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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
BETTY LEUNG

REASONS FOR DECISION ON SETTLEMENT

Hearing:	June 25, 2008	
Reasons:	September 4, 2008	
Panel:	James E. A. Turner	- Vice-Chair and Chair of the Panel
	Suresh Thakrar	- Commissioner
Counsel:	Kelley McKinnon John Humphreys Michael Bordynuik	- For Staff of the Ontario Securities Commission
	David Hausman	- For Betty Leung

REASONS FOR DECISION ON SETTLEMENT

I. BACKGROUND

[1] On June 25, 2008, a hearing was convened before the Ontario Securities Commission (the "Commission") to consider the terms of a settlement agreement (the "Settlement Agreement"), dated June 23, 2008, entered into between Staff of the Commission ("Staff") and Betty Leung ("Leung") relating to matters arising from a Notice of Hearing and Statement of Allegations dated June 23, 2008. This was a hearing under sections 127 and 127.1 of the *Securities Act*, R.S.O. 1990, c. S.5, as amended (the "Act"), to consider whether it is in the public interest to approve the Settlement Agreement and the sanctions contained therein.

[2] Pursuant to paragraph 9(1)(b) of the *Statutory Powers Procedure Act*, R.S.O. 1990, c. S.22 and the Commission's *Practice Guidelines – Settlement Procedures*, contained in the Commission's *Rules of Practice* (1997), 20 O.S.C.B. 1947, the hearing was held *in camera*.

[3] Upon considering the materials filed, the submissions made, and the amendment to the draft order submitted to us, we concluded that it was in the public interest to approve the Settlement Agreement. At that time, the hearing became public and the Chair of the Panel gave an oral summary of our reasons and indicated that written reasons would be provided in due course. These are the written reasons for our decision.

II. RELEVANT FACTS SET OUT IN THE SETTLEMENT AGREEMENT

[4] In approving the Settlement Agreement, we considered all of the facts and circumstances set forth in that agreement. As noted in *Re Rankin* (2008), 31 O.S.C.B. 3303, the facts set out in a settlement agreement are not findings of fact by the relevant panel. Rather, they are facts agreed to by Staff and the relevant respondent(s) for purposes of the settlement. In approving the Settlement Agreement, we relied solely on the facts set out in that agreement and those facts represented to us at the hearing.

[5] The relevant facts set out in the Settlement Agreement are summarized below.

[6] Leung is a resident of Toronto. She is 53 years old. She has been a legal secretary in Canada since 1989. At the material time, Leung was employed as a legal secretary at the law firm Bennett Jones LLP in Toronto. She worked for a partner whose practice is primarily advising in connection with merger and acquisition transactions.

[7] Leung acquired confidential, material information (consisting of material facts or material changes within the meaning of the Act) about various potential transactions in her role as a legal secretary through communications with other employees of Bennett Jones LLP working on the relevant transactions or from review of file materials including e-mail.

[8] Leung was aware that she could not lawfully trade securities of reporting issuers while she possessed confidential, material information about potential transactions involving those issuers. She acknowledges that she owed a duty of confidentiality to her employer and to the clients of her employer.

[9] Leung also acknowledges that she was a person in a special relationship (within the meaning of paragraph 76(5)© of the Act) with the reporting issuers involved in the merger and acquisition transactions on which Bennett Jones LLP advised.

[10] Over the period from April 2005 to March 2008, with knowledge of confidential, material information that Leung became aware of during her employment, she bought and sold securities in eight reporting issuers which are listed on the TSX. She purchased the securities using two accounts in her own name, one in the name of her husband and one account in the name of her parents. While she traded frequently, she usually purchased or sold approximately 200 to 800 shares at a time.

[11] The total profit she made from the trades of the securities over the relevant period was $51,568.61. It was represented to us that this amount includes all of the profits from the four accounts.

[12] The trading in these circumstances was not material to the reporting issuers whose securities she traded.

[13] At the time Leung purchased and sold the relevant securities, the confidential, material information she knew in respect of the reporting issuers related to possible merger and acquisition transactions or other corporate transactions. This material information had not been generally disclosed to the public. Accordingly, Leung has acknowledged in the Settlement Agreement that she was in breach of the insider trading provisions of the Act and has acted contrary to the public interest.

