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

- AND –

IN THE MATTER OF
DAVID CHARLES PHILLIPS and JOHN RUSSELL WILSON

REASONS AND DECISION REGARDING A MOTION FOR A STAY OF THE PROCEEDING

(Rule 3 of the Commission's *Rules of Procedure* (2012), 35 OSCB 10071)

Hearing:	September 10, 2014	
Decision:	January 14, 2015	
Panel:	Edward P. Kerwin	- Commissioner and Chair of the Panel
	C. Wesley M. Scott	- Commissioner
Appearances:	Freya Kristjanson	- For Staff of the Commission
	Alistair Crawley Bruce O'Toole	- For the Respondents

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REASONS AND DECISION

I. BACKGROUND

[1] A hearing before the Ontario Securities Commission (the "**Commission**"), pursuant to section 127 of the *Securities Act*, R.S.O. 1990, c. S.5, as amended (the "***Act***"), commenced on June 5, 2013 (the "**Merits Hearing**") to consider whether David Charles Phillips ("**Phillips**") and John Russell Wilson ("**Wilson**") (together, the "**Respondents**") breached certain provisions of the Act and acted contrary to the public interest (the "**OSC Proceeding**").

[2] A Statement of Allegations was filed by Staff of the Commission ("**Staff**" and together with the Respondents, the "**Parties**") on and dated June 4, 2012, and a Notice of Hearing was issued by the Commission on and dated June 4, 2012.

[3] Staff filed an Amended Statement of Allegations on and dated April 25, 2013 alleging that each of the Respondents directly or indirectly engaged or participated in an act, practice or course of conduct relating to securities which he knew, or reasonably ought to have known, would perpetrate a fraud on investors of First Leaside Group ("**FLG**"), contrary to subsection 126.1(b) of the *Act*. Staff also alleged that each of the Respondents made statements a reasonable investor would consider relevant in deciding whether to enter into or maintain a trading or advising relationship, which statements were untrue or omitted information necessary to prevent the statements from being false or misleading in the circumstances in which they were made, contrary to subsection 44(2) of the *Act*; failed to deal fairly, honestly and in good faith with their clients, contrary to section 2.1 of Commission Rule 31-505; and engaged in conduct contrary to the public interest and harmful to the integrity of the capital markets.

[4] The Merits Hearing began on June 5, 2013, and closing submissions were made on September 25, 2013. The Panel heard all the evidence and submissions of the Parties. The Panel has not rendered its decision on the Merits Hearing ("**Merits Decision**").

[5] The Respondents filed and served a Notice of Motion (the "**Stay Motion**") on and dated June 18, 2014, seeking an order to stay the OSC Proceeding against the Respondents. Specifically, the Respondents seek a stay of the release of the Merits Decision until a final determination of the civil action commenced by certain investors in FLG against the Commission, and others, in Court File CV-13-492385 dated November 7, 2013 (the "**Civil Action**").

[6] The Respondents filed and served a Memorandum of Fact and Law, a Brief of Authorities and a Motion Record on and dated July 28, 2014. Staff filed and served a Memorandum of Fact and Law, a Brief of Authorities and a Motion Record on and dated August 25, 2014. The Stay Motion was heard on September 10, 2014.

[7] The Respondents brought the Stay Motion because the Respondents are of the view that there is a real possibility of a conflict of interest between the interests of the Commission and its duty to hold a fair and proper hearing. The Respondents submit that

there is significant overlap in the issues to be determined in the OSC Proceeding and the Civil Action that would give rise to a reasonable apprehension of bias on the part of the Panel. The Respondents submit that there is an actual or perceived incentive for the Commission to deflect blame for the collapse of FLG onto, among others, the Respondents, in order to protect its own interests and reputation.

[8] Staff opposes the Stay Motion pending the outcome of the Civil Action. Staff submits that there is no reasonable apprehension of bias on the part of the Panel. Accordingly, the Stay Motion should be dismissed.

