Ontario Securities Commission
Commission des valeurs mobilières de l'Ontario
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IN THE MATTER OF THE *SECURITIES ACT*,
R.S.O. 1990, c. S.5, AS AMENDED

- AND -

IN THE MATTER OF
PAUL AZEFF, KORIN BOBROW,
MITCHELL FINKELSTEIN, HOWARD JEFFREY MILLER AND
MAN KIN CHENG (a.k.a. FRANCIS CHENG)

REASONS AND DECISION

Hearing:	September 29-30, 2014 October 1-2, 10, 14, 16-17, 20, 22-24, 27, 30-31, 2014 November 3, 5-7, 11-12, 14, 2014 December 12 and 15, 2014	
Decision:	March 24, 2015	
Panel:	Alan J. Lenczner AnneMarie Ryan Catherine E. Bateman	- Chair of the Panel - Commissioner - Commissioner
Appearances:	Donna Campbell Tamara Center Clare Devlin	- For Staff of the Commission
	Gordon Capern Jeffrey Larry	- For Mitchell Finkelstein
	Tyler Hodgson	- For Paul Azeff and Korin Bobrow
	Simon Bieber Daniel Bernstein	- For Howard Miller
	Janice Wright Greg Temelini	- For Francis Cheng

TABLE OF CONTENTS

REASONS AND DECISION

I. OVERVIEW

[1] Staff of the Ontario Securities Commission ("**Staff**"), in the Fresh As Amended Statement of Allegations of August 14, 2014, alleges that, on six separate occasions, a lawyer tipped his friend, an investment adviser, and that four investment advisers engaged in insider trading or tipping, purchasing shares for themselves, family members and/or clients while in possession of material non-public information contrary to section 76 of the *Securities Act*, R.S.O. 1990, c. S.5, as amended (the "***Act***").

[2] Staff also alleges that these investment advisers acted contrary to the public interest by recommending the shares of target companies, about to be purchased, to their friends, families and clients.

[3] Staff's theory is that the close personal relationship between each tipper and his tippee, the constant communication between tipper and tippee and the voluminous, anomalous trading in the shares of target companies, about to be acquired, gives rise to inferences that tipping of, and trading on, material non-public information took place.

[4] In the years from November 2004 to August 2007, there were six impugned takeover transactions. Staff alleges that a compelling pattern of conduct emerges from the conduct of the five respondents. Staff make a number of allegations. Shortly before the public announcement of each takeover transaction, Mitchell Finkelstein, a mergers and acquisitions lawyer in Toronto, communicated with Paul Azeff, an investment adviser with CIBC in Montreal, and told him that an imminent takeover transaction was to occur. Azeff passed on this material non-public information to his partner Korin Bobrow with whom he shared a trading code DK4. Azeff and Bobrow then bought a large volume of shares of the target company for themselves, their family members and many important clients. They also told friends and, in particular, LK who, on some occasions, in turn, telephoned a friend and investment adviser in Toronto, Howard Miller. Miller then told his associate, Francis Cheng. Both Miller and Cheng immediately bought a significant volume of the target company shares for themselves, their family members and some clients.

[5] The respondents acknowledge the relationships, the communications and the trading, but emphatically deny the receipt or utilization of material non-public information. They assert that they had good reason, based on due diligence, to purchase the target shares and no motivation to engage in illegal activity that they understood, as professionals and registrants, would prejudice their successful careers.

[6] The main legal issues that are to be decided in this matter, with respect to each of the transactions, are:

(a) What were the undisclosed material facts?

(b) Was there communication of the undisclosed material facts (tipping) by someone in a special relationship as defined in subsections 76(5)(a)-(d) of the *Act* (eg. an officer, director or advisor engaged in some aspect of the transaction)?

(c) Did the tippee or successive tippee know or ought he reasonably to have known that he was receiving undisclosed material facts from someone himself in a special relationship pursuant to the expanded definition in subsection 76(5)(e) of the *Act*?

[7] Appended as a schedule to these reasons and decision are the relevant subsections of section 76 of the *Act*.

II. PATTERN OF CONDUCT

[8] Staff emphasizes that the pattern of telephone calls between Finkelstein and Azeff, in close proximity to voluminous trading of shares by Azeff and Bobrow in Montreal, followed by the migration of the material non-public information to Toronto through a single source, LK, and the immediate buying of shares of the target in Toronto leads to the inescapable conclusion that tipping and insider trading was being carried out by professionals, all of whom knew that such activity was proscribed conduct under the *Act.* This over-arching pattern, Staff alleges, should inform the Commission in its review of the six individual transactions alleged.

[9] We reject the submission that we should view each of the six transactions through the lens of a pattern and similar fact evidence. Although there are certain similarities with respect to the conduct of the respondents regarding each takeover bid, there are many more dissimilarities which render the prejudicial effect greater than the probative value. These dissimilarities include the fact that Azeff and Bobrow did not purchase shares of all six takeover target companies. Neither did Miller and Cheng, even though the source of their information, LK, did. The volume of trading by the respondents, the number of individuals trading and the rapid acquisition of shares in some cases was pronounced and, in others, it was not.

[10] We have determined that we must adjudicate each transaction separately and judge the conduct of each respondent against the allegations made with respect to him related only to that transaction.

III. THE RESPONDENTS

[11] There are five respondents, one lawyer and four registrants.

A. Mitchell Finkelstein

[12] Finkelstein completed high school and CEGEP in Montreal. He attended the University of Western Ontario graduating with a Bachelor of Business Administration and Commerce in 1990. While there, he became friends with, and a fraternity brother of, Paul Azeff, also a Montreal resident. Finkelstein then attended the law school at the University of Ottawa, receiving his LLB in 1994.

[13] Finkelstein joined Davies Ward Phillips and Vineberg (Davies) as an associate in 1997. He became a full equity partner in 2002. His area of practice from 1997 to 2010 was a corporate, commercial practice which encompassed financings, securities, mergers and acquisitions, takeovers and plans of arrangement.

[14] He was regarded by his colleagues as a highly intelligent, industrious, committed lawyer. His commitment is illustrated by the 1850 to 2400 billable hours recorded in

the years in question, 2004 to 2007. In 2007, he was the recipient of a Lexpert Top 40 under 40 award.

[15] Finkelstein married Kim in 2000 and the couple have two children born in 2002 and 2004.

[16] Finkelstein, described as conservative of character, left the arrangement and planning of social occasions to his wife Kim.

B. Paul Azeff

[17] Azeff grew up and continues to live in Montreal. He attended the University of Western Ontario, obtaining his Bachelor of Arts in Literature in 1991. He moved back to Montreal after graduation, took the Canadian Securities Course and became a licensed investment adviser in 1992. He worked for Burns Fry, Marleau Lemire, Midland Walwyn, and Merrill Lynch until 2001. In 2001, the retail arm of Merrill Lynch was sold to CIBC Wood Gundy ("**CIBC**"). Azeff remained at CIBC until 2011 as sales manager at the Place Ville-Marie branch. This branch was the largest brokerage branch in Montreal and by 2004, Azeff had developed a big book of business with many clients.

[18] Azeff was first registered as a salesperson in Ontario in 1997, and was a dealer in the category of investment dealer beginning in 1998. In 2003, his registration was converted to that of a trading officer. In 2009, his registration was converted to that of a dealing representative until December 2010, when he was no longer registered in Ontario. In 2013, he again became registered in Ontario, subject to conditions, as a dealer in the category of investment dealer.

[19] Azeff was described as outgoing, gregarious, chatty, bright, a good broker with a network of friends and clients. In 2007, he made and received thousands of phone calls as captured by his extension at CIBC. If Azeff wanted to reach a friend or client, he would not hesitate to call four to five times in rapid succession if the first calls remained unanswered.

[20] In August 2004, Azeff married Oana. They had a joint trading account at CIBC.

[21] Azeff and Korin Bobrow met in high school and have been extremely close friends since. In 1995, Azeff and Bobrow formed a partnership at Marleau Lemire. Although not in a formal partnership while they worked at CIBC, they were in every sense of the word, partners. They shared a trading code DK4 for all their trading. They discussed investment ideas continuously. They shared their research. They looked after each other's clients when the other was absent from his adjacent desk.

C. Korin Bobrow

[22] Bobrow grew up in Montreal. He studied political science and philosophy at Carlton University, leaving it before graduation. He returned to Montreal in 1992, completed his Canadian Securities Course and became a full broker at Marleau Lemire in 1994. In 1995, Azeff joined the firm and Azeff and Bobrow moved firms in lock step, always working together throughout their careers.

[23] Bobrow was first registered as a salesperson in Ontario in 2003, and maintained that registration until 2009. At that point, he was registered in Ontario as a dealer in the category of investment dealer until December 2010, when he ceased to be registered in Ontario. In 2013, he again became registered in Ontario, subject to conditions, as a dealer in the category of investment dealer.

[24] Azeff was more interested in the technical analysis and followed the U.S. and Canadian technical charting of stocks. Bobrow, on the other hand, concentrated more on the research embedded in the analysts' reports and macroeconomics.

[25] Bobrow married Marie-Josée in January 2004. He and his wife had a joint trading account at CIBC.

D. Howard Miller

[26] Miller did not testify at the hearing. Excerpts of his compelled testimony from 2009 were read into evidence.

[27] Miller grew up in Montreal and attended McGill University, obtaining a Bachelor of Science. He furthered his education achieving a Masters of Science and Masters of Business Administration. He began working as an investment adviser at CIBC in Toronto in 1995 and moved to TD Securities ("**TD**") in 2000. Shortly thereafter, he was promoted to vice-president and in fiscal 2007 was one of the firm's top ranked investment advisers nationally.

[28] Miller is married to Heidi-Lynn. Miller had trading authority over her accounts.

[29] Miller was first registered in Ontario as a salesperson in 1995. In 1999, his registration was converted to trading officer. For a short period in 2000, his registration reverted to salesperson before once again being amended to a trading officer. His registration as a trading officer continued until 2008. In 2009, he was once again registered as a salesperson with Raymond James and then shortly after it was amended to a dealing representative with terms and conditions. He has not been registered in Ontario since October 2010.

E. Man Kin Cheng (Francis Cheng)

[30] Cheng also did not testify. His compelled testimony from 2009 was read into evidence.

[31] Cheng grew up in Hong Kong, where his brother still resides. Cheng traded an account held in his brother's name at TD in Toronto.

[32] Cheng came to Canada in 1988, graduated from University of Toronto with a Bachelor of Arts in 1994 or 1995, completed the financial and industry courses for registration and the Canadian Hedge Fund Specialist Exam.

[33] He joined TD in 1999 and became a full investment adviser in 2001.

[34] Cheng was first registered in Ontario in 1998, as a salesperson at HSBC Securities. After moving to TD in 1999, he was registered as a salesperson through to September 2008. He has not been registered in Ontario since 2008.

[35] Cheng is married to Jennifer. She had a trading account in her own name, which was funded with her own money. She provided Cheng with her password and he made all of the investment decisions in the account and executed all the trading. Cheng did not have his own trading account because he had limited monies available for investment purposes.

IV. RELEVANT LAW

A. Section 76 of the *Act* – Insider Trading and Tipping

[36] The *Act* prohibits insider trading and tipping. The decided authorities in Canada and the U.S. view this offence, when established, as very serious; it is in the nature of a cancer which erodes public confidence in the capital markets (*Re Donnini* (2002), 25 OSCB 6225 at para. 202, citing *Re MCJC Holdings* (2002), 25 OSCB 1133 at 1135). Tipping is considered as equally offensive as insider trading. Tipping provides an informational advantage unavailable, and hence unfair, to other investors. The objectives of the *Act* are stated to be protection of the public and the promotion of the integrity of the capital markets. Nearly every Canadian is invested in the capital markets through a direct investment, a mutual fund, a pension plan or an RRSP.

[37] The capital formation process depends upon investors' confidence in the fairness of the securities markets. Confidence in the capital markets is a key component to corporate well-being. If confidence is eroded, liquid funds will migrate to those markets that are better regulated and have a higher reputation for integrity. Tipping and insider trading erode confidence when it is perceived that someone has gained an advantage, not through skill and the courting of risk, but because of an informational advantage unavailable to other investors (*Re Suman* (2012) 35 OSCB 2809 ("***Suman***") at para. 23 aff'd 2013 ONSC 3192 (Div. Ct.)).

[38] In this case, the respondents are all professionals, a corporate, commercial lawyer and four licensed investment advisers, all of whom were aware of the seriousness with which securities regulators view illegal tipping and illegal insider trading and the need for confidentiality of material non-public information.

[39] Staff must establish all the elements of section 76 of the *Act*. The *Act* prohibits those in a special relationship with a reporting issuer from informing others of undisclosed material facts and from trading with knowledge of undisclosed material facts. Subsections 76 (1) and (2) of the *Act* provide:

> **76(1)** No person or company in a special relationship with a reporting issuer shall purchase or sell securities of the reporting issuer with the knowledge of a material fact or material change with respect to the reporting issuer that has not been generally disclosed.
>
> **(2)** No reporting issuer and no person or company in a special relationship with a reporting issuer shall inform, other than in the necessary course of business, another person or company of a material

> fact or material change with respect to the reporting issuer before the material fact or material change has been generally disclosed.

[40] Neither motive nor intent form a part of the legal requirements of the section.

B. Standard of Proof

[41] It is not disputed that the standard of proof applicable to the alleged offences in these proceedings is the balance of probabilities (*F(H) v. McDougall*, [2008] 3 S.C.R. 41 at para. 40 ("***F(H) v. McDougall***")).

[42] The evidence to establish the standard, on a balance of probabilities, must be clear, convincing and cogent. The question to be answered is: whether the alleged events, based on clear, convincing and cogent evidence, are more likely than not to have occurred (*F(H) v. McDougall, supra* para. 46; *Suman, supra* at para. 31).

C. Circumstantial Evidence

[43] Circumstantial evidence is clearly admissible (*Re Kusumoto*, 2007 ABASC 40 at paras. 73-74). It usually forms the bulk of the evidence in cases where insider trading and tipping is alleged. Some aspects of insider trading cases, such as the fiduciary duty and the duty not to disclose material non-public information, are relatively easy to prove. Other aspects, particularly tipping, are very difficult to prove as, generally, the only persons who have direct knowledge of the relevant communications are the wrongdoers themselves. As a result, insider trading and tipping cases are often established by inferences drawn from indirect evidence. In this case, circumstantial evidence is the evidence of communication, the relationship between the parties, the knowledge that the tipper informant had, the knowledge the tippee had, the trading by the tippee and/or successive tippees and the timing and volume of the trades in relation to the initiating conversations and successive tips.

[44] The Commission determined, in the circumstances of the *Suman* case, that:

> Knowledge of an undisclosed material fact may be properly inferred based on circumstantial evidence that includes proof of the ability and opportunity to acquire the information combined with evidence of well-timed, highly uncharacteristic, risky and highly profitable trades.
>
> (*Suman, supra* at para. 307)

[45] A variety of types of circumstantial evidence can be the indicia of insider trading or tipping:

(a) unusual trading patterns;

(b) a timely transaction in a stock shortly before a significant public announcement;

(c) a first time purchase of the stock;

(d) an abnormal concentration of trading by one brokerage firm or with one or a few brokers; and

(e) a trade that represents a very significant percentage of the particular portfolio.

[46] Motive and intent can also be weighed as facts when drawing inferences whether it is more probable than not that the alleged offences occurred.

