view, a maximum of $1,000,000 per contravention is sufficient to allow the Commission to send an appropriate deterrent message, having regard to, among other things, the gravity and impact of the conduct under consideration and the nature of the respondents that are the subject of the proceedings.
>
> (*Five Year Review Committee Final Report – Reviewing the Securities Act (Ontario)* (2003), 26 O.S.C.B. (Supp-2) at 214; for further discussion on this point see also: *Alberta (Securities Commission) v. Brost*, [2008] A.J. No. 1071 (Alta. C.A.) ("*Brost C.A.*") at para. 54; and *Lavallee v. Alberta (Securities Commission)*, [2009] A.J. No. 21 (Alta. Q.B.) at para. 164)

[52] Legislatures throughout Canada have come to a similar view on the appropriateness of the available range of an administrative penalty. The Securities Commissions of Nova Scotia, Quebec, Alberta and British Columbia have all been granted the power to award administrative penalties. For instance, the Alberta Securities Commission and the Nova Scotia Securities Commission have the power to order a person or company to pay an administrative penalty of not more than one million dollars for each contravention or failure to comply (*Securities Act*, R.S.N.S. 1989, c. 418, s. 135; and *Securities Act*, R.S.A. 2000, c. S-4, s. 199); the British Columbia Securities Commission can order a person to pay an administrative penalty of not more than $1 million for each contravention (*Securities Act*, R.S.B.C. 1996, c. 418, s. 162); and in Quebec, the Bureau de décision et de révision en valeurs mobilières can order the payment of an administrative penalty not exceeding $1 million dollars (*Securities Act*, R.S.Q., c.V-1.1, s. 273.1).

[53] An even greater range for an administrative penalty is available to self-regulatory organizations recognized by this Commission (notwithstanding that the penalties are based on contractual agreements). The Investment Industry Regulatory Organization of Canada (formerly the Investment Dealers Association, hereinafter "IIROC"), the national self-regulatory organization for securities dealers, has the authority under the *Universal Market Integrity Rules* to impose a fine not to exceed the greater of $1,000,000 and an amount triple to the financial benefit which accrued to the person as a result of committing the contravention (*Universal Market Integrity Rules*, Rule 10.5(1)(b)). In addition, IIROC also has the authority to order its Approved Members and Dealer Members to pay a fine not exceeding the greater of $1,000,000 (in the case of Approved Persons) and $5,000,000 (in the case of Dealer Members) per contravention and an amount equal to three times the profit made or loss avoided by reason of the contravention (See: *IIROC Rule Book, Dealer Member Rules*, Rules 20.33 and 20.34).

[54] The Mutual Fund Dealers Association of Canada ("MFDA"), which fulfills the same role for the distributors of mutual funds, also has the authority to impose a fine not exceeding the greater of $5,000,000.00 per offence, and an amount equal to three times the profit obtained or

loss avoided by such a person as a result of committing the violation (See: *MFDA By-Law No. 1*, ss. 24.1.1 and 24.1.2).

[55] The Respondents in this matter operate in a specific and tightly regulated segment of the Ontario capital markets, which is that of investment dealers and the approved persons employed by those dealers. Investment dealers and their employees are subject to significant capital adequacy and conduct of business requirements. Investment dealers must meet stringent capital requirements and demonstrate the ability and willingness to conduct business in a manner consistent with the securities laws of the province in which registration is held, and they must adhere to rules and regulations of IIROC. Approved persons/employees share analogous responsibilities.

[56] In pursuit of the legitimate regulatory goal of deterring others from engaging in illegal conduct, the Commission must, therefore, have proportionate sanctions at its disposal. The administrative penalty represents an appropriate legislative recognition of the need to impose sanctions that are more than "the cost of doing business". In the current securities regulation and today's capital markets context, a $1,000,000 administrative penalty is not *prima facie* penal.

The Indicia of a True Penal Consequence Are Not Present

[57] In *Wigglesworth*, Wilson J. indicated that "[o]ne indicium of the purpose of a particular fine is how the body is to dispose of the fine that it collects" (at para. 24). Regulatory fines, under this test, are less likely to be disbursed into the Consolidated Revenue Fund.

[58] In the case of the Commission's administrative penalty, subsection 3.4(2) of the Act provides that the sums collected as administrative penalties may be designated to or for the benefit of third parties. Only if there is no specific designation would the funds collected go to the Consolidated Revenue Fund.

[59] Administrative penalties that have been imposed by the Commission to date have contained a clause providing that the administrative penalty funds be distributed to or for the benefit of third parties (See for example: *Re Crombie* (2009), 32 O.S.C.B. 1628; *Re Research in Motion Ltd., supra*; *Re Biovail Corp.* (2009), 32 O.S.C.B. 563; *Re McCaffrey* (2009), 32 O.S.C.B. 827; *Re Devendranauth Misir* (2009), 32 O.S.C.B. 1807; *Re Limelight Entertainment Inc., supra*; *Re First Global Ventures, S.A.* (2008), 31 O.S.C.B. 10869; *Re Duic* (2008), 31 O.S.C.B. 8551; *Re Leung* (2008), 31 O.S.C.B. 6759; *Re Lee* (2008), 31 O.S.C.B. 8730; *Re Stern* (2008), 31 O.S.C.B. 4029; *Re Momentas Corp.* (2007), 30 O.S.C.B. 6674; *Re Melnyk* (2007), 30 O.S.C.B. 4695 (Order); *Re Griffiths* (2006), 29 O.S.C.B. 9529; *Re Bennett Environmental Inc.* (2006), 29 O.S.C.B. 9527; *Re Mountain Inn at Ribbon Creek Limited Partnership* (2005), 28 O.S.C.B. 9489; and *Re Wells Fargo Financial Canada Corp.* (2005), 28 O.S.C.B. 1062 (Order)).

Criminal Characteristics

[60] The conduct at issue in this matter, if prosecuted under section 122 of the Act in the Ontario Court of Justice would be subject to a penalty of imprisonment for up to five years less a day and a fine of up to $5,000,000, or to both. When looked at in that light, the administrative penalties being sought by Staff, are clearly not penalties that move them to the range of "criminal punishment".

No Imprisonment or Criminal Record Follows

[61] As earlier mentioned, the Commission cannot impose administrative penalties designed to redress the harm done to society at large. However, if the administrative penalty is restricted to achieve the particular private purposes which the Commission is empowered to govern and regulate, which is the result in this case, then section 11 of the Charter does not apply. The requested appropriate administrative penalty is not a penal consequence for these Respondents. It has none of the impermissible characteristics that have been identified by the Supreme Court of Canada in its review of financial penalties. The range of the requested administrative penalties is consistent with the Commission's responsibility for regulating Ontario's capital markets and its related mandate: to provide protection to investors from unfair, improper or fraudulent practices; and to foster fair and efficient capital markets and confidence in capital markets. We believe that the administrative penalties being sought are consistent with a measured and proportionate administrative tool response.

The Magnitude of the Misconduct

[62] The Respondents' improper conduct in this case involved significant sums of money. The quantity and value of Biovail common shares bought or sold by Rowan for the Trust Accounts during 2002, 2003 and 2004 were extremely high; as set out in paragraphs 26, 27 and 28 of the Merits Decision:

Year	**Shares Bought**		**Shares Sold**	
	- Figures are Approximate -			
	Quantity	**US$**	**Quantity**	**US$**
2002	7.1 million	265 million	7.0 million	250 million
2003	9.5 million	316 million	10.3 million	340 million
2004	0.2 million	2 million	0.7 million	14 million
Total	16.8 million	583 million	18.0 million	604 million

In addition, during 2002 and 2003, Rowan bought for the Trust Accounts 24,500 Biovail call options at a cost of approximately US$ 10 million.

[63] Rowan engaged in a high volume of discretionary trading of Biovail securities in the Trust Accounts during each of the Biovail Blackout Periods (See: Merits Decision, *supra* at paras. 156 and 157). As summarized below:

Year	**Shares Bought**		**Shares Sold**	
	- Figures are Approximate -			
	Quantity	**US$**	**Quantity**	**US$**
2002	2.5 million	110 million	2.0 million	100 million
2003	2.5 million	90 million	2.8 million	100 million
Total	5.0 million	200 million	4.8 million	200 million

In addition, during 2003, over 11,000 Biovail call options were acquired at a cost of approximately US$ 4 million.

[64] Rowan failed to file insider reports with respect to 7,410 trades involving 37,305,278 shares of Biovail during the period between January 1, 2002 and December 31, 2004.

[65] Rowan's conduct also resulted in the failure to disclose in Biovail's Management Information Circulars large numbers of Biovail shares over which he exercised or shared control or direction, amounting to nearly 4 million Biovail shares in 2002, over 3 million shares in 2003 and over 4 million shares in 2004. Management Information Circulars consequently disclosed incomplete and misleading information regarding insiders' shareholdings over the three-year period 2002–2004 (See: Merits Decision, *supra* at paras. 33, 125 and 129).

[66] Watt Carmichael earned approximately $2,350,000 in commissions from trading in the Trust Accounts during the period 2002 to 2004 (See: Merits Decision, *supra* at paras. 29, 30 and 31).

The Role of an Administrative Penalty in Today's Capital Markets

[67] Given the Respondents' status as registrants in a highly-regulated and broadly capitalized industry, given the scope of their misconduct, and the profits they realized from the trading in question, an administrative penalty would be an essential and appropriate aspect of a protective package of responsive sanctions. It is rationally connected to the objective, "the maintenance of high standards of fitness and business conduct to ensure honest and responsible conduct by market participants," and is a proportionate response in pursuit of that objective (*R. v. Oakes*, [1986] 1 S.C.R. 103).

[68] Capital markets are important to Canada's economic health and competitiveness, and Ontario represents an important part of the Canadian capital markets, with headquarters for close to 50% of public company issuers listed on the TSX. Failure to follow the rules causes significant harm to investors and the entire capital markets, including other market participants (See: Puri Affidavit at paras. 11, 14 and 29).

[69] Non-compliance with regulations negatively impacts investor confidence in the capital markets which may make investors less likely to trade (resulting in lower liquidity) and/or demand a higher return for their savings (resulting in a higher cost of capital). Non-compliance can also impair the price discovery process and result in inefficiencies in capital markets pricing. Non-compliance puts Ontario at a disadvantage in light of the global competition among jurisdictions for capital. (See: Puri Affidavit at para. 38)

[70] Both regulatory theory and the experience of financial regulators support the use of administrative monetary penalties as a compliance tool. Furthermore, regulatory theory and the experience of financial regulators indicate that an administrative penalty should be of a magnitude sufficient to ensure effective deterrence. Administrative monetary penalties attach a price or a quantifiable cost to non-compliance. They occupy a natural place in the middle of the range of enforcement tools that is short of incapacitate sanctions (such as license suspensions or cease trade orders) or prosecutions, but more serious than moral suasion and warning letters (See: Puri Affidavit at paras. 50-58).

[71] In the context of the capital markets, where licensed market participants engage in regulated economic activity involving enormous sums of money, and where market participants can realize gains of millions of dollars even on a single transaction by acting contrary to market

rules, significant financial penalties are necessary in order to maintain compliance with regulations (for a discussion regarding the role of fines see: *Wigglesworth, supra* at para. 23; and *Martineau v. M.N.R.*, [2004] 3 S.C.R. 737 at para. 60).

