



---

**Justifiable Expectations Standard:  
The Basis for the Exercise of the  
Public Interest Power of the  
Ontario Securities Commission**

---

Paul Davis

August 22, 2014

**Paul Davis is a partner of McMillan LLP. This paper was prepared with the assistance of Sandy Andreou (an associate at McMillan LLP); and Allison Vale, David Zhou, Jennifer Allman and Matthew Burns, each of whom is a summer student.**

**TABLE OF CONTENTS**

- 1. INTRODUCTION..... 1**
- 2. LEGISLATIVE HISTORY..... 2**
- 3. JURISPRUDENCE..... 4**
  - 3.1 Cablecasting..... 4
    - 3.1.1 Summary ..... 4
    - 3.1.2 Observations ..... 6
  - 3.2 Re Lindzon..... 7
    - 3.2.1 Summary ..... 7
    - 3.2.2 Observations ..... 8
  - 3.3 Canadian Tire ..... 8
    - 3.3.1 Summary ..... 8
    - 3.3.2 Observations ..... 11
  - 3.4 Re Selkirk Communications Ltd ..... 12
    - 3.4.1 Summary ..... 12
    - 3.4.2 Observations ..... 14
  - 3.5 Re Mithras Management Ltd..... 14
    - 3.5.1 Summary ..... 14
    - 3.5.2 Observations ..... 16
  - 3.6 Re HERO Industries Ltd..... 16
    - 3.6.1 Summary ..... 16
    - 3.6.2 Observations ..... 17
  - 3.7 Re Asbestos Corp Ltd..... 17
    - 3.7.1 Summary ..... 17
    - 3.7.2 Observations ..... 21
  - 3.8 Re Canfor Corp..... 21
    - 3.8.1 Summary ..... 21
    - 3.8.2 Observations ..... 22
  - 3.9 Re Financial Models Co ..... 22
    - 3.9.1 Summary ..... 22
    - 3.9.2 Observations ..... 24
  - 3.10 Patheon ..... 24
    - 3.10.1 Summary ..... 24
    - 3.10.2 Observations ..... 25
  - 3.11 Biovail ..... 26
    - 3.11.1 Summary ..... 26
    - 3.11.2 Observations ..... 28
  - 3.12 Re Magna International Inc ..... 28
    - 3.12.1 Summary ..... 28
    - 3.12.2 Observations ..... 29
  - 3.13 Re VenGrowth Funds (Special Committee of Directors) ..... 30
    - 3.13.1 Summary ..... 30

3.13.2	Observations .....	32
3.14	Re Donald .....	32
3.14.1	Summary .....	32
3.14.2	Observations .....	34
3.15	Re Suman .....	34
3.15.1	Summary .....	34
3.15.2	Observations .....	34
<b>4.</b>	<b>ANALYSIS.....</b>	<b>35</b>
4.1	Guiding Principles.....	35
4.1.1	Objects and Purposes of the Act .....	35
4.1.2	Orders are Preventive and Prospective .....	35
4.1.3	General Deterrence.....	36
4.1.4	Not a Private Remedy.....	36
4.1.5	Transactional Nexus .....	36
4.1.6	Dismissal of Technical Interpretations .....	36
4.1.7	Due Diligence Defence .....	37
4.1.8	Addressed by Legislature .....	37
4.1.9	Self-Restraint in Enforcing Other Statutes .....	37
4.1.10	Shareholder Approval .....	37
4.1.11	Financial Merits of a Transaction .....	38
4.1.12	Good Faith Action Based on Statement of Regulator .....	38
4.2	Surrounding Facts and Circumstances .....	38
4.2.1	Artificial Transaction .....	38
4.2.2	Failure to Disclose Material Information .....	38
4.2.3	Intended to Circumvent the Intent of the Act .....	39
4.2.4	Exploiting a Loophole .....	39
4.2.5	Conduct of Market Participants .....	39
4.3	Justifiable Expectations—the Proposed New Standard .....	39
4.3.1	Current Standards .....	39
4.3.1.1	Staff Standard .....	39
4.3.1.2	<i>Biovail</i> Standard.....	42
4.3.1.3	Abuse Standard.....	42
4.3.2	Justifiable Expectations Standard .....	44
4.3.2.1	The Standard.....	44
4.3.2.2	Application of Standard .....	44
<b>5.</b>	<b>CONCLUSION.....</b>	<b>47</b>

## Justifiable Expectations Standard: The Basis for the Exercise of the Public Interest Power of the Ontario Securities Commission<sup>1</sup>

### 1. INTRODUCTION

The ability of the State or any agency thereof to mete out sanctions in circumstances where there has not been a contravention of a clearly delineated statutory provision has generally been the purview of dictators or absolute monarchs. However, in 1978,<sup>2</sup> the Ontario Securities Commission (the "**Commission**") confirmed that it had the power, under what is now section 127 of the Ontario *Securities Act* (the "**Act**"),<sup>3</sup> to exercise its public interest jurisdiction to sanction persons, absent a breach of the Act, regulations thereunder or policy statements.<sup>4</sup> Under section 127 of the Act, the Commission may make certain orders if "in its opinion it is in the public interest."<sup>5</sup> By 1987, the Commission had exercised this power to sanction someone in circumstances where securities laws had not been breached.<sup>6</sup> Since the 1987 decision, the Commission has intervened and used its public interest powers in at least eight cases wherein there was no actual breach of securities laws.<sup>7</sup>

Following the decision of the Supreme Court of Canada ("**SCC**") in *Committee for Equal Treatment of Asbestos Minority Shareholders v Ontario (Securities Commission)*,<sup>8</sup> it is beyond doubt that the Commission may exercise its public interest power absent a breach of securities laws. In a jurisdiction subject to the rule of law, this is a uniquely powerful tool granted to securities regulators which, once exercised, is in practice extremely difficult to overturn in light of the standard of judicial review.<sup>9</sup> It is therefore not surprising that the public interest power has been the subject of much controversy, and increasingly so with its more frequent use by the Commission.<sup>10</sup> In using its public interest jurisdiction absent a breach of securities laws, the Commission is, in effect, creating its own policy statements or amending the legislation, despite it not engaging in the normal process for implementing new policies or being part of the legislative branch.

In the leading cases where, absent a breach of securities laws, the Commission has considered exercising its public interest powers, the Commission has developed guiding principles for when it will engage its public interest jurisdiction. Staff members of the Commission ("**Staff**") have recently summarized what they believe to be the standards used by the Commission when deciding whether to exercise its public interest powers:

---

<sup>1</sup> The views expressed in this paper are those of the authors and should not be attributed to McMillan LLP.

<sup>2</sup> *Re Cablecasting Ltd*, [1978] OSCB 37 [*Cablecasting*].

<sup>3</sup> RSO 1990, c S 5. For ease of reference, we will use the term "**Act**" to refer to various Ontario securities statutes. Where we have made specific reference to a provision, we will provide the citation to the appropriate legislation in question. In this paper, we will refer to the exercise of the Commission's jurisdiction under section 127 of the Act or predecessor provisions as the "**public interest power**."

<sup>4</sup> For ease of reference, we will use the term "**securities laws**" to refer to the Act, regulations thereunder (including applicable multilateral, and national instruments) and policy statements.

<sup>5</sup> *Securities Act*, RSO 1990, c S5, s 127(1).

<sup>6</sup> *Re Canadian Tire Corp* (1987), 10 OSCB 857 [*Canadian Tire*].

<sup>7</sup> Although in one of the cases, *Re Patheon Inc* (2009), 32 OSCB 6445 [*Patheon*], the Commission had serious concerns that provisions of the Act may have been contravened.

<sup>8</sup> 2001 SCC 37 [*Asbestos SCC*].

<sup>9</sup> In *British Columbia (Securities Commission) v McLean*, 2013 SCC 67 at para 33, the SCC affirmed that the applicable standard of review is reasonableness. The Court held that the interpretation of the section in question was best left to the Commission since it was its "home statute." The Court presumed that the Legislature intended for the Commission—and not the courts—to decide between "multiple reasonable interpretations" and its respective policy considerations.

<sup>10</sup> Nigel Campbell, Erin Hoult & David Badham, "Lesser Included Non-Offences?: The Use of the Public Interest Power in *Re Donald*" (2014) 27 Can J Admin L & Prac 161 [Campbell et al]; "A Fine Balance Being Tipped – A Review of the Ontario Securities Commission's Public Interest Jurisdiction" (2014) 18 Corporate Liability 3 at 1090, 1096, 1098 [Leon & Carlo].

In the absence of a technical breach of securities law, the principles that have emerged from this line of cases suggest the following: (1) in cases involving novel transactions "the conduct or transaction must clearly be demonstrated to be abusive of shareholders in particular, and of capital markets in general" and (2) in cases "... where market conduct engages the animating principles of the Act, the Commission does not have to conclude that an abuse has occurred in order to exercise its public interest jurisdiction."<sup>11</sup>

We believe this summary does not provide a complete depiction of the current state of the law regarding the use of the public interest power absent a breach, and may in fact implicitly be giving the public interest jurisdiction excessive breadth. In this paper, we hope to provide greater clarity.

Despite reference to the term "public interest" 41 times throughout the Act,<sup>12</sup> a definition or even cursory explanation of the nature and scope of the power is nowhere to be found in the statute. In this paper, we will focus only on section 127 of the Act and jurisprudence in connection therewith wherein there was no breach of securities laws. We will therefore not discuss similar legislation in other Canadian provinces, nor the exercise of the public interest power where there *has* been a breach of securities laws. In light of the fact that settlement cases are not subject to the rigours of a contested hearing, we will not focus on such cases. Finally, for the purposes of this paper, we will not address the basis and nature of the sanctions which may be imposed under section 127 of the Act.

We will begin by reviewing the legislative history of the public interest power in the Act, followed by an in-depth analysis of the jurisprudence pertaining to the use of section 127, absent a breach of securities laws. We will then examine the guiding principles that can be gleaned from the jurisprudence and conclude by outlining what we believe is a more cogent and clear basis for the exercise of the public interest power, which is supported by the leading decisions of the Commission.

We will suggest that the appropriate standard to use in determining whether the public interest power should be exercised is whether the justifiable expectations of a reasonable investor have been defeated. A positive answer to the following question will confirm that such expectations have been defeated: Would a reasonable investor lose confidence in the capital markets and be less willing to invest if the Commission did not take action to deter or prevent a repetition of the conduct in question? If the answer is clearly yes, the public interest power would then be exercised unless not justified from a policy perspective.

## 2. LEGISLATIVE HISTORY

Since its inception, the scope of orders conferred on the Commission under its public interest jurisdiction has seen significant expansion under the Act. The origin of the public interest power can be traced back to the 1962 amendments to the 1960 Act.<sup>13</sup> However, the public interest concept appears in securities legislation as early as 1945, when the first modern Act was introduced.<sup>14</sup>

In its most rudimentary form, the 1962 provision allowed for the denial of certain exemptions where the Commission considered such action to be in the public interest. Indeed, section 10(4) of the 1962 Act provided

---

<sup>11</sup> Tom Atkinson & Cullen Price, "The Ontario Securities Commission's Public Interest Power: The Primacy of Principles" (2014) 27 Can J Admin L & Prac 205 at 212 [Atkinson & Price], citing *Re Biovail Corp* (2010), 33 OSCB 8914 at para 382 [*Biovail*].

<sup>12</sup> The public interest is also referred to in section s 64.1(3) [not yet in force] of the *Securities Act*, RSO 1990, c S 5, as amended by *An Act respecting financial and Budget measures and other matters*, SO 2010, c 26, Sched 18, ss 28, 47(2).

<sup>13</sup> *The Securities Act*, RSO 1960, c 363, s 19(3), as repealed by *An Act to amend The Securities Act*, SO 1962-63, c 131, s 10(4).

<sup>14</sup> *The Securities Act, 1945*, SO 1945, c 22, s 10 states: "[t]he Commission shall suspend or cancel any registration where in its opinion such action is in the public interest" [emphasis added].

that "the Commission may, where in its opinion such action is in the public interest" order that registration exemptions do not apply.<sup>15</sup>

In the wake of the Kimber Report<sup>16</sup> and two Royal Commission reports constituted to inquire into different issues surrounding the regulation of the securities market in the 1960s,<sup>17</sup> Ontario securities legislation underwent significant overhaul. It was against this backdrop that *The Securities Act, 1966* was enacted.<sup>18</sup> The new legislation was largely based on the recommendations in the Kimber Report and the public interest power remained virtually unchanged, albeit under a different section.

In 1968, however, the Commission was afforded the discretion to order, subject to such terms and conditions as it may impose, that trading shall cease in any securities for such a period as is specified in the order.<sup>19</sup> In addition, basic procedural rights, such as hearing and notice requirements, were implemented to complement the application of the public interest power.<sup>20</sup>

Notwithstanding the addition that the Commission may make an order to cease trade despite the delivery of a confidential material change report to it, the 1978 amendments left the scope of public interest orders relatively unaffected.<sup>21</sup> Similarly, the public interest power as it appeared in the 1980<sup>22</sup> and 1990<sup>23</sup> Revised Statutes of Ontario closely resembled the language of the 1978 Act.<sup>24</sup>

The evolution of the public interest power was nearly stagnant until 1994, when the Commission's public interest jurisdiction gained much wider latitude and its repertoire of orders began to proliferate. In conjunction with its existing two powers (i.e. an order denying exemptions and a cease trade order), the 1994 amendments vested the Commission with additional orders, including the suspension, restriction or termination of registration or recognition under the Act; an order that a market participant submit to a review of its practices and procedures, and institute such changes as may be ordered; an order directing the disclosure, non-disclosure or amendment of a particular document; and an order that a person or company be reprimanded.<sup>25</sup>

In addition to extending the scope of orders under the public interest jurisdiction, the 1994 Act is noteworthy for its harmonization of the public interest sections. Whereas prior to 1994, the Commission's public interest power was located in discrete sections throughout the Act, the 1994 amendments explicitly enumerated and consolidated the different orders the Commission can make into the current form of section 127.

---

<sup>15</sup> *Supra* note 13.

<sup>16</sup> *Report of the Attorney General's Committee on Securities Legislation in Ontario* (Toronto: Queen's Printer, 1965) [Kimber Report].

<sup>17</sup> *Report of the Royal Commission on Banking and Finance* (Ottawa: Queen's Printer, 1964) (reviewed "the structure and methods of operations of the Canadian financial system, including the banking and monetary system and the institutions and processes involved in the flow of funds through the capital markets"); *Report of the Royal Commission to Investigate Trading in the Shares of Windfall Oils and Mines Limited* (Toronto: Queen's Printer, 1965) (investigated "the events involved in, and the causes of, the recent fluctuations in the prices of the shares of Windfall Oils and Mines Limited").

<sup>18</sup> SO 1966, c 142.

<sup>19</sup> *The Securities Act, 1966*, SO 1966, c 142, s 19(5), as amended by *An Act to amend The Securities Act, 1966*, SO 1968, c 123, s 40.

<sup>20</sup> *Ibid.*

<sup>21</sup> *The Securities Act*, RSO 1970, c 426, s 144(1), as amended by *An Act to revise The Securities Act*, SO 1978, c 47, s 123(2) states: "[t]he Commission may issue a cease trading order under subsection 1 notwithstanding the delivery of a report to it pursuant to subsection 3 of section 74." Section 74(3) provided that where, in the opinion of the reporting issuer, public disclosure of a material change would be unduly detrimental to the issuer's interests, that issuer may report a material change to the Commission on a confidential basis.

<sup>22</sup> *Securities Act*, RSO 1980, c 466, ss 123–24.

<sup>23</sup> *Securities Act*, RSO 1990, c S5, ss 127–28.

<sup>24</sup> *Supra* note 21, s 123 (order to cease trading), s 124 (discretion to remove exemptions).

<sup>25</sup> *Securities Act*, RSO 1990, c S 5, s 127, as repealed by *Securities Amendment Act, 1994*, SO 1994, c 11, s 375.

The 1994 amendments instigated a wave of reform. In 1999, section 127 was amended to include an order that a person resign one or more positions held as an officer or director of an issuer, and an order prohibiting a person from becoming or acting as an officer or director of any issuer.<sup>26</sup> Perhaps most controversially, pursuant to the amendments enacted in 2002, the Commission is now authorized to levy monetary sanctions, including administrative penalties and disgorgement orders.<sup>27</sup> As such, the Commission may order a person or company found to have breached Ontario "securities law" to pay an administrative fine of up to \$1 million per contravention, and require a person or company to disgorge profits made as a result of the non-compliance.

Most recently, under the 2005 amendments, six new orders were added to the legislation, including a prohibition on the acquisition of securities; an order that a person resign one or more positions held as an officer or director of a registrant, or investment fund manager; an order prohibiting a person from becoming or acting as an officer or director of a registrant, or investment fund manager; and an order prohibiting a person or company from becoming or acting as a registrant, issuer, investment fund manager or promoter.<sup>28</sup>

By 2005, the Commission had obtained significant powers to issue an array of orders if, in its opinion, such orders were in the public interest. While there were demands for the Legislature to include in the Act a definition of "public interest," it was ultimately left to the Commission and the courts to determine the nature and scope of this term.<sup>29</sup>

### 3. JURISPRUDENCE

The breadth and nature of the public interest power has been litigated and discussed since the seminal decision in *Cablecasting*.<sup>30</sup> We would suggest that a review of these decisions in chronological order will provide clear guidance as to the limits of this power and the basis on which it should be exercised.

#### 3.1 Cablecasting

##### 3.1.1 Summary

*Cablecasting* arose out of a request by minority shareholders of Cablecasting Limited ("**Cablecasting**") for the Commission to issue a cease trade order preventing Cablecasting and its management from squeezing out the minority shareholders under a going-private transaction. Two minority shareholders of Cablecasting applied for a cease trade order under the public interest power of the Commission on the basis that the information circular

---

<sup>26</sup> *Securities Act*, RSO 1990, c S 5, as amended by *More Tax Cuts for Jobs, Growth and Prosperity Act, 1999*, SO 1999, c 9, s 215.