II. THE RESPONDENTS' SUBMISSIONS

[9] The Respondents submit that a group of FLG investors, by way of Notice of Action dated November 7, 2013, commenced the Civil Action against the Commission and certain members of Staff, seeking $18,000,000 in damages for negligence accompanied by bad faith, misfeasance in public office, conspiracy, abuse of process, breach of fiduciary duty, intentional interference with economic and contractual relations, negligent misrepresentation and negligent investigation. The Respondents submit that the Civil Action was brought solely by investors who acquired securities between August 22 and October 28, 2011 (the "**Sales Period**"). The Respondents submit that they did not commence and are not parties to the Civil Action.

[10] The Respondents also submit that there is a significant overlap in the issues to be determined in the OSC Proceeding and in the Civil Action since the central critical issue to be decided by the Commission, is "whether the respondents failed to ensure that 'important facts' regarding FLG were disclosed to investors." Accordingly, the Respondents submit that the Commission must determine the following factual determinations in the OSC Proceeding which they submit are also at issue in the Civil Action:

(i) whether the retainer of Grant Thornton Limited ("**Grant Thornton**") by legal counsel to FLG to conduct a viability review of FLG was voluntary;

(ii) the appropriate interpretation of the report of Grant Thornton dated August 19, 2011 in respect of FLG (the "Grant Thornton Report");

(iii) whether the undertaking provided by Phillips to the Commission on March 18, 2011 that no sale will be made to any investors of any debt or equity in certain FLG entities was voluntarily extended at the September 1, 2011 meeting with Staff;

(iv) whether the Commission was aware that FLG, through the Respondents and its other sales people, was selling investments during the Sales Period;

(v) whether the directors and management of FLG, including the Respondents, were given the legal advice that they could not disclose the Grant Thornton Report;

(vi) whether the directors and management of FLG, including the Respondents, responded appropriately to the recommendations in the Grant Thornton Report, including the implementation of the Base Model (as defined in the Grant Thornton Report); and

(vii) whether there were material changes in circumstances from September 1, 2011 to October 28, 2011, warranting the threat of a cease trade (collectively the "**Proposed Factual Determinations**").

[11] The Respondents further submit that there is an actual or perceived incentive for the Panel to deflect blame for the collapse of FLG onto the former members of management and the board of directors, including the Respondents, in order to absolve the Commission from responsibility for the financial losses which befell the investors. In the Respondent's submission, this is because the Commission, in its Statement of Defence in the Civil Action, asserts that investors' losses were the result of the failure of FLG management to ensure that 'important facts' regarding FLG were disclosed to investors.

[12] It is the Respondents' position that the release of the Merits Decision should be stayed because there is a real possibility of a conflict of interest between the interests of the Commission and its duty to hold a fair and proper hearing, and that this conflict puts the integrity of the Commission at risk. The Respondents submit that there is no danger to the public interest as a result of delay in concluding the OSC Proceeding as the Respondents are not engaged in selling securities.

III. STAFF'S SUBMISSIONS

[13] Staff submits that the Respondents have the evidentiary burden to establish that a reasonable apprehension of bias exists on the part of the Panel and the Respondents have not met this burden. Staff submits that, instead, the Respondents rely on conjecture and speculation. Staff submits that there is no reasonable apprehension of bias on the part of the Panel.

[14] Staff also submits that there are significant safeguards in place to ensure the impartiality of the Panel. In support of this submission, Staff relies on the duties of the Panel under the *Act*, the Commission's *Charter of Governance Roles and Responsibilities* (the "**Charter of Governance**"), the Commission's *Guidelines for Members and Employees Engaged in Adjudication* (the "**Adjudication Guidelines**"), the *Commission Code of Conduct* (the "**Code of Conduct**"), the *Conflict of Interest Rules for Public Servants (Ministry) and Former Public Servants (Ministry)*¸Ontario Regulation 381/07, pursuant to the *Public Service of Ontario Act*, 2006, S.O. 2006, c. (the "***PSOA***" and the "***PSOA Rules***") and the common law.