[47] The indicators listed in the paragraphs above are not exhaustive. Nor is it necessary that all indicia be established in every case. Insider trading and tipping cases are established by a mosaic of circumstantial evidence which, when considered as a whole, leads to the inference that it is more likely than not that the trader, tipper or tippee possessed or communicated material non-public information.

[48] From circumstantial evidence which is firmly established, we are asked to draw inferences. Inferences can be drawn to determine whether it is more likely than not that the insider trading and tipping occurred. Inferences drawn must flow naturally and logically from the established facts. Inferences cannot be made where, objectively, they are unreasonable or illogical.

[49] Inferences drawn from speculated facts are legally unacceptable (*R v. Munoz*, [2006] O.J. No. 446 (Ont. S.C.J.) at para. 31; *Walton v. Alberta (Securities Commission)* 2014 ABCA 273 at paras. 27-29).

D. Material Fact

[50] A material fact, defined in subsection 1(1) of the *Act* is a fact that, objectively, would reasonably be expected to have a significant effect on the market price of the security in issue . The materiality of facts is an objective market impact test (*Re Donald* (2012) 35 OSCB 7383 ("***Donald***") at paras. 199 and 201; *Re YBM Magnex* (2003) 26 OSCB 5285 ("***YBM***") at para. 91). It is most often measured by contrasting the market impact of the public announcement with the price of the share on the date when a respondent had that information. In this hearing, we are dealing with material facts that have not been generally disclosed to the public, facts which we refer to hereafter as "**material non-public information**" or "**MNPI**".

[51] Knowledge that an acquirer had determined to acquire control of a target either by a takeover bid or by a plan of arrangement constitutes a material fact. Objectively, it is commonly anticipated that acquiring a control position of another company will be at a meaningful premium to the market price of the target (*Re Bennett*, [1996] 34 BCSCWS 55 at para. 486; *Suman, supra* at para. 11). In all six transactions, the public announcement of the transaction was at a premium to the market price.

E. Special Relationship

[52] The elements of a special relationship have raised significant debate, as it applies to tippees and, particularly, successive tippees.

[53] There is no doubt that officers and directors of an issuer are in a special relationship. So too, by virtue of subsection 76(5)(b) of the *Act* is any person or

company engaged in a business or professional activity with or on behalf of the reporting issuer. Thus lawyers, business advisers and financial advisers are all in a special relationship.

[54] What is more difficult to determine is whether an alleged successive tippee, in this case Bobrow, Miller or Cheng are caught by subsection 76(5)(e) of the *Act* which focuses on the status of a tippee's direct informant and expressly includes an informant who is himself a tippee:

> [s. 76(5)(e)] A person or company that learns of a material fact or material change with respect to the issuer from any other person or company described in this subsection, including a person or company described in this clause, and knows or ought reasonably to have known that the other person or company is a person or company in such a relationship.

[55] The two objectives of the *Act* are set out in subsection 1(1) of the *Act*. They are (a) the protection of the investing public; and (b) maintaining the integrity of the capital markets. The interpretation of every section of the *Act* must proceed from the plain and ordinary meaning given to the literal words in the provision viewed through the lens of the objectives of the *Act*.

[56] In *Danuke,* the Commission held that the respondents' trading while in possession of undisclosed material facts was contrary to the public interest (*Re Danuke* (1981), 2 O.S.C.B. 31c ("***Danuke***") at 43c). In that matter, the Commission stated:

> It is the Commission's view that all registrants ought to understand that they have a duty not to attempt to profit, directly or indirectly, through the use of inside information that they believe is confidential and know or should know came from a person having a special relationship with the source of the information.
>
> (*Danuke, supra* at para. 40c)

[57] The legislature, in promulgating subsection 76(5)(e) of the *Act*, intended to proscribe the abusive activities of an indefinite chain of indirect tippees. By using both the subjective element of "knows" and the objective test of "ought reasonably to have known" the intent of the legislature was to encompass a broad spectrum of actors who impair confidence in the capital markets by using confidential information not available to all investors. At the same time, the legislature provided safeguards so that there would not be a regime of indefinite liability. If any person "knows" that the MNPI he has came from someone in a special relationship, ie. he is told that it came from a lawyer, banker, accountant, officer or director, etc., involved in the transaction, he is caught by the subsection whether or not his informant is such a person or has no direct involvement in the transaction. If, on the other hand, the successive tippee receives very detailed MNPI from his tipper, who has no involvement in the transaction, he may, nevertheless, be caught by the subsection if the cumulative effect of a number of factors makes it more probable than not that he "ought reasonably to have known" that the MNPI came from a person in a special relationship.

[58] The tippee does not necessarily need to know the identity of the initial tipper. In a situation involving a successive tippee, it is quite probable that the tippee will not know the identity of the original tipper. How then does one distinguish between trading by the tippee based on rumour, which is not a proscribed activity, and trading by the tippee based on an objective basis, i.e. that he ought reasonably to have known that the material information originated with a person defined in subsection 76(5) of the *Act*, e.g. an insider or professional adviser to the transaction?

[59] It can be readily seen that, with respect to successive tippees, it must always be asked whether the tippee, being considered as a wrongdoer, received material facts, which he reasonably knew or ought to have known came from someone who, in turn, knew or reasonably ought to have known came from a person in a special relationship.

[60] Counsel for Cheng put the necessary requirements very well and very succinctly. She said that two tests have to be met: an information connection to the issuer (i.e. possession of inside information) and a person connection. She said that the information connection test only, which she asserted is the only requirement in Australia and the United Kingdom, was not adopted in Ontario. It was not adopted in Ontario because it would make trading on the basis of market rumours, received from sources apparently unconnected to the issuer, illegal. A person connection is satisfied depending on the relationship between tipper and tippee. We agree that there is a dual test to satisfy the requirement of a special relationship.

[61] The difficulty is not with the first part of the test, i.e. the possession of inside, confidential, non-public, generally undisclosed information by the tippee. To prove that test on the balance of probabilities requires a comparison of what information the tippee has knowledge of, contrasted with whether that information is in the public domain.

[62] The content of the second part of the test, the "person connection" is more difficult. There is little or no guidance in the authorities. It is clear that there is a broad spectrum between two poles. On the one hand, there can be lawful trading by a tippee with possession of MNPI, but with no knowledge that it came from a person in a special relationship, a person that we are referring to as a "knowledgeable person". A knowledgeable person includes all those persons enumerated in section 76 of the *Act*, eg. officers, directors and other insiders of the target or the acquirer and professional advisers, lawyers, bankers, accountants, etc. involved in acting for a party to the transaction. At the other pole is illegal trading by a tippee based on MNPI, which he knows originated with a knowledgeable person.

[63] The statutory provision of "ought reasonably to have known" that the MNPI came from a knowledgeable person falls on the spectrum between the two poles. It demands an objective test, which can be articulated by the question: should a person standing in the shoes of the tippee, reasonably assume that the MNPI passed on to him originated with a knowledgeable person?

[64] The answer to that question lies in a list of factors to be considered:

(a) What is the relationship between the tipper and tippee? Are they close friends? Do they also have a professional relationship? Does the tippee know of the trading patterns of the tipper, successes and failures?

(b) What is the professional qualification and standing of the tipper? Is he a lawyer, businessman, accountant, banker, investment adviser? Does the tipper have a position which puts him in a milieu where transactions are discussed?

(c) What is the professional qualification of the tippee? Is he an investment adviser, investment banker, lawyer, businessman, accountant, etc.? Does his profession or position put him in a position to know he cannot take advantage of confidential information and therefore a higher standard of alertness is expected of him than from a member of the general public?

(d) How detailed and specific is the MNPI? Is it general such as X Co. is "in play"? Or is it more detailed in that the MNPI includes information that a takeover is occurring and/or information about price, structure and timing?

(e) How long after he receives the MNPI does he trade? Does a very short period of time give rise to the inference that the MNPI is more likely to have originated from a knowledgeable person?

(f) What intermediate steps before trading does the tippee take, if any, to verify the information received? Does the absence of any independent verification suggest a belief on the part of the tippee that the MNPI originated with a knowledgeable person?

(g) Has the tippee ever owned the particular stock before?

(h) Was the trade a significant one given the size of his portfolio?

[65] This list of factors that informs the assessment of "ought reasonably to have known" that the MNPI came from a person in a special relationship may vary depending on the factual context and the actors involved, but provides a reasonable guideline that can be applied in the vast majority of situations. The weight to be accorded to each factor will also vary. What is important is that the overall weight given to the aggregate of all the factual criteria compels the Commission to the conclusion that it is more probable than not that the tippee ought reasonably to have known that the MNPI he received originated from a knowledgeable person, i.e. one who was in a special relationship as enumerated in section 76 of the *Act*.

F. Section 127 of the *Act* – The Public Interest

[66] Section 127 of the *Act* operates in two ways. It specifies the sanctions available for breaches of specific sections of the *Act.* It also provides the discretion to the Commission to order some, but not all, of the sanctions enumerated in the subsections, in the event it finds the conduct that has been established to be contrary to the public interest. The words "contrary to the public interest" is a discretionary concept to be applied only when the objectives of the *Act* have been abused. It is not a substitute for a near miss of an essential element of a breach of a section of the *Act*. If a required element of an allegation of a breach of a specific section fails to be established, the allegation must be dismissed. But, if the conduct in issue, reviewed on its own, is contrary to the animating principles of the *Act* and harms investors or abuses

confidence in the capital markets, the Commission may make a finding that the conduct is not in the public interest (*Committee for the Equal Treatment of Asbestos Minority Shareholders v. Ontario (Securities Commission)* [2001] 2 S.C.R. 132 at paras. 41-42; *Donald, supra* at paras. 323).

[67] The purposes of the *Act* are to provide protection to investors from unfair, improper or fraudulent practices and foster fair and efficient capital markets and confidence in capital markets (section 1.1 of the *Act*). Subsection 2.1 of the *Act* details fundamental principles for the Commission to consider in addressing the *Act*'s purposes: i) requirements for timely, accurate and efficient disclosure of information; ii) restrictions on fraudulent and unfair market practices and iii) requirements for the maintenance of high standards of fitness and business conduct to ensure honest and responsible conduct by market participants.

V. THE TELEPHONE COMMUNICATIONS

[68] Staff's allegations rely on telephone communications between Finkelstein and Azeff, between Azeff and LK, between LK and Miller, between Azeff and HG and/or between Bobrow and HF. The available phone records were entered to demonstrate the frequency and volume of the conversations between the participants, numbering in the thousands in the relevant period between 2004 and 2007. In many, but not all instances, the telephone records reveal the proximity of conversations to the start of trading.

[69] The initiation of the alleged tipping for each of the six transactions is one or more telephone conversations between Finkelstein and Azeff in the days before trading in the impugned stock occurred and within a relatively short time before the public announcement of the takeover transaction.

[70] There are four categories of available telephone records.

A. Home Phone Records

[71] For the relevant periods from November 2004 to December 2007, outgoing long distance calls from Finkelstein's and Azeff's home phones are captured. From Finkelstein's home phone records, the minimum call duration is recorded as one minute. From Azeff's home phone records, the minimum call duration is recorded as 30 seconds. This means that if the recorded call duration for Finkelstein's home phone was one minute and for Azeff's home phone was 30 seconds, it is possible that no person-to-person contact was made. The evidence was that Azeff and Kim (Finkelstein's wife) were more outgoing than their spouses and that they were most often the organizers of social gatherings, arranged get-togethers in Montreal and Toronto and planned vacations for the two families. Thus all home-to-home phone calls cannot be assumed to be between Finkelstein and Azeff.

B. Cell Phone Records

[72] Cell phone records of Finkelstein and of Azeff, capturing both outgoing local and long distance records, were made exhibits. The minimum billing period for Finkelstein's cell phone was one minute, while that of Azeff, up to May 2005, also had a minimum

one minute billing cycle. In May 2005, Azeff's new phone plan recorded per second billing.

C. Davies' Phone Records

[73] Davies' phone records were not enlightening. They captured outgoing long distance calls billed to a client file, but not toll-free calls. In none of the years were any outgoing calls from Finkelstein's work line to Azeff captured in the Davies' phone records, with one exception on July 10, 2007. This was due to toll free dialing from Davies' Toronto office. These calls were captured as incoming calls on CIBC's phone records, but only after November 2006.

D. CIBC Phone Records

[74] CIBC phone records were only available from November 2006. They showed the calls from and to the extensions used by Azeff, Bobrow and Irene S, the assistant to Azeff and Bobrow.

[75] As previously noted, there were thousands of phone calls to and from Azeff's and Bobrow's extension to family, friends and clients in 2007.

[76] More importantly, what was established from all available phone records was that there were, in total, 20 phone calls between Finkelstein and Azeff in 2004, 43 calls in 2005, and 190 calls in 2007. The records for the years 2004 and 2005 probably under-record the true number of calls because office-to-office calls were not captured. Finkelstein and Azeff did not suggest that the frequency of telephone contact increased dramatically between 2004 and 2007.

E. Calls with LK

[77] One other series of calls bears mention. In 2007, there were 1112 calls between LK and CIBC. Of those, 635 calls were with Azeff, 63 calls were with Bobrow, and 414 calls were with Irene S., Azeff and Bobrow's personal assistant. LK was Azeff's accountant, a good friend, and a person who was very interested in the stock market. Calls between the two friends in prior years are not captured. What is remarkable, is that LK and his family bought a significant number of shares in each and every one of the target companies shortly before the public announcement. Yet, few of these shares was bought through a CIBC brokerage account managed by Azeff and Bobrow.

VI. FINKELSTEIN'S CASH DEPOSITS

[78] Staff's allegations included four instances when Finkelstein deposited cash into his bank accounts: $6,300 between January 27 and 30, 2005; $6,100 on each of September 9, 2005 and December 2, 2005; and a total of $24,350 from May 1 to May 5, 2007. Each deposit occurred after the public announcement of one of the six impugned transactions and within days of a meeting between Finkelstein and Azeff in Toronto or of an opportunity for a meeting in Montreal. If proven, some motive would have been established.

[79] Finkelstein responded fully to this allegation pointing out that he followed his father's practice of keeping cash at home as a means of protecting his savings. The

cash, he testified, was from his own income or cash given to him by family and friends on the occasions of his marriage and the birth of his two children and that none of the cash came from Azeff. His deposits into his bank accounts were to insure that monies were available for installment payments of tax or for mortgage payments.

[80] As strange as Finkelstein's cash habits of keeping $25,000 - $30,000 around the house in tin boxes and depositing cash into and withdrawing cash from his bank account, from time to time may seem, there can be no reason to disbelieve Finkelstein on his explanations and accounting. Staff did not ask any relevant questions of Finkelstein regarding the cash allegations in cross-examination and the salutary rule of *Browne v. Dunne* ((1894), 6 R. 67 (H.L.)) makes it justifiably unfair to doubt Finkelstein's account. Furthermore, there was no evidence of cash withdrawals from Azeff's account or any monies from any other source. We cannot accept Staff's submissions regarding the relevance of the cash deposits.

VII. FINKELSTEIN'S KNOWLEDGE OF MATERIAL FACTS

[81] In this case, for reasons discussed below, we find that Finkelstein had knowledge of material facts in respect of the six takeover transactions alleged. He had the direct knowledge in three transactions, Masonite International Corporation ("**Masonite**" or "**MHM**"), Legacy Hotels REIT ("**Legacy**") and IPC US REIT ("**IPC**") because he was a lawyer involved in the transaction and knew of the decision to acquire the target, when it was made, and had continuing knowledge of materials facts throughout the pendency of the transaction leading to the public announcement. With respect to these transactions Finkelstein was in a special relationship with the issuer pursuant to subsection 76(5)(b) of the *Act*.