[72] LeBel J. of the Supreme Court of Canada in *Cartaway* stated:

> In my view, nothing inherent in the Commission's public interest jurisdiction, as it was considered by this Court 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 preventative. Ryan J.A. recognized this in her dissent: "The notion of general deterrence is neither punitive nor remedial. A penalty that is meant to generally deter is a penalty designed to discourage or hinder like behaviour in others" (para. 125).
>
> The *Oxford English Dictionary* (2nd ed. 1989), vol. XII, defines "preventive" as "[t]hat anticipates in order to ward against; precautionary; that keeps from coming or taking place; that acts as a hindrance or obstacle". A penalty that is meant to deter generally is a penalty that is designed to keep an occurrence from happening; it discourages similar wrongdoing in others. In a word, a general deterrent is preventative. It is therefore reasonable to consider general deterrence as a factor, albeit not the only one, in imposing a sanction under s. 162. The respective importance of general deterrence as a factor will vary according to the breach of the Act and the circumstances of the person charged with breaching the Act.
>
> It may well be that the regulation of market behaviour only works effectively when securities commissions impose *ex post* sanctions that deter forward-looking market participants from engaging in similar wrongdoing. That is a matter that falls squarely within the expertise of securities commissions, which have a special responsibility in protecting the public from being defrauded and preserving confidence in our capital markets.
>
> (*Cartaway, supra* at paras. 60-62)

[73] Although a $1 million administrative penalty "is not likely to be a trivial amount" when imposed on individuals or small businesses, an insubstantial sanction would fail to meet the important legislative objective of encouraging compliance with securities laws aimed at protecting investors from unfair, improper or fraudulent practices and at fostering fair and efficient capital markets and confidence in those markets. Financial sanctions must be significant and not trivial in order to have their intended deterrent effect in the securities context. It is to be remembered that such administrative penalty may be applied not just to individuals and small businesses but also to very large and profitable firms, for whom a lower administrative penalty may indeed be trivial.

[74] An administrative monetary penalty may not act as a sufficient deterrent if its magnitude is inadequate compared with the benefit obtained by non-compliance. In some instances, even a $1 million administrative penalty may not act as a sufficient deterrent if the benefit of non-

compliance exceeded $1 million or if the probability of detection was very low. As such, there is a need for regulatory sanctions to create economic incentives to foster compliance or alternatively, remove economic incentives for non-compliance. (See: Puri Affidavit at paras. 51-56).

[75] In that regard, a report for the UK Ministry of Justice on the system of regulatory sanctions referred to in the Puri Affidavit (the "Macrory Report"), stated:

> …
> **A sanction should aim to eliminate any financial gain or benefit from non-compliance.** Firms may calculate that by not complying with a regulation, they can make or save money. They may also take a chance and hope that they are not caught for failing to comply with their regulatory obligations or for deliberately breaking the law. Some firms may even believe that if they are caught, the financial penalties handed down by the courts will usually be relatively low and they will probably still retain some level of financial gain.
>
> If, however, firms know that making money by breaking the law will not be tolerated and sanctions can be imposed that specifically target the financial benefits gained through non-compliance, then this can reduce the financial incentive for firms to engage in this type of behaviour. For firms that persist in operating this way, removing financial benefits will ensure that, in the future, the financial gains are not enough of an incentive to break the law. …
>
> (Professor Richard B. Macrory, *Regulatory Justice: Making Sanctions Effective, Final Report*, dated November 2006 at 2.11 [emphasis in original])

[76] In contrast to criminal law, which typically prohibits conduct outright, regulatory legislation like the Act typically makes participation in regulated economic activity (which is implicitly or explicitly encouraged) conditional on acceptance of prescribed standards or rules of conduct. Anyone who chooses to engage in regulated activity is fairly presumed to accept the conditions of participation, including administrative oversight by regulators, and sanctions to induce compliance. The Respondents have voluntarily engaged in a regulated sector of the economy with the expectation of financial gain, and should properly be subject to the "high standards of fitness and business conduct to ensure honest and responsible conduct by market participants" demanded by section 2.1(2) of the Act. Administrative monetary penalties for breaches of securities law under section 127(1)9 are an important means of maintaining these high standards of compliance with the rules of market conduct.

v. Conclusion

[77] We do not accept the Respondents' challenge to the Constitutional validity of the administrative penalty provision of the Act. We conclude that section 127(1)9 does not infringe the Charter nor its principles or values.

B. If the Provision Does not Infringe the Charter, is Staff Seeking to Impose an Administrative Penalty Retrospectively in this Case?

i. Respondents' Submissions

[78] The Respondents submit that even if we were to find the $1,000,000 administrative penalty not to be "punitive", it is nevertheless designed to penalize the Respondents and as such, cannot apply retroactively. They submit the Commission's findings relate to actions that occurred prior to the coming into effect of the Commission's power to impose administrative monetary penalties on April 7, 2003. The presumption against retrospectivity should apply, precluding the Commission from ordering the payment of an administrative penalty in this matter. They point out the basic principle that retrospective laws are, absent specific and exceptional circumstances, unfair. They point out that the Merits Decision found $900,000 in commission was generated as a result of trades in 2002; $1.4 million in 2003 and approximately $50,000 in 2004, whilst the administrative penalty did not come into force until April 7, 2003.

[79] The Respondents rely on *Thow v. British Columbia (Securities Commission)*, [2009] B.C.J. No. 211 (B.C.C.A.) ("*Thow*"). At the time of Thow's misconduct the maximum administrative penalty that could be imposed by the British Columbia Securities Commission was $250,000. An administrative penalty of $6 million was imposed by the Commission. The Court of Appeal struck down the retroactive component of the Commission's decision.

ii. Staff's Submissions

[80] Staff submits that the issue of retrospectivity does not arise in this case. The majority of the Respondents' conduct occurred in the period after the power to impose an administrative penalty was granted to the Commission. Even if the issue did arise, an administrative penalty is designed to protect the public and not to punish.

[81] In particular, Staff submits that the Respondents' conduct spanned over 2002, 2003 and 2004. Staff points out that Rowan failed to file insider reports relating to thousands of trades carried out in the Trust Accounts in the period between January, 2002 and June 22, 2004.

[82] Staff submits that *Thow* is a case of total retrospective application of the statute. In that case all of the misconduct occurred between January 2003 and May 2005 and the British Columbia Securities Commission increased its administrative penalty from $250,000 to $1 million on May 18, 2006.

[83] Staff points out that in *Alberta (Securities Commission) v. Brost* (2007), ABASC 482 ("*Brost ASC*") the Alberta Securities Commission's ("ASC") power to impose an administrative penalty was increased from $100,000 to a $1 million maximum. The ASC concluded that it can impose the increased administrative penalty retrospectively because it is not punitive in its intent. Staff refers to paragraph 33 of this decision of ASC, which they say applies to the facts of this case:

> It is not, in any event, clear to us that we need consider retrospectivity. The Strategic distributions continued after 8 June 2005 when the new, higher maximum administrative penalty took effect. Alternatives and the Strategic Respondents continued in their roles after that date. In respect of Brost, it is true

> that the Brost Interview, which took place in August 2004, was the compelling piece of evidence that proved Brost's misconduct and, indeed, the centrality of his role in what transpired. However, the date of the Brost Interview itself was not indicative of the timing of his misconduct; nor, as noted, did the scheme that he instigated end with the Brost Interview or before the administrative penalty maximum was increased. That continued misconduct followed the scheme devised earlier by Brost. Had Staff not intervened with the freeze order when they did, we believe that the misconduct likely would have continued even longer. It follows that applying the Act as it read after 8 June 2005 to the facts of this case is not a retrospective application.
>
> (*Brost ASC*, *supra* at para. 33)

[84] Accordingly, Staff argues the ASC decision is applicable to this case. They say this is not like *Thow*, where a respondent ceased its activities prior to the coming into force of a provision increasing the maximum amount for an administrative penalty that can be ordered by a securities regulator. In this case, like *Brost ASC*, the Respondents continued to engage in conduct well after the time of the coming into force of a provision increasing the maximum amount for an administrative penalty. On that basis, Staff argues that this is not a retrospective application of section 127(1)9 of the Act.

iii. Analysis

[85] The issue of retrospectivity of legislation is a matter about which much has been written over the years. In 1989, Justice L'Heureux-Dubé in *Brosseau v. Alberta (Securities Commission)*, [1989] 1 S.C.R. 301 at paragraph 44 wrote:

> The basic rule of statutory interpretation, that laws should not be construed so as to have retrospective effect, was reiterated in the recent decision of this Court in *Angus v. Sun Alliance Insurance Co.*, [1988] 2 S.C.R. 256. That case, however, dealt with the question of the retrospective effect of procedural versus substantive provisions. The present case presents a different facet of the problem of retrospectivity.

[86] She continues at paragraph 47 with an excerpt of Dickson J. in *Gustavson Drilling (1964) Ltd. v. Minister of National Revenue*, [1977] 1 S.C.R. 271, at page 279:

> The general rule is that statutes are not to be construed as having retrospective operation unless such a construction is expressly or by necessary implication required by the language of the Act.

[87] At paragraph 55, Justice L'Heureux-Dubé concludes her decision as follows:

> The provisions in question are designed to disqualify from trading in securities those persons whom the Commission finds to have committed acts which call into question their business integrity. This is a measure designed to protect the public, and it is in keeping with the general regulatory role of the Commission. Since the amendment at issue here is designed to protect the public, the presumption against the retrospective effect of statutes is effectively rebutted.

[88] In 2005, the Supreme Court of Canada in *B.C. v. Imperial Tobacco Canada Ltd*. [2005], 2 S.C.R. 473 Major J., speaking for the Court, wrote as follows at paragraph 69:

> (1) Prospectivity in the Law
>
> Except for criminal law, the retrospectivity and retroactivity of which is limited by s. 11(g) of the Charter, there is no requirement of legislative prospectivity embodied in the rule of law or in any provision of our Constitution. Professor P.W. Hogg sets out the state of the law accurately (in Constitutional Law of Canada (loose-leaf ed.), vol. 2, at p. 48-29):
>
> > Apart from s. 11(g), Canadian constitutional law contains no prohibition of retroactive (or ex post facto) laws. There is a presumption of statutory interpretation that a statute should not be given retroactive effect, but, if the retroactive effect is clearly expressed, then there is no room for interpretation and the statute is effective according to its terms. Retroactive statutes are in fact common.

