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
CONRAD M. BLACK, JOHN A. BOULTBEE
AND PETER Y. ATKINSON

REASONS AND DECISION
(Subsections 127(1) and (10))

Hearing:	October 6, 8, 9, 10 and 28, 2014		
Decision:	February 26, 2015		
Panel:	Christopher Portner	-	Commissioner and Chair of the Panel
	Judith N. Robertson	-	Commissioner
Appearances:	Anna Perschy Jed Friedman	-	For the Ontario Securities Commission
	Peter F.C. Howard Sinziana R. Hennig	-	For Conrad M. Black
	John A. Boultbee	-	For himself

TABLE OF CONTENTS

I. INTRODUCTION

A. Background

[1] This matter originally arose as the result of a Notice of Hearing issued by the Ontario Securities Commission (the "**Commission**") to Hollinger Inc. ("**Hollinger**"), Conrad M. Black ("**Black**"), F. David Radler ("**Radler**"), John A. Boultbee ("**Boultbee**") and Peter Y. Atkinson ("**Atkinson**") on March 18, 2005 (the "**Original Notice of Hearing**").

[2] The Original Notice of Hearing set out the Commission's intention to hold a hearing on May 18, 2005 to consider whether, pursuant to sections 127(1) and 127.1 of the *Securities Act*, R.S.O. 1990, c. S.5, as amended (the "**Act**"), it was in the public interest for the Commission to make orders relating to Hollinger, Black, Radler, Boultbee and Atkinson (collectively, the "**Original Respondents**") as the result of the allegations made against them in the Statement of Allegations issued by the Staff of the Commission ("**Staff**") on March 18, 2005 (the "**Original Statement of Allegations**").

[3] The Original Notice of Hearing and the Original Statement of Allegations were replaced more than eight years after they were issued by a new Notice of Hearing (the "**Notice of Hearing**") and an Amended Statement of Allegations (the "**Amended Statement of Allegations**") which were both dated July 12, 2013.

[4] The Amended Statement of Allegations seeks an order against the respondents named therein, including Black and Boultbee, based on subsections 127(1) and 127(10) of the Act. The hearing to determine whether such an order should be made was held on October 6, 8, 9, 10 and 28, 2014. These are our reasons and decision in this matter.

[5] To provide a context for our reasons and decision, we have set out in the paragraphs that immediately follow, a summary of the lengthy procedural history of this matter.

[6] In very general terms, Staff alleged in the Original Statement of Allegations, among other things, that:

(a) Hollinger diverted funds from Hollinger's principal subsidiary, Hollinger International Inc. ("**International**"), to Hollinger in connection with several sales by International of community newspaper properties it owned in the United States of America (the "**United States**" or the "**U.S.**");

(b) Hollinger made statements in its continuous disclosure filings with the Commission that were misleading or untrue, including statements in respect of non-competition payments made to Black, Radler, Boultbee and Atkinson (collectively, the "**Individual Respondents**") as well as to Ravelston Corporation Limited, a privately-held corporation controlled by Black ("**Ravelston**");

(c) Hollinger failed to disclose the interests of Hollinger insiders in certain of the transactions referred to in paragraph (b) above, contrary to the requirements of Ontario securities laws;

(d) The Original Respondents failed to adequately disclose and address the conflicts of interest on the part of the Individual Respondents in the transactions referred to paragraph (b) above; and

(e) The Individual Respondents, collectively or individually, authorized, permitted or acquiesced in the alleged misconduct of Hollinger, authorized the diversion of funds characterized as non-competition payments and breached the fiduciary duties they owed to Hollinger and International.

[7] On January 24, 2006, the Commission ordered that the hearing on the merits of the matter would commence in June 2007, subject to each of the Individual Respondents agreeing to execute undertakings in which they would commit to the Commission that they would refrain from certain activities. Copies of the undertakings in a form satisfactory to the Commission (collectively, the "**Initial Undertakings**") were attached to the order of the Commission dated March 30, 2006 which ordered that the hearing on the merits of the matter would commence on June 1, 2007.

[8] On August 17, 2006, a grand jury in Chicago returned a seventeen count indictment against Black, Boultbee and others. On January 10, 2007, the U.S. government filed a Superceding Information (the "**Information**"), having removed some of the allegations from the original indictment, which charged Black, Boultbee and others with having committed multiple counts, or causes of action (collectively, the "**Counts**")[1] relating to the sale by International of its U.S. community newspaper assets to which reference is made in paragraph [6](a) above, namely, (i) mail and wire fraud; (ii) money laundering; (iii) obstruction of justice; (iv) racketeering; and (v) criminal tax violations.

[9] On April 4, 2007, the Commission ordered that the commencement of the hearing on the merits would be postponed to November 12, 2007, and in one of the recitals to the order, stated that the Individual Respondents had replaced their Initial Undertakings with amended undertakings (collectively, the "**Undertakings**" and, individually, an "**Undertaking**"), copies of which were attached to the order (*Re Hollinger Inc. et al* (2007), 30 O.S.C.B. 3507). The Undertakings of Black and Boultbee have remained in force pending the Commission's final decision in this matter.

[10] Under the terms of the Undertakings, each of the Individual Respondents undertook that, pending the Commission's final decision on liability and sanctions in the proceeding commenced by the Original Notice of Hearing, they would refrain from (i) acting or becoming an officer or director of a reporting issuer or affiliated company of a reporting issuer, as such terms are defined in the Act (with limited exceptions, in the case of Black); (ii) applying to become a registrant or from being an employee, director or officer of a registrant or an affiliated company of a registrant, as such terms are defined in the

[1] Black was charged with thirteen Counts, while Boultbee was charged with eleven Counts.

Act; (iii) engaging directly or indirectly in the solicitation of investment funds from the general public; and (iv) trading and acquiring securities of Hollinger, whether directly or indirectly.

[11] The indictment described in paragraph [8] above marked the beginning of a lengthy trial, sentencing and appeal process in the United States which is reflected in the following decisions which were produced collectively, on consent of the parties, as part of Exhibit 1 in this proceeding ("**Exhibit 1**"):

(a) The Information (United States v. Black, 05-cr-727 (N.D. Ill. June 11, 2007) (Docket Entry [738]);

(b) United States v. Black, 05-cr-727 (N.D. Ill. July 13, 2007) (Docket Entries [814, 816]) ("**Criminal Jury Verdicts**");

(c) United States v Black, 05-cr-727 (N.D. Ill. Nov. 5, 2007), (Docket Entry [929]) (St. Eve, J.) ("**Conviction Appeal Judgment**");

(d) United States v. Black, 05-cr-727 (N.D. Ill. Dec. 10, 2007) (Docket Entry [972]) (St. Eve, J.) ("**Forfeiture Decision**");

(e) United States v. Black, 05-cr-727 (N.D. Ill. Dec. 10, 2007) (Docket Entries [979, 981]) (St. Eve, J.) ("**2007 Judgment Orders**");

(f) United States v. Black, 2007, 05-cr-727, Transcript of Sentencing Decision (N.D. Ill. Dec. 10, 2007) ("**2007 Black Sentencing Decision**");

(g) United States v. Boultbee, 2007, 05-cr-727, Transcript of Sentencing Decision (N.D. III. Dec. 10, 2007) ("**2007 Boultbee Sentencing Decision**");

(h) United States v. Black, 530 F. 3d 596 (7th Cir. 2008) ("**2008 Appeal Decision**");

(i) Black v. United States, 130 S. Ct. 2963 (2010) ("**U.S. Supreme Court Decision**");

(j) United States v. Black, 625 F. 3d 386 (7th Cir. 2010) ("**2010 Appeal Decision**");

(k) United States v. Black, 131 S. Ct. 2932 (2011) ("**2011 Supreme Court Certiorari Denial**");

(l) United States v. Black, 05-cr-727 (N.D. Ill. Mar. 24, 2011/June 24, 2011) (Docket Entries [1182, 1217]) ("**2011 Judgment Orders**");

(m) United States v. Boultbee, 05-cr-727-1 (N.D. Ill. Feb. 10, 2011) ("**2011 Boultbee Sentencing Decision**");

(n) United States v. Black, 05-cr-727-1 (N.D. Ill. June 24, 2011) ("**2011 Black Sentencing Decision**");

(o) Boultbee v. United States, 12-cv-04002 (N.D. Ill. August 14, 2012) (Docket Entry [8]) (St. Eve, J.) ("**Boultbee Collateral Appeal Judgment**"); and

(p) Black v. United States, 12-cv-4306 (N.D. Ill. Feb. 19, 2013) (Docket Entry [52]), (St. Eve, J.) ("**Black Collateral Appeal Judgment**");

(collectively, the "**U.S. Criminal Proceeding**").

[12] The jury trial of all Counts described in the Information, which took place in Chicago and lasted approximately four months, was presided over by Judge Amy St. Eve ("**Judge St. Eve**") of the United States District Court for the Northern District of Illinois, Eastern Division (the "**U.S. District Court**"). On July 13, 2007, the jury found Black guilty of three Counts of mail fraud (Counts One, Six and Seven) and one count of obstruction of justice for concealing documents from an official proceeding (Count Thirteen), and not guilty of nine other Counts with which he had been charged. Boultbee was found guilty of the same three Counts of mail fraud as Black and not guilty of eight other Counts with which he had been charged.

[13] Following the completion of the appeals process in the U.S. Criminal Proceeding, Black and Boultbee remained convicted of one count of mail fraud (Count Seven), which related to unauthorized payments associated with two transactions which are described in paragraph [41] below, and Black remained convicted of obstruction of justice (Count Thirteen), which related to the concealment of documents from an official proceeding. Although the convictions of Black and Boultbee of Count One and Count Six[2] were reversed on appeal, the United States Court of Appeals for the Seventh Circuit stated in the 2010 Appeal Decision that "[t]he judge could consider at the resentencing hearing [for Black and Boultbee] the evidence that had been presented at the original trial concerning APC in determining what sentences to impose …" (2010 Appeal Decision, *supra* at p. 5).

[14] In addition to the U.S. Criminal Proceeding, on November 15, 2004, Black, Radler and Hollinger (but not Boultbee) were named as the defendants in a separate civil enforcement action initiated by the United States Securities and Exchange Commission (the "**SEC**"), the course of which is reflected in the following documents which were also produced as part of Exhibit 1:

(a) SEC v. Black, First Am. Complaint dated March 10, 2005 ("**SEC Complaint**");

[2] Counts One and Six related to the mailing of purported non-competition agreements between American Publishing Company, a subsidiary of International ("**APC**"), and each of the Individual Respondents, including Black and Boultbee, who received purported non-competition payments (the "**APC Payments**") in connection with the transaction with APC (the "**APC Transaction**").

(b) SEC v. Black, 04-cv-7377 (N.D. III. April 2, 2008) (Docket Entry [152]) (Hart, J.) ("**SEC Judgment as to Defendant Hollinger Inc.**");

(c) SEC v. Black, 04-cv-7377 (N.D. Ill. Sept. 24, 2008/Oct. 22, 2008) (Docket Entries [166, 170]) (Hart, J.) ("**SEC Summary Judgment**");

(d) SEC v. Black, 04-cv-7377 (N.D. Ill. April 30, 2009) (Docket Entry [182]) (Hart, J.) ("**SEC Disgorgement Order**");

(e) SEC v. Black, 04-cv-7377 (N.D. Ill. Feb. 21, 2012) (Docket Entry [214] (Hart, J.) ("**SEC Order Modification**");

(f) SEC v. Black, 04-cv-7377 (N.D. Ill. Apr. 19, 2012) (Docket Entry [219]) (Hart, J.) ("**SEC Judgment Modification**");

(g) SEC v. Black, 04-cv-7377 (N.D. Ill. Oct. 9, 2012) (Docket Entries [236, 237]) (Hart, J.) ("**SEC Oct. 9, 2012 Decision**");

(h) SEC v. Black, 04-cv-7377 (N.D. Ill. Dec. 7, 2012) (Docket Entry [247]) ("**SEC Black Appeal Notice**");

(i) SEC v. Black, 04-cv-7377 (N.D. Ill. July 2, 2013) (Docket Entry [263]) ("**SEC Joint Motion for Indicative Ruling**");

(j) SEC v. Black, 04-cv-7377 (N.D. Ill. July 2, 2013) (Docket Entry [266]) (Hart, J.) ("**SEC Indicative Ruling**"); and

(k) SEC v. Black, 04-cv-7377 (N.D. Ill. Aug. 13, 2013) (Docket Entry [270]) (Hart, J.) ("**SEC August 13, 2013 Judgment**");

(collectively, the "**SEC Proceeding**", and, together with the U.S. Criminal Proceeding, the "**U.S. Legal Proceedings**").