<sup>27</sup> *Securities Act*, RSO 1990, c S 5, as amended by *Keeping the Promise for a Strong Economy Act (Budget Measures), 2002*, SO 2002, c 22, s 183(1).

<sup>28</sup> *Securities Act*, RSO 1990, c S 5, as amended by *Budget Measures Act, 2005 (No 2)*, SO 2005, c 31, Schedule 20, s 8.

<sup>29</sup> See e.g. Simon Romano, "Re: Five Year Review Committee Draft Report," Comment Letter on *Five Year Review Committee Draft Report – Reviewing the Securities Act (Ontario)*, OSC (29 May 2002), online:

<[https://www.osc.gov.on.ca/documents/en/Securities/fyr\\_20020828\\_report\\_com\\_stikeman.pdf](https://www.osc.gov.on.ca/documents/en/Securities/fyr_20020828_report_com_stikeman.pdf)> ("I also recommend that consideration be given to defining, or adding some legislative explanation, to the amorphous concept of the 'public interest' in the context of section 127, given the foundation for penalties that it represents" at para 11).

<sup>30</sup> Prior to *Cablecasting*, in *Re Morton*, [1946] OR 492 (H Ct) [*Morton*], the scope of the Commission's jurisdiction to act in the public interest was subject to interpretation very early after the concept of "public interest" was introduced in the Act. *The Securities Act, 1945*, SO 1945, c 22, s 10 provided that "[t]he Commission shall suspend or cancel any registration where in its opinion such action is in the public interest." The question of whether the Commission could exercise its public interest powers and cancel a registration even when there was no complaint or charge made against the registered salesman was brought before the Ontario Supreme Court in *Morton*. The Court found that the statute itself did not require evidence of actual misconduct for the Commission to exercise its powers to "act in the public interest."

distributed by Cablecasting failed to satisfy the requirement of Form 15<sup>31</sup> under *The Business Corporations Act* (Ontario)<sup>32</sup> and the disclosure requirements under Policy 3-37.<sup>33</sup>

Though the Commission ultimately decided not to issue a cease trade order, it held that it could exercise its public interest power, despite compliance with Ontario securities law.<sup>34</sup> The Commission considered the exercise of such power in the context of the two circumstances in which counsel to minority shareholders believed it was appropriate for the Commission to exercise its public interest power. The first circumstance involved a proposed transaction that "would contravene the *OBCA* (or some other statute reflecting public policy considerations)"<sup>35</sup> (a "**Breach of Statute**"). The second circumstance involved a transaction that, "while consistent with the language of prior policy rulings and statements of the Commission, would contravene the intent of these rulings and statements and detract from the credibility of the capital markets or be otherwise inconsistent with the best interests of investors"<sup>36</sup> ("**Contrary to Intent**").

Regarding the Breach of Statute circumstances, the Commission emphasized that the availability of a remedy for minority shareholders in the courts does not preclude the Commission from granting the shareholders' application for a public interest order when a "*clear abuse of investors is demonstrated*."<sup>37</sup> To "[oust] the jurisdiction of the Commission [in such circumstances] would ... be inconsistent with the principles of The Securities Act."<sup>38</sup> However, recognizing it should be cautious when enforcing statutes not assigned to it, the Commission stated that it would exercise its public interest power in such circumstances "rarely" and only if: (i) "a significant contravention of another statute can be expeditiously demonstrated"; and (ii) "no lesser remedy suffices" under the Act.<sup>39</sup> In reference to the need to expeditiously demonstrate a significant breach of another statute, the Commission was wary of enforcing other statutes in light of the limitations on the fact-finding process at Commission hearings compared to court hearings. The Commission noted that it would be inappropriate to call upon Staff to deal with Breach of Statute matters unless "there is reason to believe that fraud has occurred or that the transaction constitutes a flagrant abuse in some other respect."<sup>40</sup>

Dealing with Contrary to Intent circumstances, the Commission rejected the contention by counsel for Cablecasting that the Commission could not exercise its public interest power unless it found a contravention of securities laws: "The obvious conclusion, that the individual with an imagination sufficiently fertile to invent an unethical scheme which skirts the words of all published pronouncements may carry out that scheme with impunity, demonstrates the difficulties of the position."<sup>41</sup>

---

<sup>31</sup> It was alleged that there was non-compliance with the requirement in Form 15 that the proposal to the shareholders' meeting be described "in sufficient detail to permit shareholders to form a reasoned judgment" (*Cablecasting, supra* note 2 at 44).

<sup>32</sup> RSO 1970, c 53, as amended by SO 1971, c 26; SO 1971, c 98, Schedule s 4; SO 1972, c 1, s 30; SO 1971 c 138; SO 1975, c 26; SO 1976, c 67 [*OBCA*]; hereinafter all references to the *OBCA* will, following 1990, refer to the *Business Corporations Act*, RSO 1990, c B 16.

<sup>33</sup> OSC Policy No 3-37 (1977) OSCB 253 required disclosure of a "summary of any appraisal or valuation known to the directors or officers of the issuer, regarding the issuer, its material assets or securities within the two years preceding the date of the bill" (at para 20(a), Appendix B), cited in *Cablecasting, supra* note 2 at 45.

<sup>34</sup> *Cablecasting, supra* note 2 at 41.

<sup>35</sup> *Ibid* [parentheses in original].

<sup>36</sup> *Ibid*.

<sup>37</sup> *Ibid* at 42 [emphasis added].

<sup>38</sup> *Ibid* at 41–42.

<sup>39</sup> *Ibid* at 42.

<sup>40</sup> *Ibid*.

<sup>41</sup> *Ibid* at 43.



At the same time, the Commission reaffirmed its practice of publishing policy statements and having them "tested by experience and by public debate."<sup>42</sup> It would be a "bold act" for the Commission, through the exercise of its public interest power, to create and apply a new policy during a contested application.<sup>43</sup>

In order to delineate the line between restraint from inappropriate "on-the-spot formulation of policies"<sup>44</sup> and circumstances demanding relief through the proper exercise of the public interest power, the Commission set out, by way of *example*, three general scenarios which applied to Contrary to Intent circumstances. Each scenario mandated a different threshold for the Commission to intervene pursuant to its power to make orders in the public interest. In order from the highest to lowest threshold for intervention, the Commission's description of the three contrasting scenarios can be summarized as follows:

1. cases where the transaction has occurred previously and has been accompanied by publicity, but the Legislature has not acted<sup>45</sup> (the "**Highest Threshold**");
2. cases where the transaction was of an "entirely novel nature"<sup>46</sup> (the "**Novel Scenario**"); and
3. cases where the new policy principle "that would be required to deal with the transaction is foreshadowed by principles already enunciated in the Act, the regulations or prior policy statements"<sup>47</sup> (the "**Lowest Threshold**").

On the facts of the case, the Commission was not satisfied that a contravention of the *OBCA* had been demonstrated, thereby excluding from consideration the Breach of Statute scenario. The Commission found the case fit under the Highest Threshold category on the basis that several Ontario corporations had used "squeeze out" transactions, similar to Cablecasting's technique, and were not subject to any "legislative or other action."<sup>48</sup> Therefore, the Commission was reluctant to create an instant policy to decide the case at hand in favour of the minority shareholders.<sup>49</sup>

### 3.1.2 Observations

It is important to note that the Commission used the phrase "clear abuse" when discussing scenarios where there had been a breach of the *OBCA*, or the Breach of Statute scenario.<sup>50</sup> However, the Commission did not articulate a reason as to why "clear abuse" could not also apply to a Contrary to Intent scenario, nor did the Commission provide any guidance on what constituted a "clear abuse." It would appear, however, that the exercise of the public interest power for the Breach of Statute scenario required a higher threshold of egregious conduct than Contrary to Intent cases, in light of the Commission's holding that a breach of another statute would have to be expeditiously demonstrated and it would only be appropriate for Staff to intervene in such cases in respect of fraud or other flagrant abuses of the statute.

---

<sup>42</sup> *Ibid.* In *Exco Corporation Limited* (1983), 6 OSCB 3263, the Commission refrained from making a determination as to whether a bidder would be allowed to not extend a take-over bid to recently issued shares from treasury of a target, as to make a determination on this issue would be to rule on the validity of the share issuance. The validity of the issuance of shares was the subject of an action before the Nova Scotia Supreme Court. In reaching its decision, the Commission gave notice that it had initiated a Staff project out of which it proposed to issue a policy to provide guidance on the "status of shares issued by a target company in the course of a take-over bid" (*ibid* at 3266).

<sup>43</sup> *Cablecasting*, *supra* note 2 at 43.

<sup>44</sup> *Ibid* at 47.

<sup>45</sup> *Ibid.* For example, in considering "'squeeze-out' transactions under the *OBCA*," the Commission must be influenced "by the fact that the Legislature has not acted to regulate such transactions despite the fact that a number of them have occurred under the *OBCA*, accompanied by much publicity."

<sup>46</sup> *Ibid.*

<sup>47</sup> *Ibid.*

<sup>48</sup> *Ibid* at 48.

<sup>49</sup> *Ibid.*

<sup>50</sup> *Ibid* at 42.

The Commission also did not provide any specific basis to determine when its public interest power should be exercised in each of the three threshold examples relating to the Contrary to Intent circumstances. The Commission listed the impact on the credibility of the capital markets as a factor in determining whether to exercise its public interest powers,<sup>51</sup> but failed to provide guidance on how it would determine when it could act in the public interest in the different threshold scenarios.

It is critical to note, however, that all three Contrary to Intent scenarios are *examples* of circumstances where conduct "contravene[s] the intent of [the] rulings and statements," or in other words, engages the underlying principles of the Act.<sup>52</sup> We would also note that, in connection with the Lowest Threshold, the Commission stated that in such circumstances it would "be less reluctant to exercise its discretionary authority"<sup>53</sup> than in circumstances that involved a Novel Scenario. "Less reluctant" clearly does not equate to an automatic exercise of the public interest power where a new policy principle that would be reflected by the exercise of such power is presaged by principles outlined in the Act.

### 3.2 *Re Lindzon*<sup>54</sup>

#### 3.2.1 Summary

Irving Lindzon ("**Lindzon**") was the director, General Counsel and President of Pan Central Explorations Limited ("**Pan Central**"). Pan Central had acquired shares in Q.M.G. Holdings Inc. ("**QMG**"), but did not consider them to be a major asset. Pan Central and QMG were both public companies. In 1978, Pan Central had severe cash flow problems. Lindzon, who was the President and sole shareholder of 370815 Ontario Limited ("**370815 Ontario**"), arranged for 370815 Ontario to issue a \$75,000 loan to Pan Central (the "**Loan Agreement**"). He convinced the other Pan Central directors to use the QMG shares as collateral security for the loan, which shares had previously been acquired at a cost of \$235,000. The Loan Agreement also gave 370815 Ontario the option (the "**Option**") to buy the QMG shares at any time when the loan was outstanding for \$175,000.00. The Toronto Stock Exchange ("**TSE**") initially approved the Loan Agreement, but later retracted its approval.

Lindzon's behaviour was attacked by Staff on two grounds: (i) he had not dealt honestly and fairly with Pan Central to the prejudice of its shareholders; and (ii) he did not satisfy the disclosure requirements of section 134 of the *OBCA*, which demanded that directors act honestly and in good faith and exercise the diligence that would be expected of a reasonably prudent person.<sup>55</sup>

*Lindzon* affirmed *Cablecasting* as a benchmark against which it would test the exercise of its broad range of discretionary powers. The Commission refused to grant a cease trade order to prevent 370815 Ontario from dealing in the QMG shares and gave two reasons for its decision.

First, the Governors of the TSE had decided not to take action when urged by the staff of the TSE. Lindzon had relied on a November 1978 letter from the TSE staff that stated it was prepared to accept the transaction. The staff had the chance to require a revision of the terms of the transactions, but did not do so. In March 1979, TSE staff changed its position and said the Option was not acceptable. The evidence before the Commission was not sufficiently different to support straying from the Governors' decision to not take action.<sup>56</sup>

---

<sup>51</sup> *Ibid* at 41.

<sup>52</sup> *Ibid*.

<sup>53</sup> *Ibid* at 43.

<sup>54</sup> [1982] 42 OSCB 43C [*Lindzon*].

<sup>55</sup> *Ibid* at 47C-48C.

<sup>56</sup> *Ibid* at 59C.

Second, the Commission adhered to the principle of self-imposed restraint noted in *Cablecasting*, which provides that "[e]xcept in special circumstances the Commission's authority should not be extended to exercising a jurisdiction analogous to that of the civil courts in matters that do not arise under the Act."<sup>57</sup> Lindzon's case did not call for an intervention. The shareholders continued to have the right under the *OBCA* to seek relief. The Commission noted that it was not suited to resolve issues of fact and law between private litigants in order to determine if there was a breach of common law rules regarding behaviour of directors or a breach of the *OBCA* (particularly breaches of fiduciary duties).

### 3.2.2 Observations

In order for the Commission to exercise its public interest powers, the issues at hand must pertain to an area suited to the Commission's expertise. In other words, and consistent with *Cablecasting*, the Commission's self-imposed restraint compels it to avoid exercising its public interest power in circumstances where litigants are seeking redress for breach of fiduciary duty or other similar contravention of the *OBCA*. The thrust of a complaint needs to relate to fundamental principles protected under the Act and have a direct impact on the capital markets in general.

### 3.3 Canadian Tire

Arguably the most famous decision of the Commission, *Canadian Tire* is believed to be the first exercise of the public interest power in circumstances where there was no breach of securities laws.

#### 3.3.1 Summary

Canadian Tire was controlled by the Billes brothers, J.W. and A.J. In October 1983, well after the death of J.W., J.W.'s estate sold his 30.4% interest to A.J.'s three children, the Billeses. To recoup the costs of purchasing J.W.'s shares, in late 1983 the Billeses proposed selling non-voting Class A shares and as a result completed a corporate reorganisation of Canadian Tire, through which (among other things) each common share was split into one common and four Class A shares. As part of the reorganization, and in order to successfully market the Class A shares, the Billeses offered to the prospective Class A shareholders take-over bid protection in the form of a coattail provision. The coattail provision sought to ensure that if the Billeses were to sell a majority of the common shares of Canadian Tire then issued and outstanding, the non-voting Class A shares would be converted into the voting common shares, or an offer of equal value had to be made to the Class A shareholders.

In June 1986, the Billeses were advised by their solicitors that the coattail would not be triggered if they sold up to 49% of their outstanding common shares. At the time, CTC Dealer Holdings ("**Dealers**") owned 17% of the outstanding common shares of Canadian Tire. On November 22, 1986, the Billeses and Dealers entered into a lock-up agreement, whereby the Dealers would make a *pro rata* bid for 49% of the common shares of Canadian Tire and the Billeses would tender their shares by means of an irrevocable deposit. The consideration for each purchased share would be determined in accordance with a prescribed formula that was designed to ensure the Billeses would receive an aggregate consideration of \$140 million for their entire 60.9% control block, provided that they sold sufficient common shares not to trigger the coattail and then converted their remaining common shares into Class A shares and sold them on the market at what would be expected to be the market price per share (\$12.00). The bid price turned out to be \$160.24 per share, some 400% greater than the prevailing trading price of the common shares of Canadian Tire, and would allow the Dealers to acquire control of Canadian Tire without triggering the coattail provisions.

---

<sup>57</sup> *Ibid.*

The Commission issued a cease trade order against the transaction. In its reasons, the Commission reiterated the *Cablecasting* principle that a breach of securities laws is not a precondition to a public interest order:

The ambit of the Commission's power under s. 123 [now section 127] is not hedged or confined by particular examples or by particular criteria ... Rather, the Legislature has vested in the Commission the power to intervene where it has been demonstrated that such intervention is necessary to fulfill the Commission's mandate to regulate the capital markets in the public interest.<sup>58</sup>

In quoting from *Cablecasting*, the Commission also acknowledged that it "must move with caution" and refrain from creating a new policy in the heat of a contested application "except on facts that demand some relief."<sup>59</sup>

The Commission proceeded to explicate what constitutes "facts that demand some relief."<sup>60</sup> It did not use the two-scenario, three-threshold framework as laid out in *Cablecasting*. Instead, it characterized the cases that call for a cease trade order as involving "an abusive transaction that will have a deleterious effect on a class of investors in particular, or on the capital markets in general,"<sup>61</sup> or "a transaction that is clearly abusive of investors and of the capital markets, whether or not that transaction constitutes a breach of the Act, the regulations or a policy statement."<sup>62</sup>

Next, the Commission referred to *Re Federal Commerce & Navigation Ltd*,<sup>63</sup> in which the Commission made the following statement:

[A]lthough technical interpretation is necessary, it is the expectation of the Commission that the participants in the capital markets of this province will be guided by the basic philosophy and rationale from which the securities laws of this province were developed. The sophisticated gloss of technicality must not be used to obscure the true intent and import of the basic philosophies that underlie the securities laws of the province. Technical interpretations that run contrary to these basic philosophies and principles will not be acceptable to the Commission.<sup>64</sup>

The Commission stated that this outlined the approach it was prepared to take, to wit: "transactions that are clearly designed to avoid the animating principles behind such legislation and rules will be scrutinized closely by the Commission and intervention will be ordered in appropriate cases."<sup>65</sup> The Commission appeared to indicate that an intention to circumvent the policies underlying the Act may be demonstrative of "abuse."

The Commission outlined the key factors which led it to issue a cease trade order, one of which was the artificiality of the transaction. When the coattail provision was drafted, the concept of the majority of shareholders was synonymous with the Billeses' control. They had 60.9% of the voting shares, and so when they gave up control that would be the majority and the coattail would be triggered. The evidence clearly showed

---

<sup>58</sup> *Canadian Tire*, *supra* note 6 at para 126 [parentheses added].

<sup>59</sup> *Ibid* at paras 128–29.

<sup>60</sup> *Ibid* at para 129.