[89] At paragraph 71 he continues:

> The absence of a general requirement of legislative prospectivity exists despite the fact that retrospective and retroactive legislation can overturn settled expectations and is sometimes perceived as unjust: see E. Edinger, "Retrospectivity in Law" (1995), 29 *U.B.C. L. Rev*. 5, at p. 13. Those who perceive it as such can perhaps take comfort in the rules of statutory interpretation that require the legislature to indicate clearly any desired retroactive or retrospective effects. Such rules ensure that the legislature has turned its mind to such effects and "determined that the benefits of retroactivity [or retrospectivity] outweigh the potential for disruption or unfairness"…

[90] In October 2008, the Alberta Court of Appeal released its decision in *Brost C.A, supra*. Although retrospective application of an increase of a potential administrative penalty was not the principal issue argued in that case, there was some reference (it appeared to be almost ancillary) made to retrospectivity by the Court. The totality of the decision relating to retrospectivity is to be found beginning at paragraph 56 and concluding at paragraph 57. These paragraphs read as follows:

> The Commission held that the administrative penalty amendment that took effect on June 8, 2005 could be applied in this case. Prior to June 8, 2005, the maximum administrative penalty that could be imposed under the Act was $100,000; after June 8, 2005, it was $1 million. The Commission held that, because administrative penalties are not punitive, the presumption against retrospective application did not bar it from imposing administrative penalties greater than the maximum administrative penalty that was available prior to June 8, 2005…
>
> The Commission was correct to conclude that the presumption against retrospective application did not apply in this case because administrative

> penalties under the Act are not punitive but are instead designed to protect the public: *Brosseau v. Alberta Securities Commission*…Moreover, contrary to what Brost and Alternatives suggest, it is well settled that "[e]xcept for criminal law, the retrospectivity and retroactivity of which is limited by s. 11(g) of the Charter, there is no requirement of legislative prospectivity embodied in … any provision of our Constitution:" *British Columbia v. Imperial Tobacco Canada Ltd.* …
>
> (*Brost CA*, *supra* at paras. 56 and 57)

[91] Chronologically, the last case to which we wish to make reference to is *Thow*, *supra*, which was released on February 12, 2009. The British Columbia Securities Commission imposed an administrative penalty of $6 million on Mr. Thow. His contraventions occurred at a time when the maximum administrative penalty was $250,000. Almost a year after the contraventions, in May 2006, legislation was enacted authorizing an increase in the maximum administrative penalty from $250,000 to $1 million for each contravention. In 2007, the British Columbia Securities Commission imposed the $6 million administrative penalty. The British Columbia Court of Appeal at paragraph 10 noted the quote from Elizabeth Edinger in "Retrospectivity in Law" (1995), 19 U.B.C.L.R. 5 at 12:

> The common theme of judges and scholars throughout the centuries has been that retrospective laws are unfair or unjust.

[92] In *Thow*, the Court wrote at paragraphs 37, 38, 47 and 49, respectively:

> Despite the similarity in the language used in the three decisions [*Brosseau Asbestos and Cartaway*], it must be recognized that the issues in the cases were somewhat different. *Brosseau*, like the present case, concerned the retroactive application of statutory amendments. In contrast, *Asbestos* and *Cartaway* were concerned with the scope of considerations that a securities commission can take into account in imposing a sanction.
>
> …
>
> *Asbestos* and *Cartaway* establish that securities commissions, not being criminal courts, may not impose penalties that are "punitive" in the sense of being designed to punish an offender for past transgressions. They may, however, impose penalties that place burdens (even very heavy burdens) on offenders, as long as the penalties are designed to encourage compliance with regulations in the future. In essence, penalties may be directed at general or specific deterrence and at protection of the public; penalties that are purely retributive or denunciatory, however, are not appropriately imposed by administrative tribunals.
>
> …
>
> The concept of "punishment" is an elastic one, and its meaning must be taken in context. In *Cartaway* and *Asbestos*, the Supreme Court of Canada used the concept to describe those penalties imposed on an offender to mark moral disapprobation of his or her conduct. In *Brosseau*, in contrast, I believe that the Court used the word "punish" in a broader context, to describe all sanctions

> imposed for the *purpose* of penalizing an offender. On the other hand, penalties imposed solely for the *purpose* of protecting society from the offender in the future, were not considered "punishment", even if they had the *effect* of placing burdens on the offender. [emphasis in the original]
>
> …
>
> Here, the Commission's imposition of the fine was arguably not "punitive" in the narrow sense of the word; that is, it may not have been imposed as a punishment for Mr. Thow's moral failings, and it may not have been motivated by a desire for retribution, or to denounce his conduct. Nonetheless, it was "punitive" in the broad sense of the word; it was designed to penalize Mr. Thow and to deter others from similar conduct. It was not merely a prophylactic measure designed to limit or eliminate the risk that Mr. Thow might pose in the future.

[93] The Court found that the new increased administrative penalty did not apply and the administrative penalty was reduced to the maximum permitted at the time the infractions occurred.

[94] We agree with and prefer to follow the reasoning and rationale of the British Columbia Court of Appeal in *Thow*, although we would emphasize that the imposition of a fine is a penalty and would downplay the use of the word punitive even though it is used in a limited sense in that decision. The law as developed by the Supreme Court of Canada cases, and followed in *Thow*, is that ongoing constraints or prohibitions may be applied retrospectively but penalty provisions, particularly monetary penalties, should not to be applied retrospectively.

[95] As a result, we therefore conclude that any administrative penalty to be imposed on the Respondents in this matter must relate only to the conduct that occurred after April 7, 2003.

[96] From the information before us it appears that Rowan failed to report more than 7,410 transactions involving 37,305,278 shares of Biovail, of which 3,690 transactions involving 19.402,118 shares of Biovail (52%) occurred after April 7, 2003. Although the imposition of an administrative penalty is not a mathematical exercise, we nevertheless conclude that any administrative penalty imposed should be approximately 52% of the administrative penalty we would have imposed had all of the transgressions (shares traded) occurred subsequent to April 7, 2003. In the result, therefore, any administrative penalty imposed upon the parties will be 52% of what we would otherwise deem to be an appropriate penalty.

iv. Conclusion

[97] In the circumstances of this case, we find that it is appropriate to make a prospective order that is both protective and preventative in nature to better protect the capital markets. We believe that the sanctions imposed which are set out below, are sufficient both to respond to the specific misconduct and to send a message to other market participants about the importance of fulfilling their statutory duties.

C. What are the Appropriate Sanctions in this Case?

i. The Law

[98] The Commission's mandate as set out at section 1.1 of the Act is: (i) to provide protection to investors from unfair, improper or fraudulent practices; and (ii) to foster fair and efficient capital markets and confidence in capital markets.

[99] The primary means for achieving the purposes of the Act as set out at paragraph 2 of section 2.1 are:

> i) requirements for timely, accurate and efficient disclosure of information,
>
> ii) restrictions on fraudulent and unfair market practices and procedures, and
>
> iii) requirements for the maintenance of high standards of fitness and business conduct to ensure honest and responsible conduct by market participants.

[100] In exercising its public interest jurisdiction, the Commission must act in a protective and preventative manner. The role of the Commission is to impose sanctions that will protect investors and the capital markets from exposure to similar conduct in the future. As stated by the Commission in *Re Mithras Management Ltd*:

> …[u]nder sections 26, 123 and 124 of the Act, the role of this 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 of those capital markets. We are not here to punish past conduct; that is the role of the courts, particularly under section 118 [now 122] of the Act. 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 prescient, after all.
>
> (*Re Mithras Management Ltd.* (1990), 13 O.S.C.B. 1600 at 1610-1611).

[101] The Supreme Court of Canada in *Committee for the Equal Treatment of Asbestos Minority Shareholders v. Ontario (Securities Commission),* [2001] 2 S.C.R. 132 ("*Asbestos*") commented on the Commission's public interest jurisdiction. The Court described it, in part, as follows:

> …"[t]he purpose of the Commission's public interest jurisdiction is neither remedial nor punitive; it is protective and preventive, intended to be exercised to prevent likely future harm to Ontario's capital markets". …
>
> …The role of the OSC under s. 127 is to protect the public interest by removing from the capital markets those whose past conduct is so abusive as to warrant

> apprehension of future conduct detrimental to the integrity of the capital markets…
>
> In summary, pursuant to s. 127(1), the OSC has the jurisdiction and a broad discretion to intervene in Ontario capital markets if it is in the public interest to do so. However, the discretion to act in the public interest is not unlimited. In exercising its discretion, the OSC should consider the protection of investors and the efficiency of, and public confidence in, capital markets generally. In addition, s. 127(1) is a regulatory provision. The sanctions under the section are preventive in nature and prospective in orientation. …
>
> (*Asbestos, supra* at paras. 42-43 and 45)

[102] In addition, the Commission should consider general deterrence as an important factor when determining appropriate sanctions. In *Cartaway*, the Supreme Court of Canada stated that "… it is reasonable to view general deterrence as an appropriate, and perhaps necessary, consideration in making orders that are both protective and preventative" (at para. 60).

[103] In determining the appropriate sanctions in this matter, we must ensure that the sanctions imposed are proportionate to the conduct of the Respondents (*Re M.C.J.C. Holdings Inc. and Michael Cowpland*, (2002), 25 O.S.C.B. 1133 ("*Re M.C.J.C. Holdings*") at 1136).

[104] The Commission has previously identified the following as some of the factors that it should be considering when imposing sanctions:

(a) the seriousness of the conduct and the breaches of the Act;

(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 recognition by a respondent of the seriousness of the improprieties;

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

(f) the size of any profit obtained or loss avoided from the illegal conduct;

(g) the size of any financial sanction or voluntary payment;

(h) the effect any sanctions may have on the ability of a respondent to participate without check in the capital markets;

(i) the reputation and prestige of the respondent;

(j) the effect any sanction might have on the livelihood of the respondent;

(k) the shame, or financial pain, that any sanction would reasonably cause to the respondent;

(l) the remorse of the respondent; and

(m) any mitigating factors.

(See: *Re Belteco Holdings Inc*. (1998), 21 O.S.C.B. 7743 at 7746; and *Re M.C.J.C. Holdings, supra* at 1136).

[105] The Commission did point out, however, that these were only some of the factors that might be considered, observing that "there may be others, and perhaps all of the factors we have mentioned may not be relevant in this or another particular case" (*Re M.C.J.C. Holdings, supra* at 1136).

[106] The Commission has also affirmed that sanctions should be fair and proportional to the sanctions imposed on others who were participants in the same matter (*Re Belteco Holdings, supra* at 7747; *Cartaway, supra* at 69).

[107] The sanctions imposed must be sufficient both to respond to the specific misconduct of the Respondent(s) and to send a message to other registrants about the importance of fulfilling their statutory duties.

ii. Rowan

a. Staff's Submissions

[108] Staff argues that Rowan's violations of the Act were serious. Staff points out that the Hearing Panel found in its Merits Decision that Rowan:

i. "repeatedly breached" section 107 of the Act by failing to file insider reports disclosing the trades in Biovail securities that he conducted in the Trust Accounts;

ii. failed to disclose to Biovail and the investing public through the 2002, 2003 and 2004 Management Information Circulars, the true extent of the Biovail securities over which he had control or direction in the Trust Accounts; and

iii. engaged in a "high volume" of discretionary trading in Biovail securities in the Trust Accounts during Biovail's blackout periods in 2002 and 2003.

(See: Merits Decision, *supra* at paras. 107, 108 128, 129 and 158)

Insider Reporting Violations

[109] With respect to the insider reporting violations, Staff submits that the scale of the violations at issue is an important consideration. In the present matter, Rowan failed to report

7,410 trades involving in excess of 37 million shares of Biovail during the period between January 1, 2002 and December 31, 2004.

[110] The evidence showed that of these trades, 3,690 transactions (involving over 19 million Biovail shares) occurred in the period after the Commission was granted the ability to impose an administrative penalty of up to $1,000,000 per violation of Ontario securities law, which became effective April 6, 2003.

[111] Staff submits that the sheer scale of the trading engaged in by Rowan while he was a director of Biovail and a member of its Audit Committee and for which no insider reports were filed is an aggravating feature in this case.