[15] The SEC Proceeding against Black was concluded, on consent of the parties, by the SEC August 13, 2013 Judgment (see paragraph [14](k) above**).** The SEC August 13, 2013 Judgment was based on Black's conviction in the U.S. Criminal Proceeding in connection with the purported non-competition payments that Black and others received which were also the subject of the SEC Complaint.

[16] The U.S. Legal Proceedings significantly affected the scheduling of the hearing initiated by the Original Notice of Hearing. As noted in the Commission's reasons dated January 24, 2006 (*Re Black* (2006), 29 O.S.C.B. 857), "common sense and judicial economy argue in favour of allowing the U.S. criminal proceedings to take place in advance of this hearing". Accordingly, following numerous adjournments, by order of the Commission dated October 7, 2009 (*Re Black* (2009), 32 O.S.C.B. 8049), the hearing relating to the Original Notice of Hearing was, at the request of Boultbee, adjourned

without a fixed date pending the release of the decision of the United States Supreme Court to which reference is made in Paragraph [11](i) above.

[17] Radler entered into a settlement agreement with Staff which was approved by order of the Commission on November 14, 2012 (*Re F. David Radler* (2012), 35 O.S.C.B. 10535), and on November 15, 2012, the Commission withdrew the allegations against Radler set out in the Original Statement of Allegations.

[18] On July 12, 2013, in the same period of time that the last of the U.S. Legal Proceedings were finally concluded[3], Staff withdrew the allegations against Hollinger set out in the Original Statement of Allegations and issued the Amended Statement of Allegations against Black, Boultbee and Atkinson.

[19] The Amended Statement of Allegations was issued in reliance on the inter-jurisdictional enforcement provisions of subsection 127(10) of the Act which permits the Commission to issue orders based on convictions of a person or company in any jurisdiction. The Amended Statement of Allegations is based on (i) the findings by the U.S. District Court that Black and Boultbee had committed mail fraud and, in the case of Black, other violations of the United States *Securities Exchange Act* of 1934; and (ii) the terms of Black's settlement agreement with the SEC. Staff also alleges that, by engaging in the conduct for which they were convicted in the United States, Black and Boultbee acted in a manner contrary to the public interest which warrants an order pursuant to subsection 127(1) of the Act, i.e., an order in the public interest.

[20] Black and Boultbee are the remaining respondents (collectively, the "**Respondents**") in the current proceeding as Atkinson entered into a settlement agreement with Staff which was approved by order of the Commission on September 23, 2013 (*Re Black et al.* (2013), 36 O.S.C.B. 9348).

[21] By Notice of Motion dated November 26, 2013, Black sought an order that either stayed the current proceeding, on the condition that his Undertaking would remain in effect, or, in the alternative, that provided directions regarding the scope of the issues to be determined at the hearing of the allegations set out in the Amended Statement of Allegations (the "**Hearing**") and the evidence that would be permitted at the Hearing. The motion was heard by the Commission on April 10 and 11, 2014.

[22] On June 13, 2014, we issued our Reasons and Decision with respect to Black's motion which dismissed his request for a stay and provided directions with respect to the scope of the evidence that would be permitted at the Hearing (*Re Black et al.* (2014), 37 O.S.C.B. 5847 (the "**June Decision**")).

[23] On August 11, 2014, we heard a motion by Boultbee to have his case severed from the current proceeding. On August 12, 2014, we issued an order dismissing Boultbee's severance motion and stated that our reasons would follow.

[3] The U.S. Criminal Proceeding was concluded on February 19, 2013 and the SEC Proceeding was concluded on August 13, 2013.

[24] On the first day of the Hearing on October 6, 2014, we heard motions from the parties with respect to a number of matters, including (i) a motion by Boultbee requesting that we review our earlier order dismissing his severance application; (ii) a motion by Boultbee that the Hearing be adjourned so that he would have time to review and assess our reasons for dismissing his severance application, when provided by the Panel, and appeal our further order dismissing his severance application, if applicable; (iii) a motion by Staff for directions regarding the scope of admissible evidence; and (iv) a request by Black for leave to produce an additional witness. We issued oral reasons with respect to all four matters on October 8, 2014 (the "**Oral Reasons**")[4]. We do not propose to summarize the Oral Reasons in these reasons other than to note that we did not approve Boultbee's requests for a severance and an adjournment, Staff's request for directions or Black's request to produce an additional witness.

[25] As a result of the June Decision and the Oral Reasons, Black and his two witnesses, Joan Maida, Black's long-standing personal assistant ("**Maida**"), and Donald Vale, the President of Hollinger at the relevant time ("**Vale**"), were permitted to testify and provide evidence relevant to the issue of any sanctions to be imposed, but expressly subject to the limitations relating to re-litigation previously summarized in the June Decision and the Oral Reasons. Maida and Vale both testified on October 9, 2014 and Black testified on October 10, 2014. Although Boultbee did not testify on his own behalf and did not call any witnesses, he did make written and oral submissions. Oral closing submissions by Staff and the Respondents were heard on October 28, 2014 and we also received written closing submissions from Staff and the Respondents.

[26] Black was present and represented by counsel during the course of the Hearing. Boultbee represented himself and participated by teleconference for certain portions of the Hearing. We accommodated Boultbee's request to participate by teleconference as he does not reside in Ontario. Boultbee was kept informed of the days on which witnesses testified so that he could make an informed decision with respect to his attendance by teleconference or in person. Boultbee participated by teleconference on October 6, 2014, for the part of the Hearing dealing with his motions, on October 8, 2014, for the part of the Hearing during which we provided our Oral Reasons, and on October 28, 2014, to provide his oral closing submissions.

[27] Subsequent to providing their closing submissions, Staff and Black were asked to provide a joint written submission on the meaning of the reference to certain types of issuers[5] to which reference is made in a written consent by Black dated May 27, 2013 ("**Black's Consent**") which was attached as Exhibit C to the SEC Joint Motion for Indicative Ruling (see paragraph [14](i) above). Staff and Black provided their joint written submission on November 5, 2014.

---

[4] The Oral Reasons were subsequently prepared in writing based on the transcript of the Hearing for the purpose of publication in the Commission's Bulletin. (*Re Black et al.* (2014), 37 O.S.C.B. 9697)

[5] The reference is to an issuer that has a class of securities registered pursuant to Section 12 of the United States *Exchange Act* [15 U.S.C. § 781] or that is required to file reports pursuant to Section 15(d) of the United States *Exchange Act* [15 U.S.C. § 7go(d)]. See also paragraph [51] of these reasons.

[28] In addition, during closing submissions, we set a timetable for the parties to file written materials with respect to costs. Staff filed its materials on November 7, 2014 and Black filed his materials on November 17, 2014. Staff filed reply submissions in support of a costs award on November 20, 2014.

B. The Respondents

[29] The following is a brief description of the Respondents and the companies with which they were involved.

1. Black

[30] Black was Chairman of the Board of Directors and Chief Executive Officer of Hollinger in 2000, the year in which the Forum and Paxton transactions[6] were concluded. He remained in these positions until his resignation in 2004.

[31] Black was also the Chairman of the Board of Directors and Chief Executive Officer of International in 2000. In November 2003, he retired as Chief Executive Officer of International, and, in January 2004, he was removed as the Chairman of the Board of Directors and as a director of International.

2. Boultbee

[32] Boultbee was the Executive Vice President, Chief Financial Officer and a director of Hollinger in 2000. He remained in these positions until his resignation in 2004.

[33] Boultbee served as the Executive Vice President of International in 2000, and for a period of time, also acted as the Chief Financial Officer of International. He remained at International until November 2003, when his employment with International was terminated.

3. Hollinger

[34] Hollinger was a reporting issuer in Ontario with its principal place of business in Toronto. Hollinger's shares were listed for trading on the Toronto Stock Exchange and were also registered with the SEC.

[35] Hollinger operated largely as a holding company, its primary asset being its investment in International. Hollinger had voting control of International but only held approximately one third of the equity in International during the relevant period of time.

[36] Black exercised voting control or direction over approximately three quarters of Hollinger's shares through private companies during the relevant period of time. As a result, he exercised indirect voting control over International at the relevant time even though he only owned indirectly approximately 15% of the equity of International.

[6] Described in paragraph [41] of these reasons.

4. International

[37] International was a Delaware corporation with its principal place of business in Chicago, Illinois. International was Hollinger's principal subsidiary. International's common shares were registered with the SEC and were listed for trading on the New York Stock Exchange. International was also a reporting issuer in Ontario. International owned and operated newspaper and publication businesses, including the National Post, the Chicago Sun-Times, the Daily Telegraph and the Jerusalem Post.

5. Ravelston

[38] Ravelston was an Ontario corporation with its principal office located in Toronto. Ravelston was a privately held corporation with 98.5 % of its equity owned by officers and directors of International and Hollinger, and 1.5 % of its equity owned by the estate of a former Hollinger director. Ravelston's principal asset was its controlling interest in Hollinger, which it held directly and through various subsidiaries, and which represented approximately 78% of Hollinger's equity during the relevant period of time. Through Conrad Black Capital Corporation, Black owned approximately 65.1% of Ravelston. Black was the Chairman of the Board of Directors and Chief Executive Officer of Ravelston.

[39] The Information states that Black and Boultbee were employees of Ravelston and that their services and those of other executives and staff were provided by Ravelston to International pursuant to a management services agreement between the two companies.

II. FINDINGS IN THE U.S. LEGAL PROCEEDINGS

[40] A brief summary of the U.S. Legal Proceedings is set out in paragraphs 3 and 4 of the June Decision. In the section below, we focus on the final decisions and findings of the U.S. Legal Proceedings on which we are relying on for the purposes of our decision in this matter.

A. The U.S. Criminal Proceeding

1. Mail Fraud (Count Seven)

[41] Count Seven related to the fraudulent payment of purported non-competition payments in connection with the sale of newspapers by International to each of Forum Communications Inc. ("**Forum**") and PMG Acquisition Corp. ("**Paxton**"). The sales are referred to in the documents included in Exhibit 1 as the Forum and Paxton transactions (the "**Forum and Paxton transactions**") and are part of the fraudulent scheme described in the Information as follows:

> 17. It was further part of the scheme that Ravelston, BLACK, BOULTBEE, ATKINSON, Radler and KIPNIS defrauded International in

> connection with the Forum and Paxton transactions. On or about September 30, 2000, International entered into an Asset Purchase Agreement to sell certain newspapers to Forum Communications Co. for $14 million, $400,000 of which was allocated to non-competition agreements. On or about October 2, 2000, International entered into an Asset Purchase Agreement to sell certain newspapers to Paxton for approximately $59 million, $2 million of which was allocated to non-competition agreements. Pursuant to the template established by Ravelston's agents, in both transactions KIPNIS inserted International and [Hollinger] as non-compete covenantors, and proposed that the amount allocated to the non-competition agreement be split 75% to International and 25% to [Hollinger]. As in prior transactions, [Hollinger] was included as a non-compete covenantor because KIPNIS, purportedly acting on behalf of International, inserted it as such. Neither Forum nor Paxton ever requested that [Hollinger] be included as a non-compete convenantor.
>
> …
>
> 21. It was further part of the scheme that on or about April 9, 2001, BLACK, BOULTBEE, ATKINSON, Radler and KIPNIS caused a subsidiary of International to pay a total of $600,000 to BLACK, BOULTBEE, ATKINSON and Radler as "supplemental non-competition payments." The "supplemental non-competition payments" were made to the defendants despite the fact that none of them had signed a non-competition agreement in connection with the Forum or Paxton transactions. These payments were thefts of International's corporate assets and fraudulent deprivations of honest services by all International agents who were involved. The payments to the individuals at International's expense also were related party transactions. BLACK, BOULTBEE, ATKINSON, Radler and KIPNIS failed to disclose these related party transactions to International's Audit Committee, thereby breaching their fiduciary duty, fraudulently depriving International of honest services, and concealing the scheme.
>
> (Information, at pp. 15, 16 and 17)

[42] The Information also stated that:

> As a publicly traded company, International was obligated to make regular filings with the United States Securities and Exchange Commission ("SEC"), and was obligated in those filings to disclose all material facts about the company to investors. Among other things, International was required to fully and accurately disclose in its SEC filings related party transactions and compensation paid to its officers and directors.
>
> (Information, at p. 8)

[43] In her Conviction Appeal Judgment, Judge St. Eve stated at page 6 that:

> The jury found each Defendant [Black and Boultbee] guilty of Count Seven of the Information. Count Seven charges them with mail fraud, in violation of 18 U.S.C. §§ 1341 and 1346. Count Seven charges a scheme to defraud involving $600,000 in non-competition payments taken out of the reserves from…the Forum and Paxton transactions, even though no non-competition agreements were executed in either of these transactions. It charges that Defendants knowingly caused a mailing in furtherance of the scheme on or about April 9, 2001 which contained four checks: $285,000 for Conrad Black; $285,000 for F. David Radler; $15,000 for John Boultbee; and $15,000 for Peter Atkinson. The $600,000 was referred to at trial as a "supplemental non-competition payment."