[15] It is Staff's position that a reasonable person would not conclude that the prospect of liability for the Commission as a result of the Civil Action would create a reasonable apprehension of bias on the part of the Panel in the OSC Proceeding for the following reasons:

(i) there is a strong presumption of impartiality at law on the part of the Panel;

(ii) the adjudicative framework including the Adjudication Guidelines provides safeguards to ensure impartiality;

(iii) the lack of personal financial interest in the Civil Action or the OSC Proceeding on the part of the Panel;

(iv) the evidence and arguments of the Merits Hearing were completed prior to the commencement of the Civil Action and the filing of a lawsuit against the Commission does not freeze all adjudicative proceedings which may involve similar parties or issues;

(v) the role of the Respondents in the Civil Action has the appearance of self-help in engineering a conflict or a perception of bias; and

(vi) there are significant differences between the Civil Action and the OSC Proceeding.

[16] Staff further submits that it is in the public interest and the interest of justice for the Panel to release the Merits Decision since the Civil Action involves different parties and there are different issues to be decided. Additionally, Staff submits that the Civil Action could be delayed for a period of more than two years given the stage of the proceedings relating to the Civil Action.

[17] Staff submits that it is important for the Commission to deal with matters in a timely and efficient manner. Accordingly, it is in the public interest to conclude the proceedings and release the Merits Decision. It is Staff's position that to stay the Merits Decision would create an incentive for those subject to regulatory proceedings to encourage others to commence litigation against the adjudicative body, thereby tarnishing the appearance of the administration of justice. Notwithstanding the fact that the Respondents are not a named party to the Civil Action, Staff presented evidence that the Respondents were involved at the inception of the Civil Action. Staff submitted that, as of November 2013, Phillips was the liaison member of the instructing committee of the FLG investors who were the plaintiffs in the Civil Action, with responsibility for interfacing with the legal team on behalf of the plaintiffs in the Civil Action. Staff also submits that each of the Respondents provided their "complete cooperation" to the plaintiff FLG investors in the Civil Action that allowed the FLG investors to commence the Civil Action against the Commission and certain individuals, in order to allegedly reduce the likelihood of investors suing the Respondents.

[18] Staff submits that the issues raised by the Respondents may be dealt with on appeal. Accordingly, there would be irreparable harm to the public interest by restraining the release of the Merits Decision.

IV. THE ISSUE

[19] This Panel must determine whether it should exercise its discretion to grant the Stay Motion and delay the release of the Merits Decision until a final determination of the

Civil Action. The question that this Panel must determine is whether releasing the Merits Decision would give rise to a reasonable apprehension of bias on the part of the Panel.

V. THE LAW

[20] The law on reasonable apprehension of bias is well-established in Canada, and has been considered on a number of occasions. The test for determining whether a reasonable apprehension of bias exists is set out in *Committee for Justice and Liberty v Canada (National Energy Board)*, [1978] 1 SCR 369 ("***National Energy***") where the Supreme Court of Canada stated that:

> …the apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information … [The] test is "what would an informed person, viewing the matter realistically and practically — and having thought the matter through — conclude. Would he think that it is more likely than not that [the decision maker], whether consciously or unconsciously, would not decide fairly." (the "**Reasonable Apprehension of Bias Test**") (para. 40).

The Reasonable Apprehension of Bias Test has been applied by the Supreme Court of Canada in *Newfoundland Telephone Co v Newfoundland (Board of Commissioners of Public Utilities)*, [1992] 1 SCR 623 and was applied by the Commission in *Re Norshield Asset Management (Canada) Ltd*, (2009) 32 OSCB 1249 ("***Re Norshield***").

[21] When applying the Reasonable Apprehension of Bias Test, there is a strong presumption of impartiality on the part of the Panel. In *E.A. Manning Ltd v Ontario (Securities Commission)*, [1995] OJ No 1305 ("***E.A. Manning***"), the Ontario Court of Appeal held that:

> …It must be presumed, in the absence of any evidence to the contrary, that the Commissioners will act fairly and impartially in discharging their adjudicative responsibilities and will consider the particular facts and circumstances of each case (para 28).