<sup>61</sup> *Ibid*.

<sup>62</sup> *Ibid* at para 130.

<sup>63</sup> (1981), 1 OSCB 20C [*Federal Commerce*].

<sup>64</sup> *Ibid* at 25C–26C.

<sup>65</sup> *Canadian Tire*, *supra* note 6 at para 132.

that the transaction was primarily structured to enable the Billeses to sell their entire control without triggering the coattail. For the Commission, such a transaction may "be characterized as artificial."<sup>66</sup>

Canadian Tire was one of Canada's best known corporations, with 83 million Class A shares outstanding; which shares represented 92% of the equity and had no say in management. The take-over protection afforded by the coattail provision was used to market the Class A shares.<sup>67</sup> The Commission viewed the transaction as "patently designed to avoid the rights granted to holders of the Class A shares" and as such, it fell under the public interest jurisdiction.<sup>68</sup>

The Commission made it clear that it was not out to "wreak havoc" in the capital markets by interfering in a broad range of transactions.<sup>69</sup> Abuse is more than just unfairness. Moreover, to be found abusive, the impugned conduct or transaction must rise to a certain level beyond unfairness. If a transaction as abusive as this one was allowed to proceed, then confidence in the capital markets would suffer and individuals would be less willing to invest.<sup>70</sup>

In finding that the transaction in question was contrary to the public interest, the Commission held that, based on the facts of the case, "regulatory intervention to stop an abusive transaction is called for."<sup>71</sup> The Commission labelled the transaction as "grossly abusive a transaction as the Commission has had before it in recent years."<sup>72</sup>

The Commission proceeded to explain what constituted "abuse":

The Commission was cautious in its wording in *Cablecasting* and we repeat that caution here. To invoke the public interest test of s. 123 [now section 127], particularly in the absence of a demonstrated breach of the Act, the regulations or a policy statement, the conduct or transaction must *clearly be demonstrated to be abusive* of shareholders in particular, and of the capital markets in general. A showing of abuse is something different from, and goes beyond, a complaint of unfairness. A complaint of unfairness may well be involved in a transaction that is said to be abusive, but they are different tests. Moreover, the abuse must be such that it can be shown to the Commission's satisfaction that a question of the public interest is involved. That almost invariably will mean some showing of a broader impact on the capital markets and their operation.<sup>73</sup>

The Billeses and Dealers argued that the Commission was not the proper forum and that this was a private matter between the Class A shareholders and the controlling shareholders. The Commission confirmed that it does not deal with "breaches of fiduciary duty, or ... of a corporate statute";<sup>74</sup> it does not serve to provide a *private* remedy. Instead, the Commission serves to regulate the *public* securities markets.<sup>75</sup> However, the Commission pointed out that Canadian Tire was a major public company with 83 million Class A shares. The Commission noted that to use the term "private" in the manner contemplated by the respondents would, in essence, apply to every take-over bid, yet it is well-known that take-over bids are a public matter. The

---

<sup>66</sup> *Ibid* at para 150.

<sup>67</sup> *Ibid* at para 156.

<sup>68</sup> *Ibid*.

<sup>69</sup> *Ibid* at para 154.

<sup>70</sup> *Ibid* at para 151.

<sup>71</sup> *Ibid*.

<sup>72</sup> *Ibid*.

<sup>73</sup> *Ibid* at para 155 [emphasis added].

<sup>74</sup> *Ibid* at para 163.

<sup>75</sup> *Ibid*.

Commission noted that the line between the courts and the Commission will not always be clear, but should the Commission overstep, the courts can remedy the matter through the appeal process.

On appeal, the Ontario Divisional Court upheld the Commission's decision.<sup>76</sup> The Court interpreted the Commission's decision as having it found that the transaction was abusive in two ways. First, it was artificial, meaning that though the transaction outwardly appeared to be a bid for 49% of the common shares, it was in essence a sale by the Billeses of their entire control block (60.9% of the common shares issued and outstanding) without triggering the coattail. Second, it was created to circumvent the coattail, thereby frustrating the intentions of Class A shareholders and confounding the "justifiable expectations" of investors and the marketplace.<sup>77</sup>

The appellants also challenged the jurisdiction of the Commission. The Court dismissed the challenge on the basis that the public interest provision contained no mention of a breach of the Act as being a requirement in order for the Commission to exercise its public interest powers (unlike other provisions in the Act). Nevertheless, the Commission's public interest powers would not go unfettered as the public interest provision clearly required that conduct be contrary to the public interest.

### 3.3.2 Observations

In *Cablecasting*, the Commission stated that in the context of a Breach of Statute scenario, the Commission had jurisdiction to exercise its public interest power where abuse of investors had been demonstrated. Theoretically, *Canadian Tire* would have qualified as a Novel Scenario under the three-tier Contrary to Intent framework set out in *Cablecasting*. In *Cablecasting*, the Commission did not outline what would meet the threshold for intervention to exercise its public interest power in Novel Scenarios. In *Canadian Tire*, the Commission seemed to pick up on the concept of "abuse"—which was a justification for intervention by the Commission in a Breach of Statute situation from *Cablecasting*—and developed the "abuse" test whereby the Commission could exercise its public interest jurisdiction under section 127 of the Act, if the transaction was clearly abusive of investors and the capital markets.

The Commission in *Canadian Tire*, faced with a Novel Scenario, held that the facts demanded relief and, in what was one of the most abusive transactions before the Commission in years,<sup>78</sup> determined that the public interest power should be exercised. In terms of what constituted "abuse" of investors and of the capital markets, the Ontario Divisional Court provided a helpful summary: "artificial transactions," such as the one in question, and transactions that are contrary to the justifiable expectations of investors and the marketplace qualify as abusive. The Commission also emphasized that the purposeful act of designing and implementing a transaction to avoid the animating principles of the Act is an important consideration.<sup>79</sup>

Notwithstanding the clear statements in favour of the abuse standard as being necessary for the exercise of the public interest power, it is equally clear that the Commission focused on the facts and circumstances that necessitated the exercise of the public interest power. We would suggest that the categorization of the conduct as abusive was necessary to show that, in the context of the transaction in question, a high threshold of egregious conduct was required for the Commission to exercise its public interest power. It is important to note that this was the first exercise of the public interest power absent a breach of securities laws, and the Commission was no doubt careful in expressing why it was critical that it exercise its public interest power.

---

<sup>76</sup> *Canadian Tire Corp v CTC Dealer Holdings Ltd* (1987), 59 OR (2d) 79 [*Canadian Tire Divisional Court*].

<sup>77</sup> *Ibid* at para 78.

<sup>78</sup> *Canadian Tire*, *supra* note 6 at para 151.

<sup>79</sup> *Ibid* at para 132.

### 3.4 Re Selkirk Communications Ltd<sup>80</sup>

#### 3.4.1 Summary

On October 15, 1987, Rogers Communications Inc. ("**Rogers**") announced its intention to bid on non-voting Class A shares of Selkirk Communications Limited ("**Selkirk**") subject to the condition, among others, that all of the Class A shareholders tender into the bid (the "**Rogers Announcement**"). A week later, Southam Inc. ("**Southam**"), the largest shareholder of Selkirk, announced it would not tender its shares to Rogers' proposed bid; consequently, Rogers did not make the bid. However, on November 3, 1987, Southam entered into separate private agreements with Cablecasting and four investment funds to purchase their Class A shares of Selkirk. The agreement provided "upside price protection" (or the right to receive additional consideration if Southam was to sell for a price higher than the bid price) to the sellers. Southam was concerned that the price paid under the private agreements, after taking into account the upside price protection, would exceed 115% of the market price, a condition of the private agreement exemption for take-over bids pursuant to section 92(1)(c) (now section 100.1(1)) of the Act. Subsequently, the private agreements were amended to ensure that the value attributed to the upside price protection would not cause Southam to be in breach of the private agreement exemption provisions of the Act. Nevertheless, Southam applied to the Commission for an order exempting the full benefits of the upside price protection clauses of its private agreements from compliance with the take-over bid provisions of the Act.<sup>81</sup> Staff applied to impose a cease trade order on Southam's transactions pursuant to the public interest power. Staff argued that the market price calculation should exclude the six trading days during which the Rogers Announcement was outstanding.

The nine Commissioners issued three separate opinions. Commissioners Beck, Holland, and Waitzer denied Southam's application for the private agreement exemption. They concluded that Southam failed to meet the requirement of satisfying the Commission that it would not be prejudicial to the public interest to grant the exemption order. In their view, the transaction in question was not the ordinary case of an exempt take-over bid through a private agreement as contemplated by the Act; rather, "it is the case of the major shareholder turning down a bid of \$35.00 per share, which would have been made to all the shareholders, and then taking advantage of the market impact of that proposed bid to increase its share position by offering a premium to Cablecasting and the Funds."<sup>82</sup> Given these particular circumstances, Commissioners Beck, Holland, and Waitzer viewed the private agreements to be "unfair to the remaining Selkirk shareholders and in that sense, it would be prejudicial to the public interest to grant the exemption requested."<sup>83</sup> The Commissioners addressed *Canadian Tire* and noted that while "the standard of 'clearly demonstrated to be abusive' *may* be appropriate" for the exercise of the public interest power, it "is not the test that ought to be applied in every case in which the 'public interest' standard of a particular section of the Act is invoked";<sup>84</sup> in this case, unfairness would be sufficient in determining whether the exemption applied for should be granted.

In addition, Commissioners Beck, Holland, and Waitzer refused to issue the cease trade order as per Staff's request, in light of the fact that there had been no prior policy statements precluding majority shareholders from relying on the market impact of a take-over bid to which they declined to tender.<sup>85</sup> In fact, in the previous

---

<sup>80</sup> (1988), 11 OSCB 286 [*Selkirk*].

<sup>81</sup> The exemption was being sought under section 100c(2)(c) (now section 104(2)) of the Act, which provided that "[o]n application by an interested person and subject to such terms and conditions as the Commission may impose, if the Commission considers that it would not be prejudicial to the public interest, the Commission may ... (c) exempt a person or company from any of the requirements of [Part XX] or the regulations related to this Part."

<sup>82</sup> *Selkirk*, *supra* note 80 at 303.

<sup>83</sup> *Ibid* at 304.

<sup>84</sup> *Ibid* at 305-306 [emphasis added].

<sup>85</sup> *Ibid* at 304.

year, the Act had been amended to remove the discretion of the Commission to recalculate market price in circumstances of an anticipated take-over bid or market manipulation, and greater certainty was introduced by increasing the period over which market price was calculated from 10 days to 20 days. The Commissioners noted that they would effectively be creating and applying a policy statement or amending the Act, were they to accept the Staff's argument that the six trading days when the Rogers bid was outstanding ought to be excluded from the market price calculation. Commissioners Beck, Holland, and Waitzer did not think it was appropriate to do so in this case: "These are not such abusive transactions that the Act should be amended on an ad hoc basis and a cease trade order issued."<sup>86</sup> While the transactions may have been "abusive," they were not sufficiently abusive to warrant the exercise of the public interest power.

Commissioners Blain, Carmichael and Wigle also rejected Staff's application for a cease trade order and also found no reason to eliminate the trading days in question and thus adjust the market price. Unlike Commissioners Beck, Holland and Waitzer, however, they would have granted Southam's application in connection with the full benefit of the use of the upside price protection. In rejecting Staff's application, they held that "[t]o eliminate the particular trading days, which would be a departure from the Regulation which determines how market value shall be calculated, requires in our view a showing of abuse or at the very least manifest unfairness."<sup>87</sup>

When applying the "abuse" test as pronounced in *Canadian Tire*, they found that the actions of Southam during the period of the proposed bid were not abusive or unfair.<sup>88</sup> Moreover, there was no stated policy of the Commission precluding reliance on the private agreement exemption for a specified period after the announcement of a proposed take-over bid (in this case, the Rogers Announcement).<sup>89</sup> There was no reason to justify intervention by the Commission to recalculate the market price, and therefore, the transactions in question were not prejudicial to the public interest.

Interestingly, Commissioners Blain, Carmichael and Wigle noted that "Black Monday"<sup>90</sup> took place within the 20-day period for the calculation of the market price, which begs the question: "Should some adjustment be made for this?"<sup>91</sup> And "[i]f one starts making adjustments, where does one stop?"<sup>92</sup>

In contrast, Commissioners Salter, Taschereau and Reid were prepared to go beyond Staff's request and to exercise the cease trade powers to restrain Southam's bid. Their analysis focused on the question of whether the Commission had authority to recalculate market price as per Staff's suggestion. They reviewed the history of the provisions of the Act and the regulations related to the calculation of market price for the purpose of the private agreement exemption. In short, prior to the amendment of the Act in 1987, section 99(b) gave the Commission authority to determine the market price where it was satisfied that the trading prices had been influenced by an anticipated take-over bid or by "improper manipulation."<sup>93</sup> The Commission exercised this authority for the first and only time in *Re British Columbia Forest Products Ltd*<sup>94</sup> to recalculate the share price to exclude a sharp run-up attributable to the market's speculation on a follow-up bid. In 1987, section 99(b) was repealed, while the base period for recalculating the market price was increased from 10 days to 20 days.

---

<sup>86</sup> *Ibid* at 305.

<sup>87</sup> *Ibid* at 332.

<sup>88</sup> *Ibid* at 333.

<sup>89</sup> *Ibid* at 334.

<sup>90</sup> Black Monday refers to Monday, October 19, 1987, when there was a significant fall in the value of stock markets around the world. For example, the Dow Jones Industrial Average fell by more than 22% on that day.

<sup>91</sup> *Selkirk*, *supra* note 80 at 334.

<sup>92</sup> *Ibid*.

<sup>93</sup> *Securities Act*, RSO 1980, c 466, s 99(b).

<sup>94</sup> (1981), 1 OSCB 116 [*BC Forest Products*].



Commissioners Salter, Taschereau and Reid viewed the amendments as having two purposes: (i) to take away the Commission's discretion to recalculate the market price in cases such as *BC Forest Products*;<sup>95</sup> and (ii) to support the confidence of vendors and purchasers that the public market price reflects the auction market's true perception of the shares' value. However, the present case was distinguishable in that the price run-up here was due to the "market's anticipation of a specific bid on specific terms such as Rogers' for Selkirk."<sup>96</sup> As such, the Commission was not precluded from intervening to recalculate market price.

Furthermore, citing *Cablecasting* and *Canadian Tire*, Commissioners Salter, Taschereau and Reid stated that the Commission's public interest powers to deny the benefit of the private agreement exemption were not constrained by the "legislated limits on the use of the private agreement exemption" or by the Commission's own prior decisions and policy statements.<sup>97</sup> On this basis, they found that Southam's proposed bid was contrary to the public interest and should be cease traded.

### 3.4.2 Observations

In reviewing the three opinions in *Selkirk*, it is striking that the categorization of the transaction under the Contrary to Intent scenarios outlined in *Cablecasting* invariably decided the conclusions reached by each of the three groups of Commissioners. Commissioners Beck, Holland, Waitzer, Blain, Carmichael and Wigle each rejected Staff's attempt to recalculate the market price and clearly categorized the circumstances as falling under the Highest Threshold in light of the recent changes to the Act. Accordingly, even though Commissioners Beck, Holland, Waitzer might have been concerned with the transaction, they concluded that it was not sufficiently abusive to warrant the exercise of the public interest power. On the other hand, Commissioners Salter, Tashcereum and Reid believed that the revised private agreement exemption provisions in the Act may well have foreshadowed their invocation of the public interest power (i.e. the Lowest Threshold circumstances).

It is interesting that Commissioners Salter, Tashcereum and Reid invoked the public interest power without using "abuse" as a justification for their jurisdiction to act. They did not go into detail about the steps and reasoning behind why they believed that the transaction was against the public interest and, despite *Canadian Tire*, they did not refer to the transaction being abusive to investors and the capital markets.

## 3.5 *Re Mithras Management Ltd*<sup>98</sup>

### 3.5.1 Summary

The respondents in *Mithras* were part of a group of individuals, limited partnerships and corporations, collectively referred to as the "Skyld Group." The respondents had relied on the "government incentive security" exemption in section 14(g) of the Regulation under the Act<sup>99</sup> to finance episodes of a television series through the sale of units in numerous limited partnerships. Later, the outstanding units were repurchased from investors in tax-motivated "buy-backs," in what were purported to be "exempt take-over bids" pursuant to section 92(1)(d) of the Act, which exempted non-reporting issuers from the formal take-over bid requirements.<sup>100</sup> The "buy-backs" were to be effected pursuant to an "exempt take-over bid circular"; and in

---

<sup>95</sup> See *ibid* ("[i]t is clear that the longer base period and the corollary repeal of clause 99(b) are responsive to and intended to cure the uncertainties which faced Noranda and all the potential purchasers of the Noranda block in [*BC Forest Products*] at 315).

<sup>96</sup> *Selkirk*, *supra* note 80 at 316–17.

<sup>97</sup> *Ibid* at 318.

<sup>98</sup> (1990), 13 OSCB 1600 [*Mithras*].

<sup>99</sup> Now *Ontario Prospectus and Registration Exemptions*, OSC Rule 45-501, (28 September 2009), s 2.1.

<sup>100</sup> This exemption is applicable provided that there is no published market for the securities that are the subject of the bid, and the number of securities holders of that class is not more than 50, not including holders who are in the employment of the offeree issuer or an affiliate of

some cases, the purchases were made in installment payments, \$4 million of which payments were due and payable.