[44] Both Black and Boultbee were convicted of Count Seven.

2. Obstruction of Justice (Count Thirteen)

[45] With respect to Count Thirteen, which is the obstruction of justice Count relating to the concealment of documents from an official proceeding, the Information states that, on or about May 20, 2005, the SEC served on Black's counsel and others, a request for the production of documents. The SEC requested, among other things, "All documents relating to any matters that are the subject of the allegations contained in the [SEC's] Complaint."

[46] The Information further states that Black:

> … corruptly concealed, and attempted to conceal, records, documents, and other objects with the intent to impair their availability for use in official proceedings, namely the SEC proceeding against BLACK, the criminal investigation of BLACK by a Federal grand jury and the pending criminal proceeding against BLACK before a judge and court of the United States;
>
> (Information, at p. 58)

[47] Black was convicted of Count Thirteen (see findings set out in the Conviction Appeal Judgment, *supra* at p. 10, 2010 Appeal Decision, *supra* at pp. 2 and 3 and 2011 Black Sentencing Decision, *supra* at p. 132).

3. Sentencing (Counts Seven and Thirteen)

[48] At the resentencing hearing before Judge St. Eve, ordered by the U.S. Court of Appeals in the 2010 Appeal Decision (see paragraph [11](j) above), Black was sentenced on Counts Seven and Thirteen to 42 months of imprisonment (including time already served) and fined US$125,000. He was also ordered to pay a special assessment of US$200 and a forfeiture amount of US$600,000 and to serve a two year term of supervised release on both Counts, to be served concurrently, following his term of

imprisonment. Boultbee was sentenced on Count Seven to time already served in prison of 329 days, and was fined US$500 and ordered to pay restitution of US$15,000.

B. The SEC Proceeding

[49] As described in paragraph [14] above, on November 15, 2004, the SEC commenced a separate civil enforcement action against Black, Radler and Hollinger (but not Boultbee). The SEC Complaint (which was the First Amended Complaint issued on March 10, 2005) alleges that International's filings with the SEC were materially false and misleading because they failed to disclose certain purported non-competition payments relating to the sale of community newspaper properties it owned in the United States.

[50] The SEC Proceeding against Black was concluded on consent by the SEC August 13, 2013 Judgment (see paragraph [15] above**)**. The judgment was based on the SEC Joint Motion for Indicative Ruling which is described in greater detail in paragraph [110] below and included Black's Consent in which Black:

(a) Acknowledges that he was convicted of mail fraud in relation to certain purported non-competition payments that he and others received and which were the subject of the SEC Complaint;

(b) Consents to the entry of the final judgment which, among other things, prohibits him from acting as a director or officer of any issuer that has a class of securities registered pursuant to Section 12 of the *Exchange Act* [15 U.S.C. § 781] or that is required to file reports pursuant to Section 15(d) of the *Exchange Act* [15 U.S.C. § 78o(d)]; and

(c) Consents to pay US$4,094,144.36 in disgorgement and prejudgment interest.

[51] At the request of the Panel, Staff and Black provided a joint written submission dated November 5, 2014 relating to the meaning and scope of the officer and director ban described in paragraph [50](b) above. In their joint submission, Staff and Black agreed that Black consented not to be an officer and director of a company which:

(a) Elects to list a class of securities on a U.S. national securities exchange, e.g., the NASDAQ Stock Market, the New York Stock Exchange or another national securities exchange in the United States; and

(b) Has a class of its equity securities (other than exempted securities such as crowdfunding offerings) held of record by either (i) 2,000 persons; or (ii) 500 persons who are not accredited investors and, on the last day of the issuer's fiscal year, have total assets exceeding US$10 million.

With respect to the phrase "required to file reports pursuant to Section 15(d) of the *Exchange Act*, the joint submission stated that an issuer is required to file reports pursuant to the Section if it has filed a registration statement under the U.S. *Securities Act of 1933* to issue securities to the public and has more than 300 record holders of such securities.

III. RELIEF SOUGHT BY THE PARTIES

A. Staff's Position

[52] Staff requests that the following order be issued with respect to the Respondents, namely, that:

(a) Trading in any securities or derivatives by Black and Boultbee cease permanently (paragraph 2 of subsection 127(1) of the Act);

(b) The acquisition of any securities by Black and Boultbee be prohibited permanently (paragraph 2.1 of subsection 127(1) of the Act);

(c) Any exemptions contained in Ontario securities law do not apply to Black and Boultbee permanently (paragraph 3 of subsection 127(1) of the Act);

(d) Black and Boultbee resign all positions that they hold as a director or officer of any issuer, registrant, or investment fund manager permanently (paragraphs 7, 8.1 and 8.3 of subsection 127(1) of the Act);

(e) Black and Boultbee be prohibited from becoming or acting as a director or officer of any issuer, registrant, or investment fund manager permanently (paragraphs 8, 8.2 and 8.4 of subsection 127(1) of the Act); and

(f) Black and Boultbee be prohibited from becoming or acting as a registrant, as an investment fund manager or as a promoter permanently (paragraph 8.5 of subsection 127(1) of the Act).

[53] Staff takes the position that the requirements for the issuance of an order pursuant to subsections 127(1) and (10) of the Act have been satisfied. More specifically, Staff relies on the following criminal convictions as they relate to Counts Seven and Thirteen to "trigger" the application of subsection 127(10) of the Act:

(a) The Criminal Jury Verdicts (see paragraph [11](b) above);

(b) The 2011 Judgment Order entered by the U.S. District Court against Boultbee with respect to Count Seven on March 24, 2011 (see paragraph [11](l) above); and

(c) The 2011 Judgment Order entered by the U.S. District Court against Black with respect to Counts Seven and Thirteen on March 24, 2011 (see paragraph [11](l) above).

[54] Staff submits that the evidence of the foregoing "decisions, read in conjunction with the Information, makes clear that they related to offences which arose from a transaction, business or course of conduct related to securities." (Paragraph 9 of Appendix 3 of the Written Closing Submissions of Staff).

[55] Staff also submits that the phrase "related to" in paragraph 1 of subsection 127(10) has a broad meaning designed to convey that there is some relation between two things and refers to the decision of the Supreme Court of Canada in *Slattery (Trustee of) v. Slattery*, [1993] 3 SCR 430 at para 22) in which the Court held as follows:

> The phrase "in respect of" was considered by this Court in *Nowegijick v. The Queen*, [1983] 1 S.C.R. 29, at p. 39:
>
> > The words "in respect of" are, in my opinion, words of the widest possible scope. They import such meanings as "in relation to", "with reference to" or "in connection with". The phrase "in respect of" is probably the widest of any expression intended to convey some connection between two related subject matters.
>
> In my view, these comments are equally applicable to the phrase "relating to". *The Pocket Oxford Dictionary* (1984) defines the word "relation" as follows:
>
> > ... what one person or thing has to do with another, way in which one stands or is related to another, kind of connection or correspondence or contrast or feeling that prevails between persons or things;...
>
> So, both the connecting phrases of s. 241(3) suggest that a wide rather than narrow view should be taken when considering whether a proposed disclosure is in respect of proceedings relating to the administration or enforcement of the *Income Tax Act*.

[56] The Divisional Court has also held that the appropriate interpretation of the phrase "relating to" only requires demonstrating "some connection". (*Ontario Attorney General v. Toronto Star*, [2010] O.J. No. 1209 (Div. Ct.) at paras 42 and 43)

[57] Staff also submits that "Since the criminal and SEC investigations led to charges and judgments related to securities, investigations that led to those indictments and convictions also clearly relate to securities. Therefore, in Staff's submission, Black's obstruction of justice conviction also arises from a course of conduct relating to securities." (Paragraph 13 of Appendix 3 of the Written Closing Submissions of Staff)

[58] Staff relies on Black's Consent in which he agreed to be banned as an officer and director of certain issuers in the United States. By doing so, Staff submits that Black has both agreed with a securities regulatory authority to be made subject to sanctions,

conditions, restrictions or requirements and has been made subject to an order of a securities regulatory authority to that effect.

[59] Staff submits that the Respondents have not demonstrated any basis for the Commission to deny recognition of the convictions of the Respondents in the U.S. Criminal Proceeding or to deny recognition of the SEC August 13, 2013 Judgment which relates to Black alone. Staff refers in this regard to the decision in *Re New Futures Trading International Corp.* in which the Commission stated that:

> The onus will rest with the Respondents to show that there was no substantial connection between the Respondents and the originating jurisdiction, that the order of the foreign regulatory authority was procured by fraud or that there was a denial of natural justice in the foreign jurisdiction.
>
> (*Re New Futures Trading International Corp*. (2013), 36 O.S.C.B. 5713 at para. 27 ("***Re New Futures***"))

[60] Staff emphasizes in its submissions that this case is about the honesty and integrity of officers and directors who are entrusted with the responsibility of managing companies which are issuers in Ontario. In Staff's view, deterrence is the most relevant factor in this case when determining to make a protective order in the public interest. Staff's focus was on the need to impose an order on the Respondents that would achieve not only specific deterrence, but also general deterrence to ensure the maintenance of the high standards of fitness and business conduct required of officers and directors in Ontario. Staff submits that it is important to send a strong message to any like-minded individuals that the conduct engaged in by the Respondents is unacceptable for officers and directors of issuers in Ontario. Ontario shareholders should be able to trust that officers and directors are acting honestly, in good faith, and with a view to the best interests of the company.

[61] According to Staff, permanent bans are necessary in this case as Count Seven relates to fraud, and those who commit fraud should be removed permanently from Ontario's capital markets as participation in Ontario's capital markets is a privilege and not a right. In Staff's submission, the permanent bans requested will also deter others from similar abuses and maintain the high standards of business conduct required of all market participants in Ontario. Staff also takes the position that any permanent officer and director bans should apply to any issuer (including reporting issuers and non-reporting issuers), as a private company (Ravelston) was part of the sophisticated scheme that facilitated the fraud.

[62] Staff also submits that, even though the convictions of Black and Boultbee of Counts One and Six (in relating to the APC Transaction) were reversed on appeal, the Commission would be entitled to take the facts determined in the 2010 Appeal Decision into account in determining what order is in the public interest.

B. Positions of the Respondents

1. Black

[63] It is Black's position that he should not be subject to an order in Ontario based on his criminal convictions in the United States and/or his settlement agreement with the SEC.

[64] Black submits that, based on the authorities and as a matter of logic, our analysis must include the following steps:

> (a) Determine which foreign orders may be relied on under subsection 127(10), and what conduct was the subject of those orders;
>
> (b) Consider whether or not sanctions are necessary to protect the public interest, applying the test the Panel has set out, i.e., the likelihood of repetition of similar conduct; and
>
> (c) If necessary, consider what the appropriate sanction should be.
>
> (See *Re Elliot*, (2009), 23 O.S.CB. 6931 ("***Re Elliot***") at para. 27)

[65] Black further submits that, in order to properly exercise its decision-making power, the Commission cannot simply "rubber stamp" the findings of the foreign decision maker. He argues that this is not an attempt to have the U.S. Legal Proceedings re-litigated, rather that the Panel must have some understanding of the actual conduct that was found offensive in the foreign jurisdiction so as to assess the likelihood of repetition of similar conduct by Black in Ontario in the future. In Black's submission, for the Panel to have such an understanding, he must be allowed to adduce and rely on evidence concerning the conduct that led to the foreign convictions.