VI. ANALYSIS

[22] We find that an informed person, viewing this matter realistically and practically, and having thought the matter through, would think that it is more likely than not that the Panel would decide the Merits Decision fairly. We dismiss the Respondent's submission that the release of the Merits Decision would cause a reasonable and informed person to conclude that the Panel would try to deflect blame for the collapse of FLG onto the Respondents in order to absolve the Commission from responsibility for the financial losses which befell the investors.

[23] We have considered the following three questions in order to determine whether we should exercise our discretion to stay the release of the Merits Decision: whether

1. there is a reasonable apprehension of bias on the part of the Panel;

2. it is in the interest of justice to grant the Stay Motion; and

3. it is in the public interest to grant the Stay Motion.

1. The Reasonable Apprehension of Bias Test

[24] We find that the Respondents did not provide sufficient evidence to show a reasonable apprehension of bias on the part of the Panel.

[25] The burden of proof for the Stay Motion requires the Respondents to show that the Reasonable Apprehension of Bias Test is met; that is, would a "reasonable… and informed person, viewing the matter realistically and practically — and having thou*g*ht the matter through — conclude" that there is bias on the part of the Panel impairing its duty to impartially adjudicate the allegations made against the Respondents. The Respondents have not met this burden of proof.

[26] Commissioners who serve on hearing panels are deemed to exercise their adjudicative role impartially and independently. The Commission in *Re Norshield*, referring to the decision in *E.A. Manning*, stated that "Commissioners are to be afforded the same presumption as judges that they will act fairly and impartially in discharging their adjudicative responsibilities and will consider the particular facts and circumstances of each case" (*Re Norshield* at para. 119).

[27] Hearing panels of the Commission are mandated by statute, common law and the governing provisions of the Commission to decide matters independently on the evidence before them. Accordingly, there are many safeguards in place to ensure that the Panel is, and remains, impartial. These safeguards include the *Act*, the *Statutory Powers Procedure Act, RSO 1990, c S 22 as amended* (the "***SPPA***"), the Rules of Procedure of the Commission (2012), 35 O.S.C.B. 10071, as amended, made under the *SPPA* (the "**Rules of Procedure**"), the Charter of Governance, the Adjudication Guidelines, the Code of Conduct, the PSOA Rules and principles of administrative law (including duties of procedural fairness and the obligation to make decisions based on the evidence) (collectively, the "**Safeguards**"). The Safeguards established by law and the adjudicative framework are important elements in providing the context within which to apply the Reasonable Apprehension of Bias Test.

[28] Proceedings before the Hearing Panel are governed by the Act, the *SPPA*, the Commission's *Rules of Procedure*, principles of administrative law and the common law. Panel members are also governed by the Charter of Governance, the Adjudication Guidelines and the Code of Conduct. The Adjudication Guidelines provide that:

> …Members should conduct their deliberations and make their decisions independently of other Members of the Commission who are not on the Panel. The prospect of disapproval from any person, institution, or group, including other Members, should not deter a Member from making the decision that he or she believes is fair and just. (Article 3.6 of the Adjudication Guidelines)

[29] Commissioners should decide on what they believe is fair and just, irrespective of any disapproval from others. Article 5 of the Adjudication Guidelines states that "members should endeavor to independently perform their adjudicative roles and functions in accordance with these Guidelines". The Charter of Governance also states that "members perform their adjudicative function by individually serving on adjudicative panels that conduct hearings and render decisions independently of the Commission as a whole" (Charter of Governance p 4).

[30] The Supreme Court of Canada in *Brosseau v Alberta (Securities Commission)*, [1989] 1 SCR 301 ("***Brosseau***") held that the "structure of the Act whereby commissioners could be involved in both the investigatory and adjudicatory functions did not, by itself, give rise to a reasonable apprehension of bias" (*Brosseau, supra,* at para. 39). The combination of the enforcement and adjudicative functions, to the extent that it is authorized by the Act, cannot form the grounds of a challenge of a reasonable apprehension of bias or lack of independence (*Norshield, supra* at para. 104).