In its analysis, the Commission focused on two aspects of the conduct: (i) the "one limited partnership per episode"; and (ii) the "buy-backs." With respect to the "one limited partnership per episode" scheme, the position of Staff was that this "one limited partnership per episode" structure represented an artificial subdivision of a business venture in order to take advantage of the prospectus exemption. In framing their jurisdiction to intervene, the Commission stated:

We are not here to punish past conduct; that is the role of the courts ... 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; we are not prescient, after all. And in so doing, we *may* well conclude that a person's past conduct has been so abusive of the capital markets as to warrant our apprehension and intervention, even if no particular breach of the Act has been made out.<sup>101</sup>

In summary, the Commission stated that it would exercise the public interest power if a person's past conduct has been so abusive of the capital markets as to warrant the Commission's intervention in order to prevent future conduct that is likely to impact the fairness and efficiency of capital markets.<sup>102</sup>

The Commission found that the respondents acted in good faith in connection with the financings done in reliance upon section 14(g) of the Regulation under the Act, owing to the assurances they gained through correspondence from a Deputy Director of the Commission. Accordingly, the Commission held there was no basis upon which it felt obliged to intervene under its public interest jurisdiction in respect of such transactions.

However, with respect to the buy-backs of limited partnership units from investors, the Commission found that the spirit and intent of the take-over bid provisions of the Act had not been complied with. In its reasons, the Commission emphasized its role to protect the public interest "by preventing any repetition of the conduct that led to the problem in the first place."<sup>103</sup> Specifically, the Commission focused on the disclosure provided to the investors with respect to the buy-backs (or installment payments). The investors were not informed that their later "instalment payments" were in any way contingent upon the financial performance of other members of the Skyld Group, and that they may have to wait "until the cows come home" for a payment they were told would be made when it was due.<sup>104</sup> As a result, the Commission held it to be in the public interest to order that the take-over bid exemptions do not apply to the respondents:

Failure to disclose obviously relevant information to offerees in the course of a take-over bid -- even one that might be said to meet the strict terms of an exemption contained in section 92 [now section 100.1] -- is a *clear breach of the underlying purpose and policy objectives* of Part XIX [now Part XX]. Investors cannot make an informed choice without all relevant information. And capital markets that are deprived of relevant information can be neither fair nor efficient. The public interest therefore requires that we protect those investors, and the integrity of

---

the offeree. The equivalent provision of the *Securities Amendment Act, 1987*, SO 1987, c 7, s 92(1)(d) can now be found in the *Securities Act*, RSO 1990, c S 5, s 100.2 and *Take-over Bids and Issuer Bids*, OSC Rule 62-504 (2008) 31 OSCB 1289 at 6.1.

<sup>101</sup> *Mithras*, *supra* note 98 at 1610-11 [emphasis added].

<sup>102</sup> *Ibid.*

<sup>103</sup> *Ibid* at 1619.

<sup>104</sup> *Ibid.*

those capital markets, from the repetition of this kind of conduct in the future. We will do so by removing from certain of the Respondents the continuing benefit of the exemptions contained in section 92 of the Act.<sup>105</sup>

### 3.5.2 Observations

The Commission's conclusion with respect to the buy-backs indicates that not disclosing "obviously relevant" (or material) information to investors whose shares were being acquired pursuant to an exempt take-over bid is abusive and demands intervention to prevent such conduct from being repeated.

In conclusion, faced with a circumstance which could fit in to the Lowest Threshold category under *Cablecasting*, the Commission focused on the conduct in question and held that it was necessary in the circumstances to exercise its public interest power. It is clear that the Commission believed that a finding of abuse was necessary, but refrained from fixating its analysis on the term. Instead the Commission focused on whether the conduct had to be prevented in the future as the repetition thereof would be damaging to investors and the integrity of the capital markets.

Interestingly, reference to abusive conduct is only made once in the entirety of the decision. The Commission's reluctance to link specific facts to the word "abuse" is followed in subsequent decisions; perhaps *Mithras* is the first indication of the Commission's eventual shift away from the term "abuse" as the exclusive standard for triggering its public interest power.

## 3.6 *Re HERO Industries Ltd*<sup>106</sup>

### 3.6.1 Summary

*HERO* concerned a dispute between two shareholders, Middlefield Capital Fund ("**Middlefield**") and Gordon Capital Corporation ("**Gordon**"). On June 12, 1990, Gordon made an offer to acquire all of the issued and outstanding shares of H.E.R.O. Industries Ltd. ("**H.E.R.O.**") at a substantial premium to the market price.

At the time of launching its bid, Gordon held approximately 14% of the common shares of H.E.R.O. Gordon's offer was conditional on approximately 62% of the shares not held by Gordon being tendered.<sup>107</sup>

Middlefield owned approximately 30% of H.E.R.O. common shares and New Frontiers Development Trust PLC ("**New Frontiers**"), a United Kingdom investment trust, owned approximately 18% of the common shares of H.E.R.O. Although H.E.R.O. was listed on the TSE and was a reporting issuer under the Act, it was a British Columbia corporation. Both Gordon and Middlefield were based in Toronto.

Gordon and Middlefield had been at odds about their respective investments in H.E.R.O. and were unable to reach agreement on a course of action prior to Gordon's bid. Subsequent to the announcement of Gordon's bid on June 7, 1990, the trading price rose until, by July 3, 1990, the "market price" of H.E.R.O. common shares (as calculated under the Regulation for the purposes of what is now section 100.1 of the Act) enabled a private agreement to be made to purchase shares at a price in excess of the bid price and exempt from the take-over bid provisions of the Act.

---

<sup>105</sup> *Ibid* at 1619–20 [emphasis added].

<sup>106</sup> (1990), 13 OSCB 3775 [*HERO*].

<sup>107</sup> *Ibid* at para 5.

In an attempt to resist the Gordon bid, Middlefield contacted New Frontiers on July 4, 1990 with an offer to purchase the latter's shares in H.E.R.O. New Frontiers agreed to sell its block to Middlefield at a price higher than the offering price under the Gordon bid, such that Middlefield now held some 48% of H.E.R.O. common shares. In short, Middlefield's resort to the private agreement exemption had the effect of thwarting a rival's bid.

In determining whether its intervention would enhance the pursuit of the policy objectives underlying the Act, the Commission considered whether the transaction in question had a sufficient connection or "nexus" so as to warrant its intervention to protect the integrity of the capital markets in the province. The Commission ultimately found that there was a sufficient jurisdictional basis upon which to intervene in light of the fact that both Gordon and Middlefield were based in Toronto and H.E.R.O. was a reporting issuer under the Act and its shares were listed on the TSE. As well, a large number of minority shareholders of H.E.R.O. were Ontario residents.

In exercising its public interest jurisdiction, the Commission focused on the actions of Middlefield in attempting to resist the Gordon bid, which would clearly have the effect of defeating it, thereby depriving the minority shareholders of the premium offered under the Gordon bid.

In considering the impact of Middlefield's actions, the Commission held that it was unfair or abusive to all participants and the markets for the following reasons: (i) it was "manifestly unfair" to the public minority shareholders of H.E.R.O., who would lose the ability to tender to a bid and receive a premium, which premium would go to New Frontiers; (ii) it was "clearly unfair" to Gordon, since the take-over bid rules prevented Gordon from using the private agreement exemption to acquire the New Frontiers' shares, while Middlefield could use the exemption to defeat Gordon's bid; and (iii) it was "clearly abusive of the integrity of the capital markets," as market participants like Middlefield are expected to "adhere to both the letter and the spirit of the rules that are intended to guarantee equal treatment of offerees in the course of a take-over bid."<sup>108</sup> As such, the Commission deemed intervention appropriate in order to protect the public interest.

### 3.6.2 Observations

In *HERO*, the Commission was faced with the use of a take-over bid exemption in circumstances where the underlying principles of take-over bid legislation were undermined by a market participant, and there would be prejudice to a bidder, the shareholders of the target, and the integrity of the capital markets. In effect, the circumstances were of the Lowest Threshold and, like *Mithras*, the public interest power was exercised. However, unlike *Selkirk*, the Legislature had not specifically addressed the issue that was before the Commission; therefore, *HERO* was not a case of the Highest Threshold circumstances. Although the Commission held that the conduct was abusive, it is clear that it found no need to focus on such a term in deciding whether to exercise its public interest power.

## 3.7 *Re Asbestos Corp Ltd*<sup>109</sup>

### 3.7.1 Summary

The *Asbestos* case concerned the acquisition of Asbestos Corporation Limited ("**ACL**"), a leading asbestos manufacturer, by a crown corporation of the Québec Government (the "**Government**"), Société Nationale de L'Amiante ("**SNA**").

---

<sup>108</sup> *HERO*, *supra* note 106 at para 29.

<sup>109</sup> (1994), 4 CCLS 223 (OSC) [*Asbestos*].

In 1977, the province of Québec was the largest asbestos producer in the Western world; however, it had almost no secondary asbestos industry. The Government decided to create an asbestos manufacturing industry to complement the asbestos mining industry in Québec, and it intended to do so by taking control of ACL.

Controlling interest in ACL was held by General Dynamics Corporation (Canada) Limited ("**GD Canada**"), which was wholly-owned by General Dynamics Corporation ("**GD US**"). A minority interest in ACL was held by shareholders in Ontario. SNA made an offer to GD Canada for its shares in ACL; the offer was rejected by GD US as the parent of GD Canada. However, in 1981, GD US agreed to sell 51% voting control of GD Canada to SNA, and therefore indirect control of ACL. Subsequently, the Government, SNA and GD US reached an agreement whereby SNA had the right to call, and GD US had the right to put, the remaining shares of GD Canada (renamed Mines SNA Inc) held by GD US.

In 1977, four years prior to the sale of voting control of GD Canada, the Government was quoted in the press as saying they would make a bid for all public shares of ACL at a price equivalent to that paid for the GD Canada shares. However, after the 1981 agreement, the Government stated that it had no intention of making any follow-up bid to minority shareholders.<sup>110</sup> In 1986, GD US exercised its put option, and SNA purchased all of the shares of GD Canada held by GD US.

The Commission held that the transaction did not qualify as a take-over bid under section 88(1)(k)(i)<sup>111</sup> (now substantially similar to section 89(1)) of the Act, and therefore did not breach the follow-up obligations. To be a take-over, an offer must have been made to at least one shareholder whose last address on the books of the issuer was in Ontario. Here, the offeree was GD US, who was not a shareholder of ACL and whose address in ACL's books was believed to be outside Ontario. GD Canada's address in ACL's books was in St. Louis, Missouri, not Ontario. GD Canada had an address in Ottawa, but it was "nothing more than an accommodation address."<sup>112</sup> All of the decisions related to GD Canada and the proposal were made in St. Louis. Thus, if SNA was to be sanctioned, it would have to be via the exercise of the Commission's public interest powers.

The Commission evaluated whether the transaction had a sufficient nexus to the Ontario market, relying on *HERO* for the proposition that the Commission must "determine that the transaction in question has a sufficient Ontario connection or 'nexus' to warrant intervention to protect the integrity of the capital markets in the province."<sup>113</sup> There must be a "sufficient Ontario connection" in any section 127(1)3 proceeding before the Commission can exercise its discretion.<sup>114</sup> This determination must occur on a case-by-case basis; what constitutes a sufficient nexus in one case may not in another. The Commission held that it should not "attempt to impose Ontario's requirement of equal treatment of minority shareholders ... on transactions which don't have a transactional connection with Ontario and which have not been deliberately structured to attempt to turn what

---

<sup>110</sup> At the time, the take-over bid provisions in the Act would have required SNA to make a follow-up offer to the other shareholders of Asbestos if the transactions did in fact constitute a take-over bid. However, the Commission held that the transaction did not constitute a take-over bid, and thus there was no follow-up requirement. See *Asbestos*, *ibid* at para 45.

<sup>111</sup> *Securities Act*, RSO 1980, c 466, s 88(1)(k)(i) as it then read: "'take-over bid' means, (i) an offer made to security holders, the last address of any of whom as shown on the books of the offeree company or other issuer is in Ontario, to purchase directly or indirectly voting securities of the company or other issuer."

<sup>112</sup> *Asbestos*, *supra* note 109 at para 38.

<sup>113</sup> *Ibid* at para 62.

<sup>114</sup> *Ibid* at para 64. It should be noted that this "requirement" from *HERO* was weakened in *Re Asbestos Corp* (1992), 10 OR (3d) 577 (CA) at para 38, where the Court of Appeal held that section 124(1) does not have an "implicit precondition" that there must be a "sufficient Ontario connection." The Commission in *Asbestos* interpreted the Court of Appeal decision as meaning that a "sufficient Ontario nexus" is not a jurisdictional requirement that has to be satisfied in any section 127(1)3 proceeding, but rather it is up to the discretion of the Commission. There will "no doubt" be situations not relating to take-over bids in which the Commission will not examine whether there was a "sufficient Ontario connection" (*Asbestos*, *supra* note 109 at para 64).

is clearly a transaction with an Ontario transactional connection into one purporting to have no such connection."<sup>115</sup>

In *HERO*, there was a sufficient nexus to Ontario because Gordon and Middlefield were both based in Ontario, H.E.R.O. was a reporting issuer under the Act, had its shares listed on the TSE and many of its minority shareholders lived in Ontario. In this case, the Commission determined that the transaction in question lacked a sufficient Ontario nexus, because: (i) ACL was not an Ontario corporation and its registered office was in Québec; (ii) the transaction was outside of Ontario and between non-Ontario parties; (iii) the transaction was not structured to make an Ontario transaction look like a non-Ontario one; and (iv) the transaction was structured with a view to tax minimization, rather than to avoid the animating principles behind Ontario's take-over bid legislation.<sup>116</sup>

The Commission held that the *Canadian Tire* abuse test was the appropriate test to determine whether to exercise its powers. The Government had to concern itself with the minority shareholders of ACL and the fact that the transaction would result in GD US obtaining a "sizable payment" while the minority shareholders received nothing. The Commission stated that this did not comply with the spirit underlying the take-over bid provisions and was abusive and manifestly unfair to the minority shareholders.<sup>117</sup> However, the Commission did not exercise its public interest powers because there was not a sufficient nexus to Ontario.

The Divisional Court reversed the Commission's decision and directed the Commission to exercise its public interest jurisdiction.<sup>118</sup> The Divisional Court reasoned that the Commission erred by creating a transactional nexus precondition:

It is both the Ontario public interest in shareholder protection of all persons in and out of Ontario making use of the Ontario capital markets and the public interest in preserving the integrity of those Ontario capital markets that activates the requirement to act pursuant to section 127(1)3 as the "sufficient Ontario connection."<sup>119</sup>

Moreover, the Divisional Court disagreed that it was a prerequisite for the finding of abuse that there be a conscious attempt to avoid what would otherwise be a take-over bid in Ontario: "The task for the OSC is to consider the effects of a transaction and regulate conduct; it is not the task of the OSC to evaluate proper or improper motives of the participants."<sup>120</sup>

The Court of Appeal reversed the ruling of the Divisional Court and restored the Commission's decision.<sup>121</sup> In its view, the Commission did not set up any jurisdictional precondition to the exercise of its public interest powers; rather, it treated a sufficient nexus to Ontario as one of the relevant factors. The Commission did not say that it could not intervene, only that it would not.<sup>122</sup> The intentions and motivations of the Government were relevant considerations for the Commission to take into account when deciding whether to exercise its public interest powers. Part of the purpose of the public interest powers is to remove participants who are a threat to the integrity of the market, based on their past misconduct. To do this, the Commission had to focus on more than

---

<sup>115</sup> *Ibid* at para 67.

<sup>116</sup> *Ibid* at paras 71–73.

<sup>117</sup> *Ibid* at paras 70–71.

<sup>118</sup> *Committee for Equal Treatment of Asbestos Minority Shareholders v Ontario (Securities Commission)* (1997), 33 OR (3d) 651 (Div Ct).

<sup>119</sup> *Ibid* at para 38 [emphasis in original].

<sup>120</sup> *Ibid* at para 49.

<sup>121</sup> *Committee for Equal Treatment of Asbestos Minority Shareholders v Ontario (Securities Commission)* (1999), 43 OR (3d) 257 (CA).

<sup>122</sup> *Ibid* at para 51.

just the effect of the lawful transaction, it had to consider whether the "Québec Government deliberately attempted to avoid the requirements of the Act."<sup>123</sup>

The SCC upheld the Court of Appeal's decision.<sup>124</sup> The SCC stated that the Legislature had clearly intended for the Commission to have a wide discretion, as evidenced from the permissive language of the provision and the wide array of sanctions available to the Commission. Nevertheless, the public interest powers are not unlimited and there are two important aspects that should be taken into account.

First, the Commission's jurisdiction is "animated in part by both of the purposes of the Act described in s. 1.1, namely 'to provide protection to investors from unfair, improper or fraudulent practices' and 'to foster fair and efficient capital markets and confidence in capital markets.'"<sup>125</sup>

Second, section 127 is a regulatory provision. The SCC quoted the Court of Appeal statement that "[t]he purpose of the Commission's public interest jurisdiction is neither remedial nor punitive; it is protective and preventive, intended to be exercised to prevent likely future harm to Ontario's capital markets."<sup>126</sup> The SCC supported the statement in *Mithras* that the role of the Commission is to remove actors from the capital market whose past conduct has been "so abusive as to warrant apprehension of future conduct detrimental to the integrity of the capital markets."<sup>127</sup> The sanctions the Commission is able to impose are preventive and prospective; they cannot be used to remedy harm to private parties or individuals.<sup>128</sup>

The SCC agreed with the Court of Appeal that no jurisdictional preconditions were established by the Commission. The Commission did not stop its inquiry at the jurisdiction question; it was "one of several relevant factors to be considered."<sup>129</sup> Also, the Commission did not establish intention as being a precondition to exercising its power. It was appropriate for the Commission to examine motive as an additional factor, and in this case, the intention of the Government was relevant.

There were four considerations inherent in section 127 that the SCC identified the Commission as having taken into account: "(i) the seriousness and severity of the sanction applied for, (ii) the effect of imposing such a sanction on the efficiency of, and public confidence in Ontario capital markets, (iii) a reluctance to use the open-ended nature of the public interest jurisdiction to police out-of-province activities, and (iv) a recognition that s. 127 powers are preventative in nature, not remedial."<sup>130</sup>

The SCC concluded with a discussion on the increasingly international nature of the capital markets and securities transactions. Transactions commonly involve multiple jurisdictions, and as a consequence, a

---

<sup>123</sup> *Ibid* at para 59.