[66] It is Black's position that, once the Panel has undertaken the analysis required by the foregoing test in its consideration of the evidence before it, the Panel cannot come to the conclusion that further sanctions against Black are necessary. His basis for this position is that (i) the conduct was an isolated event; (ii) deterrence, whether specific or general, is not needed in this matter having already been achieved by the penalties imposed on Black in the U.S. Legal Proceedings; and (iii) his acceptance and payment of the punishment, be it prison or money, in the circumstances where he "availed himself of his right to defend himself" but was not successful, and his recognition that "the buck stops with [him] as head of the company", underscores his respect for the law and should be viewed in his favour.

[67] Black emphasizes in his submissions that the role of the Commission is to protect the public interest from those whose future conduct may be detrimental to Ontario's capital markets and not to punish past conduct. Black submits that there is no reasonable likelihood of similar conduct by him occurring, i.e., it is extremely unlikely that he would ever be involved in a similar situation with a reporting issuer and, accordingly, there is no

need for an order to be issued against him to protect the public interest in Ontario. Black points out that he has already been punished for his misconduct by paying approximately US$4 million in the SEC Proceeding, and by paying a fine of $125,000, a forfeiture amount of $600,000 and a special assessment of $200 and by serving 42 months in prison, in the U.S. Criminal Proceeding. According to Black, any order of the Commission in addition to the penalties imposed in the U.S. Legal Proceedings would be punitive in nature and it is not the Commission's role to punish past conduct. Black also submits that Staff's request to include private issuers in the officer and director ban and its request for a permanent cease trade order against Black are a terrible overreach and there is no basis for imposing those sanctions.

[68] Black also submits that his total involvement with respect to the non-competition payments paid in connection with the Forum and Paxton transactions was limited to a single telephone conversation with Radler and a subsequent telephone conversation with Atkinson "to confirm that the deal had been done properly." Black submits "that the payments for personal non-compete covenants were not bad *per se*" and the "total payment to the Black-led management team on Paxton/Forum of $600,000 is considerably less than 1% of the total of these types of payments made to the Black-led management team for the 8 transactions over the years in question, which is worth remembering, were worth well over $100 million Canadian." (Black's Written Closing Submissions and paras. 35 and 36)

[69] Black also submits that the only conduct that we can consider are the findings that were upheld on appeal and not overturned in the U.S. Criminal Proceeding and, therefore, the conduct relating to the APC Payments cannot be considered. With respect to the SEC Proceeding, Black submits that the final consent order and settlement agreement entered into by him are the operative documents and supersede the findings made (and that were appealed) in the previous decisions issued in the SEC Proceeding. To do otherwise would be an error in law.

[70] Black also submits that the fact that he entered into, and complied with, his Undertaking should be taken into account by the Commission. As stated in paragraph 6 of Black's written submissions:

> On the basis of the Undertaking he entered into, he has not been a director or officer of a reporting issuer in Ontario for almost 10 years. Leaving aside for now the "time served" aspect, Black has volunteered the continuation of that undertaking, so there is no imminent prospect of him becoming a director or officer of a reporting issuer; he has no plans to do so. …

2. Boultbee

[71] Boultbee takes the position that he should not be subjected to a reciprocal order in Ontario based on his criminal conviction in the United States.

[72] He submits that the proper test to impose an order under subsections 127(1) and (10) of the Act was laid out by the Commission in *Re Elliot*. In that decision, the Commission held that a two-part process must be followed. First, it must be determined whether the threshold for an order under subsection 127(10) has been met, following which the Commission must satisfy itself that an order for sanctions under subsection 127(1) is necessary to protect the public interest in Ontario.

[73] Boultbee submits that Staff can only proceed by way of paragraph 1 of subsection 127(10) of the Act against him, and not paragraph 5 of subsection 127(10), as he did not enter into an agreement with a securities regulator as Black did.

[74] Boultbee submits that the threshold in paragraph 1 of subsection 127(10) has not been met because his fraud conviction in the United States does not arise "from a transaction, business or course of conduct related to securities or derivatives." Boultbee asserts that to be "related to securities" there must be a direct and strong connection or correlation to securities and he takes the position that his fraud conviction does not relate to "financial disclosure, failure to mention payments in a questionnaire or anything related to securities".

[75] In addition, Boultbee argues that, even if the Panel finds that the requirements in paragraph 1 of subsection 127(10) have been met, Staff has not established that an order against Boultbee is necessary to protect the public interest in Ontario.

[76] Boultbee also submits that, in the U.S. Criminal Proceeding, he was only found guilty of fraud for receiving a $15,000 non-compete payment, and that compared to International's financial results in 2001, the $15,000 amount is not material.

IV. THE LAW

A. Subsection 127(10) of the Act

[77] Paragraphs 1, 4 and 5 of subsection 127(10) of the Act provide as follows:

> **127(10) Inter-jurisdictional enforcement -** Without limiting the generality of subsections (1) and (5), an order may be made under subsection (1) or (5) in respect of a person or company if any of the following circumstances exist:
>
> 1. The person or company has been convicted in any jurisdiction of an offence arising from a transaction, business or course of conduct related to securities or derivatives.
>
> …
>
> 4. The person or company is subject to an order made by a securities regulatory authority, derivatives regulatory authority or financial regulatory authority, in any jurisdiction, that imposes sanctions, conditions, restrictions or requirements on the person or company.

5. The person or company has agreed with a securities regulatory authority, derivatives regulatory authority or financial regulatory authority, in any jurisdiction, to be made subject to sanctions, conditions, restrictions or requirements.

[78] For paragraph 1 of subsection 127(10) to apply, there must be a conviction of an offense that arose from a transaction, business or course of conduct related to securities. As the Act's mandate is protective in nature, it is appropriate to interpret the Act in a purposive manner to achieve the Act's mandate to protect Ontario's capital markets. Although not specifically a case relating to subsection 127(10) of the Act, the following principles articulated by the Commission in *Re Raymond et al.* (1994), 17 O.S.C.B. 2995 ("***Re Raymond"*)** are relevant when determining whether an offence is related to securities:

> Trennum pleaded guilty to and was convicted on charges relating to, inter alia, the N.B.S. 1986 annual report (including its financial statements for its 1986 financial year), the N.B.S. 1987 annual report (including its financial statements for its 1987 financial year), and the use of forged documents….for the 1986 and 1987 financial years of N.B.S. All of these charges related to the intentional falsification of the financial results of N.B.S. for the two financial years, with a view to inflating substantially its earnings and assets.
>
> Not every conviction of a criminal offence will, in our view, constitute relevant evidence in section 128 proceedings[7]. Rather, the offence must, in our view, be one which relates, in some manner, to the subject matter of the securities laws or conviction on which evidence that the perpetrator presents some danger to the capital markets of this province or investors in those markets. The deliberate falsification of financial statements is such an offence. Similarly, the defrauding of a company by its chief financial officer is, in our view, such an offence. [Emphasis added]
>
> (*Re Raymond, supra* at para. 21(a))

[79] For paragraph 4 of subsection 127(10) to apply, there must be an order made by a securities regulatory authority in any jurisdiction that imposes sanctions, conditions, restrictions or requirements on a person or company. For paragraph 5 of subsection 127(10) to apply, there must be an agreement with a securities regulatory authority in any jurisdiction by which a person or company is made subject to sanctions, conditions, restrictions or requirements.

[7] Under subsection 128(1) of the Act, the Commission may apply to the Superior Court of Justice for a declaration that a person or company has not complied with or is not complying with Ontario securities law.

[80] If the requirements of any of paragraphs 1, 4 and/or 5 of subsection 127(10) of the Act are satisfied, the Commission will then consider whether to make a protective order in the public interest under subsection 127(1) of the Act.

[81] The Commission has concluded that an order can be made against a respondent pursuant to the Commission's public interest jurisdiction under subsection 127(1) of the Act "on the basis of decisions and orders made in other jurisdictions", if it is necessary "to protect investors in Ontario and the integrity of Ontario's capital markets" (*Re Euston Capital Corp.* (2009), 32 O.S.C.B. 6313 at para. 46).

[82] However, it is important to note that once the criteria set out in subsection 127(10) have been satisfied, the issuance of an order is not automatic. The Commission must also satisfy itself that an order for sanctions under subsection 127(1) is necessary to protect the public interest in Ontario. As explained by the Commission in *Re Elliot*:

> The applicability of subsection 127(10) to the BCSC Order and the Settlement Agreement does not automatically lead to the conclusion that the Panel must make an order similar to that made by the [British Columbia Securities Commission] against Elliot. Rather, we must first consider whether or not sanctions are necessary to protect the public interest, before exercising any powers granted to us under subsections 127(1) and (5), and second, if necessary, consider what the appropriate sanctions should be.
>
> (*Re Elliot*, *supra* at para. 27)

[83] In the June Decision, we addressed the important role that subsection 127(10) of the Act plays in facilitating cross-jurisdictional enforcement by securities regulators and courts as follows:

> Subsection 127(10) of the Act plays an important role in facilitating the cross-jurisdictional enforcement of judgments for breaches of securities law and provides the Commission with a mechanism to issue protective and preventive orders to ensure that conduct which took place in other jurisdictions will not be repeated in Ontario's capital markets. As stated by the Supreme Court of Canada in *McLean v. British Columbia (Securities Commission),* [2013] 3 S.C.R. 895 ("***McLean***") at paragraph 51:
>
> > …given the reality of interprovincial, if not international, capital markets, [t]here can be no disputing the indispensable nature of interjurisdictional co-operation among securities regulators today" (*Global Securities Corp. v. British Columbia (Securities Commission)*, 2000 SCC 21 (CanLII), 2000 SCC 21, [2000] 1 S.C.R. 494, at para. 27). [Emphasis added]
>
> (June Decision, *supra* at para. 7)

[84] The Supreme Court also recognized the important role of reciprocal orders and the ability of securities regulators in Canada to rely on decisions from other jurisdictions as the basis for making such orders. As explained in *McLean:*

> … [the power to issue a reciprocal order] achieves the legislative goal of facilitating interprovincial [and international] cooperation by providing a triggering "event" *other than the underlying misconduct*. The corollary to this point must be the ability to actually rely on that triggering event — that is, the other jurisdiction's settlement agreement (or conviction or judicial finding or order, as the case may be) — in commencing a secondary proceeding.
>
> (*McLean, supra* at para. 54)

[85] As we emphasized in the June Decision:

> Relying on findings of other jurisdictions obviates the need for a full hearing on the merits based on similar facts that were litigated in another jurisdiction. This saves time and resources and avoids the need for an inefficient and parallel duplicative proceeding in Ontario.
>
> (June Decision, *supra* at para. 9)

[86] While subsection 127(10) does permit the Commission to rely on foreign orders, judgments and settlements, the Commission has also recognized that such foreign orders, judgments and settlements must accord with Canada's concepts for natural justice. Specifically, the Supreme Court of Canada explained in *Beals v. Saldanha*, 2003 SCC 72 ("*Beals*"):

> If the foreign state's principles of justice, court procedures and judicial protections are not similar to ours, the domestic enforcing court will need to ensure that the minimum Canadian standards of fairness were applied. If fair process was not provided to the defendant, recognition and enforcement of the judgment may be denied.
>
> The defence of natural justice is restricted to the form of the foreign procedure, to due process, and does not relate to the merits of the case. The defence is limited to the procedure by which the foreign court arrived at its judgment. However, if that procedure, while valid there, is not in accordance with Canada's concept of natural justice, the foreign judgment will be rejected. The defendant carries the burden of proof and, in this case, failed to raise any reasonable apprehensions of unfairness. [Emphasis added]
>
> (*Beals, supra* at paras. 63 and 64)

[87] The Commission has applied the principles articulated in *Beals* in the context of subsection 127(10) hearings. When considering judgments from the United States in *Re New Futures*, the Commission commented that:

> Although the application of subsection 127(10) of the Act does not involve the direct enforcement of a foreign judgment, the principles of comity and reciprocity espoused in *Morguard Investments Ltd.* and in *Beals*, underlying the enforcement of interprovincial and foreign judgments should equally apply to securities regulators. I acknowledge that the Commission's orders in the public interest involve more than monetary judgment enforcement. The Commission has the authority to impose a number of market prohibitions on the Respondents, only when it is in the public interest to do so. Comity requires that there not be barriers to recognizing and reciprocating the orders of other regulatory authorities when the findings of the foreign jurisdiction qualify under subsection 127(10) of the Act as a judgment that invokes the public interest. <u>For comity to be effective and the public interest to be protected, the threshold for reciprocity must be low. The onus will rest with the Respondents to show that there was no substantial connection between the Respondent and the originating jurisdiction, that the order of the foreign regulatory authority was procured by fraud or that there was a denial of natural justice in the foreign jurisdiction.</u> [Emphasis added]
>
> (*Re New Futures*, *supra* at para. 27)

B. General Principles Relating to the Exercise by the Commission of its Public Interest Mandate

[88] When exercising its public interest jurisdiction under section 127 of the Act, the Commission must consider the purposes of the Act which are set out in section 1.1 of the Act as follows:

> (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.