[82] In the three other transactions, MDSI Mobile Data Solutions Inc. ("**MDSI**"), Placer Dome Inc. ("**Placer**") and Dynatec Corporation ("**Dynatec**"), for reasons discussed below, we find that Finkelstein had knowledge of the decision to acquire the target because, although he was not involved as the Davies lawyer working on the transaction, he accessed deal documents between the time of the decision to acquire and the public announcement. We find that Finkelstein had material non-public information only from the time of that access. With respect to these transactions Finkelstein was in a special relationship with the issuer pursuant to subsection 76(5)(c) and (e) of the *Act*.

[83] With respect to the latter three transactions, Staff asks us to find that the knowledge of Davies can be imputed to Finkelstein from the time when Davies was engaged to advise one of the parties to the transaction. We decline to do so as it would involve speculation that Finkelstein knew about Davies' involvement in every takeover transaction through office chatter or some other unspecified means.

[84] As we address each of the transactions we shall identify the material fact(s) and when Finkelstein acquired knowledge of them.

VIII. MASONITE

A. Overview of the Transaction

[85] Masonite was a building products company with corporate offices in Ontario and Florida. Its main products were doors and door components. It had operations in more than 16 countries and 50,000 employees worldwide. MHM traded on the TSX and NYSE. It was a reporting issuer in Ontario during the relevant period from November 2004 until April 2005.

[86] There were a number of discussions, beginning in November 2003, between Kohlberg Kravis Roberts & Co. ("**KKR**"), a U.S. private equity firm, and MHM regarding a potential takeover. Those discussions were sporadic until July 2004 when they became more serious.

[87] In July 2004, KKR discussed with management of MHM a possible acquisition of MHM and indicated a preliminary valuation of C$40-42 per common share. These discussions were not publically disclosed as there was no certainty at that time that the acquisition would proceed. At that time, the shares were trading on the TSX at approximately $31 to $34.

[88] In August and September, discussions continued between KKR and Masonite. Masonite's Board authorized management to provide certain financial information to KKR and further details were discussed including the structure of the deal.

[89] On October 4, 2004, representatives of Masonite, KKR and Scotia Capital met at Masonite's research facility in Illinois for the purpose of KKR conducting due diligence.

[90] On October 20, 2004, management of Masonite discussed with their Board the financial models that had been provided to KKR. Mr. Orsino, CEO and President of Masonite, indicated to the Board that KKR continued to present a preliminary value indication, subject to further due diligence, of C$40-42. The Board authorized Orsino to continue discussions with KKR and provide the necessary due diligence information.

[91] The deal was publicly announced on December 22, 2004 in a press release issued by Masonite, stating that it had entered into a definitive agreement to be acquired by an affiliate of KKR in an all cash transaction at C$40.20 per share. This was a premium of approximately 20% to the market price on November 16, 2004.

B. The Allegations

[92] Staff alleges that Finkelstein, while in a special relationship with Masonite, informed Azeff of undisclosed material facts regarding Masonite, contrary to subsection 76(2) of the *Act*.

[93] Staff alleges that Azeff, while in possession of material undisclosed facts:

(a) traded Masonite securities on behalf of himself and his wife between November 19 and December 22, 2004 contrary to subsection 76(1) of the *Act*;

(b) recommended investing in Masonite to family members, clients and friends contrary to the public interest; and

(c) informed Bobrow and at least one client, LK, of the material facts related to the Masonite transaction contrary to subsection 76(2) of the *Act*.

[94] Staff alleges that Bobrow, while in possession of material undisclosed facts:

(a) traded in shares of Masonite between November 19 and December 22, 2004 contrary to subsection 76(1) of the *Act*;

(b) recommended investing in shares of Masonite to family members, clients and friends contrary to the public interest; and

(c) informed at least one client, HF, of the material undisclosed facts regarding the Masonite transaction contrary to subsection 76(2) of the *Act*.

[95] Staff alleges that Miller received the material undisclosed facts from LK and that, while in possession of material undisclosed information, he:

(a) purchased Masonite securities on behalf of himself and his wife between November 22 and December 22, 2004, contrary to subsection 76(1) of the *Act*;

(b) recommended investing in the shares of Masonite to family members, friends and clients contrary to the public interest; and

(c) tipped Cheng and at least one client, DW, of the material undisclosed facts regarding the Masonite transaction contrary to subsection 76(2) of the *Act.*

[96] Staff alleges that Cheng received the material undisclosed facts from Miller and that, while in possession of material undisclosed information, he:

(a) purchased Masonite securities on behalf of his wife and his brother between November 29 and December 22, 2004, contrary to subsection 76(1) of the *Act*;

(b) recommended investing in the shares of Masonite to family members and clients contrary to the public interest; and

(c) tipped at least one client, SK, and a potential client of the material undisclosed facts regarding the Masonite transaction contrary to subsection 76(2) of the *Act*.

C. Material Facts

[97] Masonite was a long standing client of Davies. Finkelstein began working on MHM matters early in his career at Davies. He was counsel to MHM on its acquisitions, had primary responsibility for negotiating and documenting its banking and credit agreements and generally providing corporate advice to MHM. Finkelstein knew and communicated with the principal officers of MHM including Ulster, Ambruz, Tubbesing and Bernards.

[98] In July 2004, Finkelstein advised MHM to cease purchasing shares under its Normal Course Issuer Bid because he determined that the possibility of an acquisition was a material fact that MHM should not take advantage of to the potential unfairness of selling shareholders.

[99] In the period from August to November 16, 2004, Finkelstein, on the instructions of his client, MHM:

(a) reviewed the compensation arrangements that the senior officers of MHM had with the company to ensure that their options or deferred shares vested in the event of a change of control;

(b) reviewed a pre-existing 2003 Standstill Agreement to ensure that its terms were still appropriate to protect MHM when it made available its confidential data to KKR; and

(c) assembled all of MHM's credit agreements for review by KKR.

[100] We are satisfied that, from July to November 15, 2004, Finkelstein was well aware of the increasing likelihood of KKR acquiring MHM. His legal services and the reasons for his services point only in that direction and to that conclusion.

[101] Then, on November 16, MHM called a meeting to be held quickly with its Davies' lawyers. This meeting was unlike previous telephone discussions with Davies' lawyers in that three executives of MHM attended at the Davies' offices and two senior Davies' partners, Gula and Connelly also attended, as well as Finkelstein. The number and seniority of people in attendance, in person, denoted an important meeting.

[102] At the hearing, Connelly described the meeting:

> A. Well, that was the, so far as I'm aware, the first – the prime organizational meeting that signalled to me that this transaction was for real because the client said we need to meet fast and we met fast. And that was because something that had been floating around in the air for a long period of time appeared suddenly to be real. The client needed legal advice about it.

[103] Finkelstein, on the other hand, described the meeting as routine:

> I don't really characterize that meeting as being all that material. It was just another preliminary meeting that we were having, similar to the work that I'd been doing up to that date in preparing and answering questions from management regarding a possible transaction with KKR.
>
> […]
>
> I believe what I had said the other day was I viewed this as more yet another internal matter that we were trying to address with the individuals, Harley and John. They had asked a question about 61501 [sic], in particular about the collateral benefits, because the deal they

> were considering obviously had some of those issues to consider, and I didn't view it as anything other than simply another means to get to the end.

[104] We prefer the evidence of Connelly with respect to his recollection of the importance of the meeting (See: *Springer v. Aird & Berlis LLP* (2009), 96 O.R. (3d) 325 (Sup. Ct. J.) at para. 14). Beginning on November 16, the docket entries by the Davies' lawyers are recorded as Project Crystal, a pseudonym used to provide greater confidentiality to a pending transaction. Previously, all legal services rendered were recorded on a MHM titled file. Connelly did not habitually perform legal services for MHM and thus this particular meeting that he was invited to attend with Gula, another senior partner at Davies, made an impression on him and sticks out in his memory. A review of the dockets immediately after the November 16 meeting shows significant legal activity and services rendered, consistent with a decision by KKR and MHM to proceed. Of particular note was the significant investigation of OSC Rule 61-501 to determine the consequences flowing from MHM executives receiving collateral benefits from a takeover by KKR.

[105] We conclude that, at a minimum, on November 16, 2004, the lawyers at Davies, including Finkelstein, knew that KKR would be proceeding with a friendly takeover transaction of MHM and that MHM was willing to be bought out. Finkelstein's knowledge of the decision by KKR to proceed to acquire MHM and MHM's acceptance of the proposal is a material fact. Further, this probable acquisition, if disclosed, would reasonably be expected to have a significant effect on the market price or value of MHM shares. The vast majority of takeover transactions are at a premium to market price of a security and further increase the value of the security. As a result, the premium on the transaction announced publicly on December 22 was approximately 20% increase to the market price on November 16. By November 16, Finkelstein was in possession of that undisclosed material fact.

1. Staff's Submissions on Additional Material Facts

[106] Staff submits that, by November 16, Finkelstein also knew that the takeover consideration was to be cash, at around Cdn. $40 per share and that the transaction would take place within a relatively compressed period of time.

[107] In July, in discussions with MHM, KKR indicated a preliminary valuation of Cdn. $40-42 per share. At a MHM Board Meeting, in October 2004, the President of MHM indicated to the Board that the value of Cdn. $40-42 was still the range. Staff also pointed to passages from Finkelstein's compelled testimony in 2010 wherein Finkelstein acknowledges that "we were told that there was a range of prices that was at least preliminarily acceptable to the company to move forward on" and "I believe they had a price in mind, that $40 was their threshold, their minimum that they were looking for, and that there was enough of an indication that […] there was enough to proceed to start to work on a deal".

[108] Staff pointed back to Finkelstein's ceasing of the Normal Course Issuer Bid in July, his review of the change of control provisions in August, his assembly of the credit agreements in early November, all services rendered by Finkelstein, and implied that it is unlikely that he would have done all this work and never asked or been told of the

indicative price of Cdn. $40 per share, particularly as he had known and interacted with the principals of MHM for more than a year.

[109] Staff then pointed forward in time to emails from Miller to a client and a lawyer, DW on November 24 between 15:17 and 17:22 in the following sequence:

> Miller: "Call me I have a tip"
>
> DW: "i'll take your tip. you've steered me right in the past. Just let me know what you are buying/selling/shorting so I can clear it hear [sic] first."
>
> Miller: "Stock trades on TSX at around $34 – cash takeover at $40 Timing should be before xmas but you never know with lawyers […] I'm long"
>
> DW: "what's the name of the issuer?"
>
> Miller: "Masonite - MHM"

[110] The respondent, Miller, an investment adviser with TD in Toronto, first became interested in MHM as a result of a telephone call from LK in Montreal. LK learned of MHM which was recommended to him by Azeff. On November 22, LK made his first purchase of 800 shares of MHM for $27,255 online at 14:54 and his second purchase of 1,000 shares of MHM for $33,920 online at 15:45. Four minutes after that, at 15:49, Miller bought 600 shares for his own account for $20,325.

[111] The emails, two days later, contain the almost precise details of the transaction publicly announced on December 22. It was a takeover, the consideration was cash and it was at Cdn. $40.20 per share.

[112] A further email from Cheng, Miller's close associate at TD on December 7, 2004, further supports Staff's contention. In his compelled testimony, Cheng admitted that he learned of MHM only from Miller. He acknowledged that the content of his email came from Miller. The email is written to a client, SK, who had previously made a complaint to TD about Cheng regarding some of her investments. Cheng had been away in China and, upon his return, wrote to SK: "I'm back in town and would like to talk to you about your account. Kindly contact me at your convenience. I'm buying MHM on Toronto Exchange for clients and 20% return is expected before Christmas. I'm looking forward to seeing you soon."

2. Finkelstein's Submissions on the Additional Material Facts

[113] To the contrary, Finkelstein was emphatic that he did not know of the transaction price until November 24. Connelly's testimony was consistent with Finkelstein's testimony that he was unable to find any evidence in the written records at Davies that the lawyers had been aware of any pricing information before November 24. He, himself, did not recollect price being discussed at the November 16 meeting.

[114] Finkelstein relied on a passage from the "Background to and Fairness of the Arrangement" in MHM's management information circular which for the date of November 24, 2004 indicates that "KKR was proposing a value of C$39[…] per Common

Share". This passage is not very informative since, in the same section, for the date of October 20, 2004, management writes "KKR continued to discuss a preliminary valuation indication, subject to further due diligence, for the Company's shares in the range of C$40 to C$42".

[115] Finkelstein also relied on a letter written on October 23, 2014, after the start of the hearing, by Ambruz, the Executive Vice President of Strategic Development of MHM at the relevant time, to the effect that he did not believe that any potential pricing or timing of the proposed transaction was made known to the Davies lawyers until after an MHM Board Meeting on November 24. We accord this letter very little weight. It was written ten years after the event, after the hearing had commenced. It provided no insight into what documents or review Ambruz made to refresh his memory of the series of events leading up to the closing of the transaction. It gives no indication why Ambruz remembered that, although MHM knew the $40 range from July 30, 2004 onward, the company lawyers were not told of the pricing until November 24. Finally, as to the timing of the transaction, the letter is inconsistent in this regard with Connelly's evidence who says he understood on November 16 that the client wanted to proceed quickly.

3. Conclusions on the Additional Material Facts

[116] On a balance of probabilities, we conclude that Finkelstein not only knew on November 16 that the acquirer and target had agreed to a transaction, but also that it was priced at approximately Cdn. $40 per MHM share, that it was to be paid for in cash and to be completed, quickly, likely by Christmas. KKR and Masonite's decision to proceed with a take-over transaction, alone, was a material fact. The price of $40 per share had been discussed between KKR and MHM since July 2004. It was discussed with the MHM Board of Directors in October 2004. Finkelstein had rendered four specific services to MHM related specifically and only to a potential takeover bid by KKR between August and November 16. The only evidence presented for the source of the specific details contained in Miller's email to DW is LK who, in turn, admitted to receiving MHM information from Azeff. From all these facts we infer that Finkelstein knew, on November 16, the pricing, structure and timing of the transaction.

[117] The pricing, consideration and timing, together with the takeover decision, are also material facts (the "**MHM Material Facts**"; *YBM, supra* at para. 94). We find that Finkelstein knew these material facts and that the material facts were not generally disclosed until the public announcement of December 22, 2004.

D. The Evidence of Tipping and Trading

[118] For the period from July to December 2004, there were no available phone records between Davies and Azeff or Bobrow's extension at CIBC. Toll free calls between Davies and CIBC were not recorded.

[119] Finkelstein testified that, in 2004, he used text messaging, but could not recall whether he ever texted Azeff. Those communications are also unavailable.

[120] What is known is that, on July 9, there was a call from Finkelstein's cell to Azeff's home for a duration of two minutes. This call was probably with regard to the birth of

Finkelstein's son, born on July 8, 2004. In mid-August 2004, Finkelstein attended Azeff's wedding in Montreal and was part of the wedding party.

[121] The next recorded telephone call occurred on November 17. No one suggested, nor was it likely, that there were no calls between Finkelstein and Azeff in the period between July 9 and November 17. Given that there were 43 recorded calls in 2005 and 190 in 2007 and no suggestion that there was a dramatic increase in the frequency of calls between the two friends between 2004 to 2007, we find that it is probable that there were unrecorded calls from office-to-office or text messages from Finkelstein to Azeff and vice-versa in the months of September to December 2004.