V. THE LAW

A. The Role of the Commission in Reviewing Settlement Agreements

[14] When considering the approval of a settlement agreement, the Commission must ensure that the settlement agreement is in the public interest and that it achieves the purposes of the Act which are to (a) provide protection to investors from unfair, improper or fraudulent practices; and (b) foster fair and efficient capital markets and confidence in capital markets (section 1.1 of the Act).

[15] The Commission's public interest role was explained in *Re Mithras Management Ltd.* (1990). 13 O.S.C.B. 1600 as follows:

> …the role of this Commission is to protect the public interest by removing from the capital markets – wholly or partially, permanently or temporarily, as the circumstances may warrant – those whose conduct in the past leads us to concluded that their conduct in the future may well be detrimental to the integrity of those capital markets. We are not here to punish past

> conduct; that is the role of the courts, particularly under section 118 [now 122] of the Act. We are here to restrain, as best we can, future conduct that is likely to be prejudicial to the public interest in having capital markets that are both fair and efficient. In so doing, we must, of necessity, look to past conduct as a guide to what we believe a person's future conduct might reasonably be expected to be. … (at 1610 and 1611)

[16] In order to approve a settlement agreement, the Commission must conclude that doing so is in the public interest. The role of the Commission in considering a proposed settlement agreement has been articulated in several cases. For instance, in *Re Koonar et al.*(2002), 25 O.S.C.B. 2691, the Commission stated:

> The role of the panel in reviewing a settlement agreement is not to substitute the sanctions it would impose in a contested hearing for what is proposed in the settlement agreement, but rather to make sure the agreed sanctions are within acceptable parameters. (*Re Koonar et al., supra* at 2692. See also *Re Melnyk* (2007), 30 O.S.C.B. 5253; *Re Pollitt* (2004), 27 O.S.C.B. 9643 at para. 33; and *Nortel Networks Corp*., transcript of oral reasons of the Commission, May 22, 2007, p. 52.)

[17] Accordingly, the Commission must consider all of the circumstances of the particular case to determine whether the sanctions are in the "appropriate range" of acceptable sanctions. The Commission has in the past rejected settlement agreements on the basis that the sanctions agreed to did not fall within the "appropriate range". As stated in *Re Rankin* (at paragraph 19) "[our] role in considering the settlement is not to renegotiate the terms of the Settlement Agreement or to suggest changes to the agreed facts, statements and sanctions set forth in the Settlement Agreement". Nevertheless, the Commission cannot approve a settlement agreement where, in its view, the sanctions agreed to fall short of the appropriate range of acceptable sanctions.

[18] In order to determine whether proposed sanctions fall within an appropriate range, the Commission must have regard to the specific circumstances and facts of each case and the factors established in the case law as relevant, including:

- the seriousness of the allegations;
- the respondent's experience in the marketplace;
- the level of a respondent's activity in the marketplace;
- whether or not there has been a recognition of the seriousness of the improprieties;
- whether or not sanctions may deter not only those involved in the case being considered, but any like-minded people from engaging in similar conduct in the capital markets;
- any mitigating factors;
- the size of any profit (or loss avoided) from the illegal conduct;

- the size of any financial sanction or voluntary payment when considered with other factors;
- the effect any sanction might have on the livelihood of the respondent;
- the restraint any sanction might have on the ability of the respondent to participate without check in the capital markets;
- the reputation and prestige of the respondent;
- the financial consequences to a respondent of any sanction; and
- the remorse of the respondent.

(See, for instance, *Re Beltecto Holdings* (1998), 21 O.S.C.B. 7743 at pp. 7746-7; and *Re M.C.J.C. Holdings and Michael Cowpland* (2002), O.S.C.B. 1133 at 1136.)

[19] It is also necessary to ensure that the sanctions contained in a settlement agreement are proportionate to the conduct in question:

> We have a duty to consider what is in the public interest. To do that, we have to take into account what sanctions are appropriate to protect the integrity of the marketplace where illegal insider trading has been admitted.
>
> In doing this, we have to take into account circumstances that are appropriate to the particular respondents. This requires us to be satisfied that proposed sanctions are proportionately appropriate with respect to the circumstances facing the particular respondents. We should not just look at absolute values, e.g. what has been paid voluntarily in other settlements, or what has been found to be appropriate sanctions by way of cease trade order in other cases. (*Re M.C.J.C. Holdings and Michael Cowpland supra* at 1134.)