[89] In pursuing the purposes of the Act, the Commission shall have regard for a number of fundamental principles including the following primary means for achieving the purposes of the Act:

> 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[8].
>
> (paragraph 2 of section 2.1 of the Act)

[90] In *Re Gordon Capital Corp v. Ontario (Securities Commission),* [1991] O.J. No. 934 (Div. Ct.) (WL. Can.) ("***Re Gordon***") the Divisional Court recognized the importance of maintaining high standards of fitness and business conduct of market participants. The case involved an appeal by Gordon Capital Corporation ("**Gordon**") from a decision of the Commission which prohibited Gordon from engaging, directly or indirectly, in principal trading for a period of 10 business days as a sanction for inadvertently breaching the Commission's take-over bid and insider reporting rules. In considering the purpose of the Act and the Commission's role, the Divisional Court stated as follows:

> The general legislative purpose of the Act and the OSC's role thereunder is to preserve the integrity of the capital markets of Ontario and protect the investing public. In this context, the proceedings against Gordon and Bond under subsection 26(1) of the Act are properly characterized as regulatory, protective or corrective. The primary purpose of the proceedings is to maintain standards of behaviour and regulate the conduct of those who are licensed to carry on business in the securities industry. The proceedings are not criminal or quasi-criminal in their design or punitive in their object. [Emphasis added]
>
> (*Re Gordon*, *supra* at para. 28)

[91] As stated above, the sanctions imposed must be protective and preventive to maintain high standards of behavior and to preserve the integrity of Ontario's capital markets. 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 articulated by the Commission in *Re Mithras Management Inc.* (1990), 13 O.S.C.B. 1600 ("***Mithras***"):

> …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

[8] The term market participant is defined in section 1 of the Act and includes a director, officer or promoter of a reporting issuer.

> person's future conduct might reasonably be expected to be; we are not prescient, after all. [Emphasis added]
>
> (*Mithras*, *supra* at 1610 and 1611)

[92] As stated by the Supreme Court of Canada in *Committee for Equal Treatment of Asbestos Minority Shareholders v. Ontario Securities Commission*, [2001] 2 S.C.R. 132 ("***Asbestos***"), the Commission's public interest mandate is neither remedial nor punitive; instead, it is protective and preventive, and it is intended to prevent future harm to Ontario's capital markets (at para. 42). More specifically, the Court stated:

> … the above interpretation is consistent with the scheme of enforcement in the Act. The enforcement techniques in the Act span a broad spectrum from purely regulatory or administrative sanctions to serious criminal penalties. The administrative sanctions are the most frequently used sanctions and are grouped together in s. 127 as "Orders in the public interest". Such orders are not punitive: *Re Albino* (1991), 14 O.S.C.B. 365. Rather, the purpose of an order under s. 127 is to restrain future conduct that is likely to be prejudicial to the public interest in fair and efficient 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: *Re Mithras Management Ltd.* (1990), 13 O.S.C.B. 1600. In contradistinction, it is for the courts to punish or remedy past conduct under ss. 122 and 128 of the Act respectively: see D. Johnston and K. Doyle Rockwell, *Canadian Securities Regulation* (2nd ed. 1998), at pp. 209-11.
>
> …
>
> … 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. … 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. [Emphasis added]
>
> (*Asbestos*, *supra* at paras. 43 and 45)

V. ANALYSIS

A. Relevant Considerations

[93] The questions that the Panel must answer are as follows:

(a) Were the Respondents convicted in any jurisdiction of an offence arising from a transaction, business or course of conduct related to securities?

(b) Did Black agree with a securities regulatory authority in any jurisdiction to be made subject to sanctions, conditions, restrictions or requirements?

(c) Were the Respondents denied natural justice in the U.S. Legal Proceedings?

(d) Are sanctions necessary to protect the public interest?

(e) If sanctions are considered to be necessary, what sanctions would be appropriate?

1. Were the Respondents convicted in any jurisdiction of an offence arising from a transaction, business or course of conduct related to securities?

[94] For the Commission to make an order in the public interest against a person under subsection 127(1) of the Act, the circumstances described in one or more of paragraphs 1 to 5 of subsection 127(10) must apply to the person in question. Staff has alleged that paragraph 1 of subsection 127(10) applies to both of the Respondents as they were convicted in a jurisdiction, i.e., the United States, of an offence arising from a transaction, business or course of conduct related to securities.

[95] After the final disposition of all appeals arising from the U.S. Criminal Proceeding, both of the Respondents were convicted of Count Seven which related to the Forum and Paxton transactions. Accordingly, the Respondents were clearly convicted in a jurisdiction which leaves outstanding a determination as to whether they were convicted of an offence arising from a transaction, business or course of conduct related to securities.

[96] Although the Forum and Paxton transactions were completed as sales of assets, the conduct of the Respondents relating to those transactions for which they were convicted breached U.S. laws related to securities as detailed above, and to findings by the U.S. courts that their behavior was fraudulent. At page 7 of the Conviction Appeal Judgment, Judge St. Eve made the following observation with respect to Black relating to the purported non-competition payments:

> Even though this was a related-party transaction, Black did not seek approval from the Audit Committee or the Board of Directors. Furthermore, the SEC filings did not disclose these payments until the company issued its 10-K and proxy statement, filed in April 2002. (Gov. Exs. Filing 9F, 9G.) These filings blatantly misrepresented that the $600,000 was paid in connection with the sale of newspapers properties, "to….satisfy a closing condition," pursuant to non-competition agreements with the buyers "to which each agreed not to compete directly or indirectly in the United States," and with the approval of the

> "Company's independent directors." (Gov. Exs. Filing 9F, 9G.) All of these representations were false.
>
> This evidence was more than sufficient for the jury to find fraudulent intent beyond a reasonable [doubt] as to Defendant Black.

[97] Judge St. Eve made the following and almost identical observations with respect to Boultbee:

> Furthermore, although Atkinson and Boultbee both disclosed other non-competition payments that they had received during the 2001 fiscal year in their respective Proxy ['27] Questionnaires for fiscal year 2001, they did not disclose the $15,000 payment. (Gov. Exs. Filing 7, 8.) Drawing all inferences in favor of the government, their intentional withholding of this information supports the jury's finding that Boultbee and Atkinson intended to defraud International.
>
> Similarly, the SEC filings did not disclose these payments until the company issued its 10-K and proxy statement, filed in April 2002. (Gov. Exs. Filing 9F, 9G.) These filings misrepresented that the $600,000 was paid in connection with the sale of newspapers properties, "to satisfy a closing condition," pursuant to non-competition agreements with the buyers "to which each agreed not to compete directly or indirectly in the United States," and with the approval of the "Company's independent directors." *(Id.) All* of these representations were false. Viewing the evidence in the government's favor, the supplemental payments qualified as a related party transaction where both Boultbee and Atkinson profited at the expense of International and its shareholders. As such, they breached their duty of loyalty because their actions conflicted with International's interests -- they wrongly siphoned off ['28] money belonging to International. They failed to bring the transaction to the attention of International's Audit Committee, which creates the inference that Defendants were trying to conceal improper payments.
>
> (Conviction Appeal Judgment, *supra* at p. 7) [Emphasis added]

[98] In his Written Closing Submissions, Boultbee disputes that subsection 127(10), and, more specifically, paragraph 1 of subsection 127(10), applies to him. In paragraph 8, he states:

> All that could be "proved" at the trial was the specific charges in Count Seven as described in pages 1 through 22 of the Information. Nothing therein refers to securities related events or anything occurring after about May 2001. Count Seven specifically charges violations under "Sections 1341, 1346 and 2" of the U.S. criminal codes.

[99] At paragraph 9 of his Written Closing Submissions, Boultbee states that "Nothing in the charged conduct relates to financial disclosure, failure to mention payments in a questionnaire or anything related to securities." Boultbee does, however, acknowledge in paragraph 7 of his Written Closing Submissions that "It is clear from the general meaning of the phrase 'relating to' and the case law that there must be some direct and strong connection or correlation."

[100] Boultbee also acknowledges in paragraph 8 of his Written Closing Submissions that paragraphs 1 to 33 of Count One are incorporated by reference in Count Seven. Among those provisions is paragraph 1(p) of the Information which states that "Among other things, International was required to fully and accurately disclose in its SEC filings related party transactions and compensation paid to its officers and directors." As noted in paragraph [97] above, International did not disclose in its SEC filings the related party transactions and compensation paid to its officers and directors in connection with the Forum and Paxton transactions.

[101] Black did not make any submissions with respect to the interpretation of the phrase "related to securities".

[102] As noted in paragraphs [55] and [56] above, the Supreme Court of Canada and the Divisional Court have held that the use of the phrase "relating to" in a statute only requires the establishment of "some connection" between two related subject matters. As the words "related to" are derived from the words "relating to", we are of the view that, when used in paragraph 1 of subsection 127(10), the words "related to" should be construed to mean that the offense or offenses of which the Respondents were convicted arose from a transaction or course of conduct that had some connection to securities. It follows, in our view, that a conviction of an offense arising from a transaction, business or course of conduct related to securities includes a course of conduct under laws that regulate securities and the companies that are issuers of securities to the public.

[103] Accordingly, and as was the case in *Re Raymond*, the defrauding of a public company by its most senior executive officers and their failure to publicly disclose and comply with U.S. securities laws applicable to the approval and disclosure of the non-competition payments made in connection with the Forum and Paxton transactions constituted a course of conduct related to securities within the meaning of paragraph 1 of subsection 127(10) of the Act.

[104] We conclude, therefore, that the Respondents were convicted in a jurisdiction, i.e., the United States, of an offence arising from a transaction or course of conduct related to securities and, accordingly, that paragraph 1 of subsection 127(10) of the Act applies to each of Black and Boultbee in respect of their convictions of Count Seven.

[105] As summarized in paragraphs [45] to [47] above, Black was also convicted of concealing, or attempting to conceal, documents with the intent of impairing their availability for use in connection with the SEC Proceeding against Black (Count Thirteen). As stated by Justice R. Posner of the United States Court of Appeals for the Seventh Circuit at page 2 of the 2010 Appeal Decision:

> There was compelling evidence that he knew that the acts that later formed the basis of the fraud charges against him and his codefendants were being investigated by a grand jury and by the SEC. In the midst of these investigations Black with the help of his secretary and his chauffeur….removed 13 boxes of documents from his office, put them in his car, was driven home, and helped carry them from the car into his house.

[106] In her Conviction Appeal Judgment, Judge St. Eve stated at page 10:

> On approximately May 19, 2007, the SEC sought more documents from Black (Gov. Ex. Toronto 18). The next day Black personally - - along with his personal assistant Joan Maida and his chauffeur - - removed 13 boxes of documents from his office…at 10 Toronto Street, including documents pertinent to both the SEC and grand jury investigations…Viewing [the details relating to the removal of the boxes] in the light most favorable to the government, the evidence more than adequately supports the jury's verdict that Black removed these boxes to conceal or to attempt to conceal them with the intent to impede their availability to the SEC or grand jury proceedings.

