Ontario Securities Commission | Commission des valeurs mobilières de l'Ontario | 22nd Floor, 20 Queen Street West, Toronto ON M5H 3S8 | 22e 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 CROWN HILL CAPITAL CORPORATION
And WAYNE LAWRENCE PUSHKA

ORAL REASONS AND DECISION

Hearing:	September 2, 2014	
Decision:	September 3, 2014	
Panel:	Alan J. Lenczner	-Commissioner and Chair of the Panel
Appearances:	Anna Perschy Albert Pelletier	-For Staff of the Commission
	Alistair Crawley Clarke Tedesco	-For Crown Hill Capital Corporation and Wayne Lawrence Pushka

ORAL REASONS AND DECISION

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

[1] This was a hearing before the Ontario Securities Commission (the "**Commission**") on September 2, 2014 (the "**Motion Hearing"**). Wayne Lawrence Pushka and Crown Hill Capital Corporation (together, the "**Respondents**") bring a motion under section 144 of the *Securities Act* (the "**Act**") to revoke or vary the order of the Commission dated January 6, 2014 pursuant to section 11 of the Act authorizing an investigation (the "**Order**").

[2] The Order was supplemented by a second investigative order dated May 20, 2014 adding Peter Cho as an additional investigator. In all other respects, the order dated May 20, 2014 is substantially similar to the Order. I accept the submission of the Respondents that the latter order dated May 20, 2014 was effectively an administrative adjunct.

[3] On August 23, 2013, the Commission composed of a panel of three commissioners, rendered a Merits Decision involving the Respondents. The findings and order made against the Respondents is found at paragraph 639 of the Merits Decision. The findings and order involve a number of breaches of the Act, as well as findings that the Respondents acted contrary to the public interest. This is the context underlying these proceedings.

[4] On February 24 and 28, 2014, a hearing was held to consider submissions from Staff of the Commission ("**Staff**") and counsel of the Respondents regarding sanctions and costs. On August 8, 2014, the Commission issued its decision on sanctions and costs against the Respondents ("**Sanctions and Costs Order**").

[5] The Panel made a number of orders against the Respondents pursuant to sections 127(1) and 127.1 of the Act. The Panel ordered that the Respondents jointly and severally disgorge to the Commission amounts obtained by them as a result of their non-compliance with Ontario securities law of $18,237,047. The Commission further ordered these amounts to be designated for allocation or use by the Commission pursuant to subsection 3.4(2)(b)(i) and (ii) of the Act. In addition, the Panel ordered the Respondents jointly and severally pay to the Commission an administrative penalty of $1,875,000, and jointly and severally pay costs in the amount of $300,000.

[6] In or about early January, 2014, prior to the hearing on sanctions and costs, Staff sought and obtained an investigative order pursuant to section 11 of the Act. This Order provided, *inter alia*, the following:

> Staff intend to seek sanctions against the Respondents including disgorgement of all amounts obtained as a result of their non-compliance

> with Ontario securities law and significant administrative penalties (paragraph 5 of the Order).
>
> The Respondents may have transferred or disposed of assets they had at the time the Notice of Hearing was issued on July 7, 2011, or since then, or may seek to do so (paragraph 6 of the Order).

[7] The memorandum that was provided to the Chair, Mr. Howard Wetston, to obtain the Order has not been produced. However, no issue is taken that there was a proper basis, in fact, to make the Order.

[8] Staff has provided an affidavit of Yvonne Lo, Staff investigator, in which she details a number of instances where assets are transferred, both domestically and internationally, out of the ownership of the Respondents and into the ownership of a spouse, child or perhaps other entities owned or controlled by the Respondents.

[9] Staff is content that the affidavit of Yvonne Lo sworn on August 21, 2014 be marked as an Exhibit. Respondents' counsel opposes and objects thereto, indicating that traditionally, any information obtained by reason of section 11 investigative order is not to be disclosed except on certain terms.

[10] I would have marked the affidavit of Yvonne Lo as an Exhibit because the information contained therein has been provided to the Respondents on at least one or two occasions, and the Respondents are fully aware of the information. In addition, the hearings before the Commission (both merits, and sanctions and costs) have been completed and the alleged transfer of assets would be within the knowledge of the Respondents. However, out of an abundance of caution, I am not going to mark the affidavit of Yvonne Lo as an Exhibit, but I am satisfied that there is a strong *prima facie* case, until a response has been received, that the Respondents have transferred Pushka's half interest in his matrimonial home and significant other assets to other members of his family, or to accounts internationally, and out of Canada. Therefore, I am satisfied that there was a factual basis to make the investigative order.

[11] The issue raised by the Respondents' counsel is that there was no legal jurisdiction to make the Order under section 11 because the object of that Order is not consistent with the due administration of Ontario securities law. Respondents' counsel indicates very clearly and very strongly that the object of the investigative order was for the enforcement of sanctions orders, and that, he submits, is not part of due administration of securities law.

[12] As a second argument, Respondents' counsel indicates that once the Commission rendered its order on sanctions and costs, it became *functus,* and there is no other current proceeding before the Commission initiated or to be initiated. Further, counsel for the Respondents submits that there is no proceeding that Staff can bring before this Commission. Accordingly, he submits that the origination and continuation of the

investigative order is not connected to, or in respect of, or relevant to, the due administration of Ontario securities law.

[13] Staff takes the opposite view.