[112] Staff refers us to a number of cases involving, amongst other misconduct, the failure to file insider reports that have been determined by the Commission: *Re Meridian Resources Inc.* (2003), 26 O.S.C.B. 3727; *Re Riley* (1999), 22 O.S.C.B. 3549; *Re Robinson* (1996), 19 O.S.C.B. 2643 and 19 O.S.C.B. 3609); and a number of settlement agreements involving such failures: *Re Melnyk* (2007), 30 O.S.C.B. 5253 ("*Melnyk Settlement Reasons*"); *Re DXStorm. Com Inc.* (2007), 30 O.S.C.B. 4731; *Re Hinke* (2006), 29 O.S.C.B. 3769; *Re Freeman* (2006), 29 O.S.C.B. 2091; re Cheung (2005), 28 O.S.C.B. 4685; *Re Crabbe Huson Group Inc.* (1999), 22 O.S.C.B. 4967; *Re Shefsky* (1999), 22 O.S.C.B. 3520). We have considered these cases below in our analysis.

[113] However, Staff further points out that none of these past cases addresses serious violations such as those committed by Rowan. They also point out that generally, these cases involved less than a hundred insider reporting violations; in some cases, dealing with settlements, the insiders had already taken steps to address their reporting violations.

[114] In addition, none of the previous decisions and settlements involved respondents who were registrants as well as corporate insiders. If anything, Staff submits that the circumstances of this case are more egregious as Rowan was a capital market professional and was expected to be knowledgeable about securities law obligations. According to Staff, a registrant should be presumed to have a higher level of awareness of the insider reporting regime and its importance to the capital markets. Rowan's failures are therefore significantly more serious than those previously considered.

[115] With respect to Rowan's failure to provide accurate and complete information to Biovail, Staff points out that the parties agreed, and the Hearing Panel found, that Rowan had disclosed his control over the Biovail shares contained in the Conset Account but not the shares contained in the Congor or Southridge Accounts. The information that Rowan provided to Biovail was in turn disclosed to the investing public through Biovail's Management Information Circulars in 2002, 2003, and 2004. The Hearing Panel found that Rowan had failed to disclose his control over between 3 and 4 million Biovail shares in each of these years to the general public.

[116] In Staff's view, the concealment of such a significant block of shares from the investing public, particularly when conducted by an experienced registrant in Rowan's position, can have significant consequences for public confidence in the integrity of Ontario's capital markets and this can be viewed as an aggravating feature concerning the conduct by Rowan.

Trading During Blackout Periods

[117] Staff points out that the Hearing Panel found in its decision at paragraphs 156, 157 and 158 that Rowan had engaged in a "high volume of discretionary trading" in Biovail shares in the Trust Accounts during Biovail blackout periods in 2002 and 2003.

[118] Staff also points out that the Commission has previously recognized the importance of adherence by directors and other insiders to corporate blackout periods (*Melnyk Settlement Reasons*, *supra* at para. 31).

[119] Staff submits that the extensive trading by Rowan during Biovail blackout periods is certainly an aggravating feature of his conduct. In Staff's view, if Rowan's trading had not been concealed, questions would have been asked by analysts and investors. In Staff's opinion, in face of public scrutiny, the trading would have come to a halt.

Rowan's Handling of the Southridge Account

[120] Finally, in reviewing Rowan's trading in the Southridge Account, and in particular his failure to properly document his client's instructions and the extent of his authority over the account, Staff points out that the Hearing Panel stressed that the importance of proper handling of discretionary trading accounts is amongst the most fundamental obligations of a registrant. In Staff's submissions, Rowan's failures with regard to this account were significant and reveal a troubling lax attitude towards his fundamental duties as a registrant.

Profits Resulting from Illegal Conduct

[121] Further, Staff submits that we should be mindful of the fact that the Hearing Panel found that Watt Carmichael earned a total of approximately $2,350,000 in commissions from trading in the Trust Accounts during the period from 2002 to 2004. Rowan owned approximately 29% of the shares of Watt Carmichael as at December 31, 2005. Staff submits that the proceeds of these trades, together with their distribution, provide a useful reference point for sanctions, particularly when determining the appropriateness and quantum of an administrative penalty.

b. Respondents' Submissions

[122] Counsel for the Respondents submits that the sanctions sought are not reasonable in light of the findings made by the Hearing Panel, and in particular when considering that the most serious allegations against Rowan have been dismissed by the Hearing Panel.

[123] Counsel acknowledges that Rowan has been found to have breached sections 107 and 127 of the Act in failing, as a director of Biovail, to file insider reports, in failing to provide complete and accurate information to Biovail for its information circulars, and in trading during the Biovail blackout periods. He submits that most of the facts underlying these findings were admitted in the Agreed Statement of Facts or not disputed at the hearing.

[124] Counsel submits that all of the findings against the other respondents arise from the unique and never to be repeated "concatenation" of Rowan's simultaneous role as an insider of a publicly traded company and as a registrant with a episodic discretionary trading authority. Rowan resigned as a director of Biovail in 2005. There has been no director of a publicly traded

company at Watt Carmichael since his resignation. Watt Carmichael is prepared to undertake that none of its registrants will ever be officers or directors of publicly traded companies. Accordingly, these events that caused the findings against the Respondents will not be repeated.

[125] According to counsel, the sanctions sought against Rowan are vindictive. Counsel submits that Rowan has lost much of his business as a result of the allegations of insider trading and misleading the Commission. In the circumstances, he would have no prospect of re-entering the business at this stage of his career after any period of suspension, much less a two year suspension.

[126] Counsel submits that there is no risk of future harm by Rowan as he has been working in the industry for over thirty years since 1977, and has never been the subject of disciplinary proceedings. The events that give rise to the findings against Rowan occurred between five and seven years ago, in the period between 2002 and 2004.

[127] Further, counsel refers us to mitigating factors that we should be considering when making our decision on sanctions. Counsel emphasizes that all of the findings against Rowan relate to trading in shares in the Trust Accounts. None of the findings against Rowan arise in respect of trades of Biovail shares owned by him and that his shares were fully disclosed in the Biovail information circulars. When he traded his shares, Rowan filed insider reports. Rowan also observed Biovail blackout periods when trading his own Biovail shares.

[128] Counsel also filed character and personal references in the form of letters from various individuals for Rowan.

[129] Counsel submits that Rowan's dual role as a director of Biovail and as registered representative trading in Biovail was disclosed to the regulatory authorities at all times. Counsel states that the IDA knew that Rowan was a Biovail director, that he was the adviser in respect of the Congor and Conset accounts, that the Congor and Conset accounts traded heavily in Biovail before and after Rowan became a Biovail director.

[130] Counsel further points out that there was a lack of guidance from regulatory authorities respecting the obligations of a registered representative who trades clients' securities while being an insider of a publicly traded company. Rowan was candid about the facts that he treated shares held in the client trust accounts differently than those which he personally owned. Further, there was no dispute that Rowan traded Biovail securities held in the Trust Accounts during the Biovail blackout periods.

[131] Counsel submits that Rowan was mistaken as to the manner in which he was required to trade and report on Biovail trades in discretionary client accounts and that it cannot be repeated. Counsel submits that the only two factors that Staff cites in support of the harsh administrative penalty are the high volume of trading in Biovail and the fact that Rowan is a registered representative. Neither factor supports the administrative penalty sought by Staff nor suggests deliberate conduct.

[132] Counsel submits that consideration of the factors stated in *Re M.C.J.C. Holdings* highlights the fact that the remedy sought by Staff is inappropriate as:

(a) there was no profit made from the illegal conduct. It is Rowan's status as a director, which gave rise to the regulatory failures in this case. Rowan would have earned the same commissions if he were not a Biovail director, or if he had filed insider reports;

(b) the sanctions sought by the Commission would completely eviscerate the ability of Rowan to make a living. It is not reasonable to expect that Rowan could retain clients over one or two years while his registration is suspended;

(c) the enormous financial penalty sought of between $750,000 and $1,000,000 is draconian and seems to be targeted at bankrupting Rowan;

(d) there can be no realistic concern about Rowan participating in the capital markets "unchecked" in light of the fact that Rowan has done precisely this over the past three years without incident and the fact that the circumstances that gave rise to the regulatory breach in this case no longer exist;

(e) until these incidents, Rowan's reputation was unblemished. Neither he nor Watt Carmichael has ever been the subject of any regulatory proceeding;

(f) Rowan has already suffered tremendously as a result of the serious allegations levelled against him. The degree of shame and financial damage are already proportionate to the findings against him; and

(g) Rowan regrets not having taken definitive measures to clarify his reporting and trading obligations in the unique circumstances.

[133] Further, counsel submits that the cases referred to by Staff are of no assistance as respondents in those cases have either admitted to failing to meet insider reports obligations or have been convicted of the same. For instance, in the *Melnyk Settlement Reasons* the respondent was found not only to have failed to file insider reports but also to have misled the IDA, one of the allegations that was dismissed against Rowan. In *Re Hinke*, the respondent failed to file insider reports despite that he was required to do so by the terms of a settlement agreement and he had been advised by Staff of his obligation to file insider reports. They also refer to the recent case of *Re Wells Fargo Financial Corp.*, (2005), 28 O.S.C.B. 1791 ("*Wells Fargo*") where the Commission made the following statements, which although arising in a different context, are apposite in the present case:

> 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 wilfulness, 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.
>
> 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.
>
> 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.
>
> 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.
>
> 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.
>
> 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.
>
> (*Wells Fargo, supra* at paras. 25-30 [emphasis added])

[134] Counsel submits that the circumstances of this case are analogous to the circumstances giving rise to the reasoning in *Wells Fargo*, as: there were no warnings issued in this case despite that the trading was known to the IDA; this is a first offence for Rowan; Rowan has endured not only the "shame" of being associated with very serious allegations such as insider trading, but has had to deal also with the harm to his business; this case is novel and arises from unique facts; this is the first case where the Commission has informed the marketplace that registered representatives must report personally for client accounts over which they have discretionary trading authority.

[135] Rowan also described, during his testimony, the impact of the proceeding on him. He indicated that the proceeding has been very harmful to him and exceedingly embarrassing both personally and professionally. He also mentioned that shortly after the initial public disclosure of the proceeding, some significant accounts that he managed left the firm, which would have produced at least $100,000 to $150,000 of gross revenues to the firm. He also mentioned that Biovail, which had been covering his legal fees until January 2008, is now seeking to recover from him the legal fees previously paid on his behalf. Finally, he testified that the sanctions sought by Staff, if ordered, would have a devastating impact on him, as his principal assets are his house and his ownership in Watt Carmichael.

[136] Counsel submits that the appropriate sanction against Rowan is a reprimand and a prohibition on Rowan to become a director of a reporting issuer, as this sanction is connected to the breaches at issue, all of which arise due to Rowan's former status as a Biovail insider. Counsel submits that the sanctions sought, other than the administrative penalty, are not

sufficiently connected to the harm at issue to fall within the Commission's public interest jurisdiction. Further, the administrative penalty sought is completely disproportionate to the findings against Rowan.

c. Analysis

Rowan's Insider Reporting Violations

[137] As stated above, the Hearing Panel found that Rowan breached section 107 of the Act by failing to file insider reports disclosing the trades in Biovail shares that he conducted in the Trust Accounts:

> …Rowan, as an insider of Biovail by virtue of his role as a director of Biovail, was required to file insider reports with respect to trades of Biovail securities in the Trust Accounts in accordance with subsection 107(2) of the *Act*.
>
> (Merits Decision, *supra* at para. 107).