[31] In *Brosseau,* the Supreme Court of Canada also recognized that "had there been any evidence of a possible conflict between the interest of the Commission in the outcome of the hearing, and their duty to give a fair hearing to the appellant, it would be a different matter, and might raise a reasonable apprehension of bias" (*Brosseau, supra*, at para. 41).

[32] The Respondents' submissions are based on a perceived incentive for the Panel to deflect blame for the collapse of FLG onto, among others, the Respondents, in order to absolve the Commission from responsibility for the financial losses which befell the investors. Accordingly, the Respondents submit that there is a real possibility of a conflict of interest between the interests of the Commission and the duty of the Panel to hold a fair and proper hearing.

[33] The Respondents also submit that there is significant overlap in the issues to be determined in the OSC Proceeding and the Civil Action and this overlap gives rise to a reasonable apprehension of bias.

[34] Notwithstanding their submissions, the Respondents failed to demonstrate how a reasonable and informed person, having thought the matter through, would conclude that there is a reasonable apprehension of bias on the part of the Panel particularly in light of the Safeguards.

[35] The Respondents failed to show a conflict between the interests of the Commission in the outcome of the hearing and the Panel's duty to give a fair hearing to the Respondents. The Respondents do not assert that the Panel is actually biased.

[36] In considering the Proposed Factual Determinations submitted by the Respondents we find that the OSC Proceeding is separate and apart from the Civil Action. The Civil Action is a proceeding under different procedural and evidentiary rules which may result in different findings by the trier in the Civil Action notwithstanding the findings of the Panel in the Merits Decision. The Proposed Factual Determinations are not issues that the Panel must determine, except, to consider whether the Respondents relied on legal advice

in deciding whether or not to disclose the Grant Thornton Report. However, we find that the question of whether or not the Respondents relied on legal advice in deciding whether or not to disclose the Grant Thoronton Report is not sufficient to grant the Stay Motion. In *Howe v Institute of Chartered Accountants of Ontario* (1994) 21 OR 3d 315 ("***Howe***"), the Ontario Divisional Court held, and the Ontario Court of Appeal affirmed, that "overlapping issues alone will not lead to a stay" (para 41).

[37] The inquiry into reasonable apprehension of bias is highly fact-specific and contextual (*Wewaykum Indian Band v. Canada*, [2003] S.C.J. No. 50 at para. 77).

[38] The Respondents rely on *Curtis v Manitoba (Securities Commission)* 2006 MBCA 135 ("***Curtis***") in which the Manitoba Court of Appeal ordered a stay of the Manitoba Securities Commission's proceeding because of a finding of reasonable apprehension of bias. In Re Curtis, the respondents were adversarial co-defendants with the Manitoba Securities Commission in a class action suit commenced prior to the hearing. The Court found that there was an actual or perceived incentive for the Manitoba Securities Commission "to deflect blame from itself onto the [respondents] in order to protect its own interests and reputation."

[39] *Curtis, supra* was distinguished on its facts by the Divisional Court in *Xanthoudakis v. Ontario Securities Commission,* 2011 ONSC 4685 ("***Xanthoudakis 2011***"). In that case, the Divisional Court considered comments made by the Chair of the Commission in a media interview, which was held during the hearing and in which the Commission's own actions in the matter were challenged. The Divisional Court considered the overall structure and organization of the Commission, including the Safeguards, and found that a reasonable, fully-informed person would recognize the separation of the adjudicative function from the investigative function and the Chair of the Commission and would not conclude that the Commission had pre-judged the matter (*Xanthoudakis 2011, supra*, at paras. 36-51).

[40] In *Pearlman v. Manitoba Law Society*, [1991] 2 S.C.R. 869, the Supreme Court of Canada found that the any alleged pecuniary interest that the members of the judicial committee might have in a costs award against the lawyer who was the subject of the disciplinary proceeding was "far too attenuated and remote to give rise to a reasonable apprehension of bias."

[41] Staff submits that the possibility that the Civil Action could result in adverse financial consequences for the Commission is also far too attenuated and remote, particularly given that the Panel has no personal financial interest in the outcome of the Civil Action.