<sup>124</sup> *Asbestos SCC*, *supra* note 8.

<sup>125</sup> *Ibid* at para 41.

<sup>126</sup> *Ibid* at para 42.

<sup>127</sup> *Ibid* at para 43.

<sup>128</sup> Likewise, in *Re Cartaway Resource Corp*, 2004 SCC 26 at para 58 [*Cartaway*], the Court noted that section 127 is preventive in nature and prospective in application, rather than remedial or punitive; the Commission should consider "the protection of investors and the efficiency of, and public confidence in, capital markets generally." The Court went on to clarify that nothing prevents the Commission from considering general deterrence when making an order; it is a reasonable and appropriate consideration. A general deterrence is not remedial or punitive, it is "designed to discourage or hinder like behaviour in others" (*ibid* at para 60). That is, a general deterrence is preventive. Participants in the capital markets are viewed as being rational actors, and as such general deterrence has a role to play when the Commission is determining whether to make a public interest order. The weight that will be given to general deterrence in any one case is for the Commission to determine. That being said, when the Court reviews decisions of the Commission for reasonableness, if an unreasonable weight was given to general deterrence it will render the order unreasonable. The importance of a general deterrent will vary based on the circumstances of the case.

<sup>129</sup> *Asbestos SCC*, *supra* note 8 at para 52.

<sup>130</sup> *Ibid* at para 57.

transaction that is contrary to the Act in Ontario may be perfectly acceptable in another regime. As such, it is "sound and responsible" for the Commission to insist on a more "clear and direct" connection with Ontario.<sup>131</sup>

### 3.7.2 Observations

*Asbestos* confirmed the Commission's ability to exercise its public interest power absent a breach of securities laws. The decision also sets out constitutional limits to the exercise of the Commission's public interest jurisdiction, much of which had been recognized in prior jurisprudence.<sup>132</sup> Finally, the decision confirmed that the Commission may consider transactional nexus and intentions of the respondent in determining whether to exercise its public interest power.

## 3.8 *Re Canfor Corp*<sup>133</sup>

### 3.8.1 Summary

Canfor Corporation ("**Canfor**") made a take-over bid for all of Slocan Forest Products Ltd.'s ("**Slocan**") outstanding common shares. Slocan was a timber company and thus section 50 of the *BC Forest Act*<sup>134</sup> ("**Forest Act**") applied to the take-over bid. Section 50 provided that the prior consent of the Minister of Forests was required for any change, acquisition or disposal of control of a corporation that is a holder of timber tenure. Canfor offered deposit receipts as payment for the Slocan shares. After consent of the Minister had been received, Slocan shareholders would be able to receive 0.935 Canfor shares per deposit receipt, subject to adjustment.

Slocan alleged that the Canfor offer should have been left open during the period of time when the Minister was deciding whether to give consent under section 50 of the *Forest Act*, so that the Slocan shareholders who had deposited their shares under the Canfor bid would have had the right to withdraw their shares from the bid. This would have enabled shareholders to realize the value of their Slocan shares and respond to any competing take-over bids. Canfor disagreed and stated it would not be reasonable to force it to take the commercial risk of going through the entire consent period without knowing if its bid was acceptable to shareholders.<sup>135</sup>

The Commission agreed with Slocan that an underlying policy of Part XX of the Act involved enabling shareholders to have the power to respond to a competing bid. It would have been more fair, and more in line with the spirit of the Act, if there had been a withdrawal right in respect of a competing bid. However, there was no statutory requirement for Canfor to do so because the Slocan shares will be taken up and paid for if the bid succeeds.<sup>136</sup> Nevertheless, it was still open to the Commission to exercise its public interest powers.

The Commission affirmed that the *Canadian Tire* abuse test is the standard to be followed. *Selkirk* was cited as setting the standard to be applied in take-over bid cases where there is no breach of the Act. The Commission in *Canfor* determined that six of the nine Commissioners in *Selkirk* applied the abuse test from *Canadian Tire*.

The Commission continued by criticizing the vagueness of the *HERO* decision: "It is not clear to us just what test the panel in this case considered to be relevant. At different places ... the panel used the terms 'manifestly

---

<sup>131</sup> *Ibid* at para 62.

<sup>132</sup> See 4.1.1.

<sup>133</sup> (1995), 18 OSCB 475 [*Canfor*].

<sup>134</sup> 1979, RSBC c 140 (now section 54).

<sup>135</sup> *Canfor*, *supra* note 133 at para 28.

<sup>136</sup> *Ibid* at para 33.



unfair', 'unfair', 'clearly unfair', 'quite unfair', and 'clearly abusive.'"<sup>137</sup> However, the Commission concluded that the *Canadian Tire* test was satisfied in *HERO*, despite the plethora of terms used, because the panel found that the transaction was "'clearly abusive of the integrity of the capital markets.'"<sup>138</sup> The Commission concluded that, absent a breach of the Act, it should not exercise its public interest cease trade powers unless "there has been something abusive of investors or the capital markets in the transaction."<sup>139</sup>

Ultimately, the Commission decided not to exercise its cease trade power against Canfor. While it would have been more fair and more in keeping with the spirit of the Act to have a withdrawal right for Slocan's shareholders, the Commission held that "[t]here was no evidence ... that the Canfor bid was 'clearly designed to avoid the animating principles' behind the take-over bid provisions of the Act."<sup>140</sup> The deposit receipts given to Slocan shareholders would be traded on the TSE, which gave them a level of protection similar to a withdrawal right, with the exception of the ability to tender into a competing bid. Had Canfor offered a withdrawal right to the Slocan shareholders, it would have exposed Canfor to commercial risks it was not prepared to take, given the time and effort involved in pursuing its bid. The Commission did not rule out the possibility that there could be future cases wherein a similar structure would be declared contrary to the public interest.

### 3.8.2 Observations

In summary, the Commission held that the abuse test from *Canadian Tire* is the applicable test in deciding whether it should exercise its public interest powers absent a breach of securities laws. In applying the abuse standard to the facts at hand, the Commission (in what was clearly the Lowest Threshold circumstances) concluded that Canfor's actions were not abusive because of the stringent provisions of the *Forest Act*, the lack of evidence that the transaction was designed to avoid the animating principles of the Act and the level of protection offered to Slocan shareholders.

## 3.9 Re Financial Models Co<sup>141</sup>

### 3.9.1 Summary

*Financial Models* concerned the response of Stamos Katotakis ("**Katotakis**"), a shareholder and director of Financial Models Company Inc. ("**FMC**"), to a take-over bid by Linedata Services S.A. ("**Linedata**"). Katotakis launched a take-over bid through his company 1066821 Ontario Inc. ("**Katotakis Holdco**") for the shares of FMC.

In 1998, Katotakis, BNY Capital Corporation ("**BNY**"), an affiliate of the Bank of New York with 22.4% of the shares, and Dr. William R. Waters ("**Waters**"), a co-founder of FMC with 20% of the shares, entered into a shareholder agreement (the "**Shareholder Agreement**"). It required any shareholder wishing to sell its shares (the "**Selling Shareholder**") to give the other parties a selling notice ("**Selling Notice**"), setting out the price (the "**Set Price**") at which it was willing to sell its shares. If one or more parties accepted, then the accepting parties must launch a take-over bid for all of the shares and the Selling Shareholder must tender into the take-

---

<sup>137</sup> *Ibid* at para 38.

<sup>138</sup> *Ibid*.

<sup>139</sup> *Ibid* at para 40.

<sup>140</sup> *Ibid* at para 41.

<sup>141</sup> (2005), 28 OSCB 2184 [*Financial Models*].

over bid.<sup>142</sup> If the other parties did not accept the Selling Notice, then the Selling Shareholder could sell its shares to a third party.

In August 2004, Katotakis, who held 40.4% of FMC shares, discussed the possibility of Linedata acquiring FMC shares in exchange for cash and Linedata shares. In mid-October, Katotakis informed the board of directors that he did not wish to continue the discussions with Linedata. The other members of the board disagreed, and pursued the transaction. By the end of November, they had agreed in principle to tender their shares to Linedata. On December 20, 2004, FMC entered into acquisition and lock-up agreements with Linedata, subject to Katotakis' right of first purchase of FMC shares. On December 23, Linedata offered to purchase all of the issued and outstanding shares of FMC at a value of \$12.76 per share.

Earlier, on December 8, 2004, BNY and Waters delivered Selling Notices under the Shareholder Agreement to Katotakis of their intention to sell all of their shares at a Set Price of \$12.20 per share. On December 29, Katotakis accepted the Selling Notices, and, pursuant to the Shareholder Agreement, launched an offer to acquire the shares of FMC (the "**Katotakis Offer**").

It had been contemplated that, if less than all of the shares were acquired by the Katotakis Offer, there would be a secondary transaction (the "**Follow-on Transaction**") to acquire shares not acquired through the Katotakis Offer. The Follow-on Transaction would likely be an amalgamation which would require a majority of the minority shareholders' approval.<sup>143</sup> The shares Katotakis acquired from BNY and Waters would be counted as part of the minority shares for approval.

The special committee of the board of FMC argued that: (i) it was abusive to the capital markets for Katotakis to include the shares he would receive through the Selling Notices (namely, the shares held by BNY and Waters) as part of the minority in a majority of the minority vote; (ii) the disclosure by FMC did not alert shareholders to the nature and consequences of the Shareholder Agreement and the risks to minority shareholders that if the Selling Notice was accepted, minority shareholders would be deprived of the chance to obtain benefits through a third party acquirer; and (iii) Katotakis had deprived FMC shareholders of the chance to obtain full value for their shares.<sup>144</sup>

The Commission affirmed the abuse test from *Canadian Tire* by stating that it will intervene when there is abuse. In a take-over bid, abuse could occur when "a transaction is artificial and defeats the reasonable expectation of investors."<sup>145</sup> The Commission proceeded by citing, with approval, the principle in *HERO* that, "the Commission intervenes under its public interest jurisdiction where the intervention would further the policy aims of the Commission in a situation where, for technical reasons, the law otherwise permits a transaction that abuses policy aims."<sup>146</sup>

The Commission held that there was no evidence that the transaction was artificial or that there was an intention to violate the reasonable expectations of shareholders. The Shareholder Agreement and the applicable

---

<sup>142</sup> Note: the Commission described the Shareholder Agreement as requiring the Selling Shareholder to be the one to launch the take-over bid. See *ibid* at para 12. However, based on how the transaction was described throughout the rest of the case (see e.g. *ibid* at para 23), it seems as if the party who accepted the Selling Notice was the one who had the obligation to launch the take-over bid, rather than the Selling Shareholder.

<sup>143</sup> *Insider Bids, Issuer Bids, Business Combinations and Related Part Transactions*, OSC MI 61-501 (2004) stated that related party transactions must have obtained minority approval. Where minority approval is required, the votes of the issuer, interested parties, related parties and their joint actors will be excluded.

<sup>144</sup> *Financial Models*, *supra* note 141 at paras 27-30.

<sup>145</sup> *Ibid* at para 50.

<sup>146</sup> *Ibid* at para 54.

securities legislation were both public records that the capital market could rely on. Waters and BNY were not forced to enter into the Shareholder Agreement creating the Selling Notice requirement: "A desire to be free of a contractual commitment is not a basis to invoke the jurisdiction of the Commission."<sup>147</sup> Katotakis, in responding to the Selling Notices, "was not initiating a transaction that was purposefully designed to exploit a loophole in the shareholder protections contained in a company's charter (as alleged in *Canadian Tire*) or in securities legislation (as alleged in *H.E.R.O.*)."<sup>148</sup> Katotakis did not participate in the establishment of the timing, price, terms or conditions of the Selling Notices. He did not frustrate shareholder expectation of an auction because FMC could not have an auction until the Selling Notices were delivered and not accepted.

### 3.9.2 Observations

The Commission in *Financial Models* emphasized key factors that can lead to the exercise of the public interest power, including whether a transaction is artificial and intended to violate the reasonable expectations of shareholders. In circumstances where shareholders were well aware of the fact that the Shareholder Agreement may create hard lock-up agreements and shares acquired under such agreements could be voted to approve a second-step squeeze out, the exercise of the public interest power would be unwarranted. Once again, the Commission emphasized the need for a finding of abuse before the public interest power can be exercised in what was clearly the Lowest Threshold circumstances.

## 3.10 *Patheon*

### 3.10.1 Summary

At issue in *Patheon* was an unsolicited offer by JLL Patheon Holdings ("**JLL**") to purchase for cash any and all of the outstanding restricted voting shares of Patheon Inc. Specifically, the Commission had "real concerns" that a voting agreement entered into by JLL and MOVA Pharmaceuticals Corporation may have contravened sections 97(1)<sup>149</sup> and 97.1(1)<sup>150</sup> of the Act.<sup>151</sup>

The Commission stated there should be no doubt that it "will intervene in the public interest where the take-over bid rules have been complied with but the animating principles underlying those rules have not."<sup>152</sup> Referencing *Mithras*, the Commission noted that while the immediate object of the Act's take-over provisions is the protection of investors (namely by ensuring that offerees are treated equally, afforded adequate information, and provided a reasonable amount of time), the overarching purpose of these provisions is to protect the integrity of the capital markets.<sup>153</sup> The Commission added, without elaboration, that the conclusion in *Mithras* is consistent with the foreshadowing principle under the Lowest Threshold circumstances discussed in *Cablecasting*.<sup>154</sup>

---

<sup>147</sup> *Ibid* at para 62.

<sup>148</sup> *Ibid* at para 63.

<sup>149</sup> Section 97(1) holds that all holders of the same class of securities shall be offered identical consideration if a formal bid is made.

<sup>150</sup> Section 97.1(1) provides that if a formal bid is intended to be made, the person or company making the bid shall not enter into any collateral agreement, commitment or understanding with any person or company they are acting jointly or in concert with, if it would result, directly or indirectly, in the security holder having consideration of a greater value than that offered to other security holders.

<sup>151</sup> *Patheon, supra* note 7 at para 120.

<sup>152</sup> *Ibid* at para 116.

<sup>153</sup> *Ibid*.

<sup>154</sup> That is, that the Commission will be less reluctant to intervene using its public interest powers when the principle or policy that would be required to deal with the transaction is foreshadowed by principles already in the Act, regulations or prior policy statements (*Cablecasting, supra* note 2 at 43).

The Commission proceeded to cite *HERO* as providing further support for the proposition that the Commission may intervene where a bid undermines the animating principles of the Act, adding that the conduct in question was "clearly abusive of the integrity of capital markets."<sup>155</sup>

The Commission also considered the statement in *Re Sterling Centrecorp Inc*<sup>156</sup> that it must examine "all of the facts, all of the policy consideration[s] at play, all of the underlying circumstances of the case, and all of the interests affected by the matter and the remedy sought" when considering the use of its public interest power.<sup>157</sup>

### 3.10.2 Observations

In light of the fact that the Commission was concerned that there may have been breaches of the Act, *Patheon* can be distinguished from the other cases discussed in which there was clearly no breach of securities laws. However, the Commission's discussion of cases that lacked a clear breach, and its portending of the reasoning in *Biovail*,<sup>158</sup> makes *Patheon* an important case.

In *Patheon*, the Commission's desire to move away from the abuse standard begins to manifest as we see the Commission shift its focus back to the Lowest Threshold language employed in *Cablecasting*. To this end, the Commission notes that the conclusion in *Mithras* is consistent with *Cablecasting*, and while this is certainly the case, it is interesting to note that nowhere in *Mithras* did the Commission refer to *Cablecasting*.

It is also important to note that the Lowest Threshold example from *Cablecasting* does not support the principle that the public interest power may be exercised absent abuse in circumstances where the animating principles underlying the Act have not been complied with. The Lowest Threshold example simply asserts that the Commission is more likely to exercise its public interest power than in Novel Scenarios if the legislation or policy statement that would otherwise be required to deal with the conduct is foreshadowed (or clearly implied) by provisions already set out in securities laws. Prior to *Patheon*, there appears to be no jurisprudential support for the proposition that conduct which engages the animating principles of the Act may, by itself and without a finding of abuse, warrant the exercise of the public interest power. In fact, *Canadian Tire* and its disciples (including *Canfor*), which emphasized the abuse standard, specifically noted that the animating principles of the Act had been breached<sup>159</sup> and this, together with a finding of abuse, was a basis for exercising the public interest power.

In diverging from *Mithras* and opting to orient the discussion around the underlying principles of the Act, the Commission presages what is to come in *Biovail* and the inelegant attempt to shift away from the *Canadian Tire* abuse standard more generally.

---

<sup>155</sup> *Patheon*, *supra* note 7 at para 117.

<sup>156</sup> (2007), 30 OSCB 6683 [*Sterling*].

<sup>157</sup> *Patheon*, *supra* note 7 at para 118.

<sup>158</sup> *Supra* note 11.

<sup>159</sup> *Canadian Tire*, *supra* note 6 at para 132; *Canfor*, *supra* note 133 at para 33.

### 3.11 Biovail

#### 3.11.1 Summary

On October 1, 2003, a truck carrying a shipment of Wellbutrin XL ("**WXL**"), an antidepressant drug manufactured by Biovail Corporation ("**Biovail**"), was involved in an accident (the "**Accident**") en route to GlaxoSmithKline Inc. ("**GSK**"). As a result, GSK did not receive the full shipment of WXL as anticipated.

In its decision, the Commission considered whether Biovail's public statements in press releases about its inability to meet its earnings forecast as a result of the Accident were misleading or untrue in a material respect, thus contravening section 122(1)(b), or alternatively section 122(1)(a), of the Act.<sup>160</sup> In determining that the statements attributing the anticipated shortfall to the Accident were misleading or untrue in a material respect as per section 122(1) of the Act, the Commission concluded that a reasonable investor would have considered the statements important in making an investment decision with respect to Biovail's shares. In particular, the Commission found that the statements that the Accident contributed significantly to the unfavourable variance in its third quarter revenue and earnings and, that the revenue associated with the shipment was in the range of \$10 to \$20 million (when in fact it was \$5 million and this only impacted fourth quarter results), were misleading or untrue in a material respect.