[122] Although Finkelstein was a client of Azeff and had a brokerage account with him, there was not a lot of discussion between them regarding investments, as the account was a small one, between $80,000-$100,000, and Finkelstein was known affectionately by Azeff as "Mitch Restricted" because of his position and work at Davies. We note that both Finkelstein and Azeff testified that Azeff never recommended or even discussed with Finkelstein the purchase of any of the shares of the six target companies, which he recommended to his other clients. This may have been because Azeff knew Davies was the law firm involved in some aspect of the transaction or because none of the shares recommended to other clients was suitable for Finkelstein's modest portfolio.

[123] On Wednesday, November 17, there were four attempts by Azeff to call Finkelstein:

7:25 Azeff (home) to Finkelstein (cell) – 30 seconds

7:26 Azeff (home) to Finkelstein (cell) – 30 seconds

8:09 Azeff (home) to Finkelstein (cell) – 30 seconds

8:13 Azeff (home) to Finkelstein (cell) – 36 seconds

Although the last call of 36 seconds would normally indicate some discussion, there is no incoming call shown on Finkelstein's cell bill, which makes it likely that there was no contact.

[124] Finkelstein had no recollection of this 36 second call. Azeff testified that he was trying to reach Finkelstein to find out what colour Finkelstein's wife, Kim, would want the frame to be of a children's painting that his wife, Oana, had painted for Finkelstein's second child, born on July 8, 2004. The painting was to be a surprise for Kim. Azeff stated that was why he was calling Finkelstein.

[125] On Friday, November 19 at 7:20, Azeff, from home, called Finkelstein's home, a call that lasted four minutes and 48 seconds. Finkelstein's evidence was that he was most probably not at home at that time, as it was his practice to leave the house before his children awoke. Also, on reviewing his dockets, he noted that he docketed 9.1 billable hours that day and was additionally involved in significant non-billable work related to Davies' Evaluations Committee. Being a Friday, he would typically try to be home by dinner time to observe the Sabbath. Thus, to accomplish all that he would have to leave home before 7:00.

[126] Azeff's testimony was that he spoke to Finkelstein's wife Kim about the best colour for the picture frame. He apparently decided to call her when he failed to reach Finkelstein and abandoned the attempt at surprising her. Kim did not testify. There is no corroboration for Azeff's testimony on this point.

[127] On Friday, November 19, commencing at 9:24, Azeff and Bobrow began placing orders to buy shares of MHM on the TSX. By 10:55, Azeff and Bobrow had bought 10,100 shares at a value of $346,450 for their parents, siblings, themselves and some clients, all through their DK4 trading code. By the end of that day, Azeff and Bobrow had bought 33,150 shares for a value of $1,134,578 through the DK4 accounts representing approximately 48% of the total trading of MHM on the TSX.

[128] None of the accounts for whom they bought shares had bought MHM shares in the previous six months. Essentially, this was a new core position for Azeff and Bobrow, their family members and clients.

[129] On Monday, November 22, Azeff and Bobrow bought a further 31,235 shares of MHM through their DK4 code for $1,064,069, representing approximately 19% of the shares of MHM traded on the TSX.

[130] Between November 19 and December 22, the date of the public announcement of the takeover transaction of MHM by KKR, Azeff and Bobrow had purchased 293,360 shares of MHM for more than 100 accounts through the DK4 code for a value of $9,950,520.

[131] Staff alleges that Azeff tipped LK, who then purchased shares of MHM. LK, in turn, tipped Miller.

[132] LK is Azeff's accountant, lives in Montreal, and is a good friend of Azeff. This fact is borne out by the fact that, although not a significant investment client of Azeff, there were 1112 calls in 2007 between Azeff's office and LK in 2007 (when phone records by CIBC extension were available): 635 calls were with Azeff; 63 with Bobrow; and 414 with Irene S., Azeff and Bobrow's personal assistant.

[133] LK acknowledged, in his testimony, that the idea of purchasing MHM came from Azeff. Azeff mentioned to him that MHM was "in play". In his words, "in play" could mean a takeover. He also thought that it had something to do with a private equity player. He recalled something about 20% and some general discussion with Azeff and/or HG about premiums. He was under the impression that Azeff was confident about his recommendation. He did not discuss a source with Azeff and did not ask Azeff about his source.

[134] On November 22 at 14:54, relying on his conversation with Azeff, LK purchased, for the first time, 800 shares of MHM, online for $27,255 through TD. Less than an hour later, at 15:45, he bought a further 1,000 shares online through TD for $33,920.

[135] Four minutes later, at 15:49, Miller, an investment adviser at TD in Toronto, made a first purchase of 600 MHM shares for $20,325.

[136] Miller acknowledged that he first heard of MHM on a phone call from LK from Montreal. Neither Miller nor LK could remember when that phone call occurred. But

since the chain of information regarding MHM came from Azeff to LK to Miller, the telephone call must have been between Friday, November 19 and Monday, November 22.

[137] LK and Miller met approximately 30 years ago when they played on the same softball team in Montreal. Thereafter, they lost touch for a number of years when Miller moved to Toronto. They reconnected by happenstance when, in 2002 or 2003, they ended up sitting on a beach beside each other. They spoke fairly frequently between 2004 and 2007. LK provided some accounting or tax advice, as a friend, to Miller and Miller provided investment advice or comments on the stock market to LK.

[138] LK confirmed that he told Miller about MHM. He testified that he spoke with Miller after he spoke with Azeff. LK recalled that his discussion included telling Miller that he thought the company was "in play", that likely private equity funds were interested, that they had cash as consideration, that a 20% premium was possible and that there was pressure to do a deal before the upcoming holidays began.

[139] Miller did not testify at the hearing. His evidence was introduced by excerpts of his compelled testimony taken in August and September 2009. When shown his email of November 24, 2004, with the elements of the transaction: Stock trades on TSX at around $34, cash takeover at $40, and timing before Christmas, he acknowledged that the reference was to Masonite and that a cash takeover of $40 was discussed with LK. He said that the phrase "Timing should be before xmas" was information provided by LK.

[140] Any ambiguity arising from Miller's compelled testimony or the context in which it was given, could have been, but was not, explained by him. We therefore gave it a literal interpretation and one that was consistent with LK's account of the discussion with Miller.

[141] In addition to the 600 shares of MHM he purchased on November 22, Miller bought a further 2,400 between November 23 and November 29. The total of 3,000 shares for a cost of $102,265 was his largest position at the time.

[142] Miller also bought 4,300 shares for his wife Heidi-Lynn at a cost of $145,738 and a further 3,300 shares for other family members for $113,104.

[143] Miller recommended the purchase of MHM shares to clients and their families, who bought a total of 46,100 shares for $1,577,978.

[144] Francis Cheng, Miller's colleague and mentee was away in Asia from November 20 to November 29. Nevertheless, Miller told him about MHM:

> Q. Did you share the information that you obtained from [LK] with Francis?
>
> A. Yes.

[145] On November 29, Cheng started buying MHM shares, at first for his wife, then for his brother in Hong Kong, other family members and clients. The MHM shares purchased for Cheng's wife accounted for 98% of the value of her portfolio at the end of

November 2004. In total, the five accounts of the Cheng family purchased 9,100 shares for $308,789 and Cheng clients purchased, on recommendation from Cheng, a further 4,100 shares of MHM for $139,372.

[146] On December 7, Cheng sent an email to SK, a client who had previously complained about Cheng's investments on her behalf: "I'm back in town and would like to talk to you about your account. Kindly contact me at your convenience. I'm buying MHM on Toronto Exchange for clients and 20% return is expected before Christmas. I'm looking forward to seeing you soon."

[147] Cheng also elected not to testify, even though he attended the hearing. His compelled testimony was admitted in the record. In it, he admitted that the specific information in the email came from Miller. He said he heard from Miller that the takeover would be before Christmas and that there would be a 20% premium to the current stock price.

[148] On the next day, Cheng sent another email to a person in Chicago whom he had recently met while standing in a ferry line for a trip from Hong Kong to Macau:

> Take a look at MHM […] listed on the Toronto Stock Exchange. It's a takeover target and I was told that it'll be done at Cdn$40.00 before Christmas. It's currently trading at Cdn$34.00 and I don't see much downside from here even if the deal ended up falling through.

[149] Staff also alleges that Bobrow tipped a close friend and client, HF.

[150] Bobrow had a good friend and client, HF, with an investment portfolio of approximately $5 million. HF also had a trading account at Scotia McLeod. HF is a lawyer and accountant and a sophisticated investor who described his trading as a combination of short-term, speculative and long-term investments. By 2004, HF had been a client of Bobrow for approximately ten years. They began a friendship in the mid-nineties and became very close friends. HF attended Bobrow's destination wedding in 2004. By 2004, HF had become an important client with whom Bobrow spoke frequently, often a few times a day.

[151] HF began dating his current wife BR in 2003. She did not have a trading account with Bobrow.

[152] On November 29, 2004, while HF was in Boca Raton, Florida, he emailed Bobrow at 7:48:

> Good morning. In boca, as you know. Cell is spotty here. In meetings all day so can't chat much. Will call when I can. You can try me for any major developments. You should try to email me. It may work better. Send back directly to my rim. Talk later. Ciao. H.

[153] He then instructed Bobrow three times by text message to buy 1,000 shares of MHM at increasing prices below the market.

[154] At 8:18, BR, HF's fiancée, sent Bobrow an email: "Hi Kory, I have a chq to send you this am. Please email me your address. Thanks."

[155] At 8:55, Bobrow replied "Hi B---, the address is 1 Place Ville Marie, Suite 4125, Montreal, Qc H3B 3P9. What account is it going into?"

[156] At 10:54, BR emailed Bobrow "Did you receive my cheque?".

[157] At 10:56, Bobrow replied "Yes, thanks, and we are filled on 900 of 1,000".

[158] At 11:03, BR asked "What is the symbol… so I can follow it".

[159] Three minutes later, at 11:06, Bobrow emailed HF "Does B---- know what she's buying, she's asking for the symbol".

[160] At 11:15, HF replied to Bobrow "No. Don't tell. Confidential."

[161] At 11:17, Bobrow responded "r u kidding or serious?"

[162] At 11:24, HF replied to Bobrow: "I haven't told anyone. Tell her I will tell her later. We don't want this info in the public domain".

[163] At 11:25, Bobrow then emailed BR "H will call you later".

[164] Staff points to the purchase of the 1,000 shares by HF either for himself or on behalf of BR and the email chain to support its claim that Bobrow tipped HF with MNPI.

E. The Respondents' Evidence

1. Finkelstein

[165] Finkelstein emphatically denied that he ever discussed any transaction with Azeff or passed MNPI to him. Finkelstein was a very intelligent young partner at Davies in 2004 with a bright future ahead of him. His colleagues and clients thought highly of him. He was committed to his professional work recording 1861 billable hours in 2004 and 2442 hours in 2007. In addition, he logged a significant number of non-billable hours involved in firm committees and administration.

[166] His nature was described to be conservative and introverted. By contrast, Finkelstein stated his wife was much more social and extroverted. She was the one who arranged social get-togethers with friends and family. She made travel and holiday arrangements.

[167] Finkelstein introduced his wife to Azeff, before he and Kim were married in September 2000. Azeff was part of Finkelstein's wedding party. Azeff and Kim became good friends and chatted by phone, fairly regularly in the period between 2004 and 2007. These calls were from home to home as Kim worked from the house while her children were young.

[168] Finkelstein contends that there was no motive for him to pass MNPI to Azeff. In 2004, Finkelstein's household income was $464,000 with every indication that it would

continue to rise. And it did, year by year, reaching $876,000 in 2007. He submits that he would not jeopardise a promising career.

2. Azeff and Bobrow

[169] Azeff and Bobrow claim that they had decided to build a core position in a manufacturer-wholesaler and that is why MHM stock was bought for more than 100 accounts. They point to the content of their "reasonable basis file" to demonstrate their intention to build a core position, their assembly of analysts' reports and their due diligence on MHM. CIBC requires every broker to have a reasonable basis file containing evidence of research before recommending a stock, as a safeguard against a client claim based on an unfavourable outcome.

[170] Most of Azeff and Bobrow's reasonable basis file consists of analysts' reports of October 20 and 21, 2004 reviewing MHM's third quarter results and the forward prospect for the company itself. The file included reports by Merrill Lynch, CIBC and Motley Fool of October 20 and 21 and by National Bank Financial of November 15. The reports reflected the positive results of MHM particularly for the third quarter. They all rated the stock as a sector performer and noted that its stock price was better value than its peers. Some reports had a buy recommendation, others remained neutral. They gave a one year to 18 month target of a rise in the stock price of 10 to 20%.

[171] Azeff and Bobrow also pointed to a Bloomberg technical chart for MHM in U.S. dollars. The chart indicated that on November 4, 2004 there was a golden cross, whereby the 50 day moving average of MHM stock crossed the 200 day moving average. A golden cross is considered by technical analysts to be a strong buying signal. When asked why they waited to start buying MHM until November 19, they said that they were waiting, in part, for the Canadian golden cross, which the technical charts indicated was in progress, but which did not occur until after the buying on November 19, 22 and 25.

[172] Azeff also said that by November 15, there had been four significantly destructive hurricanes in the USA and he was waiting to see if there would be another hurricane before the end of the season. Hurricanes meant more need for doors and door assemblies; thus higher sales and revenue for MHM.

[173] Azeff flatly denied that they were told of any MNPI by Finkelstein including any information that KKR was going to acquire MHM, or the probable price, or the timing before Christmas. Bobrow also denied that Azeff told him, that he had received MNPI from Finkelstein.

[174] Bobrow pointed to the sale of 400 shares of MHM from his mother's account on November 29 as being inconsistent with knowledge of a takeover of MHM. If he knew a takeover was likely and imminent, why would he sell 400 shares, shares he had bought on margin ten days earlier?

[175] Bobrow also disputes that the email exchange he had with HF and his fiancée, BR, denotes knowledge of MNPI or that he tipped HF. He says that there is an innocent explanation: it being that HF is a private person and he feared that BR would discuss HF's purchase of MHM with others. Apparently BR was known to be quite open and expansive in her conversations with friends. HF corroborated Bobrow's testimony with

the exception of one aspect, i.e. that Bobrow stated he believed he was buying the shares for HF. HF intended that the shares be bought for BR in his account.

[176] LK acknowledged that he was told of MHM by Azeff and bought shares online shortly thereafter. He said that, although they may have discussed that the company was "in play", that didn't necessarily mean a takeover. He also pointed to the fact that, although he bought 1,800 shares on November 22, he sold 1,000 shares on November 26, a sale he would not have made had he known that there was a takeover bid.

3. Miller

[177] Miller, who didn't testify at the hearing, said he bought MHM shares because LK told him there was a buzz about MHM in Montreal. He was certain that he did some research on MHM before buying, but could not remember any in particular or produce any. He says that he and LK speculated about the price and timing of the potential transaction and that he and LK valued Masonite at about $40 per share. He says he didn't know LK's source for the information and didn't ask LK about his source.

[178] Miller submits that the magnitude of the Masonite positions was consistent with other positions held in his and his wife's accounts.

4. Cheng

[179] Cheng, who also didn't testify at the hearing, said that he bought on the information conveyed by Miller. He thought that Miller was passing on a rumour. There are always rumours in the marketplace of possible or even likely takeovers and their target price.

[180] Cheng states that there is no evidence that he knew that Miller was a person in a special relationship with Masonite.

[181] Cheng further contends that his trading was not uncharacteristic and cannot be used to support an inference of a special relationship.