[107] As Black's conviction of Count Thirteen was based on his obstruction of, or attempt to obstruct, an investigation by the SEC of Black's breaches of the securities laws of the United States, we conclude that the offence of which he was convicted arose from a course of conduct related to securities.

[108] Based on the foregoing, we conclude that, as to Count Thirteen, Black was convicted in a jurisdiction, i.e., the United States, of an offence arising from a course of conduct related to securities and that paragraph 1 of subsection 127(10) of the Act applies to Black in respect of Count Thirteen.

2. Did Black agree with a securities regulatory authority in any jurisdiction to be made subject to sanctions, conditions, restrictions or requirements?

[109] On July 1, 2013, counsel for each of Black and the SEC filed the SEC Joint Motion for Indicative Ruling with the U.S. District Court stating that the SEC and Black had agreed on the terms of a settlement and requested that the final judgment against Black relating to the SEC Proceeding (the SEC Oct. 9, 2012 Decision) be vacated and replaced by a proposed final judgment in the form attached as an Exhibit to the Joint Motion (the "**Form of the Final Judgment**").

[110] In Black's Consent, which was attached as a schedule to the SEC Joint Motion for Indicative Ruling, Black acknowledged that he had been convicted of mail fraud in relation to certain purported non-competition payments that he and others received and which were the subject of the SEC Complaint. He also expressly consented to the entry of the final judgment in the SEC Proceeding in the Form of the Final Judgment which, among other things:

(a) Permanently enjoined Black from violating U.S. securities laws;

(b) Ordered Black to pay US$4,094,144.36 in disgorgement and prejudgment interest; and

(c) Prohibited Black from acting as a director or officer of any issuer that has a class of securities registered pursuant to Section 12 of the *Exchange Act* [15 U.S.C. § 781] or that is required to file reports pursuant to Section 15(d) of the *Exchange Act* [15 U.S.C. § 78o(d)].

Black also agreed that "upon the filing of this Consent [Black] hereby withdraws any papers filed in this action to the extent that they deny any allegation in the [SEC] complaint". In other words, Black withdrew his appeal of the SEC Oct. 9, 2012 Decision.

[111] On August 13, 2013, the U.S. District Court issued a final judgment (the SEC August 13, 2013 Judgment) on the terms of the Form of the Final Judgment described in paragraphs [109] and [110] above which included the terms of Black's Consent.

[112] Staff takes the position that both paragraphs 4 and 5 of subsection 127(10), the terms of which are summarized in paragraph [79] above, apply to Black on the basis of his consent to the SEC August 13, 2013 Judgment. In the absence of submissions from any of the parties, we are of the view that paragraph 4 of subsection 127(10) does not apply to Black as the SEC August 13, 2013 Judgment was an order of the U.S. District Court and not that of a securities regulatory authority, e.g., the SEC, or a derivatives or financial regulatory authority. We do, however, agree with Staff's position relating to the applicability of paragraph 5 of subsection 127(10) as Black clearly agreed with a regulatory authority in a jurisdiction, i.e., the SEC, to be made subject to sanctions, conditions, restrictions or requirements.

[113] Based on the foregoing, we conclude that Black entered into an agreement with a securities regulatory authority in the United States to be made subject to sanctions, conditions, restrictions or requirements. Accordingly, paragraph 5 of subsection 127(10) of the Act applies to Black.

3. Were the Respondents denied natural justice in the U.S. Legal Proceedings?

[114] In the June Decision, we dealt at some length with the standards to be applied when reciprocal orders are based on decisions of foreign courts and regulators. In paragraphs [86] and [87] above, we review the basis on which, and the principles that apply to, the reliance by the Commission on foreign orders, judgments and settlements.

[115] Neither Black nor Boultbee has alleged, introduced any evidence or made any submissions to support a finding that they were denied natural justice in the U.S. Legal Proceedings. As we concluded in the June Decision, "By any measure, the U.S. [Legal] Proceedings met Canadian standards of fairness and Canada's concept of natural justice" (June Decision, *supra* at para. 33). Black and Boultbee carried the burden of proof if they were to attempt to establish that they were denied natural justice in the conduct of the

U.S. Legal Proceedings. In our view, they did not raise any reasonable apprehension of unfairness.

4. Are sanctions necessary to protect the public interest?

[116] Black submits that, given that he is 70 years of age and has offered to continue to remain bound by his Undertaking with which he has complied since he provided it in November 2007, there is no need for the Commission to make an order against him. If he ever wishes to act as an officer or director in the future, Black said that he would provide notice to the Commission and the Commission would deal with the request at that time.

[117] The questions for us to answer with respect to Black's submissions are whether an order in the public interest is necessary and whether Black's age, his offer to continue to be bound by his Undertaking on a voluntary basis and his current intention not to become a registrant or an officer or director of a reporting issuer could properly be dispositive of this proceeding as it relates to him.

[118] In Black's submission, the only basis for an order in the public interest is if there is a real risk of future conduct that is the same as the past conduct which resulted in his convictions in the U.S. Legal Proceedings. Black has described in his Written Closing Submissions the following hypothetical circumstance in which this might happen in the future:

> 98. So the trail of logic necessary to even hypothesize a public interest that needs protection at this stage requires:
>
> (a) a reporting issuer asking Black to be an officer or director of the company;
>
> (b) Black to change his present plan and seek to accept that position;
>
> (c) provide notice at some point in the future to the Commission that he would like to be a director and officer (one can then imagine what Staff's position would be to the reporting issuer and/or what terms and conditions might be sought);
>
> (d) if all those hurdles are surmounted, then it is necessary to hypothesize a transaction between Black and this notional reporting issuer in which Black is to receive some consideration;
>
> (e) the next step would be that there would have to be some concern that the reporting issuer did not have the appropriate structure, such as a Special Committee of independent advisors to review and approve the transaction as between Black and the company, so that there would be a risk that Black was getting some consideration above fair market value;

(f) next, it is necessary to hypothesize the absence of disclosure or proper disclosure of the transaction by the reporting issuer;

(g) finally, it is then necessary to hypothesize that any such transaction would not receive scrutiny by the media and the regulators.

Even Alice in Wonderland could only believe six impossible things before breakfast. Merely the recitation of the chain of logic demonstrates that it is simply inconceivable that there could be any transaction with a reporting issuer in the future where there could be any prospect of harm to the public interest.

99. As was said in the previous motion given the publicity he has been subjected to throughout his career, but most especially in the last decade, it is beyond unlikely that any payments to Black with respect to any transaction of a reporting issuer with whom he might in some way become associated win the future would not receive not only his full attention, but also the microscopic scrutiny of the full board of the reporting issuer, its advisors, the media, and, to update the reference, the man or woman on the Chi-Cheemaun ferry. It is obvious and inevitable that public scrutiny of Black bordering on the obsessive will continue, and his opportunity for conduct short of a Caesar's wife standard, even if he were minded to attempt it, would essentially be non-existent.

(Black's Written Closing Submissions at paras. 98 and 99)

[119] With respect to Count Thirteen and the likelihood of similar conduct in the future, Black submits that he:

> ….would err on the side of caution in being absolutely sure that he was in full compliance with any court order or summons and that [any] step he took could not be criticized in that regard.
>
> (Black's Written Closing Submissions at para. 100)

[120] Boultbee limited his submissions with respect to sanctions to his statement that Staff has "failed to provide any evidence or grounds that would warrant the sanctions requested or to require protection of the capital markets." (Boultbee's Written Closing Submissions Summary at p. 6.)

[121] In our view, the future conduct of Black and Boultbee to be restrained is any breach by them of the securities laws of Ontario and any conduct contrary to the public interest and not solely the specific conduct for which the Respondents were convicted. Accordingly, we are not limited to seeking to restrain specific conduct such as the hypothetical circumstances posited by Black in paragraphs 98 and 99 of his Written Closing Submissions or, as was the case in the U.S. Legal Proceedings, the fraudulent

diversion of proceeds arising from the sale of assets and the failure to comply with corporate approval and disclosure obligations under U.S. securities laws and, in Black's case, the attempt to conceal documents from an investigation.

[122] As noted in paragraph [89] above, restrictions on fraudulent and unfair market practices is one of the primary means for achieving the purposes of the Act. In our view, to limit restraints on future conduct to that which relates solely to the repetition of one or more specific incidents of misconduct resulting in criminal convictions would not achieve those purposes, particularly where the prior misconduct raises fundamental issues of honesty and integrity. We also need to consider restraining future misconduct that would be enabled and facilitated if the Respondents were to again be placed in a position of trust and control by being appointed as officers and/or directors of any company. We also need to consider whether sanctions would assist in maintaining the appropriately high standards of fitness and business conduct expected of market participants.

[123] Interpreting the Act in a sufficiently broad manner that ensures that the Act's objective of protecting Ontario's capital markets is achieved has been accepted by the courts. In *Wilder v. Ontario (Securities Commission)*, [2001] O.J. No. 1017 at para. 19 (Ont. C.A.) ("***Wilder***"), the Ontario Court of Appeal had to decide whether section 122 of the Act was within the exclusive jurisdiction of the Superior Court of Ontario, or whether it was open to the Commission to hold an administrative hearing under section 127 to determine whether a breach under that section was contrary to the public interest. In coming to its conclusion that the Commission did have the power to do so, the Ontario Court of Appeal stated that "[a]nother well-known principle of statutory interpretation is that courts must consider the broader legislative purpose of an Act when giving meaning to its constituent provisions. The purposive approach to interpretation best ensures the attainment of the true object sought by the legislators" (see also *Pacific Coast Coin Exchange v Ontario (Securities Commission)*, [1978] 2 S.C.R. 112 at p. 127, for a discussion on the appropriate interpretation of the Act).

[124] In our view, and for the reasons we describe in greater detail below, the misconduct of the Respondents was both serious and carried out in circumstances that warrant apprehension on our part that the future conduct of the Respondents will be detrimental to the integrity of Ontario's capital markets. Taking into account our foregoing analysis, we conclude that appropriate sanctions are necessary to protect the integrity of Ontario's capital markets.

B. The Appropriate Sanctions in this Matter

[125] In determining the appropriate sanctions to order, we must also consider the specific circumstances in this matter, together with any aggravating or mitigating factors, to ensure that the sanctions are proportionate to both the Respondents' conduct and the range of sanctions ordered in similar cases (*Re M.C.J.C. Holdings*, (2002), 25 O.S.C.B. 1133 at 1134).

[126] The case law sets out the following non-exhaustive list of factors that are important to consider when imposing sanctions, and these also apply in the context of imposing sanctions as part of an order under subsections 127(1) and (10) of the Act:

> (a) The seriousness of the allegations proved;
>
> (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 a recognition of the seriousness of the improprieties;
>
> (e) The need to deter a respondent, and other like-minded individuals, from engaging in similar abuses of the capital markets in the future;
>
> (f) Whether the violations are isolated or recurrent;
>
> (g) The size of any profit gained or loss avoided from the illegal conduct;
>
> (h) Any mitigating factors, including the remorse of the respondent;
>
> (i) The effect any sanction might have on the livelihood of the respondent;
>
> (j) The effect any sanction might have on the ability of a respondent to participate without check in the capital markets;
>
> (k) Whether a particular sanction will have an impact on the respondent and be effective; and
>
> (l) The size of any financial sanctions or voluntary payment when considering other factors.
>
> (*Re M.C.J.C. Holdings*, *supra* at 1136 and *Re Belteco Holdings Inc.*, 21 O.S.C.B. 7743 at 7746)

[127] The applicability and importance of each factor will vary according to the facts and circumstances of the case.