[138] The Hearing Panel also stressed that the requirement to file insider reports set out in section 107 of the Act serves two purposes:

> (a) a deterrent purpose: insiders are less likely to engage in improper trading if such trading is subject to public scrutiny. Insider reporting allows the market and securities regulatory authorities to monitor insider transactions and take action if improper trading is identified; and
>
> (b) a signaling purpose: investors are provided with information concerning the trading activities of insiders, and, by inference, the insiders' views concerning the prospects of the issuer, thereby enhancing market efficiency.
>
> (Merits Decision, *supra* at para. 78, citing *Report of the Attorney General's Committee on Securities Legislation in Ontario* (the "Kimber Report"), Toronto: Queen's Printer, 1965), paras. 2.02 – 2.05)

[139] The Hearing Panel acknowledged that "timely, accurate and efficient disclosure of information" is one of the primary means of achieving the purposes of the Act (Merits Decision, *supra* at para. 79). The Hearing Panel affirmed that the insider reporting requirements have an integral role to play in fulfilling this objective. Citing previous Commission jurisprudence regarding section 107 of the Act, it observed that:

> [t]hese requirements are intended to discourage trading with knowledge of material undisclosed information, and enhance investor confidence in the securities market. Additionally, the reports have been of use to market participants as an indicator of perceptions that insiders have about issuers and their prospects.
>
> (Merits Decision, supra at para. 81, citing *Notice and Request for Comments on Proposed Refinement of the Early Warning Regime and the Rules Regarding*

Insider Reporting, Takeover Bids and Control Block distributions as they Apply to Investors in General, Including Portfolio Managers and Portfolio Clients (1994), 17 O.S.C.B. 4438, quoted in *Re Robinson, supra* at para. 252)

[140] Indeed, the Commission has previously stated that it "considers a failure to comply with the reporting requirements of the Act respecting insider trading [to be] a serious breach of the Act" and a "*failure to meet these obligations should result in serious consequences*" (*re Cheung, supra* at para. 18 [emphasis added]).

[141] Rowan failed to report a large number of trades involving shares of Biovail during the period between January 1, 2002 and December 31, 2004. Of these trades, it should be noted that a significant portion of the transactions occurred in the period after the Commission was granted the ability to impose an administrative penalty of up to $1,000,000 for each failure to comply with Ontario securities law.

[142] The Commission has previously considered a number of cases involving, amongst other misconduct, the failure to file insider reports (*Re Meridian Resources Inc., supra*; *Re Riley, supra*; and *Re Robinson, supra*).

[143] The Commission has also approved a number of settlement agreements involving such failures (See: *Melnyk Settlement Reasons, supra*; *Re DXStorm. Com Inc., supra*; *Re Hinke, supra*; *Re Freeman, supra*; *Re Cheung, supra*; *Re Crabbe Huson Group Inc., supra*; *Re Shefsky, supra*).

[144] In the present case, the Hearing Panel took note of the "significant volume and frequency of trading" of Biovail shares in Trust Accounts, and thus, found that Rowan repeatedly breached the insider reporting requirements of section 107 of the Act (Merits Decision, *supra* at para. 108).

[145] As a registrant, the President of a registered broker and investment dealer, and a director and member of an audit committee of a reporting issuer, Rowan was expected to have a higher level of awareness of the insider reporting regime and its importance to the capital markets. Rowan's breaches of Ontario securities law are therefore significantly more serious than those previously considered.

The Failure to Make Complete and Accurate Disclosure to Biovail

[146] In the present case, the parties agreed and the Hearing Panel found that Rowan had disclosed his control over the Biovail shares contained in the Conset Account but not the shares contained in the Congor or Southridge Accounts. The information that Rowan provided to Biovail was in turn disclosed to the investing public including Biovail shareholders through Biovail's Management Information Circulars in 2002, 2003 and 2004.

[147] The Hearing Panel therefore found that Rowan had failed to disclose in Biovail's Management Information Circulars, which are provided to Biovail shareholders and others, between 3,000,000 and 4,000,000 Biovail shares over which he exercised or shared control in each of the three years. (See: Merits Decision, *supra* at para. 33). As the Hearing Panel observed:

> …It is incumbent on a director of a reporting issuer, through the filing of insider reports or otherwise, to ensure that the issuer has accurate, current information as to the director's ownership of or control or direction over securities of the issuer so as to enable the issuer to properly discharge its reporting obligations and failure by a director to do so, is, in our opinion, contrary to the public interest.
>
> (Merits Decision, *supra* at para. 127)

[148] Further, the Hearing Panel found that Rowan failed to disclose to Biovail and to the investing public the true extent of the Biovail shares in the Trust Accounts over which he exercised or shared control or direction:

> We find that Rowan's failure to report the Biovail holdings in the Congor and Southridge Accounts caused the disclosure contained in Management Information Circulars for 2002, 2003 and 2004 to be misleading or untrue or caused them to not state a fact that was required to be stated or that was necessary to make the statements in the circulars not misleading.
>
> The disclosure of only the securities in the Conset Trust in the Management Information Circular, plus the clear instructions on Form 30 to include the number of each class of voting securities of the issuer over which control or direction is exercised by the proposed director, should, at a minimum, have triggered further inquiries on the part of Rowan with regard to his obligation to disclose his holdings in the Congor and Southridge Accounts. But there is no convincing evidence that Rowan made such inquiries or consulted with legal counsel specifically about his responsibility to make such disclosure. …
>
> (Merits Decision, *supra* at paras. 125-126).

[149] We note that, in approving the Melnyk Settlement, the Commission made the following observations regarding the harm caused to the investing public as a result of disclosure violations of insider trading information:

> …Our insider reporting rules, and other requirements related to disclosure by insiders of their share ownership, are important elements of our securities law regime and disclosure of insider trading information is considered by many market participants to influence their own investment decisions. We do not discount the impact that public knowledge of the trading by the Trusts might have had on investment decisions made by investors and other shareholders of Biovail.
>
> (*Melnyk Settlement Reasons*, *supra* at para. 26)

[150] The failure to disclose such a significant block of shares to the investing public, particularly when done by an experienced registrant like Rowan is highly reprehensible. Such a failure can have significant consequences for public confidence in the integrity of Ontario's capital markets.

The Blackout Period Allegations

[151] The Hearing Panel found that Rowan engaged in a "high volume" of discretionary trading in the Biovail shares contained in the Trust Accounts during Biovail's blackout periods in 2002 and 2003. At all material times, Biovail had a clear and detailed policy concerning insider reporting and trading blackout periods. In the circumstances, Rowan's conduct was abusive of the integrity of the capital markets of Ontario, and contrary to the public interest.

[152] And as the Hearing Panel confirmed:

> [c]ompanies generally impose blackout periods on management and other insiders because of the increased risk posed by insiders having access to material undisclosed information during such periods. Blackout periods have played an important role in maintaining confidence in the capital markets for a considerable period of time.
>
> (Merits Decision, *supra* at para. 142)

[153] The Commission has previously recognized the importance of adherence by directors and other insiders to corporate blackout periods. In the *Melnyk Settlement Reasons* the Commission wrote:

> [c]orporate black-out policies form an important element of securities law compliance by public companies and their insiders. There should be a heavy onus on any insider who trades, or recommends trading, during a black-out period to demonstrate that he or she did so without knowledge of any material fact or material change. …
>
> (*Melnyk Settlement Reasons*, *supra* at para. 31).

[154] The Hearing Panel found that Rowan had engaged in a "high volume" of discretionary trading in Biovail shares in the Trust Accounts during Biovail's blackout periods in 2002 and 2003. Specifically, it concluded that:

> …in 2002…there were acquisitions in excess of 2.5 million Biovail common shares at a cost of approximately U.S. $110 million, and dispositions in excess of 2 million Biovail common shares for proceeds of approximately U.S. $100 million during the 2002 Biovail Blackout Periods.
>
> In 2003… there were acquisitions in excess of 2.5 million Biovail common shares at a cost of approximately US$90 million and in excess of 2.8 million Biovail common shares were sold for proceeds of approximately US $100 million. Further, more than 11,000 Biovail call options were acquired at a cost of approximately US$4 million…
>
> (Merits Decision, *supra* at paras. 156-157)

[155] As a result, the Hearing Panel said:

> We find there is ample evidence that Rowan engaged in a high volume of discretionary trading in Biovail securities in the Trust Accounts during the Biovail Blackout Periods in 2002 and 2003.
>
> We do not agree with the Respondents that blackout periods are simply a matter between the issuer and its insiders. Issuers establish blackout periods to ensure there will be no trading in the corporation's securities by persons who have access to undisclosed material information until that information has been disclosed to the market and sufficient time has elapsed to permit its evaluation. In this case, Rowan was an insider of Biovail and should have respected the Biovail Blackout Periods.
>
> …Rowan's conduct fell below the standards applicable to a registrant who is both in a senior position at a registered broker and investment dealer and director of a reporter issuer and a member of its Audit Committee. We find that, in the circumstances of this case, Rowan's conduct was abusive of the integrity of the capital markets of Ontario and contrary to the public interest.
>
> (Merits Decision, *supra* at paras. 158-160).

[156] The ASC has previously considered a case in which a director of a reporting issuer has traded in securities of the issuer in contravention of a blackout period (*Re Armstrong,* [2004] A.S.C.D. No. 1489). This case, however, did not involve trading as extensive as that conducted by Rowan or in a reporting issuer with the market capitalization and prominence of Biovail.

Proportionality of Sanctions

[157] Watt Carmichael earned a total of approximately $2,350,000 in commissions from trading in the Trust Accounts during the period from 2002 to 2004. Rowan owned approximately 29% of the shares of Watt Carmichael as at December 31, 2005. He was also "the registered representative at Watt Carmichael for the Conset, Congor and Southridge Accounts…" (Merits Decision, *supra* at para. 5). In this case, Staff submits the proceeds of these trades, together with their distribution, provide a useful reference point for sanctions, particularly when determining the appropriateness and quantum of an administrative penalty. However, while the proceeds may provide a useful reference point with respect to sanctions generally, section 127(1)9 provides the Commission with the power to impose an administrative penalty of not more than $1 million for each failure to comply with Ontario securities law. The Panel when determining the appropriate quantum of an administrative penalty must consider all relevant factors to ensure that the penalty meets the regulatory objective of general and specific deterrence as mandated by section 127(1)9 of the Act.

[158] Similarly, it is relevant to note the sanctions imposed on Melnyk as part of a resolution of related allegations. In a Settlement Agreement resolving the allegations against him, Melnyk agreed to the following sanctions:

- to pay an administrative penalty to the Commission in the amount of $750,000.00, to be allocated by the Commission to or for the benefit of third parties pursuant to section 3.4(2)(b) of the Act;

- to be prohibited from acting as a director of Biovail for a period of one year beginning June 30, 2007;

- to be reprimanded; and

- to pay to the Commission $250,000.00 representing a portion of the costs of the Commission's investigation in relation to this proceeding.

(*Melnyk Settlement Reasons, supra* at para. 33)

d. Conclusion

[159] Unlike in *Wells Fargo* where Wells Fargo Financial Canada Corporation, a public issuer in Ontario, engaged in a straightforward conduct which did not require extensive investigations, that is the failure to file financial information on a timely basis, the conduct of the Respondents in this case required an extensive investigation in connection with numerous serious allegations. This is not the only difference of course, but this is one that deserves highlighting at the outset. In *Wells Fargo*, the public issuer failed, on four occasions between February 2003 and October 2004, 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.