F. Analysis and Conclusion

[182] We conclude that all the elements of subsections 76(1), 76(2), 76(5)(b) and 76(5)(e) of the *Act* have been established and that the respondents, Azeff, Bobrow, Miller and Cheng breached subsection 76(1) of the *Act*, that Finkelstein, Azeff, Bobrow, Miller and Cheng breached section 76(2) of the *Act* and, thereby, all have also conducted themselves contrary to the public interest. Additionally, the four registrant respondents, by recommending the purchase of MHM shares to friends, family and/or clients have acted contrary to the animating principles of the *Act*, contrary to the public interest.

[183] Finkelstein, as the commercial lawyer engaged to assist MHM to prepare for, negotiate and implement its takeover by KKR was in a special relationship with MHM and, as we have previously determined, had relevant MNPI.

[184] Finkelstein and Azeff were good, long-term friends who kept in regular touch. Azeff attended Finkelstein's wedding in 2000. Finkelstein attended Azeff's wedding in Montreal as part of Azeff's wedding party in August 2004. There were regular phone

calls between the two, but since the records of work-to-work calls are unavailable, no precise dates of work-to-work communications can be determined.

[185] Finkelstein's manner of giving evidence lacked spontaneity and was well rehearsed. Often he would answer questions from his own counsel by indicating that they would be coming to that evidence later. He left the impression that his evidence was tightly controlled. The substance of his testimony ignored or touched lightly upon important elements that needed explanation. He spoke very little of his relationship and communications with Azeff in the relevant period from 2004-2007. He did not elucidate why he spoke to Azeff dozens of times annually or why there were 190 calls placed between them in 2007. He made it clear that they were not talking about his small investment portfolio. We know that Finkelstein was a busy lawyer involved in a number of significant mergers and acquisition transactions in this period. Finkelstein's testimony did not illuminate for us the reasons for, nor the nature of, the work-to-work calls particularly at and around the days and weeks leading to the impugned transactions. Accordingly, we accorded less weight to Finkelstein's subjective testimony than to the objective facts.

[186] On Friday, November 19, before the market opening, Bobrow and Azeff placed orders to buy MHM shares in significant amounts for themselves and their family members. Within one hour and a half, 10,100 shares were acquired for $346,450. By the end of that day, Azeff and Bobrow acquired 33,150 MHM shares through the DK4 code for $1,134,578 representing 48% of the volume traded on the TSX, 32.5% of the combined volume of the TSX and NYSE that day and 97% of the purchases by CIBC.

[187] On Monday, November 22, Azeff and Bobrow bought a further 31,235 shares of MHM through the DK4 accounts for $1,064,069 representing 19% of the MHM shares traded on the TSX. The buying continued until the public announcement on December 22, by which time, Azeff and Bobrow, through the DK4 code, had bought 293,360 shares for a value of $9,950,520. Shares of MHM were bought for more than 100 DK4 accounts.

[188] We find the number of clients, volume of stock and the rapid accumulation of shares to be unusual and anomalous.

[189] MHM had not been bought by Azeff and Bobrow, or any of their accounts in the previous six month period. It had never been a core position.

[190] There was no evidence of rumours in the marketplace that MHM was a takeover target.

[191] The analyst reports constituting the reasonable basis file were dated, for the most part, on October 20 and 21. Although they were encouraging about MHM's prospects, they were not acted on by Azeff and Bobrow nor did they result in significant, sustained volume of purchases or price in the marketplace. The November 15 National Bank Financial report reflected a modest target increase of approximately 6 to 7%. The U.S. golden cross buying signal reached on November 4 did not prompt Azeff and Bobrow to promptly buy any shares of MHM. The justification for a delay in buying put forward by Azeff, that he was waiting for the end of the hurricane season and/or for the Canadian golden cross, is illogical. Four very significant hurricanes had already occurred and the season didn't end until the end of November. Further

hurricanes would have increased the market price of MHM. Azeff didn't wait for the Canadian golden cross to occur before he started buying MHM shares.

[192] On Monday, November 22, LK bought shares of MHM, online, based on information received from Azeff. LK is Azeff's accountant and a good friend. They are in constant, almost daily communication. LK admitted that Azeff probably told him MHM was "in play". Although much was made by the respondents that "in play" could mean a sale, an acquisition, a joint venture, etc., we interpret that "in play", in its ordinary meaning, meant that MHM was being taken over. Moreover, the use of the phrase "in play" between two sophisticated persons, followed shortly thereafter by LK's purchases of 6,200 shares for himself and his wife for a value of $206,097, which represented the largest position he took in any company up to 2004 and a significant proportion of his and his wife's investment account supports the inference that "in play" meant a takeover to him.

[193] LK telephoned Miller and very shortly after LK's second purchase i.e. four minutes later, on November 22, Miller in Toronto started purchasing for himself and then for his clients. Miller acknowledged that the MHM shares he bought were his biggest equity position at the time.

[194] Miller also acknowledged that his knowledge of MHM came only from LK, that he had not owned the stock before, that he had not followed the company and that he did not have available any research that he conducted before buying the stock.

[195] Two days later, on November 24, Miller sent an email to DW, a lawyer, "Call me I have a tip". DW replies "i'll take your tip. you've steered me right in the past." Miller then writes: "Stock trades on TSX at around $34 – cash takeover at $40 Timing should be before xmas". Miller acknowledged that he discussed and received the details for this email from LK.

[196] The details of the email are further corroborated by the email Miller's associate Cheng sends to SK on December 7: "I'm buying MHM on Toronto Exchange for clients and 20% return is expected before Christmas".

[197] We conclude that Finkelstein informed Azeff, between November 16 and 19, at least, that KKR had agreed to proceed quickly with a takeover transaction to which MHM acquiesced. Although it is not necessary to establish tipping, we also find that Finkelstein told Azeff of the pricing and structure of the transaction. The ability and opportunity for Finkelstein to communicate with Azeff was readily available and thus, we infer that there was communication between them either in the telephone call of November 17, or in a work-to-work call between November 17 and 19 or in text messages. We come to this conclusion from the sudden, voluminous buying of MHM shares by Azeff and Bobrow for themselves, their families, friends and clients, from the buying of MHM shares by Miller and Cheng with no pretence of underlying research, from the precise details of the Miller and Cheng emails, details which are borne out in the public announcement of December 22, 2004 and from the chain of admitted communication between Azeff to Bobrow and from Azeff to LK to Miller to Cheng, from Montreal to Toronto, all occurring within a few days. We infer that Finkelstein informed (tipped) Azeff with MNPI contrary to subsection 76(2) of the *Act*. On a balance of probabilities, there is no other reasonable explanation for this sequence of events.

[198] On a balance of probabilities, we find that the purchase of MHM shares by Azeff and Bobrow, Miller and Cheng, was timely trading motivated by the MNPI each of them received. We have carefully considered the evidence given by Azeff and Bobrow explaining their purchases of MHM shares but determine that it is more probable that the purchases resulted from the knowledge of undisclosed material facts they received rather than by their own research efforts. The gap in time between the analysts' reports, the U.S. golden cross and the start of purchasing is overwhelmed by the close proximity between Finkelstein's knowledge of the go-ahead of the transaction by KKR and MHM, the volume of trading and the specific information that Azeff passed on to Bobrow and LK. Azeff was in a special relationship because Azeff knew or ought to have known that Finkelstein was in a special relationship with MHM. Azeff knew that Finkelstein was a mergers and acquisitions lawyer at Davies and, from the information imparted, he knew or ought to have known that Finkelstein was in a special relationship with MHM.

[199] Bobrow, as a long-time partner of Azeff, had all the same knowledge and information as Azeff. Both acknowledged in their testimony that they shared information and clients. From Bobrow's trading of MHM beginning early November 19 we infer that Azeff informed Bobrow the MHM Material Facts that came from Finkelstein. We find that Bobrow knew or ought to have known that Azeff was in a special relationship with MHM.

[200] We find that Miller and Cheng both traded on MNPI. They gave no explanations for their purchases. They produced no research to underpin reasons why they bought MHM. These purchases were their first purchases of MHM and were the largest positions in each of their portfolios.

[201] The fact that Cheng, on behalf of his wife, purchased MHM shares constituting 98% of the value of her portfolio, in the circumstances in which these purchases were made, represents unusual trading and therefore no further analysis of prior trading is necessary. We are of the view that, given the combination of MHM being Miller's largest position at the time and the specific information he passed on to DW, an analysis of prior trading was not required to infer insider trading.

[202] The more difficult assessment of special relationship is with respect to Miller and Cheng. For a finding of breach of subsection 76(1) of the *Act* to be made against them, it must be determined that LK knew or ought to have known that the material facts he received from Azeff came from a person, namely Azeff, who himself was in a special relationship with the issuer, i.e. that Azeff knew or ought to have known that his information came from a knowledgeable person and additionally that Miller, when he received the material facts from LK, knew or ought to have known that LK was in a special relationship, i.e. that he ought to have known that the information came from a knowledgeable person.

[203] In addressing the allegation that Miller and Cheng breached subsections 76(1) and (2) of the *Act*, we must determine whether each of them was in a special relationship with MHM. We find that neither Miller nor Cheng knew that the MNPI Miller received from LK and that Cheng received from Miller came from a knowledgeable person. In determining whether each of Miller and Cheng ought reasonably to have known that the MNPI they received came from a knowledgeable person we applied the factors enumerated earlier and find as facts:

(a) LK and Miller knew each other well in 2004. They had re-established an earlier friendship in 2002 or 2003 and from then on LK and Miller spoke often by phone. Their conversations revolved around their professional activities, LK speaking and asking Miller about stocks and the market, and Miller asking for tax and accounting advice. They each respected the other's positions and expertise in their respective disciplines. They each had confidence in the information and advice given from one to the other;

(b) LK was a partner in a prominent Montreal accounting and auditing firm, a fact known to Miller. Miller would understand that LK had clients, business relationships and friends involved in transactional activities in Montreal;

(c) Miller was a senior investment adviser, with a big book of business at TD. He knew or is deemed to know the provisions of the *Act* and the prohibition on trading on MNPI. A higher standard of vigilance and inquiry must be expected from a registrant than from someone who is a retail investor;

(d) The information that Miller received from LK was detailed and very specific. It was not just that MHM was "in play". That information alone could result from a rumour. Even in that event, a licensed registrant should inquire of his tipper the source of the information. Failure to inquire is not a defence. But, in this case, LK provided Miller with details of the "in play" i.e. a takeover: that it was for $40, in cash and by X-mas. That this information was reliable is exemplified by Miller's emails to DW "Call me I have a tip" and "Stock trades on TSX at around $34 – cash takeover at $40 Timing should be before xmas"."

(e) Within a very short time, Miller bought, for himself, a significant number of shares of MHM and then for his family and for 22 accounts of clients. There is no evidence that he did any research into the company. He acted on the MNPI provided; and

(f) Cheng learned of the MHM Material Facts from Miller and subsequently purchased MHM shares.

[204] From these established facts, we conclude that Miller ought to have known that the MNPI LK gave him derived from a knowledgeable person. The relationship between the tipper and tippee, the essential details of the MHM takeover bid, the precipitous, anomalous, significant trading by Miller, the registrant, make it more probable than not that he ought reasonably to have known that LK was in a special relationship with MHM and the MHM Material Facts originated from a person in a special relationship.

[205] Cheng, too, relied on the same factual basis tipped to him by Miller, his mentor and supervisor. Cheng's email to SK underscores his reliance on the reliability of the MNPI that Miller gave him. He would not have risked passing speculative information, which may prove wrong, to an already complaining client. Cheng, too, as a registrant, failed to inquire of Miller the source of Miller's information. Cheng too did no due diligence on MHM and undertook no research. He relied entirely on the MNPI given to him by Miller and precipitously bought a large position for himself and family members of MHM, a stock neither he nor they had owned previously. On the basis of all the facts

regarding Cheng, we conclude, on a balance of probabilities that he ought reasonably to have known that Miller was in a special relationship with MHM and the MHM Material Facts originated from a knowledgeable person.

[206] On November 29, Bobrow sold 400 shares he had bought for his mother. We note that the purchase of these shares on November 22 and their sale on November 29 were in a margin account which may be the explanation. In any event, Bobrow bought a further 800 shares in his mother's account after that. We do not accept that this isolated sale establishes, in light of all the other evidence, that Bobrow did not have MNPI, that he did not trade on it or tip HF with regard to it. The email exchanges with HF, his contemporaneous purchase of MHM shares and particularly the words "[w]e don't want this info in the public domain" are persuasive evidence of Bobrow tipping HF.

[207] We address the fact that LK sold 1,000 shares of the 1,800 he bought on November 22. He then resumed buying shares resulting in a final position of 6,200 shares in his own and his wife's accounts. Stacked against the specific details of the transaction which he passed on to Miller, this fact does not undermine his knowledge. We also note that in subsequent transactions alleged in the Fresh as Amended Statement of Allegations, he acted consistently, buying a lot of shares, then selling a few and resuming purchases. He was a very active trader, in his words he would "buy and sell a stock in the same day".

[208] Finally, we address the lack of motive for Finkelstein to tip his good friend Azeff with MNPI. We considered this submission by his counsel very seriously. Motive, in the form of consideration received by a tipper can form an important factor in concluding that tipping occurred. Absence of motive is not a determinative factor in favour of no tipping having occurred. The language of subsection 76(2) of the *Act* does not require that there be a motive. Weighing all the facts established, those that point to tipping, and those that point to no tipping, we are satisfied on the balance of probabilities that Finkelstein tipped Azeff.

[209] With respect to allegations relating to Masonite, we find that from November 16, 2004 to December 22, 2004:

(a) Masonite was a "reporting issuer" within the meaning of the *Act*;

(b) Finkelstein was a person in a special relationship with Masonite within the meaning of subsection 76(5)(b) of the *Act*;

(c) the MHM Material Facts were facts that would reasonably be expected to have a significant effect on the market price or value of the Masonite securities and were therefore "material facts" with respect to Masonite, within the meaning of the *Act*;

(d) Finkelstein informed Azeff, Azeff informed Bobrow and LK, Bobrow informed HF, Miller informed Cheng and DW, and Cheng informed SK, other than in the necessary course of business, of the MHM Material Facts before they had been generally disclosed, contrary to subsection 76(2) of the *Act* and contrary to the public interest;

(e) each of Azeff, Bobrow, Miller and Cheng learned of the MHM Material Facts from a person whom he knew or ought reasonably to have known was a person in a special relationship with Masonite and, as a result, were persons in a special relationship with Masonite within the meaning of subsection 76(5)(e) of the *Act*;

(f) based on the foregoing, Azeff, Bobrow, Miller and Cheng each purchased Masonite securities with knowledge of the MHM Material Facts that had not been generally disclosed, contrary to subsection 76(1) of the *Act* and contrary to the public interest; and

(g) each of Azeff, Bobrow, Miller and Cheng acted contrary to the public interest by recommending, with knowledge of the MHM Material Facts, that a client or clients purchase Masonite securities.

IX. MDSI

A. Overview of the Transaction

[210] MDSI was a reporting issuer in Ontario and a mobile software company, with operations in North America, Europe and Australia during the period of June to August 2005. Its shares traded on the TSX and NASDAQ.

[211] On May 25, 2005, a letter of intent was signed between MDSI and Vista Equity Fund LLP ("**Vista**") for acquisition of all outstanding shares of MDSI at $8.15 per share. Davies had been retained in April by Vista to act on its behalf in the acquisition of the shares of MDSI.