Despite this finding, the Commission held that there was no breach of Ontario securities law because: (i) the statements were not made in documents that were "required to be filed or furnished" under the Act within the meaning of section 122(1)(b); and (ii) the releases were not "submitted to the Commission" as required in section 122(1)(a).<sup>161</sup>

The Commission then considered whether it should nevertheless exercise its public interest power against Mr. Eugene Melnyk ("**Melnyk**"), the founder of Biovail and its Chairman and Chief Executive Officer at the time of the misleading disclosure in question. Melnyk argued that "only an egregious misstatement going to the core of Biovail's business or existence could amount to abuse of the capital markets, not any misstatement."<sup>162</sup> While the Commission recognized that its public interest power must be exercised with caution, the Commission stressed the importance of disclosure to investors and capital markets in prior cases.<sup>163</sup> As such and in keeping with *Cablecasting*, the Commission noted that it would be less reluctant to exercise its public interest powers when the policy that would be created by its decision is foreshadowed by principles already expressed in the Act.<sup>164</sup>

In considering the abuse standard, the Commission then distinguished *Canadian Tire* as not being "a disclosure case," but a take-over bid case. The Commission then made a clean break with the abuse standard by holding that: "where market conduct engages the animating principles of the Act, the Commission does not have to conclude that an abuse has occurred in order to exercise its public interest jurisdiction."<sup>165</sup> Indeed, the

---

<sup>160</sup> Section 122(1)(b) applies to statements made in any application, release, report, return or other document required to be filed or furnished under Ontario securities law. Section 122(1)(a) applies to statements made in any material, evidence or information submitted to the Commission, including statements made to a Staff investigator carrying out an investigation or examination under the Act.

<sup>161</sup> The Commission held that merely filing a document on the System for Electronic Document Analysis and Retrieval (SEDAR) does not constitute submission. See *Biovail*, *supra* note 11 at para 366: "In our view, the fact that the four Releases were filed by Biovail on SEDAR does not make them materials, evidence or information 'submitted to the Commission' within the meaning of subsection 122(1)(a) of the Act."

<sup>162</sup> *Ibid* at para 372.

<sup>163</sup> See e.g. *Re Philip Services Corp* (2006), 29 OSCB 3941 ("[d]isclosure is the cornerstone principle of securities regulation. All persons investing in securities should have equal access to information that may affect their investment decisions" at para 7).

<sup>164</sup> *Biovail*, *supra* note 11 at para 375.

<sup>165</sup> *Ibid* at para 382.

Commission noted that there is an "essential public interest in ensuring that all public statements made by reporting issuers and others are accurate and not misleading or untrue and can be relied upon by investors in making investment decisions."<sup>166</sup>

The Commission went on to say that "[t]here should be no doubt in the minds of market participants that the Commission is entitled to exercise its public interest jurisdiction where any inaccurate, misleading or untrue public statement is made, whether or not that statement contravenes Ontario securities law."<sup>167</sup> However, the Commissioners emphasized that the Commission had to consider "all of the relevant circumstances" and may not, for example, exercise its public interest power merely because an issuer has issued "misleading or untrue statements."<sup>168</sup> Even where the conduct in question is the disclosure of untrue press releases, the Commission must consider all of the facts, "including the nature and significance of the misleading or untrue statements and the circumstances in which they were made," before concluding that the exercise of its public interest power is warranted.<sup>169</sup>

Ultimately, the Commission decided to exercise its public interest jurisdiction, owing to the findings against Melnyk with respect Biovail's misstatements and omissions of information.<sup>170</sup> The Commission found that "Melnyk authorized, permitted or acquiesced in the issue of each of the Releases and in making the disclosure and statements contained in each of them" and was therefore responsible for Biovail's conduct.<sup>171</sup>

The Commission also considered whether in all of the circumstances, Melnyk had demonstrated that he exercised due care and diligence.<sup>172</sup> The Commission asserted that "[i]f we are satisfied that he exercised such care or diligence, we would not conclude that it is in the public interest to issue an order against him under section 127."<sup>173</sup> Ultimately, the Commission found that Melnyk had not exercised appropriate due care and diligence as was warranted in the circumstances and concluded his conduct was in fact contrary to the public interest.<sup>174</sup> Specifically, the Commission was unconvinced by Melnyk's due diligence defence since Melnyk:

(i) had access at any time to whatever information was known by Biovail and its senior officers and employees and could have obtained appropriate supporting information with respect to all of the statements made by Biovail..., (ii) was directly involved in and made decisions related to the content and extent of the disclosure made by Biovail..., and (iii) had final approval of the Releases and other public statements made by Biovail.<sup>175</sup>

---

<sup>166</sup> *Ibid* at para 388.

<sup>167</sup> *Ibid* at para 383.

<sup>168</sup> *Ibid* at para 389.

<sup>169</sup> *Ibid*.

<sup>170</sup> In particular, the Commission concluded that Biovail made statements that, in a material respect, was misleading or untrue, and that Biovail omitted to state facts necessary to render those statements not misleading. See *ibid* at para 391.

<sup>171</sup> *Ibid* at para 397.

<sup>172</sup> *Ibid* at para 400.

<sup>173</sup> *Ibid*. It is of interest to note that in *Gordon Capital Corp v Ontario (Securities Commission)* (1991), 14 OSCB 2713 [*Gordon Capital*], the Commission held that the defence of due diligence would not be a basis for not exercising the public interest power: "The fact that Gordon may have acted without malevolent motive and inadvertently is not determinative of the right of the OSC to exercise its regulatory and discretionary powers to impose a sanction upon Gordon" (*Ibid* at para 34). However, in that case, the Commission found that there had in fact been breaches of the Act.

<sup>174</sup> As Chairman and CEO of Biovail, Melnyk had a direct responsibility to ensure that Biovail did not make inaccurate, misleading or untrue public statements. In light of his involvement in Biovail's disclosure decisions, Melnyk had an obligation to exercise due care and diligence in the circumstances. The Commission found that there were a number of red flags that should have alerted Melnyk to make further inquiries, yet there was limited evidence demonstrating that Melnyk did anything at the relevant time to satisfy that onus.

<sup>175</sup> *Biovail*, *supra* note 11 at para 401.

In addition, there was no evidence that either Biovail or Melnyk sought outside legal or accounting advice.<sup>176</sup>

### 3.11.2 Observations

The Commission moved away entirely from the "abuse" standard established in *Canadian Tire* and pronounced a new standard to the effect that, absent abuse, the public interest power may be exercised where the animating principles of the Act are engaged. In those circumstances, the Commission does not have to conclude that an abuse has occurred in order to exercise its public interest jurisdiction.<sup>177</sup> *Biovail* is often quoted as the decision that set out this new standard. However, we believe the move away from the abuse standard established in *Canadian Tire* and its progeny (such as *Canfor*) had been foreshadowed by earlier cases such as *HERO* and *Mithras*, where abuse was becoming a statement of a conclusion, rather than a standard.

We would suggest, however, that the standard developed in *Biovail* is not helpful and is in fact as conclusory as the abuse standard. As outlined in 3.1.2, in order for the Commission to exercise its public interest power the conduct in question must have engaged the animating principles of the Act—this is simply a threshold issue. The practice that has developed since *Patheon* in citing the Lowest Threshold circumstance in order to avoid the abuse standard shows only the inappropriateness of the abuse standard, it does not advance the discussion of developing a standard that is workable. The example of the Lowest Threshold was an acknowledgement by the Commission, in *Cablecasting*, that in circumstances where clearly delineated provisions in securities laws address or foreshadow conduct that would be contrary to the underlying principles of the Act, a lower threshold of conduct (when compared to Novel Scenario circumstances) is required for the Commission to exercise its public interest power. That statement, however, does not advance the discussion of what the standard should actually be in such circumstances. Even the Commission in *Biovail* concluded that the disclosure of misleading or untrue statements alone, without more (i.e. merely engaging the animating principles of the Act), is not sufficient for the exercise of the public interest power.

## 3.12 *Re Magna International Inc*<sup>178</sup>

### 3.12.1 Summary

In *Magna*, the Commission decided not to intervene on public interest grounds because the transaction proposed by Magna International Inc. ("**Magna**") (to eliminate the dual class structure of its voting shares by having the Stronach Trust agree to cancel its Class B shares (or multiple voting shares) of Magna at a significant premium to market price) was not abusive.

Consistent with *Patheon* and *Biovail*, the Commission stated that it can intervene on public interest grounds in respect of "conduct that is technically in compliance with securities law requirements but that is inconsistent with the animating principles underlying those requirements *or* is abusive of investors or the capital markets."<sup>179</sup>

The Commission cited *Canadian Tire*, *HERO*, *Financial Models* and *Patheon* in holding that conduct will be abusive if the transaction is "artificial and defeats the reasonable expectations of investors or shareholders."<sup>180</sup>

---

<sup>176</sup> *Ibid* at para 404.

<sup>177</sup> *Ibid* at para 382.

<sup>178</sup> (2011), 34 OSCB 1290 [*Magna*].

<sup>179</sup> *Ibid* at para 184 [emphasis added].

<sup>180</sup> *Ibid*.

In line with *Patheon* and *Biovail*, the Commission noted, in citing *Cablecasting*, that it will more readily exercise its powers when the new policy that would be required to address the impugned transaction is foreshadowed by principles already in securities laws.

The Commission in *Magna* continued by evaluating *Canadian Tire*:

[t]he key finding in *Re Canadian Tire* was that the public holders of Class A non-voting shares of Canadian Tire had a reasonable expectation, as a result of the coat-tail protection contained in Canadian Tire's articles, that they would share in any control premium being paid for the common shares. That reasonable expectation was being frustrated by an artificial transaction structured specifically to avoid triggering the coat-tail protection.<sup>181</sup>

Unlike in *Canadian Tire*, *Magna* had no coattail provisions, which meant that the Stronach Trust was legally entitled to sell its Class B shares to any purchaser at any price it negotiated. Holders of the Class A subordinate voting shares knew their rights (or lack thereof) when they first acquired their shares. Therefore, "the Class A shareholders had no reasonable expectation that they would share in any control premium being paid for the Class B Shares."<sup>182</sup>

The Class A shareholders had the chance to vote on and approve the proposed transaction; if they had voted against it, the transaction would not have proceeded. If approval by a majority of the minority vote had not been a condition to proceeding, the Commission had "little doubt" it would have restrained the transaction "as an abusive related party transaction."<sup>183</sup> However, the Commission warned that shareholder approval does not mean the Commission will not intervene; "if a transaction is abusive, then shareholder approval will not be sufficient."<sup>184</sup>

The Commission held that much of the complaint stemming from the proposed transaction was about the proposed price to be paid for the Class B shares. However, "a transaction is not abusive simply because certain investors or shareholders consider the price proposed to be paid to be outrageous."<sup>185</sup> It was not for the Commission to determine if a transaction was desirable from "a financial or economic standpoint."<sup>186</sup>

### 3.12.2 Observations

Once again, the facts of the case strongly influenced the Commission's decision. When the Commission exercises its public interest powers in the absence of a breach, it considers the particular circumstances of the case and how they affect the shareholders and the capital markets. In *Magna*, the knowledge of shareholders as to their rights and their ability to vote on the proposed transaction militated in favour of the conclusion that *Magna's* conduct was not egregious and, therefore, did not require the Commission to exercise its public interest power. In other words, the reasonable or justifiable expectations of shareholders was not being defeated.

---

<sup>181</sup> *Ibid* at para 188.

<sup>182</sup> *Ibid* at para 189.

<sup>183</sup> *Ibid* at para 190.

<sup>184</sup> *Ibid* at para 195.

<sup>185</sup> *Ibid* at para 191.

<sup>186</sup> *Ibid*.



### 3.13 Re VenGrowth Funds (Special Committee of Directors)<sup>187</sup>

#### 3.13.1 Summary

GrowthWorks Canadian Fund Ltd. ("**GrowthWorks**") commenced a hostile merger proposal (the "**Proposal**") to acquire The VenGrowth Investment Fund Inc. and related entities ("**VenGrowth**") by soliciting the VenGrowth shareholders to enter into support agreements ("**Support Agreements**") with GrowthWorks. The Support Agreements gave GrowthWorks an irrevocable power of attorney to requisition shareholder meetings and to vote at shareholder meetings with the shares that were subject to the Support Agreements in favour of certain matters (the "**Subject Shares**").<sup>188</sup> As a result of the powers obtained through the Support Agreements, GrowthWorks could vote in any shareholder meeting to approve the Proposal and vote against competing transactions.

A special committee of independent directors of VenGrowth (the "**Special Committee**") challenged GrowthWorks's solicitation of Support Agreements and its right to vote the Subject Shares. The independent directors argued that:<sup>189</sup>

- (i) VenGrowth shareholders were deprived of the rights they would have in a take-over bid or proxy contest to determine whether to accept the Proposal or to accept a competing bid;
- (ii) GrowthWorks contravened the proxy solicitation requirements in the Act and the *Canada Business Corporations Act*;<sup>190</sup>
- (iii) GrowthWorks' conduct was inconsistent with the animating principles that inform the Act's proxy and take-over bid regimes; and
- (iv) the circular of GrowthWorks distributed to VenGrowth shareholders was incomplete and misleading.

The Special Committee entered into a letter of intent with Covington Capital Corporation ("**Covington**") to agree upon a form of a definitive merger agreement. The execution of the merger agreement was subject to the condition that the Commission make an order preventing GrowthWorks from voting the Subject Shares or GrowthWorks agreeing to not vote the Subject Shares.

At the hearing before the Commission, GrowthWorks agreed that it would allow VenGrowth shareholders to terminate the Support Agreements which they had signed. GrowthWorks also submitted that at the time a shareholders' meeting was called a circular and form of proxy would be provided to VenGrowth shareholders that complied with applicable law.

In considering its public interest jurisdiction, the Commission reiterated that it cannot use its public interest powers to "assess the business or financial merits of any proposed transaction or transactions."<sup>191</sup> The

---

<sup>187</sup> (2011), 34 OSCB 6755 [*VenGrowth*].

<sup>188</sup> *Ibid* at para 1.

<sup>189</sup> *VenGrowth*, *supra* note 187 at para 5.

<sup>190</sup> RSC 1985 c C-44 [*CBCA*].

<sup>191</sup> *Ibid* at para 34.

Commission also noted, as was stated in *Sterling*, that when exercising its powers the Commission will look to "all of the facts, all of the policy consideration[s] at play, all of the underlying circumstances."<sup>192</sup>

Next, the Commission cited *Patheon* as standing for the proposition that the Commission has jurisdiction to intervene even in the absence of a breach of the Act if the animating principles informing the Act's take-over bid regime have not been complied with.<sup>193</sup> The Commission in *VenGrowth* noted that a person subject to a proxy solicitation in connection with a merger faces the same investor-protection issues that arise in the context of a take-over bid.<sup>194</sup> On this basis, the Commission determined that the animating principles informing the Act's take-over bid and proxy regimes were equally applicable to GrowthWorks.

The Support Agreements effectively allowed GrowthWorks to skip over the auction stage that ensures that the value of shares are maximized. GrowthWorks had enough Subject Shares that it was able to vote to approve the Proposal at any shareholder meeting and vote against any competing transaction (such as the Covington transaction). The Support Agreements were a "solicitation of the right to vote shares held by VenGrowth shareholders at VenGrowth shareholder meetings called to consider the GrowthWorks Proposal or any competing transaction."<sup>195</sup>

Next, the Commission examined whether GrowthWorks' conduct constituted solicitation of a proxy in a manner contrary to section 86(1) of the Act. The Commission held that the Support Agreements were not proxies, and so the solicitation was not contrary to Ontario securities law. The Support Agreements allowed GrowthWorks to execute proxies for VenGrowth shareholders, but they were not proxies in and of themselves.

On the question as to whether GrowthWorks' solicitation of the Support Agreements was contrary to the public interest, the Commission noted that the Support Agreements were irrevocable, which meant VenGrowth shareholders were not able to choose between the Proposal and competing transactions (such as the Covington transaction). The Commission held that under the Act and related instruments, a proxy does not have to be revocable. The *CBCA*, on the other hand, requires that a shareholder be able to revoke a proxy.<sup>196</sup> In the take-over bid context, the Act permits a security holder to withdraw its shares at any time before the bidder takes them up. This withdrawal right of shareholders was, in the Commission's view, "comparable"<sup>197</sup> to the shareholders' right under the *CBCA* to revoke the proxies they have granted if they change their decision about how to vote in respect of a proposed merger or acquisition transaction. The Commission viewed the right of withdrawal or revocation as being "fundamental to protecting the interests of those shareholders" and required by "the principles underlying the take-over bid and proxy solicitation provisions of the Act."<sup>198</sup>

In this case, the Support Agreements prevented shareholders from choosing between competing transactions and did not allow for their termination. As such, the solicitation of the Support Agreements was contrary to the public interest and engaged the jurisdiction of the Commission, which determined that shareholders should have the opportunity to terminate the Support Agreements at any time. The Commission ordered that the Proposal be cease traded under section 127 until GrowthWorks (i) "ceases to have any right, power or authority to vote" the Subject Shares; and (ii) "publicly announces that it has ceased to have any such voting rights."<sup>199</sup>

---

<sup>192</sup> *Sterling*, *supra* note 156 at para 212.

<sup>193</sup> *VenGrowth*, *supra* note 187 at para 37.

<sup>194</sup> *Ibid* at para 38.

<sup>195</sup> *Ibid* at para 53.

<sup>196</sup> *CBCA*, *supra* note 190, s 148(4).

<sup>197</sup> *VenGrowth*, *supra* note 187 at para 58.

<sup>198</sup> *Ibid* at para 59.

<sup>199</sup> *Ibid* at Schedule A.