[160] The Panel in *Wells Fargo* considered the fact that this was the first time that a violation of that particular nature was enforced as a factor militating in favour of not imposing a huge administrative penalty. In its oral reasons, the Panel stated: "[t]he 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" (*Wells Fargo, supra* at para. 30). Although the Respondents argue that the same rationale should apply when considering sanctions against them, we do not agree. In particular, with respect to Rowan, we stress that his conduct was egregious and involved several violations of the Act that occurred on a repeated basis over an extended period of time.

[161] Rowan failed to comply with Ontario securities law by: breaching section 107 of the Act by failing to file insider reports in respect of trades in Biovail securities that he executed in the Trust Accounts; engaging in conduct contrary to the public interest by failing to provide complete and accurate information to Biovail concerning the number of Biovail common shares held in the Trust Accounts over which he exercised or shared control or direction; and engaging in conduct contrary to the public interest by trading in Biovail securities in the Trust Accounts during Biovail's Blackout Periods. Further, the Hearing Panel found that Rowan's conduct was contrary to the public interest.

[162] We also note that Rowan's testimony about the harm to himself and his firm as a result of the proceeding, were not substantiated by any financial record or documentary evidence. This is despite Staff's earlier request for particulars and documents supporting the claim about of any harm to his business.

[163] The 'character' and personal letters filed on Rowan's behalf, whilst impressive, do not excuse his egregious conduct.

[164] In light of the circumstances of this case, Rowan's conduct fell well below the standards applicable to both a registrant who was also the President of a registered broker and investment dealer and an insider who was a director of a reporting issuer and a member of its Audit Committee. In the circumstances, Rowan's conduct was abusive of the integrity of the capital markets of Ontario and contrary to the public interest.

[165] We consider these breaches to be serious when considered individually and collectively. Further, these were repeated failures to comply with Ontario securities law over an extended period spanning from 2002-2004. Section 127(1)9 of the Act provides for a maximum administrative penalty of $1 million for each failure to comply with Ontario securities law. We are mindful, however, that we must consider the administrative penalty in the context of the other sanctions imposed on a respondent. Further, we must consider the total effect of the sanction on the individual respondent as well as on the public in general, in order to appropriately penalize and to deter.

[166] In light of our determination on the issue of retrospectivity, we require that Rowan pay an administrative penalty in the amount of $520,000, to be allocated by the Commission to or for the benefit of third parties pursuant to section 3.4(2)(b) of the Act, in order to deter him from engaging in other conduct contrary to the Act and contrary to the public interest and to deter others from engaging in similar conduct. Were it not for our finding on the application of retrospectivity in this case, the administrative penalty would have been more in the range of $900,000 to $1,000,000.

[167] We therefore impose the following sanctions against Rowan:

(a) his registration is suspended for a period of 12 months;

(b) at the conclusion of his suspension of registration, his registration shall be subject to a condition that he not be approved to act in any supervisory role for a further period of 18 months;

(c) he is required to resign any position that he currently holds as a director or officer of a reporting issuer or a registrant;

(d) he is prohibited from becoming or acting as a director or officer of a reporting issuer or an affiliate of a reporting issuer for a period of 7 years;

(e) he is prohibited from becoming or acting as a director or officer of a registrant for a period of 3 years;

(f) he is reprimanded; and

(g) he shall pay an administrative penalty in the amount of $520,000 to the Commission pursuant to section 127(1)9, to be allocated by the Commission to or for the benefit of third parties pursuant to section 3.4(2)(b) of the Act.

iii. Carmichael

a. Staff's Submissions

[168] Staff submits that Carmichael, as a person responsible for Watt Carmichael's overall compliance with regulatory requirements, failed to ensure that Watt Carmichael had appropriate policies and procedures in place to discharge its regulatory responsibilities and failed to ensure that McKenney was providing proper oversight to the trading in the Trust Accounts.

[169] Staff submits that, as this Commission and other securities regulatory authorities have recognized, proper supervision by a registrant is a critical component of the securities regulatory system. Registered firms and those that are charged with supervisory responsibilities serve as gatekeepers with the responsibility of detecting misconduct promptly before there is harm or further harm to investors and the capital markets generally.

[170] As stated above, Watt Carmichael earned a total of approximately $2,350,000 in commissions from trading in the Trust Accounts during the period from 2002 to 2004. Carmichael owned approximately 44% of the shares of Watt Carmichael as at December 31, 2005.

[171] Staff submits that the proceeds of these trades, together with their distribution provide a useful reference point for sanctions, particularly when determining the appropriateness and quantum of an administrative penalty.

b. Respondents' Submissions

[172] Counsel submits that Carmichael is the Chairman and CEO of Watt Carmichael and is the driving force and the key operator of Watt Carmichael. The company, which has fifteen (15) employees, has operated under Carmichael's direction for years, including over the last two very trying years when the firm has laboured under the heavy cloud of allegations of insider trading and misleading the Commission.

[173] Counsel submits that Carmichael has never been the subject of a disciplinary proceeding and has a reputation for integrity and professionalism, as was demonstrated in the letters of support introduced during the hearing.

[174] Counsel stresses that the evidence shows that the Hearing Panel's findings arise in unique and complex supervisory circumstances that will not be repeated. The sanctions sought by Staff against Carmichael are completely out of proportion with the Hearing Panel's finding, and following *Mithras*, beyond the public interest jurisdiction of the Commission.

[175] Counsel submits that although the Commission has found that Watt Carmichael should have had additional policies in place, Carmichael did put relevant policies in place. Carmichael segregated Rowan's RR Code so that his trading could be reviewed. Specifically, he put in place regulations to prevent trading of Biovail in managed accounts, and he directed McKenney to ensure, to the extent possible, that Rowan was not trading with inside information.

[176] Carmichael stated that there was no policy in place to ensure that Rowan was not trading during blackout periods or filing insider reports. This fact, which has now been found to be a

regulatory failing, must be put in context. Simply stated, counsel submits that there is no precedent for such a supervisory requirement.

[177] Counsel submits that there was extensive evidence led during the hearing respecting the extent to which the Trust Accounts were reviewed by the IDA. According to counsel, it is a significant mitigating factor that Watt Carmichael's policies and procedures were reviewed and approved by the IDA, which was itself aware of the circumstance. As Carmichael testified, he took comfort in the fact that the firm supervisory policies were consistently IDA-approved.

[178] Counsel further submits that the evidence before the Hearing Panel clearly shows that the question of whether or not there was an obligation on the part of Watt Carmichael to supervise Rowan's filing of insider reports and his trading in client accounts during blackout periods was not free from doubt. Carmichael was operating in unique supervisory circumstances without pre-existing guidance.

[179] Carmichael recognizes the Hearing Panel's findings and understands clearly that these will now serve as a guide to him and for others with supervisory responsibilities in relation to registrants who are also insiders of publicly traded companies. He accepts that a reprimand and caution for the future is necessary to signal to the market that the Commission views this as a serious matter.

[180] Counsel also filed character and personal reference letters from various individuals attesting to Carmichael's character.

[181] Carmichael also described, during his testimony, the impact of the proceeding on him and on his firm. He indicated that the proceeding has been very harmful to Watt Carmichael, to the individuals involved and caused a great deal of financial duress. He also mentioned that the proceeding has created embarrassment and that one of the partners left the firm resulting in a loss of $300,000 a year in net profit between commissions, fees and the like. He also mentioned that he personally incurred a loss of approximately 10% of the assets that he managed prior to the proceeding translating in a loss of $160,000 in gross revenues a year for Watt Carmichael over the last two years, and the company also incurred considerable legal fees.

c. Analysis

[182] As Chairman, CEO and acknowledged UDP of Watt Carmichael, Carmichael is responsible for the firm's overall compliance with regulatory requirements, and for overseeing the development and implementation of its compliance practices and procedures" (Merits Decision, *supra* at para. 346).

[183] The Hearing Panel found that Carmichael failed to ensure that Watt Carmichael had adequate policies and procedures in place to discharge its regulatory responsibilities and failed to ensure that McKenney was providing proper oversight to the trading in the Trust Accounts. (See: Merits Decision, *supra* at paras. 351-352).

[184] Carmichael testified that he joined the investment industry in 1973 and has spent his entire career at Watt Carmichael.

[185] Given his knowledge of the unique nature of the Trust Accounts, Carmichael should have ensured that Watt Carmichael had adequate policies, procedures and practices in place to ensure Watt Carmichael's compliance with its responsibilities.

[186] The Hearing Panel accepted Kleberg's expert evidence only as it related to industry standards for brokerage compliance practices. Kleberg testified about the division of supervisory responsibilities that is mandated within securities brokerages. Each firm must have a UDP who is responsible for the firm's overall compliance with regulatory requirements as well as overseeing the development and implementation of its compliance practices and procedures. Kleberg testified that these Trust Accounts warranted especially close supervision and required effective policies and procedures. In his words, the Trust Accounts were "screaming for attention". He highlighted the salient features of the Trust Accounts from a supervisory perspective:

(i) the accounts held a very large position in Biovail securities;

(ii) the accounts were highly concentrated in Biovail securities;

(iii) the accounts conducted very active trading in Biovail securities;

(iv) the registered representative assigned to the accounts was an insider of Biovail; and

(v) the registered representative held discretionary trading authority over the accounts.

[187] Kleberg also testified that the UDP should ensure that his CCO carries out his responsibilities including supervising the filing of insider reports.

[188] As Chairman, CEO and UDP, Carmichael was ultimately responsible for ensuring that Watt Carmichael had appropriate policies, procedures and practices in place, and for ensuring that McKenney, as CCO, satisfied his oversight responsibilities. Carmichael failed to fulfill this responsibility as Chairman, CEO and UDP, contrary to the public interest (Merits Decision, *supra* at para. 352).

[189] Carmichael, given his knowledge of the unique nature of the Trust Accounts, should have ensured that Watt Carmichael had adequate policies, procedures and practices in place to ensure Watt Carmichael's compliance with its responsibilities.

[190] The Commission has previously considered cases involving supervisory failures, including failures by securities firms, UDPs and CCOs (*Re Marchment & MacKay Ltd.* (1999), 22 O.S.C.B. 4705; *Re E.A. Manning Ltd.* (1995), 19 O.S.C.B. 5317). The Commission, together with other Canadian securities regulators, has also considered a number of settlement agreements concerning allegations of inadequate supervision. These cases reflect a wide range of supervisory failures, not all of which are directly comparable to the present case (*Re Union Securities Ltd.* 2006 BCSECCOM 220; *Re Simpson* (2005), 28 O.S.C.B. 7126; *Re Bruce* (2004) 27 O.S.C.B. 9319 and 9320; *Re Yorkton Securities Inc.* (2002) 25 O.S.C.B. 1106; *Re RT Capital Management Inc.* (2000) 23 O.S.C.B. 5117, 23 O.S.C.B. 5118, 23 O.S.C.B. 5177; *Re Yorkton Securities Inc.* (1994) 17 O.S.C.B. 5386).