[212] In June 2005, the MDSI Board retained Torys LLP as independent counsel and CIBC World markets as financial advisor to prepare a fairness opinion.

[213] On July 29, 2005, the MDSI Board met, received the fairness opinion, and approved the Arrangement Agreement.

[214] The public announcement of the takeover occurred at 13:59 on July 29, 2005 in a press release announcing that MDSI had entered into an agreement to be acquired by Vista for US$8.00 per share (cash), a premium of approximately 60% to the 10-day average closing price for MDSI on NASDAQ.

B. The Allegations

[215] Staff alleges that Finkelstein, while in a special relationship with MDSI, informed Azeff of the material undisclosed facts of the Vista/MDSI transaction. Staff also alleges that, while in possession of the material undisclosed facts, Azeff recommended investment in shares of MDSI to several friends.

C. Material Facts and Finkelstein's Knowledge

[216] Davies had been retained by Vista in April 2005 but Finkelstein was not one of the lawyers involved in the transaction.

[217] Disclosure of the MDSI transaction would reasonably be expected to have had a significant effect on the price of MDSI's shares. The material facts related to this transaction included the fact that Vista and MDSI had signed a letter of agreement for Vista to acquire all outstanding shares of MDSI at US$8.15 per share.

[218] On June 6, Finkelstein accessed the Vista – MDSI letter of intent through Davies' Document Management System ("**DMS**"). From the content of the letter of intent, Finkelstein came into possession of MNPI, being knowledge of a takeover, and was under a duty and prohibition not to disclose this information to anyone. From June 6 onward, Finkelstein was in a special relationship with the issuer.

[219] On July 18, Finkelstein accessed six documents from the Vista file code named Project Canada and on July 27, he accessed, through DMS, three documents. The documents accessed included a Timetable, an MDSI fact sheet, a Draft Agreement and a Draft Press Release announcing the proposed transaction. The documents indicated

that the price to be paid by Vista for MDSI shares was 60% over the then market price and the estimated announcement date of July 27.

D. The Evidence

[220] There were a number of phone calls between Finkelstein's and Azeff's homes beginning on June 16 and culminating on July 27, two days before the public announcement of the takeover. The calls were of long duration, 22 minutes on June 16, 9 minutes on July 11, 24 minutes on July 12 and 22 minutes from 21:25 on July 27.

[221] On the following day, July 28, 2005, several friends/clients of Azeff, who had not previously owned shares of MDSI between January 2, 2004 and July 27, 2005, began purchasing shares of MDSI, although not through accounts with Azeff at CIBC under the DK4 code.

[222] On July 28, HG, a friend of Azeff, bought 16,000 shares of MDSI for a value of $80,352 through his HSBC account. HG had not owned any shares of MDSI in the six months prior to July 28.

[223] HG and Azeff have been extremely close friends since birth. HG was a client, as were a number of his family members and friends. In the relevant period 2004 to 2007, they were in frequent contact. For 2007, HG and Azeff are recorded, on the CIBC work line, as having contacted each other 409 times. That number does not include home or cell phone calls. Azeff viewed HG as being very smart, very wealthy and an expert in real estate. HG is a lawyer who, although he did not represent Azeff and Bobrow personally in this matter, oversaw their file and representation.

[224] That same day, LK bought 6,000 shares for his and his wife's account for a value of $33,952 through his TD account. He, too, had not owned MDSI shares in the previous six months.

[225] Also, on that day, DC, a friend of Azeff, bought 2,000 shares of MDSI through a non DK4 account at CIBC for $12,685.

[226] All three individuals sold their entire holdings on July 29, after the public announcement, each reaping a profit between 49.9% and 55.8%.

[227] Neither Azeff nor Bobrow bought any shares for themselves, their family members or their clients through the DK4 account.

[228] The record is replete with cell phone calls from July 20 to July 28 between Azeff and HG, Azeff and LK and LK and HG.

[229] Staff alleges that Azeff recommended to these three individuals investing in the shares of MDSI contrary to the public interest. The origin of the recommendation allegation is founded on the alleged fact that Finkelstein tipped Azeff, who in turn recommended MDSI shares to ingratiate himself with friends and clients.

E. Analysis and Conclusion

[230] The fact that neither Azeff nor Bobrow bought any shares through their DK4 accounts for themselves, their family, friends or clients, significantly undermines the

receipt by them and use of MNPI. When contrasted with the buying of MHM for more than 100 accounts, the difference is stark.

[231] Further, both Connelly, a senior partner at Davies, and Finkelstein testified and demonstrated that many corporate commercial lawyers at Davies accessed documents from files in ongoing transactions for precedential value. Indeed, Finkelstein submits that in the years 2004-2007, he accessed some 8,000 documents on files he was not working on through DMS. It appears that the practice was general and not in the least restricted to Finkelstein. We are troubled by the nature and category of some of the documents accessed – Timetable and Press Release – but are not prepared to speculate.

[232] Although there are suspicious circumstances that arise from the types of documents accessed by Finkelstein, his calls with Azeff and the buying of shares by friends of Azeff, we do not find that we have clear, convincing and cogent evidence of facts from which to draw the necessary inferences that Finkelstein tipped Azeff, who used MNPI to recommend MDSI shares contrary to the public interest. We dismiss the allegation that Finkelstein tipped Azeff.

[233] The evidence of HG and LK regarding the reasons they bought MDSI is vague. We cannot and will not draw an inference unless the evidence is convincing and the inference natural and logical. The allegation that Azeff recommended the purchase of MDSI contrary to the public interest is dismissed.

X. PLACER

A. Overview of the Transaction

[234] In the fall of 2005, Placer was a reporting issuer in Ontario and a gold producer with mines around the world. Its shares were listed on the TSX and NYSE.

[235] Barrick and Goldcorp were large gold producing companies, intent on growing by acquisition. This fact was widely known. Indeed, in the years leading to the fall of 2005, there had been much consolidation in the industry. Barrick was known to be an aggressive acquirer.

[236] On Aug. 22, 2005, executives of Barrick and Goldcorp began discussions concerning a potential joint acquisition of Placer. Between Aug. 24 and mid-Sept., Barrick continued to analyze several strategic options, including the possible purchase of Placer.

[237] Davies had acted for Barrick for many years. On September 7, 2005, it opened a file, code named Project Domestic, relating to a possible acquisition of Placer. Finkelstein was not one of the lawyers assigned to this acquisition.

[238] On Sept. 14, Barrick's Board of directors instructed management to continue to evaluate Placer, among a number of strategic initiatives, but to place a greater emphasis on other strategic initiatives. Following that meeting, Barrick advised Goldcorp that it did not make sense to continue active discussions regarding a potential acquisition of Placer at that time.

[239] On Oct. 3, 2005, Barrick's joint committee of management and directors once again considered the Placer acquisition and determined that it should be explored. On Oct. 6, executives of Barrick and Goldcorp agreed to thoroughly investigate the potential of making a joint bid to acquire Placer.

[240] On Oct. 7, Barrick and Goldcorp signed a confidentiality agreement and Barrick provided Goldcorp with a draft term sheet for the transaction.

[241] Between October 13 and October 27, Barrick and Goldcorp re-engaged with their counsel, Davies and Cassels Brock and their advisers Merrill Lynch to discuss the terms of an agreement whereby Goldcorp would acquire some of the Placer assets. That agreement, the Goldcorp Agreement, was not finalized until October 29. On October 30, the Barrick Board approved the making of an offer to acquire the shares of Placer.

[242] On October 31, the offer to acquire Placer was announced whereby shareholders tendering to the offer would receive US$20.50 per share: 87% of the purchase price in Barrick shares and 13% in cash. The offer represented a premium of approximately 27% over the market price of Placer shares.

B. The Allegations

[243] Staff alleges that Finkelstein, while in a special relationship with Placer, informed Azeff of the material undisclosed facts of the transaction, contrary to subsection 76(2) of the *Act*.

[244] Staff further alleges that Azeff tipped Bobrow and both, while in a special relationship with Placer, and in possession of material undisclosed facts:

(a) traded in Placer shares, contrary to subsection 76(1) of the *Act*; and

(b) recommended the purchase of Placer shares to family members, clients and friends contrary to the public interest.

C. Analysis and Conclusion

[245] On September 14, 2005, Finkelstein accessed three documents: Joint Bid Precedent Agreements Binder Index; Binder Index Project Domestic; and a Summary of the Value of a Change of Control Under Executive Compensation Arrangements. On September 15, Finkelstein accessed a document entitled "Market Share Analysis".

[246] On October 18, Finkelstein accessed the Target 2004 AIF which is a Placer Annual Information form for the year 2004.

[247] We have reviewed these documents and do not find in their content the key terms of a transaction, the pricing or the timing.

[248] What Finkelstein could not have known from his access of the documents on September 14 and 15, was that Barrick had ceased discussions regarding a joint bid with Goldcorp for Placer and was evaluating other acquisitions. Staff placed weight on Finkelstein's access of documents on September 14 and 15 as the time when he gained MNPI and was obliged not to disclose that information. Staff then pointed to Finkelstein contacting Azeff at 21:11 at home for 1 minute and Azeff's home calling Finkelstein's home at 21:14 for 8 minutes and 42 seconds. Staff submits that MNPI was then conveyed to Azeff, who together with Bobrow on September 15 and 16, solicited sales of 25,500 shares of Placer for a value of approximately $500,000.

[249] If the accessed documents pointed to a takeover of Placer, the logical trading by Azeff and Bobrow would have been to buy Placer shares.

[250] Not only do we find that there was no pertinent information in the documents accessed, but also, that the sale of Placer shares by Azeff clients is illogical and negates any suggestion that Finkelstein passed on MNPI to Azeff.

[251] The access of the historical 2004 AIF of Placer on October 18 would only allow Finkelstein to know that the target was Placer. Nothing else in the document is relevant to a transaction in October 2005. It is unusual that Finkelstein would access a gold company AIF when he was looking for precedents for a U.S. REIT that he was working on. The 2004 AIFs for hundreds of companies were available on SEDAR by October 2005. Nevertheless, according to Staff's theory, Finkelstein knew Placer was the target on September 14. This document did not enhance his knowledge.

[252] There is insufficient evidence that Finkelstein knew in the last four days of October that an offer for Placer was about to be made. We are not satisfied that there is a clear, cogent and convincing evidentiary base to permit us to draw an inference that Finkelstein was in possession of the material undisclosed facts regarding the proposed takeover by Barrick of Placer or that he subsequently tipped Azeff.

[253] There were a number of contacts between Azeff and Finkelstein from October 25 to October 30 and we note that there was substantial buying of Placer by family, clients and friends of Azeff and Bobrow from October 26 to 28, resulting in purchases of 72,300 shares of Placer for a value of $1,388,280 in the DK4 accounts.

[254] While, it is possible that Finkelstein learned of the imminent offer from heightened office activity and the notoriety of Barrick as a longstanding client, we are not prepared to enter into that speculation.

[255] Azeff and Bobrow testified that they always held shares of prominent gold companies, including Barrick and Placer, in their own accounts and their clients' portfolios. They were aware of the consolidation in the market and traded to take advantage of it. Their evidence is consistent with the context of the times and the events. We accept their evidence regarding this transaction.

[256] The allegations against Finkelstein of tipping, against Azeff of trading and tipping and against Bobrow of trading are dismissed. For the same reasons, we dismiss the allegations that Azeff and Bobrow recommended Placer contrary to the public interest.

XI. DYNATEC

A. Overview of Transaction

[257] Dynatec was a service provider to the mining industry. It also owned the Ambatovy Project, a developable gold and base metal property in Madagascar. As well, its assets included a 24.5% interest in FNX Mining Company. Dynatec was a reporting issuer in Ontario during the period January 1, 2007 to May 31, 2007.

[258] On February 14, 2007 Sherritt International Company ("**Sherritt**") and Dynatec signed a Confidentiality Agreement. On February 27, the Dynatec Board of Directors established a Special Committee to analyze any proposal received from Sherritt.

[259] On March 11, the Special Committee met to discuss a letter from Sherritt which stated that, subject to due diligence, Sherritt was prepared to offer Dynatec shareholders a price of up to Cdn. $3.65 per share (a 36% premium based on Dynatec's 20-day average trading price) which would include consideration in Sherritt and FNX shares, as well as cash.

[260] On April 3, 2007, the Dynatec Special Committee, to whom Davies was counsel, recommended that Dynatec should proceed with Sherritt's takeover proposal that, for each Dynatec share, a Dynatec shareholder would receive 0.64 FNX shares and 0.19 Sherritt shares.

[261] On April 17, the Special Committee met, noted that the financial advisers were then ready to deliver a fairness opinion and that negotiations with Sherritt were substantially complete.

[262] On April 19, the Special Committee met twice, at 16:00 and at 21:30 and recommended the transaction to the Board of Dynatec. The Board then met at 22:00 and approved the agreement. The next morning, April 20 at 8:20, the public announcement was made that Sherritt would acquire Dynatec. Dynatec shareholders were to receive 0.19 of a Sherritt share and 0.635 of a FNX share. Based on Dynatec's TSX closing price on April 19, the consideration represented a 29% premium.

B. The Allegations

[263] Staff alleges that Finkelstein, while in a special relationship to Dynatec, acquired material undisclosed facts relating to the Dynatec transaction by April 18, 2007 and passed on those material facts to his friend Azeff who, in turn, then tipped Bobrow and at least one client, LK, of the material facts contrary to subsection 76(2) of the *Act*. Staff also alleges that Azeff and Bobrow, while in possession of the material facts, recommended investing in Dynatec shares to clients/friends contrary to the public interest. Finally, Staff alleges that Miller tipped Cheng and that Miller and Cheng, while in possession of material undisclosed facts, illegally traded in shares of Dynatec contrary to subsection 76(1) of the *Act* and that Cheng recommended purchasing Dynatec to family members contrary to the public interest.

C. Material Facts and Finkelstein's Knowledge

[264] The intended purchase of Dynatec by Sherritt at a premium of approximately 30% is a material fact that would reasonably be expected to have had a significant effect on the market value of shares of Dynatec. This fact was not generally disclosed to

the market during the period from February to April prior to the public announcement on April 20 that Sherritt was going to acquire Dynatec.

[265] Finkelstein was not one of the Davies' lawyers involved in this transaction. He accessed transaction documents on April 18 beginning at 12:48. The first document accessed was the Voting Agreement found in the Dynatec file under the code name Project Champion.

[266] Between 14:07 and 14:10, Finkelstein accessed a number of other documents related to the transaction including the Indicative Timetable, which showed the timing for the press release, and the Combination Agreement.

[267] We find that Sherritt's takeover proposal of Dynatec was a material fact from April 3, 2007 (the "**Dynatec Material Fact**"). Finkelstein had knowledge of the material fact from April 18. The material fact was not generally disclosed until the public announcement on April 20.

D. The Evidence

[268] Between January and April 15, 2007, there were approximately 30 phone calls between Finkelstein and Azeff.

[269] On April 18, while Finkelstein was accessing the Voting Agreement, he called from his work to Azeff's work for 2 minutes and 12 seconds. Then six minutes later, at 12:54, Finkelstein called Azeff again, this time from cell to cell. This call is only of one minute duration, the minimum billing, which means there may or may not have been any direct contact. At 14:49, Azeff called Finkelstein at work for 2 minutes and 36 seconds. At 21:10, there was another call from Finkelstein's home to Azeff for 16 minutes.