[42] In this matter, unlike in *Re Curtis*, the Respondents are not co-defendants with the Commission to the Civil Action, (ii) the Merits Hearing, including the tendering of evidence and closing submissions by the Parties, was concluded prior to the commencement of the Civil Action and (iii) the Respondents were involved in commencing the Civil Action and thereby creating the alleged bias.

[43] In an email dated June 19, 2014 (the "**June 19, 2014 Email**") from Counsel to the Respondents to Staff, and in another email dated and sent November 21, 2013 (the "**November 21, 2013 Email**") from a plaintiff named in the Civil Action to another plaintiff in the Civil Action there is evidence that the Respondents had some involvement at the initial stages when a broader civil claim was being considered. Specifically, in the November 21, 2013 Email a named plaintiff to the Civil Action wrote: "this law suit is certainly not in their [the Respondents] interests, but we could not have contemplated it without their [the Respondents] complete co-operation". (Motion Record of Staff, Tabs E and N).

[44] The Alberta Court Appeal in *Boardwalk REIT LLP v Edmonton (City),* 2008 ABCA 176 ("***Boardwalk***") held that one cannot attempt to create a reasonable apprehension of bias by his own actions and that "such attempts of self-help by engineering perceived conflicts are firmly rejected, for obvious reasons of justice and policy" (*Boardwalk* at para. 72).

[45] We find that a reasonable, fully-informed person would conclude that it was more likely than not that the Panel would decide the matter fairly given the Safeguards, and that the alleged source of bias are allegations made against the Commission in the Civil Action, which was commenced with the Respondents' involvement and after the hearing of evidence and submissions in the Merits Hearing had concluded.

[46] While it is critical that the public's confidence in the impartiality and integrity of governmental administrative agencies be maintained, the Respondents in this case have not established a reasonable apprehension of bias on the part of the Panel to warrant a stay of the proceeding. The Respondents have not shown how the release of the Merits Decision will not maintain the public's confidence as described in *Curtis*.

2. The Interest of Justice Test

[47] The Panel can exercise its discretion to grant the Stay Motion if the interests of justice support delaying the release of the Merits Decision. In *Xanthoudakis v Ontario (Securities Commission)* [2009] O.J. No. 1873 ("***Xanthoudakis 2009***"), the Divisional Court stated that:

> [t]he overarching consideration in determining whether a stay should be granted is whether the interests of justice call for a stay. This court has often said that it is undesirable to grant a stay of tribunal proceedings absent "exceptional or extraordinary circumstance demonstrating that the applicants must be heard" (para. 35).
>
> The Divisional Court in para. 36 adopted the frequently quoted statement from *Ontario College of Art v Ontario (Human Rights Commission),* [1993] O.J. No. 61 at para. 6: For some time now the Divisional Court has ...taken the position that it should not fragment proceedings before administrative tribunals. Fragmentation causes both delay and distracting interruptions in administrative proceedings. It is preferable, therefore, to allow such matters to run their full course before the tribunal and then consider all legal issues arising from the

> proceedings at their conclusion. In particular, at that time, these applicants will have a full right of appeal....".

The Divisional Court dismissed the stay motion, and at para. 39 held that the public interest favoured the continuation of the OSC proceeding:

> In my view the public interest favours the continuation of this proceeding to allow the timely determination of the proceedings. The OSC has an important public interest mandate in regulating the financial market. These are important public interest proceedings that have been outstanding for two years and are near completion. The Divisional Court could address the issues raised in this appeal, together with any other grounds of appeal, in one hearing after the OSC proceedings have been concluded on the merits.

[48] In *Korea Data Systems (USA) Inc. v Amazing Technologies Inc.* 2012 ONCA 756 ("***Korea Data Systems***"), the Ontario Court of Appeal held that the statutory power to grant a stay, empowers the court to stay proceedings where "it is in the interest of justice that the proceedings be stayed" (para. 18). The court also stated in para. 18 that this "applies equally to the exercise of this Court's jurisdiction to stay an appeal pending the disposition of another body".