[191] Although Carmichael's violations of the Act were not as significant as those of Rowan, we nevertheless find that Carmichael as Chairman, CEO and acknowledged UDP of Watt Carmichael had an important leadership role in the brokerage firm and was responsible to ensure that the firm and its employees operated in compliance with Ontario securities law by adopting appropriate policies, procedures and practices. Carmichael, in light of his role and long–standing career in the industry, should not have abdicated his responsibilities. In particular, Carmichael's failure to supervise trading by Rowan and to address the issues arising from Rowan's dual role as a director of Biovail and as a registered representative trading in Biovail securities amounted to serious misconduct.

[192] We also note that Carmichael's testimony about the harm to himself and his firm as a result of the proceeding, was not substantiated by any financial record or documentary evidence. This is despite Staff's earlier request for particulars and documents supporting the claim about any harm to the business.

[193] Carmichael failed to comply with Ontario securities law by failing to "…adequately supervise Rowan's trading in Biovail securities in the Trust Accounts…"(Merits Decision, *supra* at para. 345). The breaches in this case are serious when considered individually and collectively. Further, they were repeated failures to comply with Ontario securities law over an extended period from 2002-2004.

[194] Section 127(1)9 of the Act provides for a maximum administrative penalty of $1 million for each failure to comply with Ontario securities law. We are mindful however, that we must consider the administrative penalty in the context of the other sanctions imposed on a respondent. Further, we must consider the total effect of the sanction on the individual respondent as well as on the public in general, in order to appropriately deter the respondent and others and do justice in the circumstances.

[195] As stated above, Watt Carmichael earned a total of approximately $2,350,000 in commissions from trading in the Trust Accounts during the period from 2002 to 2004. A significant number of shares of Watt Carmichael, approximately 44%, were owned by Carmichael as at December 31, 2005. In this case, Staff submits the proceeds of these trades, together with their distribution, provide a useful reference point for sanctions, particularly when determining the appropriateness and quantum of an administrative penalty. However, while the proceeds may provide a useful reference point with respect to sanctions generally, section 127(1)9 provides the Commission with the power to impose an administrative penalty of not more than $1 million for each failure to comply with Ontario securities law. The Panel when determining the appropriate quantum of an administrative penalty must consider all relevant factors to ensure that the penalty meets the regulatory objective of general and specific deterrence as mandated by section 127(1)9 of the Act.

[196] Having regard to all of the circumstances, including the sales compliance reviews by IDA/IIROC and the impressive character and personal letters concerning Carmichael's background and public service and in light of our determination on the issue of retrospectivity, we require that Carmichael pay an administrative penalty in the amount of $250,000, to be allocated by the Commission to or for the benefit of third parties pursuant to section 3.4(2)(b) of the Act, in order to deter him from engaging in other conduct contrary to the Act and contrary to the public interest and to deter others from engaging in similar conduct. Were it not for our

finding of the application of retrospectivity in this case, the administrative penalty would have been more in the range of $450,000 to $550,000.

[197] In considering a prohibition on Carmichael from acting as a director or officer of a registrant, we are cognizant of the effect that such prohibition would have on a small firm such as Watt Carmichael, when combined with our decision to impose a suspension on its President. Although, in other circumstances, we would have imposed a longer prohibition, we have determined that a 45-day suspension is appropriate in the circumstances.

d. Conclusion

[198] We therefore impose the following sanctions against Carmichael:

(a) he is required to resign any position that he currently holds as a director or officer of a registrant;

(b) he is prohibited from becoming or acting as a director or officer of a registrant for a period of 45 days;

(c) a condition is imposed on his registration that he not be approved to act in any supervisory role for a period of 45 days;

(d) he is reprimanded; and

(e) he shall pay an administrative penalty in the amount of $250,000, to be allocated by the Commission to or for the benefit of third parties pursuant to section 3.4(2)(b) of the Act.

iv. McKenney

a. Staff's Submissions

[199] Staff submits that the CCO is responsible for creating awareness of compliance issues within the firm, monitoring adherence with regulatory requirements and ensuring compliance with such requirements (Merits Decision, *supra* at para. 330).

[200] Staff points out that McKenney admitted being aware of the concentration of Biovail securities in the Trust Accounts, the unusually high volume of trading in the Biovail securities in the Trust Accounts, that these were offshore accounts and that Melnyk was the settlor (Merits Decision, *supra* at para. 332).

[201] According to Staff, in spite of the clear risks McKenney failed to properly supervise Rowan's trading in the Trust Accounts. In particular, McKenney, as CCO, failed to ensure that:

(a) Rowan filed insider reports relating to his trading in Biovail securities in the Trust Accounts;

(b) Rowan ceased trading in Biovail securities in the Trust Accounts during Biovail Blackout Periods; and

(c) Rowan ceased trading in Biovail securities in the Trust Accounts during periods where he was in possession of material undisclosed information concerning Biovail.

(Merits Decision, *supra* at para. 333)

[202] The Hearing Panel found that McKenney "made only sporadic and inadequate attempts to determine when Rowan had knowledge of information not generally disclosed" (Merits Decision, *supra* at para. 334).

b. Respondents' Submissions

[203] Counsel submits that, like the other respondents, McKenney has never been the subject of any regulatory proceedings. He began working in the industry as a clerk/messenger almost 50 years ago. Counsel submits that McKenney did take steps to monitor Rowan's trading in Biovail. He established a segregated code for trading in Biovail by Rowan, which facilitated monitoring of Biovail trading by Rowan in daily reviews. He reviewed trading on a daily basis and consistent with the Hearing Panel's findings, never found anything that would indicate that Rowan was engaged in insider trading.

[204] Counsel submits that McKenney testified that he did not consider it to be part of his supervisory responsibilities to monitor Rowan's compliance with Biovail blackout periods or to monitor whether Rowan was filing insider reports for trades in client accounts. As already submitted, there was no law, regulation or prior finding of this Commission which would impose a specific supervisory obligation to review for such matters. Counsel states that the Commission has now, through its Merits Decision, provided guidance to the Ontario capital markets for the future.

[205] According to counsel, McKenney suffers from poor health and has retired, and any further action against McKenney would be inappropriate in the circumstances.

c. Analysis

[206] McKenney joined the investment industry in 1962, and joined Watt Carmichael in 1996. McKenney was at all material times the Chief Financial Officer and CCO of Watt Carmichael (Merits Decision, *supra* at para. 9).

[207] The Hearing Panel found that, as CCO of Watt Carmichael, McKenney was responsible for supervising Rowan's trading to ensure compliance and failed to do so. The Hearing Panel found that his failures include:

(a) making "only sporadic and inadequate attempts" to determine when Rowan had knowledge of undisclosed information;

(b) accepting "information provided by a registered representative at face value" rather than performing independent checks;

(c) relying on "happenstance" to determine when Rowan was attending a Biovail Board or Audit Committee meeting; and

(d) failure to adhere to Watt Carmichael's own policies by only monitoring trading in Biovail securities in accounts controlled by Rowan

(Merits Decision, *supra* at paras. 334-342).

[208] The CCO should be vigilant and ensure that all the employees and senior staff are aware of compliance issues within the firm and monitor compliance with regulatory requirements. Kleberg testified that industry standards would not generally require the CCO to monitor adherence to corporate blackout periods by a brokerage client who is an insider of a reporting issuer. However, it was his view that where a registered representative who is also an insider of a reporting issuer ("RR/insider") has discretionary authority to trade in securities of the reporting issuer, close supervision by the CCO is required to ensure that an RR/insider does not trade in the issuer's securities during the issuer's blackout periods. Kleberg stated that this monitoring would not be difficult since the CCO could simply ask the reporting issuer to notify him of any blackout periods. This monitoring was required to ensure that Rowan did not transmit any inside information concerning Biovail to other investment advisors or clients.

[209] We also considered the fact that McKenney admitted being aware of the concentration of Biovail securities in the Trust Accounts, the unusually high volume of trading in the Biovail securities in the Trust Accounts, that these were offshore accounts and that Melnyk was the settlor. In our view, McKenney should at least have met the industry standard and monitored Biovail trading in all accounts at the firm.

[210] McKenney failed to properly supervise Rowan's trading in the Trust Accounts. In particular, McKenney, as CCO, failed to ensure that:

(a) Rowan filed insider reports relating to his trading in Biovail securities in the Trust Accounts;

(b) Rowan ceased trading in Biovail securities in the Trust Accounts during Biovail Blackout Periods; and

(c) Rowan ceased trading in Biovail securities in the Trust Accounts during periods where he was in possession of material undisclosed information concerning Biovail

(Merits Decision, *supra* at para. 333).

[211] McKenney "made only sporadic and inadequate attempts to determine when Rowan had knowledge of information not generally disclosed" (Merits Decision, *supra* at para. 334).

d. Conclusion

[212] We have taken into consideration the above mentioned important factors and have determined to impose the following sanctions against McKenney:

(a) he is required to resign any position that he currently holds as a director or officer of a registrant;

(b) he is prohibited from becoming or acting as a director or officer of a registrant for a period of 12 months;

(c) he shall have a condition imposed on his registration that he not be approved to act in any supervisory role for a period of 12 months; and

(d) he is reprimanded.

v. Watt Carmichael

a. Staff's Submissions

[213] Staff submits that in reviewing the conduct of Carmichael, McKenney and Watt Carmichael, the Hearing Panel concluded that two senior officers of Watt Carmichael had failed in their duty under Commission Rule 31-505 to supervise Rowan's trading activities in the Trust Accounts.

[214] Further, Staff refers us to the Merits Decision where the Hearing Panel found that Watt Carmichael's compliance policies, procedures and practices were inadequate in that Watt Carmichael failed to ensure the containment of inside information and failed to properly document its compliance activities. Staff also stress that Watt Carmichael failed to adequately supervise Rowan's trading in Biovail securities in the Trust Accounts. Staff points out that these are serious findings about the failures of the firm.

[215] Staff submits that failure to properly supervise has significant consequences for the securities regulatory regime as a whole, and thus calls for a robust response in order to protect the public interest.

b. Respondents' Submissions

[216] The Respondents submit that their submissions respecting Carmichael and McKenney apply to Watt Carmichael as well. Watt Carmichael has undertaken never to have an officer as a director of a public company as a registrant, which ensures that the circumstances giving rise to the penalties against Watt Carmichael will never be repeated.

[217] The Respondents argue that the suggestion that Watt Carmichael undergo an independent review of its compliance procedures is difficult to comprehend in light of the evidence that Watt Carmichael has undergone six sales compliance reviews by the IDA between 1997 and 2005. On each occasion, its compliance procedures have been found to be compliant by the IDA. Watt Carmichael will be subject to a further IDA Sales Compliance review, in the normal course, in November 2009. It is not clear to the Respondents what a further third party compliance review is intended to accomplish.

[218] Counsel submits that, not only are the sanctions sought by Staff completely out of proportion with the findings against the Respondents, they also ignore Watt Carmichael's vulnerability to sanction. Watt Carmichael is a small firm, which prior to these allegations, has enjoyed an excellent regulatory reputation in the industry for over thirty years. It has fifteen (15) employees in total, may of whom have been at the firm for decades. The allegations levelled

against the Respondents, particularly the devastating allegations that were not made out, have had a injurious impact upon the firm and its employees.

c. Analysis

[219] The Hearing Panel found that Watt Carmichael's compliance policies, procedures and practices were inadequate in that they failed to address the inherent risk in Rowan's dual role and that it failed to adequately supervise Rowan's trading in Biovail securities in the Trust Accounts:

> ….Watt Carmichael's compliance policies, procedures and practices were inadequate in that they failed to address the inherent risk in Rowan's dual role as registered representative for the Trust Accounts with discretionary trading authority and as an insider of Biovail.
>
> In particular, Watt Carmichael failed to adequately supervise Rowan's trading in Biovail securities in the Trust Accounts, in that Watt Carmichael failed to ensure the containment of inside information, failed to ensure Rowan's compliance with insider trading and disclosure rules and the Biovail Blackout Policy, and failed to properly document its compliance activities
>
> (Merits Decision, *supra* at paras. 344-345).