[270] At 13:01, on April 18, shortly after the calls with Finkelstein, Azeff called his very good friend HG and beginning nine minutes later, HG purchased 40,000 shares of Dynatec. HG had not owned Dynatec in the six months prior and there is no evidence of contact, from or to Azeff's CIBC work line, between Azeff and HG in the weeks before April 18. The absence of prior work-to-work calls is unusual since there were 409 work calls between the two friends in 2007. The April 18 call from Azeff to HG and his immediate purchases stand out. These share purchases were made in nine minutes, by 13:10.

[271] At 13:24 and 13:25, Azeff placed an additional two calls of one minute each to HG, and beginning three minutes later, at 13:28, HG purchased 15,000 additional Dynatec shares. On the following day, HG purchased a further 7,000 shares to make his two day total investment 62,000 shares valued at $235,893.

[272] LK admitted he invested in Dynatec based on discussions he had with Azeff. He purchased 3,000 shares on April 18, but not through Azeff. He made his purchases online. He and his wife, for whom he had trading authority, purchased a total of 10,000 shares of Dynatec that day and a further net amount of 10,000 shares on April 19 to hold, in aggregate, 20,000 shares valued at $75,705. This represented approximately 15% of their investment portfolio.

[273] LK called Miller in Toronto four times on April 18, commencing at 11:58 and at 14:40, 15:09 and at 15:45. At 15:12, Miller bought 8,000 shares for his wife and by the end of the day on April 19, he had bought 20,000 shares in that account valued at $76,160. These purchases represented 10% of their investment account.

[274] Cheng also bought 22,600 shares for his family members on April 18 and 19 at a value of $85,804.

[275] On April 18 at 15:38, Bobrow called HF, but may not have reached him as the call duration was only 30 seconds. They definitely did speak on April 19 at 9:37, when the call lasted for four minutes and 24 seconds. Within an hour, HF bought 20,000 shares of Dynatec for $75,800.

[276] Irene S., Azeff and Bobrow's assistant, also bought 5,000 shares as did her husband, MM, an investment adviser with a different branch of CIBC in Montreal. Their purchases of 10,000 shares for $38,750 were made on April 18 shortly after a call that Irene S. made to her husband at 14:41. Although Irene S. gave evidence at the hearing, she did not suggest that these purchases or any of her and her husband's purchases of the target shares in the other impugned transactions, emanated from anywhere other than information passed on by Azeff or Bobrow. It was not suggested that their timely trading was initiated by independent research by Irene S. or her investment adviser husband, MM.

E. The Respondents' Evidence

[277] Finkelstein vigorously denied that he passed MNPI to Azeff. He explained that he accessed the Voting Agreement because he was directed to these documents by Gula as a result of the Court of Appeal decision in *Sunrise REIT*. That decision was the subject of discussion and written commentary and was of interest to all corporate commercial lawyers. The decision, dated March 6, 2007, addressed the interaction between Standstill Agreements and fiduciary outs. Finkelstein was working on transactions for two other clients at the time and thought that the Voting Agreement might provide guidance. With respect to the other accessed document, he provided only general and not specific evidence.

[278] Finkelstein could not remember the purpose of, and the content of, the four calls on April 18.

[279] Azeff and Bobrow both pointed to the fact that the C family placed an unsolicited order for 225,000 Dynatec shares through Irene S., while Azeff and Bobrow were on a lunch break. They stated this purchase, which was partially filled through a cross by the CIBC trade desk on the TSX at 13:33, indicated that there was already information in the marketplace prompting buying of Dynatec shares.

[280] Azeff and Bobrow vehemently denied that they passed on MNPI to LK, HG and HF since they themselves had none. Azeff, however did acknowledge that he told HG that a sophisticated client had placed a large order for Dynatec shares. HG did not know the C family personally, but knew them by reputation to be clever and astute. He would press Azeff to tell him what that family was buying and Azeff would, on occasion, do so. This was one of those occasions.

[281] Azeff and Bobrow also testified to the fact that the C family placed two orders on April 18, one for a block trade of Transalta shares and one for a block trade of 225,000 Dynatec shares. Azeff and Bobrow said that the Dynatec order was placed with Irene S. at 12:38 and that she called the order desk in Toronto for a block trade which was crossed internally. Azeff and Bobrow say they were at lunch when the order was placed and could not have recommended Dynatec to the C family.

[282] LK acknowledged that he learned of Dynatec from Azeff and may have heard that it was "in play" from Azeff. He said that he did discuss it with Miller.

[283] Miller had no records or research regarding Dynatec. He was sure that he discussed it with LK. There is no evidence that Miller owned Dynatec previously.

F. Analysis and Conclusion

[284] In this instance, the established facts are of such a nature as to make inferences therefrom reasonable: Finkelstein's first access of the Voting Agreement containing MNPI on April 18 at 12:48 and a contemporaneous call to Azeff; the further access to four more documents containing MNPI between 14:07 and 14:10, which include timing for a press release and the identity of the parties to the transaction, including the distribution of FNX shares as part of the purchase transaction; several more calls with Azeff that day; the initiation of the purchases of Dynatec shares by LK, HG, Irene S., Miller and Cheng. The timing of all these events within a two day span, the purchases of Dynatec shares in Montreal and Toronto in one afternoon by friends and clients of Azeff and Bobrow and the volume of shares purchased, a significant 595,000 shares, supports the inference that Finkelstein tipped Azeff with MNPI, Azeff passed on the tip to Bobrow and both Azeff and Bobrow recommended to their close friends and clients the purchase of shares of Dynatec. This inference is more probable than any innocent explanation.

[285] We have reviewed the Voting Agreement that Finkelstein accessed on April 18 and observe nothing in it that addresses the concerns that the Court of Appeal raised in its March 6 decision. Usually, as was the case in this instance, law firms circulate commentary on ground-breaking law and provide drafting guidance. It thus seems strange that Gula would have directed Finkelstein to a document six weeks after the March 6 decision. Gula did not give evidence. There is no reasonable explanation for the access to the other documents one hour and 20 minutes later. The very title of these documents would indicate no relevance to the issue of interaction between a Standstill Agreement and fiduciary out.

[286] Four to five calls between Azeff and Finkelstein in one afternoon and evening is notable. Finkelstein was extremely busy, docketing on average, 200 hours a month in 2007. He very seldom spoke to Azeff about his modest investment account. He was not a social conversationalist. We are particularly troubled by the contemporaneous timing of the access to the Voting Agreement and the initial call to Azeff.

[287] The essence of Azeff's and Bobrow's submissions regarding the sudden buying of Dynatec shares by HG, LK and HF was that there was information in the market that Dynatec was being taken over, that the C family placed unsolicited orders to buy 225,000 shares with their assistant Irene S. while they were at lunch on April 18 and

that the subsequent purchases of Dynatec shares by HG, LK and HF were not as a result of MNPI that they passed to these persons.

[288] Bobrow explained that he had been trying, unsuccessfully, to interest the C family in buying shares of Dynatec in the previous year, 2006. Bobrow believed that the Dynatec share price failed to consider the value of the Ambatovy development capability which had been greenlighted to proceed by the Government of Madagascar. Bobrow also felt that the market price did not reflect the proper value of the 24% of FNX that Dynatec owned. He was frustrated that the C family were resistant to his entreaties.

[289] A lot of evidence was adduced regarding the timing of the C family's purchases of shares of Transalta and of Dynatec on April 18. The evidence regarding timing of the orders and the lunch time presence or absence of Azeff and Bobrow was contradictory and unclear. We are not prepared to make a finding on the balance of probabilities that Azeff or Bobrow recommended Dynatec shares to the C family.

[290] We also find that the C family's unsolicited purchases of Dynatec shares does not, of necessity, negate a finding that Azeff and Bobrow recommended Dynatec shares to others based on their knowledge of MNPI. The number of phone calls between Finkelstein and Azeff on April 18, the subsequent calls between Azeff and HG, the calls by Bobrow to HF on April 18 and 19, the four calls by LK to Miller on April 18 and the voluminous buying of shares of Dynatec by HG, HF, LK, Miller and Cheng on April 18 and 19, in the 48 hours before the public announcement, when none of these persons had bought any Dynatec shares in the previous six months, gives rise to the strong inference, and we so find, that Azeff and Bobrow passed on MNPI.

[291] LK admitted receiving a recommendation to buy Dynatec from Azeff and acting on it by purchasing shares online. He then spoke to Miller. Miller acknowledged that he heard of Dynatec from LK and bought shares of Dynatec for family and clients and passed on a recommendation to Cheng to also consider doing so.

[292] The evidence regarding the conversations between LK and Miller and Miller and Cheng was very general and extremely minimal. It amounted to little more than that LK told Miller about Dynatec. There is no evidence that LK told Miller he was buying Dynatec, that the company was being taken over, at what price, or when. While it is true that both Miller and Cheng made rapid purchases, without further due diligence, shortly after receiving LK's call, we are not satisfied that the evidence establishes, on a balance of probabilities, that Miller and Cheng received any MNPI.

[293] We find that Azeff learned of the MNPI from Finkelstein. Finkelstein accessed documents related to the transaction, which contained the MNPI. Azeff knew or ought to have known that Finkelstein was in a special relationship with Dynatec. Azeff knew that Finkelstein was a mergers and acquisitions lawyer at Davies, the law firm involved in the acquisition transaction, and, from the information imparted, he knew or ought to have known that Finkelstein was in a special relationship with Dynatec.

[294] Bobrow, as a long-time partner of Azeff, had all the same knowledge and information as Azeff. Both acknowledged in their testimony that they shared information and clients. We find that Azeff tipped Bobrow with the MNPI and its source at about 12:50 on April 18. Bobrow telephoned a high net worth client, HF, who made

initial purchases of Dynatec shares the next day. We also find that Bobrow knew or ought to have known that Azeff was in a special relationship with Dynatec.

[295] Azeff called HG at 13:01 on April 18. Nine minutes later, HG started purchasing Dynatec shares for himself and not through CIBC. Within approximately ten minutes, he had bought an initial 40,000 shares. There were further calls between Azeff and HG that afternoon. HG bought another 15,000 shares of Dynatec that day and 7,000 more the next day, for an aggregate of 62,000 shares with a value of $236,000. HG had no recollection why he purchased shares that day. He had an uncertain theory that Azeff may have told him that another client was accumulating a position, but it was only a theory based on hindsight. We reject this explanation as speculative.

[296] We find that Azeff and Bobrow, on learning of MNPI from Finkelstein, recommended the purchase of Dynatec shares to a number of clients, including HG, HF and LK, contrary to the public interest. Both Azeff and Bobrow knew they were in possession of MNPI, were prudent enough not to purchase shares for themselves or their family members, but nevertheless wanted to benefit their friends and clients to the disadvantage of the general investing public.

[297] With respect to allegations relating to Dynatec, we find that from April 18, 2007 to April 20, 2007:

(a) Dynatec was a "reporting issuer" within the meaning of the *Act*;

(b) Finkelstein was a person in a special relationship with Dynatec within the meaning of subsection 76(5)(c) or (e) of the *Act*;

(c) the Dynatec Material Fact was a fact that would reasonably be expected to have a significant effect on the market price or value of the Dynatec securities and is therefore a "material fact" with respect to Dynatec, within the meaning of the *Act*;

(d) Finkelstein informed Azeff and Azeff informed Bobrow, other than in the necessary course of business, of the Dynatec Material Fact before it had been generally disclosed, contrary to subsection 76(2) of the *Act* and contrary to the public interest;

(e) each of Azeff and Bobrow learned of the Dynatec Material Fact from a person whom he knew or ought reasonably to have known was a person in a special relationship with Dynatec and, as a result, were persons in a special relationship with Dynatec within the meaning of subsection 76(5)(e) of the *Act*; and

(f) each of Azeff and Bobrow acted contrary to the public interest by recommending, with knowledge of the Dynatec Material Fact, that a client or clients purchase Dynatec securities.

[298] We do not find that the allegations of illegal trading, tipping and recommending against Miller and Cheng have been established in respect of Dynatec.

XII. LEGACY HOTELS REIT

A. Overview of the Transaction

[299] Legacy was a Canadian REIT that owned landmark hotel properties including the Fairmont Royal York. It was a reporting issuer in Ontario during the period June 1 to August 31, 2007.

[300] On April 12, 2007, Davies was retained to represent a joint venture between Cadbridge Investors LP ("**Cadbridge**") and InnVest REIT ("**InnVest**") to purchase Legacy. The file was given the code name Project Diamond. Finkelstein was the primary lawyer assigned to the file and carried the process to its completion including through the public announcement of the transaction on July 12.

[301] The expected sale of the Legacy hotels was prominently reported in the public press in November 2006 and again in January 2007. On March 1, Legacy issued a press release indicating that it was exploring strategic alternatives. The analysts reported that this meant the REIT would be sold or restructured, but then no further announcement was made.

[302] On June 18, Legacy issued a press release providing an update concerning its review of strategic alternatives and stated that it had received non-binding offers in the range of $12.60 per unit, which represented a 14% premium over the trading price immediately prior to the March 1 announcement. The press release noted that there could be no assurances that negotiations would result in a binding offer.

[303] The market was skeptical, questioned whether any of the non-binding offers would become firm and the price of a unit on the TSX started declining to $12 after the June 18 press release. Clearly, there were more sellers than buyers.

[304] On June 29, the Special Committee reviewed issues relating to the Support Agreement and Lock-Up Agreement between Legacy and the Offeror Consortium, Cadbridge and InnVest. Between June 29 and July 1, the probability of the deal occurring became more likely.

[305] By July 4, the deal had progressed to the point that it was going to close and would likely be announced on July 12. During the following week from July 5 to 12, continued meetings and email correspondence show that the details of the deal were being finalized.

[306] The press release announcing the takeover of Legacy by the Offeror Consortium, Cadbridge and InnVest was issued at 17:36 on July 12, 2007.

B. The Allegations

[307] Staff alleges that Finkelstein, while in a special relationship to Legacy, tipped Azeff of the material undisclosed facts regarding the Legacy transaction on or before July 5 and that Azeff then tipped Bobrow of the undisclosed material facts; in so doing, Staff alleges that Finkelstein and Azeff acted contrary to subsection 76(2) of the *Act* and the public interest. They further allege that Azeff and Bobrow then recommended investing in Legacy units to family members, clients and friends, contrary to the public interest.

C. The Material Facts and Finkelstein's Knowledge

[308] As the principal Davies lawyer on the transaction, Finkelstein was in a special relationship with Legacy. As of April 2007, he became aware of the potential of a transaction involving Legacy.

[309] By June 11, Finkelstein was aware that the Offeror Consortium had submitted a bid for all of the outstanding units of Legacy. Between June 29 and July 4, Finkelstein knew that the deal had progressed and was likely to close. He also knew that the target announcement date was approximately July 12. These were material facts, which, if disclosed, would reasonably be expected to have a significant effect on the market price or value of Legacy units (the "**Legacy Material Facts**").

[310] During the period June 29 and up until the press release on July 12, only the lawyers, including Finkelstein, other advisors and the parties knew these facts. The market certainly did not, as the price continued to decline. The Legacy Material Facts were generally undisclosed to the public until the press release of July 12.

D. The Evidence

[311] Although there are phone records of calls between Finkelstein and Azeff in the period from January to early April 2007, the frequency increased noticeably from April 9, which continued to mid-June.

[312] In April and May, clients of Azeff and Bobrow purchased 5,000 units in the expectation that there would be positive developments toward a sale. When nothing occurred, those units were sold in May and early June.

[313] In July 2007, Finkelstein was engaged in two takeover transactions, Legacy, announced July 12 and IPC REIT announced August 14, 2007. In that month he docketed 258 hours.