[20] We must take all of the above mentioned considerations into account in determining whether the Settlement Agreement is in the public interest.

B. The Seriousness of Insider Trading

[21] We agree with Staff that insider trading is a very serious offence under the Act and that it is conduct that very significantly harms investors as well as the integrity of, and confidence in, the capital markets.

[22] The insider trading prohibition is found in subsection 76(1) of the Act and provides as follows:

> 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.

[23] Subsection 76(1) of the Act prevents individuals who are in a preferential position from trading securities with knowledge of material corporate information concerning an issuer, such as pending corporate transactions, and thereby taking advantage and exploiting information which is not generally known to others in the marketplace.

[24] As pointed out in the Kimber Report:

> The ideal securities market should be a free and open market with the prices thereon based upon the fullest possible knowledge of all relevant facts among traders. Any factor which tends to destroy or put in question this concept lessens the confidence of the investing public in the market place and is, therefore, a matter of public concern. (*The Report of the Attorney General's Committee on Securities Legislation in Ontario* (Toronto: Queen's Printer, 1965) at 10.)

[25] The Commission has emphasized in the past that "all investors should have an equal opportunity to consider all material facts and changes in reaching investment decisions" (*McLaughlin v. S.B. McLaughlin Associates Ltd.* (1981), 14 B.L.R. 46 (Ont. Securities Comm.) at 59). Insider trading violates this principle of equal opportunity and gives those with confidential, material information an unfair advantage and benefit in trading securities in the capital markets.

[26] This principle was emphasized by the Commission in *Re Duic* (2004), 27 O.S.C.B. 2754 at paragraph 25:

> To protect investors and ensure public confidence in the capital markets, the legislature has prohibited illegal insider trading. Illegal insider trading involves the purchase or sale of a security with knowledge of undisclosed material information about the issuer of the security. The purpose of this prohibition is to maintain a level playing field of available information for all investors in Ontario …

[27] Accordingly, Leung's conduct in committing insider trading is the most serious of the kinds of illegal conduct that may come before us. It is serious and it is unacceptable. We must take into account the serious nature of Leung's conduct in assessing whether the sanctions proposed in the Settlement Agreement fall within the "appropriate range" of acceptable sanctions.

V. DISCUSSIONS AND ANALYSIS

A. Leung's Conduct

[28] Leung engaged in illegal insider trading. As a legal secretary at Bennett Jones LLP, she was in a position of trust and worked closely with the lawyers in a very highly regarded law firm. Her duties as a legal secretary put her in a position where she had access to confidential merger and acquisition information and other corporate information

of various clients. She had an obligation to safeguard that information and not to use it for her own advantage.

[29] Leung was aware that insider trading was contrary to the law and that what she was doing was illegal. She admits that she was aware that she could not lawfully trade securities of reporting issuers while she possessed undisclosed confidential material information about potential transactions.

[30] Accordingly, Leung knew her conduct was illegal and a breach of trust, it was intentional and it occurred over an extended period. This was not a one-time lapse in judgment or an isolated incident; it was deliberate and planned conduct with respect to eight different reporting issuers that occurred over a period of almost three years. These circumstances make Leung's conduct, within the range of possible insider trading offences, of the most serious kind.

[31] By entering into the Settlement Agreement, Leung acknowledges that her conduct breached the Act and was contrary to the public interest and she expresses remorse for her conduct.

B. Sanctions

[32] The sanctions agreed to in the Settlement Agreement included the following:

- trading in any securities by Leung cease permanently from the date of the approval of the Settlement Agreement, except that Leung is permitted to trade only in mutual fund securities in one account on her own behalf, one account on behalf of her registered retirement savings plan, and one account on behalf of her locked-in pension plan, through no more than two registered dealers, to whom she must give a copy of this Order at the time she opens or modifies these accounts;

- acquisition of any securities by Leung is prohibited permanently from the date of the approval of the Settlement Agreement, except that Leung is permitted to acquire mutual fund securities in one account on her own behalf, one account on behalf of her registered retirement savings plan, and one account on behalf of her locked-in pension plan, through no more than two registered dealers, to whom she must give a copy of this Order at the time she opens or modifies these accounts;

- Notwithstanding the foregoing, Leung shall have 60 days from the date of this order to effect liquidating trades of any non-mutual fund securities that she owns beneficially or over which she exercises direction or control;

- Leung shall pay the amount of $90,244 to the Commission within 60 days of this order for allocation to or for the benefit of third parties in accordance with subsection 3.4(2) of the Act; and

- Leung shall pay costs of the investigation to the Commission in the amount of $5,000 within 60 days of this order.