[220] This severe inadequacy at Watt Carmichael was emphasized by Kleberg who testified that he had examined Watt Carmichael's Policies and Procedures Manual to examine its treatment of insider information containment. His conclusion was that "it did not address the appropriate procedures". Kleberg concluded that the Trust Accounts warranted especially close supervision and required effective policies and procedures.

[221] We agree with Kleberg when he said Watt Carmichael's Policies and Procedures regarding containment of insider information did not address appropriate issues and procedures.

d. Conclusion

[222] We conclude that Watt Carmichael must undergo an independent review of its compliance structure as well as its procedures relating to the handling of confidential information and conflicts of interest.

[223] In light of our determination on the issue of retrospectivity, we require that Watt Carmichael pay an administrative penalty in the amount of $450,000, to be allocated by the Commission to or for the benefit of third parties pursuant to section 3.4(2)(b) of the Act, in order to deter Watt Carmichael from engaging in other conduct contrary to the Act and contrary to the public interest and to deter others from engaging in similar conduct. Were it not for our finding of the application of retrospectivity in this case, the administrative penalty would have been more in the range of $850,000 to $1,000,000.

D. What are the Appropriate Costs in this Case?

i. Staff's Submissions

[224] Staff submits that the Respondents should be ordered pursuant to section 127.1 of the Act to jointly and severally pay a portion of the costs in the amount of $283,691.40 towards the costs of the hearing on the merits. Staff notified the Respondents of its intention to seek costs in this matter right from the outset of the proceeding. A request for costs was included in the initial Notice of Hearing dated July 28, 2006.

[225] In preparing the bill of costs, Staff has employed the methodology expressly approved by the Commission in three recent decisions regarding costs awards: *Re Cornwall* (2008), 31 O.S.C.B. 4840; *Re Momentas Corp.* (2007), 30 O.S.C.B. 6475; *Re Ochnik* (2006), 29 O.S.C.B. 5917.

[226] Specifically, as in those cases, Staff has provided both its bill of costs and copies of the timesheets supporting the hourly figures claimed. These timesheets provide dates, numbers of hours worked and details of the tasks performed by each of the individuals listed in the bill of costs.

[227] As in the previous cases, the present bill of costs employs the hourly rates approved by the Commission, and excludes any time spent by students-at-law, law clerks and assistants. The rates that are applied are: (1) $205 an hour for litigation staff; and (2) $185 for investigation employees.

[228] In addition, as in the *Re Ochnik* matter, Staff is only seeking recovery of the time spent in preparing for the hearing on the merits. The hours claimed begin from the date of approval of Melnyk's settlement agreement on May 19, 2007 and end on September 7, 2007. They therefore exclude the costs of the lengthy investigation of this matter, and also do not include the time spent preparing for and attending the present hearing regarding sanctions. Further, Staff does not seek the costs associated with the response to the constitutional challenge brought by the Respondents.

[229] Finally, the hours claimed for two staff members, Johanna Superina and Rima Pilipavicius, have been reduced to take account of tasks which related, at least in part to matters not directly connected to the present case. The remaining time claims for all Staff members directly relates to the hearing on the merits and its preparation.

[230] Staff points out that as part of its settlement agreement, Melnyk was required to pay $250,000 in costs, which represented a portion of the costs of the Commission's investigation in relation to this proceeding.

[231] Staff therefore submits that its request for costs is both proportionate and reasonable in all of the circumstances.

ii. Respondents' Submissions

[232] The Respondents submit that no costs should be awarded against them in this matter. In support of this submission, the Respondents cite subsection 17.1(2) of the *Statutory Powers*

Procedure Act, R.S.O. 1990, c. S.22 ("SPPA") which provides that a tribunal may not make a costs order "under this section" unless a party's conduct has been unreasonable or the party has acted in bad faith.

[233] The Respondents submit that they did not act unreasonably or in bad faith in defending themselves against the charges laid by Staff, as is evidenced by the fact that the most serious allegations were dismissed.

[234] Further, they argue that it is unfair that section 127.1 of the Act contemplates an award of costs in favour of the Commission, but not in favour of the Respondents. They rely on a decision that recognized the failings of a one-sided power to award costs. They rely on *Credifinance Securities Limited*, [2006] I.D.A.C.D. No. 30, which states at paragraph 56:

> In recent years, there has been a trend to the awarding of quite substantial costs in these cases. We think that care should be exercised so that fear of attracting an award of very large costs does not have the effect of inhibiting a Member, or an approved person, from advancing a defence which it thinks is meritorious. It is also worth keeping in mind, when thinking about costs, that a successful respondent cannot get its costs from the IDA. Since the power to award costs is one-sided, we think that a conservative approach is not unwarranted.

[235] Further, they submit that we should take into consideration the fact that four of the eight allegations were not made out and accordingly, this should affect the costs award against the Respondents. They rely on *Octagon Capital Corporation*, [2007] I.D.A.C.D. No.16 at paragraph 78, which states that:

> As we commented above, a considerable amount of hearing time required involved Counts 2 and 3 in the Notice of Hearing. Octagon was entirely successful on those two matters. We find it unfair, under all these circumstances, to require Octagon to pay the IDA its costs for Count 1 when Octagon cannot recover any costs from the IDA for successfully defending itself on Counts 2 and 3. We, therefore, conclude that there should be no order for costs.

iii. Analysis

[236] The Commission's jurisdiction to award costs is established by section 127.1 of the Act (enacted in December 1999). The application of that provision is expressly contemplated by subsection 17.1(6) of the SPPA. A costs award by the Commission is not made "under" section 17.1 of the SPPA as argued by the Respondents. This provision does not apply to the present proceeding.

[237] In considering a request for an award of costs related to the Commission's investigation/hearing, the Commission has identified a number of additional factors which should be considered, including:

(a) the importance of early notice of an intention to seek costs;

(b) the seriousness of the allegations and the conduct of the parties;

(c) the presence or absence of abuse of process by any respondent;

(d) the conduct of any respondent as it affects investigative and hearing costs; and

(e) the reasonableness of the costs requested by Staff.

(*Re Ochnik, supra* at para. 29.)

[238] These would apply to the determination of a request for an award of the hearing costs. We consider these factors below when determining the appropriate amount of costs, if any, that the Respondents should be required to pay pursuant to subsection 127.1 of the Act.

[239] Further, we have also considered the unique circumstances of this case, and the fact that four of the eight allegations were not made out, in determining the appropriate amount of costs that should be paid by the Respondents. In particular, we considered the fact that the vast majority of the evidence led at the hearing was directed at allegations that were not made out.

[240] Based on the submissions and information presented by Staff, we have assessed that the total costs payable by the Respondents should be approximately half of $283,691.40. In determining this amount we have considered the facts that many of the allegations against the Respondents were not proven by Staff and represented a substantial part of the case.

iv. Conclusion

[241] The Respondents shall jointly and severally pay costs and disbursements fixed at $140,000 to the Commission pursuant to subsection 127.1(2).

VI. SUMMARY OF OUR SANCTIONS AND COSTS ORDER

[242] Our order reflects the seriousness of the securities law violations that occurred in this matter, and imposes sanctions that will not only deter the Respondents but also like-minded people from engaging in future conduct that violates securities law.

[243] Accordingly, by Order dated December 21, 2009, we order that:

With respect to Rowan:

(a) his registration is suspended for a period of 12 months pursuant to section 127(1)1 of the Act;

(b) at the conclusion of his suspension of registration, his registration shall be subject to a condition that he not be approved to act in any supervisory role for a further period of 18 months pursuant to section 127(1)1 of the Act;

(c) he is required to resign any position that he currently holds as a director or officer of a reporting issuer or registrant pursuant to sections 127(1)7 and 127(1)8.1 of the Act;

(d) he is prohibited from becoming or acting as a director or officer of a reporting issuer or an affiliate of a reporting issuer for a period of 7 years pursuant to section 127(1)8 of the Act;

(e) he is prohibited from becoming or acting as a director or officer of a registrant for a period of 3 years pursuant to section 127(1)8.2 of the Act;

(f) he is reprimanded pursuant to section 127(1)6 of the Act;

(g) he shall pay an administrative penalty pursuant to section 127(1)9 of the Act in the amount of $520,000, to be allocated by the Commission to or for the benefit of third parties pursuant to section 3.4(2)(b) of the Act.

With respect to Carmichael:

(a) he is required to resign any position that he currently holds as a director or officer of a registrant pursuant to section 127(1)8.1 of the Act;

(b) he is prohibited from becoming or acting as a director or officer of a registrant for a period of 45 days pursuant to section 127(1)8.2 of the Act;

(c) a condition is imposed on his registration pursuant to section 127(1)1 of the Act that he not be approved to act in any supervisory role for a period of 45 days;

(d) he is reprimanded pursuant to section 127(1)6 of the Act; and

(e) he shall pay an administrative penalty pursuant to section 127(1)9 of the Act in the amount of $250,000, to be allocated by the Commission to or for the benefit of third parties pursuant to section 3.4(2)(b) of the Act.

With respect to McKenney:

(a) he is required to resign any position that he currently holds as a director or officer of a registrant pursuant to section 127(1)8.1 of the Act;

(b) he is prohibited from becoming or acting as a director or officer of a registrant for a period of 12 months pursuant to section 127(1)8.2 of the Act;

(c) a condition is imposed on his registration pursuant to section 127(1)1 of the Act that he not be approved to act in any supervisory role for a period of 12 months; and

(d) he is reprimanded pursuant to section 127(1)6 of the Act.

With respect to Watt Carmichael:

(a) it is required to undergo an independent review of its compliance structure as well as its procedures relating to the handling of confidential information and conflicts of interest pursuant to section 127(1)4 of the Act. This review should encompass the following points:

(i) it is to be conducted by an independent party approved by Staff;

(ii) it is to be conducted at the expense of Watt Carmichael;

(iii) it is required to implement any changes recommended by the expert within reasonable times frames set out by the expert after consultation with Watt Carmichael and Staff; and

(iv) Watt Carmichael is to provide Staff with a copy of the report and recommendations of the expert and with progress reports concerning the implementation of the report's recommendations;

(b) it is reprimanded pursuant to section 127(1)6 of the Act; and

(c) it shall pay an administrative penalty in the amount of $450,000 pursuant to section 127(1)9 of the Act, to be allocated by the Commission to or for the benefit of third parties pursuant to section 3.4(2)(b) of the Act.

On the issue of costs:

(a) pursuant to subsection 127.1(2) of the Act, the Respondents shall jointly and severally pay to the Commission $140,000 in costs and disbursements.

Dated this 21st day of December, 2009.

"*Patrick J. LeSage*"
Patrick J. LeSage, Q.C.

"*Suresh Thakrar*"
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