[128] In *Re Cartaway Resources Corp.*, [2004] 1 S.C.R. 672 ("***Cartaway***"), the Supreme Court of Canada explained that deterrence is "…an appropriate, and perhaps necessary, consideration in making orders that are both protective and preventive" (at para. 60). The Supreme Court also emphasized that deterrence may be specific to the respondent or general so as to deter the public at large:

> Deterrent penalties work on two levels. They may target society generally, including potential wrongdoers, in an effort to demonstrate the negative

> consequences of wrongdoing. They may also target the individual wrongdoer in an attempt to show the unprofitability of repeated wrongdoing. The first is general deterrence; the second is specific or individual deterrence: see C. C. Ruby, *Sentencing* (5th ed. 1999). In both cases deterrence is prospective in orientation and aims at preventing future conduct.
>
> (*Cartaway*, *supra* at para. 52)

[129] Both general and specific deterrence are important considerations when imposing sanctions. General deterrence requires imposing sanctions that will send a strong message to any other like-minded individuals (in this case, officers and directors) that the misconduct engaged in is unacceptable and will not be tolerated by the Commission. Specific deterrence requires imposing sanctions that will send a strong message to respondents to discourage them from engaging in further misconduct and recidivism in the future. In both cases, general and specific deterrence are an important sanctioning factor to consider when crafting sanctions to ensure that similar misconduct in the future is discouraged.

1. Considerations and Submissions of the Parties

[130] There are a number of factors that the Commission should consider when imposing sanctions including those set out in paragraph [126] above. We must also take some account of the fact that the Respondents have already been subjected to consequential penalties in the United States resulting from their respective convictions in the U.S. Criminal Proceeding and the misconduct acknowledged by Black in the SEC Proceeding. Such penalties included fines, disgorgement and other financial assessments and, importantly, imprisonment which is not a sanction that can be imposed by the Commission. Taking into account the nature of the criminal convictions and the prior sanctions imposed in the United States, we are of the view that the following are the most relevant considerations in determining the appropriate sanctions in this matter:

(a) The seriousness of the offences for which the Respondents were convicted;

(b) The Respondents' experience in the marketplace;

(c) Whether or not there has been recognition of the seriousness of the misconduct;

(d) The need to deter the Respondents and other like-minded individuals from engaging in similar abuses of the capital markets in the future, i.e., specific and general deterrence;

(e) Whether the violations were isolated or recurrent; and

(f) Any mitigating or aggravating factors.

The seriousness of the offences for which the Respondents were convicted

[131] A criminal conviction of fraud, which requires that there be evidence of the fraud (including the intent to defraud) beyond a reasonable doubt, is among the most serious offences of which a respondent can be convicted in a securities-related matter. In the words of Judge St. Eve when she addressed Black's conviction for fraud, "[i]t is a very serious crime." (2011 Black Sentencing Decision, at p. 132 at line 13), and as stated by the Commission in *Re Al-tar* (2010), 33 O.S.C.B. 5535:

> Fraud is "one of the most egregious securities violations" and is both "an affront to the individual investors directly targeted" and something that "decreases confidence in the fairness and efficiency of the entire capital market system."
>
> (*Re Al-tar, supra* at para. 214, citing *Re Capital Alternatives inc.* (2007), A.B.A.S.C. 79 at para. 308, citing D Johnston & K.D. Rockwell, *Canadian Securities Regulation*, 4th ed. (Markham: LexisNexis 2007) at 420.)

[132] Of significant importance in assessing appropriate sanctions in this matter is the fact that the fraud committed by the Respondents entailed the breach by the Respondents of their fiduciary duties; in Black's case, as a director and Chief Executive Officer of both Hollinger and International, and in Boultbee's case, as an Executive Vice President, Chief Financial Officer and director of Hollinger and for part or all of the relevant periods of time, as the Chief Financial Officer and Executive Vice President of International. As stated by Judge St. Eve when resentencing Black following his partially successful appeal to the Supreme Court of the United States:

> Mr. Black's position in directing the payment and agreeing to splitting the funds and calling them non-competes is what assisted in carrying out the fraud. He had the money diverted for himself and his co-schemers, and he abused the trust of the shareholders by taking the money that belonged to them.
>
> (2011 Black Sentencing Decision at p. 27, lines 15 to 20.)

[133] Judge St. Eve also stated to Black that, "[y]ou had a duty of trust; the shareholders put trust in you; and, you violated that trust." (2011 Black Sentencing Hearing at p. 132, lines 18 and 19.)

[134] In the 2007 Boultbee Sentencing Decision**,** Judge St. Eve said:

> Mr. Boultbee, you have committed a very serious offense. You have violated the trust that the corporation and its shareholders have placed in you. You have stolen money from the corporation. And it was easy money for you and your co-schemers to steal.

(2007 Boultbee Sentencing Decision at p. 267, lines 17 to 21.)

[135] In our view, the obstruction of justice for which Black was also convicted (Count Thirteen) was also serious misconduct. Concealing documents from a securities regulator harms the integrity of the capital markets and the confidence that the public has in the regulator and the capital markets. In the U.S. Criminal Proceeding, Judge St. Eve also emphasized the severity of the obstruction of justice misconduct as follows:

> There was also an obstruction of justice count in this case, as you know, that you were found guilty of. And that was not touched, as Ms. Porter indicated, by the Seventh Circuit or the Supreme Court's opinion. And I am not going to debate with anybody what the evidence showed. The jury's verdict stands, and they have spoken that it was more than just taking some boxes out of a room. And I think this case would be very different without that count of conviction. [Emphasis added]
>
> (2011 Black Sentencing Decision, supra at p. 132 line 20 to p. 133 line 2)

The Respondents' experience in the marketplace

[136] Both Black and Boultbee were extremely experienced business executives with many years of experience managing the affairs of reporting issuers which entailed compliance with the securities laws of Canada and the United States. Neither of them suggested that their criminal convictions resulted from their lack of knowledge of either the legal approval and disclosure requirements relating to non-competition payments involving related party transactions or the expected standards of conduct by fiduciaries and market participants.

Whether or not there has been recognition of the seriousness of the misconduct

[137] Staff submits that the Respondents have not demonstrated any recognition of the seriousness of their misconduct and that they have both attempted to trivialize or minimize the severity of the nature of their criminal convictions. As stated by Black in his testimony in this matter "I broke no laws and I did nothing unethical" (Hearing Transcript, October 10, 2014 at p. 62, lines 8-9). Black submits that the issues that arose in relation to the Forum and Paxton transactions represented isolated incidents of non-compliance and that the other transactions in which the Black-led management team were involved were exemplars of compliance**.**

[138] Black has characterized his conduct which the courts in the United States determined was criminal in nature as essentially nothing more than failures in documentation which resulted from the shortcomings of his subordinates on whom he relied. (Paragraphs 23, 43 and following and 148 of Black's Written Closing Submissions)

[139] Boultbee refutes Staff's submission that he has minimized any of his actions regarding the U.S. Criminal Proceeding, stating that:

> …I have never ever made a public statement regarding the case against me, the conviction, my conduct, and so I don't know on what basis [Staff counsel] can in any way say I'm trivializing my conduct.
>
> Trying to defend myself in a criminal case, trying to defend myself in this case, is not trivializing anything, it is merely exercising my right. It's just a nonsensical thing for [Staff counsel] to try to say I've done any trivializing of anything.
>
> (Hearing Transcript, October 28, 2014 at p. 28, lines 14-23)

[140] However, when commenting on the finding of guilt involving his $15,000 non-competition payment, Boultbee focuses on the size of the payment and not the criminal conviction for fraud. He submits that:

> When that amount is compared to the financial results for Hollinger International Inc. for the 2001 year with total assets of $2 billion, revenues of $1.1 billion and a net loss of $338 million (Form 10-K) it is clear that $15,000 or, even, $600,000, would not meet the test for materiality in Dunn and no reasonable person would claim that an amount of this magnitude would affect the judgment of a reasonable investor. From a financial point of view the amount was not material *vis-à-vis* the financial reporting.
>
> (Paragraph 13 of Boultbee's Written Closing Submissions.)

[141] Ignoring the issue of remorse, which we address in paragraph [154] below, both Black and Boultbee demonstrate a total disregard for and indifference to the findings of serious fraud by the U.S. courts and the creation of a scheme to defraud International and the shareholders of International. Their attitude with respect to the discharge of their responsibilities as officers and directors of public companies raises serious concerns in our minds relating to their future behavior in Ontario's capital markets.

The need for specific and general deterrence

[142] In his written submissions relating to whether additional sanctions are needed for deterrence in the context of the current proceeding, Black has called our attention to the following comments by Judge St. Eve at Black's resentencing hearing:

> Adequately deterring criminal conduct. There is a specific and a general deterrence there. A specific deterrence -- given the punishment that has been imposed and the consequences of your actions -- I am not concerned about seeing you in court again, Mr. Black; but, there is also a general deterrence factor that is significant: <u>That corporate executives need to be</u>

> sent the message that the company's money belongs to the shareholders and the company and not the individual corporate executives; and, they have to act in the best interest and not defraud their companies.
>
> Protecting the public from you, that is another factor. I touched upon that. Given your history, your age, everything you have lost and your conduct while incarcerated, I am not worried about protecting the public from further crimes by you. I do not think that is a factor. [Emphasis added]
>
> (2011 Black Sentencing Decision, at p. 138 at lines 13 to 25, and p. 139 at lines 1 and 2)

[143] Black submits that Judge St. Eve considered the need for general deterrence at his resentencing hearing and concluded that a 42 month prison sentence would be sufficient for that, among other, purposes. (Black's Written Submissions, at para. 110)

[144] Judge St. Eve's comments with respect to the adequacy of the penalties imposed on Black for specific and general deterrence obviously relate only to the United States. Her comments also followed extensive submissions by counsel for the United States Attorney as well as counsel for the Respondents with respect to a number of different considerations relating to sentencing including the need for post-incarceration supervision in light of the possible deportation of the Respondents. We on the other hand, must consider the serious nature of the Respondents' convictions in the context of protecting Ontario's capital markets given the fact that at least one of the Respondents, Black, continues to reside in Ontario.

[145] Black submits that there is no need for deterrence given that:

> In the last 10 years, Black has spent more than three years in prison, paid fines and forfeiture totaling close to $5 million, incurred the cost of a decade-long cross-border legal battle, seen the destruction of his major asset, and has effectively been removed from both the U.S. and the Ontario capital markets the entire time.
>
> It would be preposterous to suggest that a public interest order in Ontario could effect specific deterrence above and beyond the toll these events have already taken on Black. It is similarly farfetched to suggest that a public interest order is necessary for general deterrence. Any person who might consider engaging in the type of conduct for which Black has been sentenced in the U.S. Criminal Proceedings would blanch at the thought of undergoing a fraction of the ordeal he has been through.
>
> (Black's Written Closing Submissions, at paras. 107 and 108)

[146] As described in paragraph [74] above, Boultbee argues that, even if the Panel finds that the requirements in paragraph 1 of subsection 127(10) have been met, Staff has

not established that an order against Boultbee is necessary to protect the public interest in Ontario. In addition, in his written submissions, Boultbee also emphasizes that Staff did not submit any evidence to suggest that he poses a future risk to the capital markets and he points out that Judge St. Eve was not concerned about recidivism when she sentenced him in the U.S. Criminal Proceeding.

[147] Black and Boultbee abused their positions of trust as officers and directors to enable the fraudulent conduct for which they were convicted to take place. In our view, the circumstances of this matter demonstrate the need for both specific and general deterrence.

Whether the violations are isolated or recurrent

[148] Black has submitted that the Forum and Paxton transactions were:

> ….an isolated situation – one transaction out of 8 or 9 much larger transactions that all withstood intense scrutiny and were proper. Paxton/Forum is the aberration, not the norm, and the failure of corporate governance with respect to the matter is relatively easy to identify (and the prospect of recurrence beyond remote).
>
> (Black's Written Closing Submissions. at para. 103)

[149] Staff submits that the Forum and Paxton transactions were not isolated incidents and referred to the APC Transaction, which is briefly described in paragraph [13] above, and two earlier proceedings in the United States in which Black alone was involved. As the 2010 Appeal Decision vacated the jury's guilty verdict with respect to Count Six, there was no conviction in the U.S. Criminal Proceeding relating to the APC Transaction. In addition, as the Statement of Allegations did not include allegations relating to the two earlier proceedings in the United States involving Black and as the facts relating to those proceedings were not in evidence, we are not in a position to assess their relevance or implications and have ascribed no weight to these matters in these reasons. For the purposes of the current proceeding, we are concerned only with Counts Seven and Thirteen and the SEC August 13, 2013 Judgment, in the case of Black, and Count Seven alone, in the case of Boultbee.