[314] A flurry of phone calls occurred on July 4 and 5 between Finkelstein and Azeff. Of particular note is a call at 7:39 on July 5, which lasted almost four minutes. Then, at 8:29, Azeff called HG for a call duration of over 3 minutes, and 38 minutes later, prior to the opening of the markets, HG entered an order to purchase 5,000 Legacy units. He said he could not recall how he first became interested in Legacy. On Friday, July 6, HG bought a further 5,000 units.

[315] On July 10, Finkelstein called Azeff from his office at 7:47 for two minutes. Azeff then called HG at 8:52. They spoke again at 9:02 and at 9:49 HG bought 5,000 units and at 9:53 he bought another 15,000 units for a combined investment of $240,420 that day.

[316] On July 10, Bobrow emailed HF, who was in Germany, "I also think we should buy some Legacy, bought some for my mom this morning at 12:02". Within 26 minutes HF gave Bobrow the order to buy 10,000 shares.

[317] On July 12, the day of the announcement, there was a further call between Finkelstein and Azeff and immediately thereafter, two calls between Azeff and HG. Eleven minutes after the last call, HG entered an order to purchase 3,000 more units of Legacy and then, after further phone calls between Azeff and HG, another 5,000 units.

In total, HG bought 38,000 units for $456,978. At 14:35, HG sent Azeff a blank email with the subject line "2 hours!". At 17:36, the Legacy takeover was announced.

[318] LK testified that he had discussions with Azeff, initiated by Azeff, regarding Legacy. He passed on the information received from Azeff to Miller. LK did not testify that he had owned Legacy previously. On July 9, 10 and 12, he and his wife purchased 6,500 units for a total value of $78,120, a sizeable amount for his portfolio. During these few days, there were, at least, a half dozen calls between Azeff and LK.

[319] Commencing on July 5, Azeff, on behalf of his family members, bought 8,300 units for $100,395 and Bobrow, on behalf of his mother, bought 6,500 units for $78,910. Mrs. Bobrow had previously sold her holdings of Legacy on May 22 and 24, 2007. Azeff's family had not owned any Legacy units in the prior six months.

[320] Irene S. and her family members bought 17,000 units on July 5, 6, 10, 11 and 12 for $205,221. They had previously sold 4,000 units on May 25, 2007.

[321] Between July 5 and July 12, family and clients under the DK4 code invested $3,058,387 in 254,200 Legacy units.

[322] The evidence given by the witnesses, other than the respondents, was that the initiation of their purchases of Legacy flowed from the recommendations of either Azeff or Bobrow.

E. Analysis and Conclusion

[323] Finkelstein argued that he was not aware of the internal Legacy management discussions. However, between June 29 and July 4, Finkelstein learned that the Legacy deal had progressed and had become a firm deal that would be announced on or about July 12.

[324] Azeff's and Bobrow's submissions were principally that they followed the REIT market closely, their prior trading in Legacy aligns with publicly available information, their trading does not fit with Finkelstein's knowledge and phone contact and that there were published rumours that Legacy was a takeover target. Azeff and Bobrow sought to justify the purchases by their family members, clients and friends on the basis that the June 18 press release from Legacy, stating that it had received non-binding offers, was very positive news. Azeff also viewed a June 19 report from CIBC as an indication that a higher bid or bids might surface. If that was his belief, he would have bought then and not waited. But wait he did and the subsequent decline in late June and early July must have dented any optimism regarding Legacy receiving a firm, binding offer.

[325] There were numerous calls between Finkelstein's and Azeff's home and office numbers on July 4 and 5. We find that Azeff learned of the MNPI from Finkelstein. Azeff knew or ought to have known that Finkelstein was in a special relationship with Legacy. Azeff knew that Finkelstein was a mergers and acquisitions lawyer at Davies and, from the information imparted, he knew or ought to have known that Finkelstein was in a special relationship with Legacy.

[326] Bobrow, as a long-time partner of Azeff, had all the same knowledge and information as Azeff. Both acknowledged in their testimony that they shared information and clients. We find that Azeff tipped Bobrow with the MNPI he learned from Finkelstein. Bobrow in turn recommended Legacy to family and clients. We also find that Bobrow knew or ought to have known that Azeff was in a special relationship with Legacy.

[327] Given the numerous phone calls between Finkelstein and Azeff from July 4 to July 12, the large volume of precipitous purchasing of Legacy units from July 5 onwards by the Azeff and Bobrow family members, and their clients, and the passing on of information to friends immediately following calls between Finkelstein and Azeff, namely HG and LK, who bought large numbers of units themselves, separately, we determine that it is reasonable to infer, on a balance of probabilities, that Finkelstein, who was in a special relationship with Legacy, conveyed MNPI to Azeff contrary to section 76(2) of the *Act.* Azeff in turn tipped Bobrow. Both recommended the purchase of Legacy units to family, friends and clients, contrary to the public interest. Of particular note is an email from HG to Azeff at 14:35 on July 12 "2 hours!", a few hours before the public announcement.

[328] With respect to allegations relating to Legacy, we find that from July 4, 2007 to July 12, 2007:

(a) Legacy was a "reporting issuer" within the meaning of the *Act*;

(b) Finkelstein was a person in a special relationship with Legacy within the meaning of subsection 76(5)(b) of the *Act*;

(c) the Legacy Material Facts were facts that would reasonably be expected to have a significant effect on the market price or value of the Legacy securities and was therefore "material facts" with respect to Legacy, within the meaning of the *Act*;

(d) Finkelstein informed Azeff and Azeff informed Bobrow, other than in the necessary course of business, of the Legacy Material Facts before they had been generally disclosed, contrary to subsection 76(2) of the *Act* and contrary to the public interest; and

(e) each of Azeff and Bobrow acted contrary to the public interest by recommending, with knowledge of the Legacy Material Facts, that a client or clients purchase Legacy securities.

XIII. IPC US REIT

A. Overview of the Transaction

[329] In 2007, IPC was a REIT reporting issuer in Ontario that invested exclusively in US commercial real estate. It was listed on the TSX.

[330] After unsuccessful attempts to sell itself privately in 2005 and 2006, on January 30, 2007, IPC issued a press release announcing the intention to solicit proposals for its acquisition.

[331] On February 6, 2007, Davies opened a file to represent IPC during the public sale process. Finkelstein was the principal Davies' lawyer assigned to the matter. He thus was in a special relationship with the issuer.

[332] 140 potential buyers expressed interest and 67 entered into Confidentiality and Standstill Agreements in the month of February.

[333] On March 14, 2007, potential buyers submitted first round bids. Of these, five were invited into the second round. Despite negotiations through May and June, none of the bids was accepted.

[334] On August 2, Behringer, which had signed a Confidentiality Agreement with IPC in February, but had never submitted a bid, reached out to IPC regarding an Acquisition Proposal. Finkelstein was copied on the transmission. That afternoon, IPC responded positively that it did not see any deal breakers. There was no evidence that Finkelstein knew of any proposal by Behringer earlier than August 2.

[335] On August 14, the takeover was publicly announced.

B. The Allegations

[336] Staff alleges that Finkelstein, while in a special relationship with IPC, informed Azeff of the material undisclosed facts of the transaction, contrary to subsection 76(2) of the *Act*.

[337] Staff further alleges that Azeff tipped Bobrow and both, while in a special relationship with, and in possession of material undisclosed facts, recommended the purchase of IPC units to family members, clients and friends contrary to the public interest.

C. Analysis and Conclusion

[338] Since buying of IPC units in DK4 accounts began at 11:13 on August 8, Staff's allegations hinge on communication between Finkelstein and Azeff on August 7.

[339] For 2007, complete records exist for work-to-work calls, cell phone calls and home-to-home calls. Between July 23 and August 7, the records indicate no calls between Finkelstein and Azeff.

[340] On August 7 at 17:00, there was a call from Azeff to Finkelstein at work for one minute. It is incongruous that Azeff was calling Finkelstein seeking information of a confidential nature when they had not spoken for two weeks. Finally, we accept the

evidence of Finkelstein that he had no conversation with Azeff as he was on a conference call at the time.

[341] Without the vital link of the telephone call on August 7, any inference to be drawn from the immediately subsequent fortuitous trading by Azeff and Bobrow and others would be inferences founded on speculation.

[342] The allegations related to IPC are dismissed.

XIV. CONCLUSION

[343] Upon considering the evidence tendered, submissions made and legal authorities cited to us by the parties with respect to each allegation, and for each of the Respondents, we make the following conclusions:

1. With respect to allegations relating to Masonite, we find that from November 16, 2004 to December 22, 2004:

    (a) Masonite was a "reporting issuer" within the meaning of the *Act*;

    (b) Finkelstein was a person in a special relationship with Masonite within the meaning of subsection 76(5)(b) of the *Act*;

    (c) the MHM Material Facts were facts that would reasonably be expected to have a significant effect on the market price or value of the Masonite securities and were therefore "material facts" with respect to Masonite, within the meaning of the *Act*;

    (d) Finkelstein informed Azeff, Azeff informed Bobrow and LK, Bobrow informed HF, Miller informed Cheng and DW, and Cheng informed SK, other than in the necessary course of business, of the MHM Material Facts before they had been generally disclosed, contrary to subsection 76(2) of the *Act* and contrary to the public interest;

    (e) each of Azeff, Bobrow, Miller and Cheng learned of the MHM Material Fact from a person whom he knew or ought reasonably to have known was a person in a special relationship with Masonite and, as a result, were persons in a special relationship with Masonite within the meaning of subsection 76(5)(e) of the *Act*;

    (f) based on the foregoing, Azeff, Bobrow, Miller and Cheng each purchased Masonite securities with knowledge of the MHM Material Facts that had not been generally disclosed, contrary to subsection 76(1) of the *Act* and contrary to the public interest; and

    (g) each of Azeff, Bobrow, Miller and Cheng acted contrary to the public interest by recommending, with knowledge of the MHM Material Facts, that a client or clients purchase Masonite securities.

2. With respect to allegations relating to MDSI, we are not satisfied that Finkelstein tipped Azeff or that Azeff in turn recommended MDSI to others.

3. With respect to allegations relating to Placer, we are not satisfied that Finkelstein tipped Azeff, that Azeff tipped Bobrow, traded and recommended Placer to others or that Bobrow traded and recommended to others.

4. With respect to allegations relating to Dynatec, we find that from April 18, 2007 to April 20, 2007:

   (a) Dynatec was a "reporting issuer" within the meaning of the *Act*;

   (b) Finkelstein was a person in a special relationship with Dynatec within the meaning of subsection 76(5)(c) or (e) of the *Act*;

   (c) the Dynatec Material Fact was a fact that would reasonably be expected to have a significant effect on the market price or value of the Dynatec securities and is therefore a "material fact" with respect to Dynatec, within the meaning of the *Act*;

   (d) Finkelstein informed Azeff and Azeff informed Bobrow, other than in the necessary course of business, of the Dynatec Material Fact before it had been generally disclosed, contrary to subsection 76(2) of the *Act* and contrary to the public interest;

   (e) each of Azeff and Bobrow learned of the Dynatec Material Fact from a person whom he knew or ought reasonably to have known was a person in a special relationship with Dynatec and, as a result, were persons in a special relationship with Dynatec within the meaning of subsection 76(5)(e) of the *Act*; and

   (f) each of Azeff and Bobrow acted contrary to the public interest by recommending, with knowledge of the Dynatec Material Fact, that a client or clients purchase Dynatec securities.

5. We do not find that the allegations of illegal trading, tipping and recommending against Miller and Cheng have been established in respect of Dynatec.

6. With respect to allegations relating to Legacy, we find that from July 4, 2007 to July 12, 2007:

   (a) Legacy was a "reporting issuer" within the meaning of the *Act*;

   (b) Finkelstein was a person in a special relationship with Legacy within the meaning of subsection 76(5)(b) of the *Act*;

   (c) the Legacy Material Facts were facts that would reasonably be expected to have a significant effect on the market price or value of the Legacy securities and were therefore "material facts" with respect to Legacy, within the meaning of the *Act*;

(d) Finkelstein informed Azeff and Azeff informed Bobrow, other than in the necessary course of business, of the Legacy Material Facts before they had been generally disclosed, contrary to subsection 76(2) of the *Act* and contrary to the public interest; and

(e) each of Azeff and Bobrow acted contrary to the public interest by recommending, with knowledge of the Legacy Material Facts, that a client or clients purchase Legacy securities.

7. With respect to allegations relating to IPC, we are not satisfied that Finkelstein tipped Azeff or that Azeff tipped Bobrow and recommended IPC to others or that Bobrow recommended IPC.

[344] For the reasons outlined above, we will also issue an order dated March 24, 2015 which sets down the date of May 21, 2015 for a hearing with respect to sanctions and costs in this matter.

Dated at Toronto this 24th day of March, 2015.

"Alan Lenczner"

_____

Alan J. Lenczner

"AnneMarie Ryan"

_____

AnneMarie Ryan

"Catherine Bateman"

_____

Catherine E. Bateman

APPENDIX A:

SECTION 76 OF THE ACT IN THE RELEVANT PERIOD FROM 2004-2007

Trading where undisclosed change

76. (1) No person or company in a special relationship with a reporting issuer shall purchase or sell securities of the reporting issuer with the knowledge of a material fact or material change with respect to the reporting issuer that has not been generally disclosed.

Tipping

(2) No reporting issuer and no person or company in a special relationship with a reporting issuer shall inform, other than in the necessary course of business, another person or company of a material fact or material change with respect to the reporting issuer before the material fact or material change has been generally disclosed.

Idem

(3) No person or company that proposes,

(a) to make a take-over bid, as defined in Part XX, for the securities of a reporting issuer;

(b) to become a party to a reorganization, amalgamation, merger, arrangement or similar business combination with a reporting issuer; or

(c) to acquire a substantial portion of the property of a reporting issuer,

shall inform another person or company of a material fact or material change with respect to the reporting issuer before the material fact or material change has been generally disclosed except where the information is given in the necessary course of business to effect the take-over bid, business combination or acquisition.

Defence

(4) No person or company shall be found to have contravened subsection (1), (2) or (3) if the person or company proves that the person or company reasonably believed that the material fact or material change had been generally disclosed.

Definition

(5) For the purposes of this section,

"person or company in a special relationship with a reporting issuer" means,

(a) a person or company that is an insider, affiliate or associate of,

(i) the reporting issuer,

(ii) a person or company that is proposing to make a take-over bid, as defined in Part XX, for the securities of the reporting issuer, or

(iii) a person or company that is proposing to become a party to a reorganization, amalgamation, merger or arrangement or similar business combination with the reporting issuer or to acquire a substantial portion of its property,

(b) a person or company that is engaging in or proposes to engage in any business or professional activity with or on behalf of the reporting issuer or with or on behalf of a person or company described in subclause (a) (ii) or (iii),

(c) a person who is a director, officer or employee of the reporting issuer or of a person or company described in subclause (a) (ii) or (iii) or clause (b),

(d) a person or company that learned of the material fact or material change with respect to the reporting issuer while the person or company was a person or company described in clause (a), (b) or (c),

(e) a person or company that learns of a material fact or material change with respect to the issuer from any other person or company described in this subsection, including a person or company described in this clause, and knows or ought reasonably to have known that the other person or company is a person or company in such a relationship.

Idem

(6) For the purpose of subsection (1), a security of the reporting issuer shall be deemed to include,

(a) a put, call, option or other right or obligation to purchase or sell securities of the reporting issuer; or

(b) a security, the market price of which varies materially with the market price of the securities of the issuer.