### 3.13.2 Observations

It is of interest to note that, although the Commission found that the solicitation of the Support Agreements was contrary to the public interest, such conduct was not held to be abusive "of shareholders or the capital markets" in view of the "substantial relevant disclosure in the GrowthWorks Circular."<sup>200</sup>

It is not clear whether the distinction put forth in *Biovail* between disclosure cases and take-over bid cases was of relevance to the Commission in *VenGrowth*. In *VenGrowth*, the Commission did not apply the abuse standard while determining that the principles underlying the take-over bid regime were applicable. This appears inconsistent with *Biovail* (a disclosure case), where the Commission drew a distinction between take-over bid cases and disclosure cases in sidestepping the abuse standard. We would suggest that this only highlights the difficulties in utilizing these standards.

What is clear is that in *VenGrowth*, the Commission had for the first time applied the *Biovail* standard of engaging the animating principles of the Act while holding that the same conduct was not abusive. Also, it would appear that *VenGrowth* held that the failure to provide revocation or withdrawal rights is sufficient to cause the Commission to exercise the public interest power. However, in *Canfor*, the Commission concluded that the lack of withdrawal rights was not abusive in light of the stringent requirements under the *Forest Act*, and therefore its public interest power should not be exercised. Although the facts in *Canfor* and *VenGrowth* are significantly different, that alone may not explain the inconsistent results. We suspect that the shift away from the label "abuse" may be allowing the Commission to lower its threshold of conduct which is considered to be contrary to the public interest, without providing for an appropriate explanation. See our discussion of this decision in 4.3.2.2.

## 3.14 *Re Donald*<sup>201</sup>

### 3.14.1 Summary

Paul Donald ("**Donald**") was an officer of Research in Motion Limited ("**RIM**"). On August 20, 2008, he attended a golf tournament and dinner for RIM executives. At the dinner, he had a conversation with a Vice President of RIM, Chris Wormald ("**Wormald**"). Donald learned three important facts at this dinner: (i) RIM had been, but was not currently, engaged in confidential discussions with Certicom regarding a potential acquisition; (ii) RIM had an ongoing interest in acquiring Certicom; and (iii) Certicom's share price was undervalued based on its licensing agreements.

The next day, Donald called his broker and placed an order for \$300,000 worth of Certicom shares for a price not to exceed \$1.55 per share. When he was questioned in examination by Staff as to why he bought the shares, he responded that "it looked like a good investment based on a discussion I had with a gentleman, Chris Wormald."<sup>202</sup>

On December 3, 2008, RIM announced that it would commence a hostile bid for Certicom at \$1.50 per share. On March 23, 2009, RIM acquired Certicom for \$3.00 per share, which resulted in a profit of \$295,000 for Donald.

The Commission held that Donald did not engage in prohibited insider trading. In order to breach section 76(1) of the Act, an individual or company must have a "special relationship" with a reporting issuer and have traded

---

<sup>200</sup> *Ibid* at para 62.

<sup>201</sup> (2012), 35 OSCB 7383 [*Donald*].

<sup>202</sup> *Ibid* at para 56.

in its securities with knowledge of a material fact or material change that has not been generally disclosed. In order for section 76(1) to apply, RIM must have made a decision to propose a take-over bid of Certicom. At the time of the golf event, RIM had not made such a decision; they were not "proposing a reorganization, amalgamation, merger or arrangement of similar business combination with Certicom."<sup>203</sup> The Commission held that there was no special relationship, although Donald was in possession of material facts.

After finding there was no breach of the Act, the Commission turned to its public interest powers. It cited *Canadian Tire* and *Biovail* for the proposition that a breach of the Act is not required for the Commission to exercise its powers. In *Canadian Tire*, the Commission held that it should restrain transactions that are abusive of investors and the capital markets. In *Biovail*, it stated that conduct that engages the animating principles of the Act can be restrained without a finding of abuse.

Next, the Commission turned to previous insider trading cases. In *Re Danuke*,<sup>204</sup> the Commission stated that:

[A]ll registrants ought to understand that they have a duty not to attempt to profit, directly or indirectly, through the use of insider 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.<sup>205</sup>

The Commission cited *Re Seto*,<sup>206</sup> in which the Alberta Securities Commission made it clear that there can be conduct that is contrary to the public interest even where the respondent was not liable under insider trading provisions.<sup>207</sup>

The Commission found that Donald's conduct was "abusive of the capital markets and to confidence in the capital markets."<sup>208</sup> The Commission found that Donald knew that the information was confidential and it would have a significant effect on the market price of Certicom shares if disclosed. Someone in Donald's position must have known that the information was told to him on a confidential basis and with the expectation that he not use it for personal gain.<sup>209</sup> Donald, as an officer of a public company, was a market participant and consistent with section 2.1 of the Act was expected to adhere to a high standard of behaviour.<sup>210</sup> By purchasing Certicom shares with knowledge of material facts that were not generally disclosed, Donald failed to meet this high standard. His purchase directly engaged the fundamental principles of securities regulation and the purposes of the Act, and thus the Commission exercised its public interest powers even though there was no breach of the Act.<sup>211</sup>

It is interesting to note that within 11 months of the *Donald* decision, the Act was amended so that the conduct engaged in by Donald would now be a breach of the Act.<sup>212</sup>

---

<sup>203</sup> *Ibid* at para 235.

<sup>204</sup> (1981), 2 OSCB 31C.

<sup>205</sup> *Ibid* at 40C.

<sup>206</sup> 2003 LNABASC 81 [*Seto*].

<sup>207</sup> *Donald*, *supra* note 201 at para 307.

<sup>208</sup> *Ibid* at para 324.

<sup>209</sup> *Ibid* at para 314.

<sup>210</sup> *Ibid* at para 319.

<sup>211</sup> *Ibid* at para 323.

<sup>212</sup> The decision in *Donald* was released on August 1, 2012. On May 2, 2013, the Ontario government introduced *An Act to implement Budget measures and to enact and amend various Acts*, SO 2013, c 2 ("**Bill 65**"). As omnibus legislation, Bill 65 amended more than a dozen statutes, including the *Securities Act*, RSO 1990, c S 5. More specifically, Bill 65 modified the definition of "person or company in a special relationship

### 3.14.2 Observations

The facts in *Donald* clearly fall within the Lowest Threshold circumstances. The Commission held that Donald's actions were abusive of the capital markets and to confidence therein. In addition, his conduct directly "engaged the fundamental principles of securities legislation." The facts and circumstances which caused the Commission to exercise its public interest power in *Donald* seem no more alarming than the facts in *Biovail*. It is clear that in both *Biovail* and *Donald* market participants had undertaken activities which, in the Commission's opinion, were well below the standard of behaviour expected of them: Donald, while knowingly in possession of undisclosed, material and confidential information relating to a public company, bought the shares of such company; in the same vein, Melnyk authorized the repeated issuance of intentionally misleading disclosure which omitted or misstated clearly material information. However, in *Biovail*, the Commission appeared unwilling or unable to find the impugned conduct abusive. Having departed from the abuse standard in *Biovail*, why was it necessary to return to it in *Donald*? This could be explained by the fact that different Commissioners may not be in agreement on these issues, but we suspect that the reasoning is more straightforward. We would argue that this discrepancy lends further support to the proposition that the designation of conduct as abusive is merely a statement of conclusion that, until *Patheon*, was necessary for the exercise of the public interest power as a result of *Canadian Tire* and its progeny.

## 3.15 *Re Suman*<sup>213</sup>

### 3.15.1 Summary

In the course of his employment at MDS Sciex, Shane Suman ("**Suman**") communicated undisclosed material information to his wife about the proposed acquisition of Molecular Devices Corporation ("**Molecular**")—a US listed company. Suman and his wife then purchased a large number of securities in the company (the "**Molecular Purchases**"), securing profits of almost US \$1 million.

Although Molecular was a public company whose shares were listed on NASDAQ, it was not a "reporting issuer" within the meaning of the Act; as such, the Molecular Purchases did not strictly breach section 76(1) of the Act.<sup>214</sup> The Commission found that, had Molecular been a reporting issuer, the Molecular Purchases would have clearly contravened the insider trading provisions of the Act. Accordingly, the Commission concluded that Suman's conduct was "inconsistent with the underlying policy objectives of subsection 76(1) of the Act" and hence contrary to the public interest.<sup>215</sup>

### 3.15.2 Observations

*Suman* is consistent with *Donald* in that, the impugned conduct is clearly conduct which the insider trading provisions are designed to prohibit, despite not meeting one technical definition in the provision. The facts fit squarely within the Lowest Threshold circumstances. Importantly, the Commission in *Suman* did not use the abuse standard to come to the aforesaid conclusion.

---

with a reporting issuer" to include, among others, "persons or companies that are considering or evaluating whether to make a take-over bid or enter into an arrangement with the reporting issuer." Bill 65 received royal assent on June 13, 2013.

<sup>213</sup> (2012), 35 OSCB 2809 [*Suman*].

<sup>214</sup> *Securities Act*, RSO 1990, c S 5, s 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."

<sup>215</sup> *Suman*, *supra* note 213 at para 351.

## 4. ANALYSIS

Based on the jurisprudence summarized above, in [4.1](#), we have distilled key guiding principles applicable to the exercise by the Commission of its public interest power. In [4.2](#), we examine the surrounding factual circumstances that have historically led the Commission to exercise its public interest jurisdiction. Following a review of [4.1](#) and [4.2](#), the reader may well ask why we have not included "abuse" or acting contrary to the animating principles under the Act as guiding principles or facts or circumstances to consider. As will be discussed in [4.3](#), the authors believe that such language serves merely as statements of conclusions that the public interest power should be exercised. In [4.3](#), we will conclude our analysis by suggesting that a justifiable expectations standard would provide a cogent and clear basis for determining if the public interest power should be exercised.

### 4.1 Guiding Principles

#### 4.1.1 Objects and Purposes of the Act

In *Asbestos SCC*, the SCC noted that the Commission's public interest jurisdiction is limited by the dual purposes of the Act set out in section 1(1), namely "to provide protection to investors from unfair, improper or fraudulent practices" and "to foster fair and efficient capital markets and confidence in capital markets."<sup>216</sup> However, it is important to note that the constitutional basis on which the Commission is constrained by the objects and purposes of the Act predates both *Asbestos* as well as the 1994 amendments which first introduced the purposes provision in Ontario securities legislation. In fact, before section 1(1) crystallized into its current statutory form, the Commission conceded the inherent limitations on its public interest power in earlier decisions. Most notably, in *Ainsley Financial Corp v Ontario (Securities Commission)*, the Court noted that the parameters of the Commission's authority is confined to its statutory mandate.<sup>217</sup> Thus, prior to the enactment of section 1(1) of the Act, it has been a guiding principle that the Commission's discretionary powers are *not* untrammelled; the 1994 amendments merely codified the scope of its mandate that which was already expressed in *Ainsley* and espoused in the Daniels Report.<sup>218</sup> Indeed, the jurisprudence is replete with prior decisions wherein the statutory bounds of the Commission's discretionary power have been explicated and the accord of curial deference has been circumscribed to the Commission's jurisdiction under its enabling statute.<sup>219</sup>

#### 4.1.2 Orders are Preventive and Prospective

Section 127 is a regulatory provision; as such, the Commission's public interest power is preventive and prospective—it is neither remedial nor punitive. On at least two occasions, the SCC has confirmed the regulatory

---

<sup>216</sup> *Securities Act*, RSO 1990, c S 5, s 1.1.

<sup>217</sup> (1993), 14 OR (3d) 280 (Ct J (Gen Div)) at para 30 [*Ainsley*]. Shortly thereafter, the Ontario Task Force on Securities Regulation was struck to recommend an appropriate legislative response to the *Ainsley* decision and clarify the mandate and responsibilities of the Commission in fulfilling the purposes of the Act: *Responsibility and Responsiveness—Final Report of The Ontario Task Force on Securities Regulation*, OSC Notice 94/07/08, (1994), 17 OSCB 3208 [Daniels Report].

<sup>218</sup> *Ibid* ("[w]e recommend the adoption of a statutory purpose clause that would define the purposes of the Act and the mandate of the Commission in fulfilling its responsibilities under the Act" at 45).

<sup>219</sup> See e.g. *Gordon Capital*, *supra* note 173 ("[t]he scope of the OSC's discretion in defining 'the public interest' standard ... is limited only by the general purpose of the Act, being the regulation of the securities industry in Ontario, and the broad powers of the OSC thereunder to preserve the integrity of the Ontario capital markets and protect the investing public" at para 37); *WD Latimer Co v Bray* (1973), 2 OR (2d) 391 (Div Ct) ("the Commission [is] to protect the investing public in Ontario from grave and pressing perils clearly apprehended by the Legislature and calling for potent and unorthodox measures of control and protection" at para 6); *Brosseau v Alberta Securities Commission*, [1989] 1 SCR 301 ("Securities Acts in general can be said to be aimed at regulating the market and protecting the general public ... this protective role, common to all securities commissions, gives a special character to such bodies which must be recognized when assessing the way in which their functions are carried out under their Acts" at paras 35–36).

nature of the provision. In *Asbestos SCC*, the court stated that the purpose of an order under section 127 is "to restrain future conduct that is likely to be prejudicial to the public interest in fair and efficient capital markets."<sup>220</sup> Likewise in *Cartaway*, the SCC reiterated that sanctions under section 127 are "preventive in nature and prospective in application."<sup>221</sup>

#### 4.1.3 General Deterrence

The notion of general deterrence may also inform the choice of sanctions the Commission can impose under its public interest power. In *Cartaway*, the SCC clarified that the deterrent effect of an order is an appropriate consideration in the formulation of an order in the public interest. Thus, where future conduct is deleterious to capital markets, general deterrence may be a relevant factor in assessing the appropriate penalty in the public interest. Insofar as section 127 is a regulatory provision and its sanctions are neither remedial nor punitive, the same is true of general deterrence. Indeed, no one factor is dispositive and likewise, the weight given to general deterrence will vary from case to case. However, in light of the role a general deterrent has to play in preventing future harm to capital markets, the SCC has deemed it a legitimate factor to take into account in the Commission's rendering of sanctions under the public interest power.

#### 4.1.4 Not a Private Remedy

Consistent with the Commission's limitations on the exercise of its public interest power recognized in *Asbestos*, in order for the Commission to exercise its public interest powers, it must pertain to an area in which it is suited to hear. In other words, the Commission's self-imposed restraint compels it to avoid exercising its public interest power in circumstances where litigants are seeking redress for breaches of fiduciary duty or oppressive conduct under corporate legislation.<sup>222</sup> The thrust of a complaint needs to relate to fundamental principles protected under the Act and have a direct impact on the capital markets in general.<sup>223</sup> In *Canadian Tire*, the Commission confirmed that it does not deal with breaches of fiduciary duties or of purely corporate matters; the Commission does not serve to provide a private remedy. Instead, the Commission serves to regulate the *public* securities markets.<sup>224</sup>

#### 4.1.5 Transactional Nexus

Among the several factors the Commission has considered in exercising its discretion is whether the transaction in question had a sufficient Ontario nexus or connection. Although a relevant consideration, the existence of a transactional nexus is not a condition precedent or jurisdictional requirement. In *Asbestos SCC*, the court laboured this point in its emphatic declination to accept the Divisional Court's contention that the public interest jurisdiction is subject to any such implicit precondition. The existence of an Ontario connection is but one of the several factors to be considered in the exercise of the Commission's authority; albeit an important factor.

#### 4.1.6 Dismissal of Technical Interpretations

To the extent that a transaction is clearly designed to avoid the animating principles of the Act, "the sophisticated gloss of technicality must not be used to obscure the true intent and import of the basic philosophies that underlie the securities laws of the province."<sup>225</sup> While technical interpretations may well be

<sup>220</sup> *Asbestos SCC*, *supra* note 8 at para 43.

<sup>221</sup> *Cartaway*, *supra* note 128 at para 58.

<sup>222</sup> *Lindzon*, *supra* note 54 at 59C-60C.

<sup>223</sup> See generally *Ibid*.

<sup>224</sup> *Canadian Tire*, *supra* note 6 at para 163.

<sup>225</sup> *Federal Commerce*, *supra* note 63 at 25C-26C.

necessary, the Commission will not sit idly by until a breach of the Act has occurred. Therefore, technical interpretations that frustrate the basic philosophies of securities laws will not be accepted in those situations where a transaction would otherwise be illegal, but for some inconsequential technicality not captured in the provisions of the securities laws. This principle is consistent with the Lowest Threshold example in *Cablecasting*.

#### 4.1.7 Due Diligence Defence

In determining whether to exercise its public interest power, the Commission will consider whether a person exercised due care and diligence in the circumstances (particularly in relation to misleading or untrue disclosure). However, the onus to prove such due care and diligence will be on the respondent.<sup>226</sup> Evidence of due care and diligence includes seeking and relying on the advice of independent legal or accounting advisors.<sup>227</sup>

#### 4.1.8 Addressed by Legislature

In addition, the Commission will consider whether the impugned conduct has been previously spoken to by the Legislature *or* has been the subject of much publicity despite no legislative action being taken.<sup>228</sup> In circumstances where the transaction has been addressed by the Legislature (by action or inaction) without being made subject to regulation, the application of section 127 is highly unlikely.<sup>229</sup>

#### 4.1.9 Self-Restraint in Enforcing Other Statutes

The Legislature has determined that certain matters are to be regulated under statutes not assigned to the Commission. Even when conduct or transactions regulated under these statutes engage the animating principles of the Act, the Commission should be cautious when asked to enforce such statutes. As noted in *Cablecasting*, in such circumstances, the public interest power should be exercised rarely, and only where relief is required immediately and the conduct is so egregious as to equate to fraud or similar conduct.<sup>230</sup>

#### 4.1.10 Shareholder Approval

While shareholder approval may be influential in the Commission's public interest analysis, a vote in favour of a proposed transaction may not be determinative of whether a transaction will proceed. For example, in *Magna*, the Commission resolved not to exercise its public interest power in light of the fact that the proposed transaction received a majority of the minority shareholder approval. Thus, the Commission has acknowledged the right of shareholders to decide for themselves whether to vote for or against a proposed transaction where adequate disclosure was provided. However, the Commission in *Magna* cautioned that shareholder approval will not remedy a transaction that is abusive of shareholders or the capital markets; rather, "if a transaction is abusive, then shareholder approval will not be sufficient."<sup>231</sup> It seems the Commission in *Magna* did not find the conduct egregious enough to override shareholder approval, yet in other cases with more deplorable facts, shareholder approval will not suffice.