Any mitigating or aggravating factors

[150] We permitted Black to lead evidence on his own behalf as well as the evidence of Maida and Vale, subject to the prohibition against re-litigation. More specifically, we permitted evidence relating to:

> "box score" matters, which could, by way of example, include a brief description of transactions that included non-competition payments, and Black's general approach to best corporate practices, as they are relevant to the issue of sanctions, but not to the underlying details of the transactions.

(Oral Reasons, *supra* at para. 26)

[151] We agree with Staff's submissions that the evidence of Maida and Vale and Black's evidence related to his criminal convictions was either considered in the U.S. Legal Proceedings in which Black did not testify or was available at the time of the U.S. Legal Proceedings but, for whatever reason, Black chose not to introduce it. The witnesses described the events and conduct surrounding the Forum and Paxton transactions (Count Seven) and the obstruction of justice charge (Count Thirteen). Specifically, we heard evidence about Black's mindset and what he thought or knew at the time the Forum and Paxton purported non-competition arrangements were made and the recollections of Maida, Vale and Black relating to the circumstances surrounding the removal by Black of 13 boxes from Hollinger's offices.

[152] In our view, the evidence of Maida, Vale and Black described above amounted to re-litigation of Counts Seven and Thirteen and, notwithstanding Black's assertions to the contrary, it was designed to undermine the findings in the U.S. Legal Proceedings. As a result, we did not ascribe any weight to this evidence. As explained by the Divisional Court in *Ontario (Motor Vehicles Act, Registrar) v. Jacobs*, [2004] O.J. No. 189 (Div. Ct.) at para. 33:

> It is one thing to accept responsibility, express remorse and point to rehabilitation. It is another thing to deny guilt in face of a criminal conviction. It is one thing to point to mitigating factors. It is another thing to deny the criminal intent underlying a fraud conviction…

[153] Whether or not the criminal convictions of the Respondents with respect to Count Seven were the result of one lapse in International's corporate governance practices, as advocated by Black, does not mitigate the findings of the courts in the United States that the Respondents committed fraud and that their conduct entailed planning and sophisticated means and was part of a deliberate scheme. We are also not persuaded that the fact that the dollar amount the Respondents received as a result of their fraud was significantly less than the amounts of the payments that were not found to be fraudulent is a relevant or mitigating factor. In our view, there is no level of fraud that should not engage a consideration of appropriate sanctions. As we note in paragraph [141] above, we have serious concerns relating to the protection of Ontario's capital markets. As a result, we are obligated to determine what sanctions should be imposed by us for the purpose of deterring the Respondents and other like-minded individuals from engaging in conduct that is detrimental to the integrity of the capital markets in Ontario.

[154] Although we do not consider remorse necessary nor the absence of contrition as an aggravating factor in determining sanctions in proceedings before the Commission in which respondents contest in good faith the allegations made against them, the failure of the Respondents to acknowledge in any way the legitimacy of the detailed findings of fraud against them in the U.S. Legal Proceedings (and, in Black's case, the finding that he obstructed justice) raises serious concerns in our minds as to the reliability of their assurances that they pose no threat to Ontario's capital markets in the future.

[155] Boultbee submits that, while it is impossible for him to quantify the effects of any future director and officer bans, it is certain that, if the Panel chooses to impose them, he will not have the opportunity to earn income from those types of positions. Black did not make any submissions with respect to the effect that any sanctions may have on his livelihood.

[156] Boultbee also submits that his conduct should not be considered "on all fours" with any of the other respondents in this matter and that unlike respondents Black and Atkinson, he was not the subject of an SEC proceeding and that this should be a comparatively mitigating factor. For the reasons described in paragraph [161] below, we do not find Boultbee's submissions persuasive.

2. Sanctions

[157] As stated by the Commission in *Mithras: supra* at page 1611 (and summarized in paragraph [91] above), the role of the Commission is "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 doing so, 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…"

[158] Applying the principles set out in *Mithras***,** the Supreme Court of Canada stated in *Asbestos* that:

> 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:
>
> (*Asbestos*, supra at para. 43)

[159] We have concluded that the misconduct for which Black and Boultbee were convicted in the U.S. Legal Proceedings was sufficiently abusive as to warrant apprehension of future conduct detrimental to the integrity of Ontario's capital markets. We agree with Staff that specific and general deterrence are required in this matter to maintain the high standards of fitness and business conduct expected of market participants. In all of the circumstances, and given our foregoing analysis, we have concluded that sanctions against both Respondents are appropriate and necessary in this matter.

[160] We have also concluded that Black's proposal that, in lieu of sanctions, he should be permitted to continue to comply with his Undertaking would be manifestly inappropriate given the fact that he could withdraw the Undertaking at any time and such an approach would fail to address the need for both specific and general deterrence.

[161] In coming to the foregoing conclusion with respect to Boultbee, we recognize that he did not exert the same influence in Hollinger and International as Black did and his payment relating to the Forum and Paxton transactions was significantly less than that of

Black. However, Judge St. Eve concluded that Boultbee was either the principal architect or one of the architects of the tax planning for both companies which resulted in the establishment of what is described in paragraph 2 of the Information (which is incorporated by reference in Count Seven) as "a scheme to defraud International and International's public shareholders…by means of materially false and fraudulent pretenses, representations, promises and commissions, in connection with the U.S. Community Newspaper Asset Sales." (Information, *supra* at pp. 8 and 9). (See also the comments of Judge St. Eve in this regard set out in paragraph [43] above.)

[162] As summarized in paragraph [52] above, Staff has requested an order that includes, among other things, a ban on any trading in securities or derivatives by the Respondents as well as bans on the acquisition of securities and the use of exemptions contained in Ontario securities laws. The misconduct of the Respondents for which they were convicted in the U.S. Legal Proceedings was not based on allegations relating to the trading or acquisition of securities and, as noted above, the role of the Commission is to prevent future conduct having looked at past conduct as a guide and not to mete out punishment for such past conduct. Accordingly, we do not believe that prohibitions with respect to the trading or acquisition of securities or derivatives or denying the Respondents the use of any exemptions contained in Ontario securities law are appropriate in the circumstances.

[163] We do, however, believe that, it would be appropriate, for the purposes of investor protection, for the Commission to prohibit the Respondents from holding the positions of director or officer in circumstances where they could direct or influence the management of a business that is required to comply with the securities laws of Ontario. To do so would, in our view, properly limit their ability to undertake conduct in the future that would be detrimental to the integrity of Ontario's capital markets. We have also concluded that, in the circumstances described in these reasons, such prohibitions should be permanent as there is no basis in these specific circumstances in our view for considering that the risk of future misconduct is somehow circumscribed by the passage of time.

[164] Accordingly, we will issue an order that:

(a) Requires Black and Boultbee to resign all positions that they hold as a director or officer of any issuer, registrant or investment fund manager;

(b) Prohibits Black and Boultbee from becoming or acting as a director or officer of any issuer, registrant or investment fund manager; and

(c) Prohibits Black and Boultbee from becoming or acting as a registrant, as an investment fund manager or as a promoter.

VI. COSTS

[165] In its written submissions on costs, Staff submits that, based on the differing levels of responsibility for the time and resources expended by Staff, the Respondents

should be ordered to pay costs in the amount of $160,793.08 and that Black should be responsible for 95% or $152,753.43 of such amount and Boultbee should be responsible for 5% or $8,093.65. Staff submits that this is a conservative approach to cost recovery as the final amount sought represents a 62% discount of Staff's total costs in this matter which are only claimed for the time period from April 1, 2013 to August 31, 2014.

[166] Staff's costs are calculated based on its standard schedule of hourly rates of $185 per hour for investigators and $205 per hour for litigation counsel. Staff submits that its request for costs is conservative as it is not seeking any recovery for time spent in September and October 2014 preparing for and attending the hearing and preparing closing submissions. In addition, Staff is not seeking costs for pre-litigation analysis related to time spent by students-at-law, law clerks and investigative and other members of Staff. According to Staff, given that the Respondents were responsible for actions that served or aimed to delay and/or lengthen the amount of time involved with the matter, the conservative approach taken to costs is in line with the Commission's decisions in *Al-Tar Energy Corp (Re)* (2011), 34 O.S.C.B. 447 and *Global Partners Capital (Re)* (2011), 34 O.S.C.B. 10023.

[167] Black submits that a cost award is inappropriate in this matter as the purpose of inter-jurisdictional proceedings is to conserve the scarce resources of the Commission by avoiding duplicative efforts. Hearings in such proceedings are reduced in scope and little independent investigation is needed as decisions and/or agreements from the foreign jurisdiction are relied upon and, in fact, the only evidence relied on by Staff were the decisions from the U.S. Legal Proceedings. Accordingly, it would be punitive to expect a respondent to shoulder the costs in every such jurisdiction for each proceeding in which an inter-jurisdictional order is sought.

[168] In addition, Black submits that, as he was willing to continue his Undertaking that he not seek a position as a director or officer of a reporting issuer, the entire proceeding was unnecessary, making a cost award inappropriate. Black also points out that the motions in this matter helped to frame the scope of the hearing and reduce hearing time and thereby reduced costs and that some of Staff's conduct in this matter contributed to higher costs. Further, Black emphasized in his submissions that, to date, costs have never been ordered in a contested subsection 127(10) hearing before the Commission and there is no precedent to support Staff's request for costs.

[169] Black also submits that the amount of costs requested by Staff is unreasonable and surprising considering that the costs in this matter far exceed the costs claimed by Staff in longer hearings that deal with multiple respondents. Black also takes issue with the number of hours spent on certain tasks as set out in Staff's Bill of Costs and argues that there is not enough supporting detail to ascertain the exact work for which Staff is claiming costs and it appears that some of the hours might be inflated. Black submits that, if costs are ordered, a discount on costs is warranted and that the costs claimed by Staff should be more in line with the costs incurred by Black's legal team in the same time period.

[170] We did not receive any submissions on costs from Boultbee (either orally or in written form).

[171] In our view, this is not a matter in which costs should be awarded to Staff. We are guided by Rule 18.2 of the Commission's *Rules of Procedure* (2014), 37 O.S.C.B. 4168 and have been influenced by the following factors:

(a) The Hearing was complex and involved important issues and, unlike most of the prior subsection 127(10) hearings, it was a vigorously contested oral hearing in which the Respondents participated and *viva voce* evidence was led. The Commission was required to examine the scope of evidence permitted in the Hearing.

(b) During the course of the Hearing, Staff and the Respondents brought various motions and we do not find that one or the other contributed solely to the delays and the number of days on which the hearing was conducted. In fact, the motions did help us to address the scope of evidence to be heard at the Hearing and assisted Black in organizing and preparing his witnesses which saved hearing time in the end.

(c) All of the parties participated in a manner that assisted the Commission in understanding the issues before it and provided detailed oral and written submissions and participated in a responsible and informed and well-prepared manner.

(d) To date, the Commission has not ordered costs in a contested subsection 127(10) hearing, and, although we have no doubt that Staff incurred costs in the order of magnitude requested, it has not provided us with any compelling reason to deviate from the Commission's prior practice in the current proceeding.

(e) Finally, we note that Black and Boultbee were partially successful in this matter, and Staff was not granted all of the relief that it had requested.

VII. CONCLUSION

[172] Based on the foregoing, we have concluded that the criteria to impose an order under subsection 127(10) of the Act have been satisfied and that it is in the public interest to make an order under subsection 127(1) of the Act imposing market conduct restrictions on the Respondents. We will issue a separate order giving effect to our decision as follows:

IT IS HEREBY ORDERED THAT:

1. Pursuant to paragraphs 7, 8.1 and 8.3 of subsection 127(1) of the Act, Black and Boultbee shall resign all positions that they hold as a director or officer of any issuer, registrant or investment fund manager;

2. Pursuant to paragraphs 8, 8.2 and 8.4 of subsection 127(1) of the Act, Black and Boultbee shall be prohibited from becoming or acting as a director or officer of any issuer, registrant or investment fund manager;

3. Pursuant to paragraph 8.5 of subsection 127(1) of the Act, Black and Boultbee shall be prohibited from becoming or acting as a registrant, as an investment fund manager or as a promoter; and

4. The Respondents are released from their respective Undertakings (as defined in paragraph [9] of these reasons).

Dated at Toronto this 26th day of February, 2015.

"Christopher Portner"	*"Judith N. Robertson"*
Christopher Portner	Judith N. Robertson