[14] To resolve this issue, I turn to the interpretation of section 11 of the Act. Section 11 reads:

> (1) The Commission may, by order, appoint one or more persons to make such investigation with respect to a matter as it considers expedient,
>
> (a) for the due administration of Ontario securities law or the regulation of the capital markets in Ontario; or
>
> (b) to assist in the due administration of the securities or derivatives laws or the regulation of the capital markets in another jurisdiction.
>
> (2) An order under this section shall describe the matter to be investigated.

Subsection (3) also reads with respect to the scope of investigation:

> (3) For the purposes of an investigation under this section, a person appointed to make the investigation may investigate and inquire into,
>
> (a) the affairs of the person or company in respect of which the investigation is being made, including any trades, communications, negotiations, transactions, investigations, loans, borrowings or payments to, by, on behalf of, or in relation to or connected with the person or company and any property, assets or things owned, acquired or alienated in whole or in part by the person or company or by any other person or company acting on behalf of or as agent for the person or company; and
>
> (b) the assets at any time held, the liabilities, debts, undertakings and obligations at any time existing, the financial or other conditions at any time prevailing in or in relation to or in connection with the person or company, and any relationship that may at any time exist or have existed between the person or company and any other person or company by reason of investments, commissions promised, secured or paid, interests held or acquired, the loaning or borrowing of money, stock or other property, the transfer, negotiation or holding of stock, interlocking directorates, common control, undue influence or control or any other relationship.

[15] In interpreting section 11, I am guided by the Supreme Court of Canada decision in *Sound v Motion Picture Theatre Associations of Canada*, [2012] SCC 38. The court in that case held that "the object of statutory interpretation is to establish Parliament's intent by reading the words of the provisions in question in their entire context and in their grammatical and ordinary sense, harmoniously with the scheme of the Act, the object of

the Act and the intention of Parliament" (paragraph 32). The Court indicates that the interpretation is to be a purposive interpretation.

[16] In determining the scope of the Act, I need to look no further than the Act itself. I begin the analysis with what is encompassed by 'Ontario securities law'. The definition 'Ontario securities law' is found in section 1(1) of the Act and includes "in respect of a person or company, a decision of the Commission or a Director to which the person or company is subject". I find that the investigative order that was made falls within the ambit of 'a decision of the Commission or Director' provided for in the definition.

[17] The purpose of the Act is defined in section 1.1 which reads:

> (a) to provide protection to investors from unfair, improper or fraudulent practices; and
>
> (b) to foster fair and efficient capital markets and confidence in capital markets.

The principles to be considered are also defined in the Act in section 2.1, and include "effective and responsive securities regulation requires timely, open and efficient administration and enforcement of this Act by the Commission".

[18] The next point in the analysis is the object of the Act. I refer to the case of *Deloitte v Touche LLP v Ontario (Securities Commission),* (2005) OJ No 1510. In this case, the Divisional Court held that "the Supreme Court has recognized the effective enforcement of securities regulation is essential to achieving the purposes of the Act". The Court also referred to *Pezim* in so far as "it was the legislatures' intention to give securities commissions broad powers with respect to investigations, audits, hearings and orders – the very tools of enforcement – and a broad discretion to determine what is in the public interest in the course of exercising those powers" (paragraph 55).

[19] The same sentiment about the object of the Act is expressed in *Rowan v Ontario (Securities Commission)* 2012 ONCA 208 where the Ontario Court of Appeal indicates that "penalties of up to $1 million per infraction are, in my view, entirely in keeping with the Commission's mandate to regulate the capital markets where enormous sums of money are involved and where substantial penalties are necessary to remove economic incentives for non-compliance with market rules" (paragraph 49). The Court cites *Cartaway Resources Corp. (Re),* [2004] 1 SCR 672 that "in carrying out their regulatory and preventative mandate provincial securities commissions may legitimately consider deterrence when imposing a monetary penalty…It is perhaps necessary, consideration in making orders that are both protective and preventative" (paragraph 51).

[20] Having determined the scope and object of the Act, I now turn to the intention of Parliament. I note that the Act itself provides a number of sections where Staff can seek orders such as freeze orders under section 126 for interim preservation of property, applications to the Superior Court of Justice under section 128 that a person is not compliant with Ontario securities law, and applications under section 129 for the appointment of receiver.

[21] Finally, the language found in section 11 is very broad. It contains words such as "with respect to", "in respect of", "in relation to", and "in connection with". There have been a number of decisions that have held that those words, when used in the Statute of an administrative tribunal, import a broad meaning and are to be given significant latitude.

[22] Taking into consideration the language of section 11, the object of the Act, the scheme of the Act, and other provisions in the Act, it is my view that the investigative order made in this case was proper, and appropriate.

[23] Staff of the Commission has an obligation to enforce any sanctions order that has been made. While it is true that Staff has to seek that remedy in the Superior Court of Justice, in my view, Staff can nevertheless use the tools of an investigative order where it believes that there may be a transfer of assets so as to negate any sanctions order that is to be made, or has been made.

[24] Enforcement is an essential and fundamental object of the Act, and Staff is the appropriate party to seek timely enforcement of any order that the Commission may make. Staff does not have to wait until the assets have been transferred but may move to gather information. In essence, what is being sought here is the gathering of information for use, perhaps, in another forum.

[25] I want to thank counsel for excellent submissions, and in result the motion to vary or revoke the Order is dismissed.

DATED at Toronto this 3rd day of September, 2014.

"Alan Lenczner"

Alan J. Lenczner