[33] As noted above, in this case we are faced with very serious conduct. We agree with Staff's submission that it is important that we send a strong deterrent message to anyone who may be tempted to engage in this type of illegal conduct.

V. Mitigating Considerations

[34] Notwithstanding the seriousness of Leung's conduct, we have considered the following mitigating circumstances:

(i) once the illegal insider trading was identified, Leung was extraordinarily cooperative with Staff in bringing this matter to an expeditious conclusion;

(ii) Leung's conduct has had a devastating impact on her employment, which has been terminated, and on her future employment opportunities;

(iii) the profit made from the illegal insider trading was relatively small, approximately $51,500;

(iv) the trading by Leung was not material to the reporting issuers whose securities she traded and did not affect the market price of those securities;

(v) Leung was a legal secretary, not a lawyer or more senior person within the relevant law firm; and

(vi) Leung recognizes the seriousness of her improprieties and is remorseful.

[35] We also note that this proceeding will resolve this matter without the need for a hearing on the merits before the Commission.

V. The Amendment to the Order

[36] The Settlement Agreement submitted to us contained an order that Leung pay an administrative penalty of $90,244 and contained no bar of Leung from acting as an officer or director of a market participant. We advised Staff and the Respondent at the conclusion of the hearing that we were not prepared to approve the Settlement Agreement and the contemplated order on the terms submitted to us.

[37] We advised the parties that we had two concerns. First, we indicated that we were not prepared to approve an administrative penalty of less than two times the profit made from the illegal trading. In our view, in these circumstances, that was the minimum financial penalty that we felt conveyed the seriousness of Leung's conduct. Second, while we recognize that Leung is not currently an officer or director of a market participant and that it is unlikely that she would become one, we indicated that we were not prepared to remain silent on that matter. In our view, a person who commits insider trading of the nature described in these reasons should be permanently barred from acting as an officer or director of a market participant.

[38] After advising the parties that we would not approve the Settlement Agreement on the terms proposed, we adjourned the hearing at the request of the parties to give them an opportunity to consider our views. At the conclusion of that adjournment, counsel for Staff and Leung indicated that they had agreed to amend the proposed order to respond to our concerns.

V. CONCLUSION

[39] We believe that we are giving very substantial benefit to the Respondent in approving this settlement. By settling this matter, Leung is avoiding the possibility of a criminal proceeding under the Act with the possibility of a jail sentence. We would not have viewed these overall sanctions as adequate if a hearing had been held on the merits and we had concluded that the Respondent had committed the insider trading that she has acknowledged in the Settlement Agreement. We would have imposed much more substantial sanctions.

[40] By approving this settlement, however, we believe that we have acted in the public interest. We have imposed a permanent trading ban on appropriate terms on Leung. We have also permanently banned Leung from being an officer or director of any market participant. The message is that if you commit insider trading you will be permanently banned from trading in Ontario and from participating in capital markets as a market participant.

[41] We have approved an administrative penalty equal to two times the profit made from the illegal trading. Accordingly, our message is that, if you commit insider trading, you will likely be subject to sanctions equal to at least two times the profit obtained from such trading.

[42] We have also recognized the very substantial cooperation of the Respondent by approving a cost award of $5,000, an amount that is substantially below the Commission's costs in this matter.

[43] In the result, we approve the Settlement Agreement as being in the public interest. The draft order in the form submitted to us is approved, except that on consent of Staff and Leung, the amount to be paid as an administrative penalty shall be $103,137.22, representing two times the profits made in this matter, and Leung is permanently prohibited from becoming a director or officer of any market participant.

DATED at Toronto on this 4th day of September, 2008.

"*James E. A. Turner*"	"*Suresh Thakrar*"
James E. A. Turner	Suresh Thakrar