[49] The Ontario Court of Appeal, in *Korea Data Systems,* identified certain factors that are relevant in exercising the discretion to stay a proceeding, including "irreparable harm or an imbalance of convenience", "the public interest in the fair, well-ordered and timely disposition of litigation", and "the effective use of scarce public resources" (para. 19).

[50] Applying these factors to the facts in this matter, the public interest is better served through timely and efficient proceedings. The Respondents did not demonstrate the irreparable harm they would suffer from the release of the Merits Decision in view of the fact that they are not named parties to the Civil Action, and that the Respondents have a statutory right of appeal after the conclusion of the OSC Proceeding.

3. The Public Interest

[51] We find that it is in the public interest to conclude the OSC Proceeding and dismiss the Stay Motion. Although a discussion of the public interest may form part of the interests of justice test, we have decided to discuss it separately in light of the importance of this factor in this particular case.

[52] The Respondents submit that the public interest would not be harmed by a stay of the proceeding because neither of the Respondents is engaged in selling securities and Phillips remains subject to a cease trade order. However, the Respondents failed to address whether granting the Stay Motion would impact the timely and efficient enforcement of securities law in Ontario's capital markets and investor confidence in the capital markets.

[53] Section 1.1 of the Act provides that the purposes of the Act are:

(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.

[54] The Supreme Court of Canada has recognized that the primary goal of securities legislation is the protection of the investing public, intended to be exercised to prevent likely future harm to Ontario's capital markets. (*Committee for the Equal Treatment of Asbestos Minority Shareholders v Ontario (Securities Commission)*, [2001] 2 SCR 132 at paras. 37, 39 and 42) To achieve this goal the Commission has "a very broad discretion to determine what is in the public's interest". (*Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 SCR 557 at para 75) This broad discretion allows the Commission to intervene whenever the conduct is contrary to the public interest, even when there is no specific breach of the Act (*Re Canadian Tire Corp*. (1987), 10 OSCB 857 at paras. 124-126)

[55] The scope of the Commission's discretion in defining the public interest is limited only by the general purposes of the *Act*. (*Gordon Capital Corp. v Ontario (Securities Commission)*, [1991] 50 OAC 258 (Div Ct) at para. 37) The public interest demands that matters be dealt with expeditiously. The regulator's ability to respond efficiently and effectively is a fundamental requirement for a properly functioning capital market. It is in the public interest to maintain a system of securities regulatory enforcement that effectively and expeditiously deals with allegations of capital market misconduct to protect the public (*Re Arbour Energy* (2009) ABASC 366 at paras. 53-57).

[56] In *Howe*, the Court held that:

> To permit the disciplinary hearings in the case at bar to be blocked indefinitely by the existence of civil actions which may not be prosecuted expeditiously and which may ultimately be settled would be quite inconsistent, in my opinion, with a recognition of the public interest in the disciplinary proceedings.

[57] In *Re Robinson* (1993) 1 CCLS 248, the Commission held that "the public expects and requires that this Commission will move expeditiously to deal with market participants who are alleged to have engaged in conduct which is abusive of the capital markets" (para. 13).

[58] As noted above, the Divisional Court dismissed the stay motion in *Xanthoudakis 2009* and held that the public interest favoured the continuation of the OSC proceeding.

[59] We are concerned that it may take a number of years for the Civil Action to achieve some form of finality. Additionally, there is a wider concern that a stay of the OSC Proceeding in these circumstances would create an incentive on the part of those subject to such proceedings to encourage others to commence litigation against the Commission.

VII. CONCLUSION

[60] The Respondents have failed to establish a reasonable apprehension of bias on the part of the Panel by the release of the Merits Decision, and the interests of justice test calls for a release of the Merits Decision. Equally, the public interest is served by the conclusion of the OSC Proceeding.

[61] For these reasons, the Stay Motion is dismissed.

DATED at Toronto this 14th day of January, 2015.

"Edward P. Kerwin"	*"C.W.M. Scott"*
Edward P. Kerwin	C.W.M. Scott