---

<sup>226</sup> *Biovail*, *supra* note 11 at para 406.

<sup>227</sup> *Ibid* at para 404.

<sup>228</sup> *Cablecasting*, *supra* note 2 at 43.

<sup>229</sup> *Ibid* at 48.

<sup>230</sup> *Ibid* at 42.

<sup>231</sup> *Magna*, *supra* note 178 at para 195.



#### 4.1.11 Financial Merits of a Transaction

When deciding whether to exercise its public interest jurisdiction, the business or financial merits of any transaction will have no bearing on the Commission's decision to intervene. In *Magna*, the Commission explicitly stated that "[i]t is not our role as securities regulators to assess the desirability of the Proposed Transaction from a financial or economic standpoint."<sup>232</sup> The Commission affirmed this principle in *VenGrowth*.<sup>233</sup>

#### 4.1.12 Good Faith Action Based on Statement of Regulator

As noted in *Lindzon* and *Mithras*, conduct undertaken in reliance on statements from regulators will generally not be subject to sanction.<sup>234</sup>

### 4.2 Surrounding Facts and Circumstances

While the Commission's jurisdiction under section 127 of the Act is broad and powerful, the scope of its public interest mandate is not unfettered. As was acknowledged in *Canadian Tire*, and has since been reaffirmed in *Sterling*, the Commission's authority to make orders in the public interest must be exercised with caution. In the case of the latter decision, the Commission explicitly held that, when considering the use of its public interest jurisdiction, it must "have regard to all of the facts, all of the policy consideration[s] at play, all of the underlying circumstances of the case, and all of the interests affected by the matter and the remedy sought."<sup>235</sup> In *Cablecasting*, the Commission indicated that the degree of offensive or egregious conduct necessary to invoke its public interest jurisdiction will depend on certain key factors and the surrounding circumstances of each case. In the fact scenarios discussed below, the Commission has chosen to exercise its public interest power.

#### 4.2.1 Artificial Transaction

In circumstances where the evidence indicates an intention of constructing an artificial transaction, or one that appears on its face legal, but in reality, was contrived to circumvent the purpose of securities regulations, the Commission will likely exercise its public interest jurisdiction; that is, substance, not form, will support a finding of artificiality. Where a transaction "may fairly be characterized as artificial,"<sup>236</sup> the Commission has confirmed its authority to make orders in the public interest in *Canadian Tire*,<sup>237</sup> *Financial Models*<sup>238</sup> and *Magna*.<sup>239</sup>

#### 4.2.2 Failure to Disclose Material Information

Where there has been a deliberate failure to disclose obviously material information critical to making an investment decision, the Commission has historically elected to exercise its public interest power. In both *Mithras* and *Biovail*, the Commission stressed the importance of adequate disclosure of basic information to investors and found that, where the capital markets are deprived of such relevant information, it will invoke its public interest authority. In light of the fact that "timely, accurate and efficient disclosure of information" is, pursuant to section 2.1(2)(i) of the Act, one of the primary means of achieving the purpose of the Act, this is not surprising.

---

<sup>232</sup> *Ibid* at para 191.

<sup>233</sup> *VenGrowth*, *supra* note 187 at para 34.

<sup>234</sup> See *Lindzon*, *supra* note 54 at 59C; *Mithras*, *supra* note 98 at 1610.

<sup>235</sup> *Sterling*, *supra* note 156 at para 212 [parentheses added].

<sup>236</sup> *Canadian Tire*, *supra* note 6 at para 150.

<sup>237</sup> *Ibid*.

<sup>238</sup> *Financial Models*, *supra* note 141 at para 50.

<sup>239</sup> *Magna*, *supra* note 178 at para 184.

### 4.2.3 Intended to Circumvent the Intent of the Act

In addition, the Commission has previously indicated that when considering the use of its public interest jurisdiction, it will look to whether the transaction conformed both with the letter *and* spirit of the Act.<sup>240</sup> Where there appears to have been a deliberate attempt to circumvent the intent of securities laws, the Commission will have no qualms to intervene under its public interest jurisdiction as it did in *Canadian Tire* and *Mithras*. Thus, transactions which are intentionally contrived to skirt the purpose of the Act will correspondingly attract sanction under section 127.

### 4.2.4 Exploiting a Loophole

Similarly, in *Financial Models*, the Commission held that it will interfere with transactions that were "purposefully designed to exploit a loophole" in the statutory scheme.<sup>241</sup> Accordingly, transactions that are devised to capitalize on a gap in the regulatory system will not be tolerated by the Commission.<sup>242</sup> It would also appear that a transaction that has the effect of relying on a loophole in the legislation, while being clearly contrary to its underlying policy objectives (and intentionally so), will also be sanctioned.<sup>243</sup>

### 4.2.5 Conduct of Market Participants

Section 2.1(2)(iii) of the Act provides that one of the primary means of achieving the purpose of the Act is for market participants to maintain "high standards of fitness and business conduct to ensure honest and responsible conduct." Accordingly, conduct by market participants that clearly run contrary to the animating principles of the Act are more likely to be subject to sanction.<sup>244</sup>

## 4.3 Justifiable Expectations—the Proposed New Standard

### 4.3.1 Current Standards

In considering the guiding principles set out in 4.1, together with the surrounding factual circumstances noted in 4.2, we can only conclude that the standards commonly articulated as being those used by the Commission to exercise its public interest power have not served to guide the conclusions reached by the Commission in the leading decisions set out above.

#### 4.3.1.1 Staff Standard

We first note the following statement recently made by members of Staff:

In the absence of a technical breach of securities law, the principles that have emerged from this line of cases suggest the following: (1) in cases involving novel transactions "the conduct or transaction must clearly be demonstrated to be abusive of shareholders in particular, and of capital markets in general" and (2) in cases "... where market conduct engages the animating

---

<sup>240</sup> *Mithras*, *supra* note 98 at 1621.

<sup>241</sup> *Financial Models*, *supra* note 141 at para 63.

<sup>242</sup> See also *HERO*, *supra* note 106 ("the absence of particular rules dealing with the conduct of rivals for control should not be taken to mean that there are not equivalent policy concerns regarding that conduct" at para 21).

<sup>243</sup> See e.g. *Donald*, *supra* note 201 at paras 59–60; *Suman*, *supra* note 213 at para 351.

<sup>244</sup> See *Biovail*, *supra* note 11 at para 382; *Donald*, *supra* note 201 at paras 306, 323.

principles of the Act, the Commission does not have to conclude that an abuse has occurred in order to exercise its public interest jurisdiction."<sup>245</sup>

With respect to the first part of this standard, we would note that the use of the abuse standard has clearly not been limited to novel transactions. The sanctioned transaction in each of *Mithras*, *HERO* and *Donald* was not a novel transaction, and yet each was categorized as being abusive in the course of the Commission's decision to exercise its public interest power. Moreover, in *Canfor* and *Financial Models*, the Commission, in take-over bid cases, decided not to exercise its public interest power, as the transactions were not considered to be abusive. We believe that the line of cases being referred to that would suggest that abusive conduct is required for novel transactions starts with *Cablecasting*. As noted in 3.1.1, the Commission in *Cablecasting* used the phrase "clear abuse" when discussing scenarios where there had been a breach of the *OBCA* or the Breach of Statute scenario, and not Novel Scenario circumstances.<sup>246</sup> Moreover, in *Canadian Tire*, which is clearly a case of a Novel Scenario and the decision that introduced the abuse standard, the Commission did not limit the applicability of the abuse standard to novel circumstances. We will discuss the abuse standard in more detail in 4.3.1.3.

With respect to the second part of this standard outlined by members of Staff, as we have stated in 3.11.2, the public interest power simply cannot be exercised if the animating principles of the Act have *not* been engaged. Therefore, this part of the standard is merely a gating issue reflected by the guiding principles summarized in 4.1.1 (Objects and Purposes of the Act). Accordingly, the application of this part of the standard would only allow one to ascertain if the Commission had the ability to exercise its public interest power—not whether it should do so. We would also note that even in *Canadian Tire*, the decision that created the abuse standard, the Commission held that "seeking to avoid the animating principles" under the Act would only lead to intervention by the Commission "in appropriate cases."<sup>247</sup>

The genesis of the animating principles standard looks to be *Patheon*, which appears to rely upon the Lowest Threshold example in *Cablecasting*. In circumstances where "the principle of the new policy ruling that would be required to deal with the transaction [in question] is foreshadowed by principles already enunciated in the Act, the regulations or prior policy statements"<sup>248</sup> (or, in other words, where the conduct engages (or is clearly contrary to) the animating principles of specific provisions in the Act), a lower standard of conduct than that which would be required in Novel Scenario transactions would make it more likely that the Commission will exercise its public interest power. The Lowest Threshold example does not call for a lower standard nor does it identify the standard that would be applicable. It merely puts forward the obvious proposition that certain factual circumstances may, in effect, create a presumption or make it more likely that the public interest power will be exercised.

Simply engaging the animating principles of securities laws should not result in the exercise of the public interest power. As noted in *Biovail*, the Commission must consider "all of the relevant circumstances" and may not, for example, exercise its public interest power merely because an issuer has issued "misleading or untrue statements"<sup>249</sup> (which certainly engages the animating principles under the Act). Even where the conduct in question is the disclosure of untrue press releases, the Commission must consider all the facts, "including the nature and significance of the misleading or untrue statements and the circumstances in which they were made,"<sup>250</sup> before concluding that the exercise of its public interest power is warranted. The fact that a lower

---

<sup>245</sup> Atkinson & Price, *supra* note 11.

<sup>246</sup> *Cablecasting*, *supra* note 2 at 42.

<sup>247</sup> *Canadian Tire*, *supra* note 6 at para 132.

<sup>248</sup> *Cablecasting*, *supra* note 2 at 43.

<sup>249</sup> *Biovail*, *supra* note 11 at para 389.

<sup>250</sup> *Ibid*.

threshold of conduct is required for the exercise of the public interest power does not mean that the standard needs to be different in those circumstances. It merely points to the necessity of having a standard that is flexible enough to be utilized in various factual circumstances.

There can be no doubt that, depending on certain key factors, the nature of the conduct required to bring about the exercise of the public interest power would be an increasing or decreasing gradation of troubling, offensive or abusive conduct. That is why the examples outlined in *Cablecasting* in examining when the public interest power should be exercised are helpful.

In considering the Contrary to Intent examples outlined in *Cablecasting*, if a transaction has been addressed by the Legislature without being made subject to regulation, whether intentionally such as in *Selkirk*, or by omission such as in *Cablecasting*, it is difficult to imagine the nature of the conduct that would be required for the Commission to exercise its public interest power. In such circumstances, the Commission would likely be overstepping its authority. It is therefore not surprising that the public interest power has not yet been exercised in such circumstances. With respect to transactions which would fit under the Novel Scenario umbrella, the Commission's exercise of its public interest power "might seem more appropriate"<sup>251</sup> than in circumstances where the transaction has been addressed by the Legislature without being made subject to regulation. However, the conduct will likely have to be well outside acceptable business conduct or, in the circumstances of *Canadian Tire*, artificial and intentionally designed to circumvent the purpose of a critical contract or commitment made for the benefit of shareholders. In the Lowest Threshold circumstances, where the new policy that would in effect be implemented in response to the impugned conduct is foreshadowed by principles already enunciated in the Act, or where the conduct engages or is clearly contrary to the animating principles of *specific* provisions in the Act, it is more likely that the conduct will attract the exercise of the Commission's public interest power.

The most significant concern with the engaging the animating principles of the Act standard is that the use of a standard that merely identifies when a power can be exercised may lead to the exercise of the power in circumstances where it should not be exercised.<sup>252</sup> This may be of particular concern with respect to disputes regarding matters in which the Commission, historically, had not strayed. For example, at a time of increasing shareholder activism, the Commission may well be asked to intervene in corporate law matters, that are not governed by securities law. We would suggest that, regardless of whether the animating principles of securities laws are engaged, in such circumstances the Commission should be mindful of the statements made in *Cablecasting*, *Lindzon* and *Canadian Tire* to exercise self-restraint.

While the Commission in *Cablecasting*, in considering Breach of Statute circumstances, emphasized that the availability of a remedy for minority shareholders in the courts does not preclude the Commission from granting a shareholder's application for a public interest order when a "clear abuse of investors is demonstrated," the Commission noted that, in such circumstances, it should exercise its public interest power "rarely" and only if: (i) "a significant contravention of another statute can be expeditiously demonstrated"; and (ii) "no lesser remedy suffices" under the Act.<sup>253</sup> In reference to the need to expeditiously demonstrate a significant breach of another statute, the Commission was wary of enforcing other statutes in light of the limitations on the fact-finding process at Commission hearings compared to court hearings. The Commission noted that it would be inappropriate to call upon Staff to deal with Breach of Statute matters unless "there is

---

<sup>251</sup> *Cablecasting*, *supra* note 2 at 43.

<sup>252</sup> Sandra Rubin, "Courts v regulators: The blurred boundaries in securities regulation," *Lexpert* (2014) online: <<http://www.lexpert.ca/magazine/article/courts-v-regulators-the-blurred-boundaries-in-securities-regulation-2694/>>.

<sup>253</sup> *Cablecasting*, *supra* note 2 at 42.

reason to believe that fraud has occurred or that the transaction constitutes a flagrant abuse in some other respect."<sup>254</sup>

*Lindzon* focused on the fact that the Commission was not well-suited to arbitrate private matters under corporate statutes, including allegations of breach of fiduciary duty. *Canadian Tire* also emphasized that the Commission's role was not to determine breaches of corporate statutes, while acknowledging that in some cases there may be overlap between the regulation of the capital markets and corporate law disputes requiring a private remedy.<sup>255</sup>

Where litigants can avail themselves of remedies before the courts for breach of corporate statutory provisions, it is not clear that it is in the public interest for the Commission to intervene (even if asked to do so), unless there is a clear and unambiguous demonstration of a "flagrant abuse" warranting immediate intervention by the Commission in order to protect the capital markets. In order to find a more rational basis for such intervention, it is therefore important to establish a standard that actually provides guidance and assists in truly determining if and when the public interest power should be exercised.

#### 4.3.1.2 Biovail Standard

Second, we turn to the standard put forward in *Patheon*, *Biovail*, *Magna* and *VenGrowth* to the effect that the Commission can intervene on public interest grounds in respect of "conduct that is technically in compliance with securities law requirements but that is inconsistent with the animating principles underlying those requirements *or* is abusive of investors or the capital markets."<sup>256</sup> Unlike the standard set out in 4.3.1.1, this standard makes it clear that the abuse standard is not limited to novel transactions. However, in all other respects, the standards in 4.3.1.1 and 4.3.1.2 are identical and our comments in 4.3.1.1 are equally applicable.

In *Biovail*, the case most identified with the standard in 4.3.1.2, there is commentary as to whether different standards should apply if the conduct in question relates to the animating principles of the Act in connection with disclosure when compared to take-over bid issues. In principle, we do not understand the legal basis for such a distinction.<sup>257</sup> While it may be easier to prove that a sanction is required due to misleading or untrue public disclosure, that does not detract from the fact that section 127 of the Act contemplates one standard. In order to encourage predictability, we believe that only one standard should be followed.

#### 4.3.1.3 Abuse Standard

In bemoaning the demise of the abuse standard, it has been argued that this standard was "meant to represent a high threshold" and "was appropriate and necessary to promote predictability and order."<sup>258</sup> We would suggest, however, that the so-called "abuse" standard that truly originated under *Canadian Tire* is not well-defined, but merely shorthand, and with the passage of time has caused confusion and proved to be unhelpful.

The question that must be asked is what constitutes "abuse" under this standard? What transactions should be sanctioned and therefore labelled as abusive? *Canadian Tire* and other decisions<sup>259</sup> focused on whether the transaction or conduct was artificial and intentionally designed to circumvent the animating principles of securities laws. It was clear even in the early cases that meaning had to be given to such term; that is, the facts of

---

<sup>254</sup> *Ibid.*

<sup>255</sup> *Canadian Tire*, *supra* note 6 at para 163.

<sup>256</sup> *Ibid* at para 184 [emphasis added].

<sup>257</sup> See also *Leon & Carlo*, *supra* note 10 at 1097-98.

<sup>258</sup> *Ibid* at 1091.

<sup>259</sup> *Financial Models*, *supra* note 141 at para 56; *Canfor*, *supra* note 133 at para 41.

the case determined whether the power would be exercised, not the label "abuse." It has also been suggested that abuse can be found where someone seeks to deliberately "exploit a loophole" in securities laws.<sup>260</sup> However, the categories of abusive transactions (or transactions that are contrary to the public interest) certainly cannot be so limited, otherwise an "individual with an imagination sufficiently fertile to invent an unethical scheme which skirts the words"<sup>261</sup> of any such defined categories would be free to act in a manner that would negatively impact the efficiency and fairness of the capital markets.

We would suggest that the early decisions of the Commission were insightful in seeking to frame the Commission's jurisdiction to intervene in the public interest in a more cogent manner. In *Mithras*, the Commission noted the following:

We are not here to punish past conduct; that is the role of the courts ... 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; we are not prescient, after all. And in so doing, we *may* well conclude that a person's past conduct has been so abusive of the capital markets as to warrant our apprehension and intervention, even if no particular breach of the Act has been made out.<sup>262</sup>

The Commission was focused on exercising its public interest power in order to ensure that capital markets were fair and efficient by ensuring that past conduct that was egregious was not repeated. This principle was also recognized by the court in *Asbestos SCC*.<sup>263</sup> Why is this goal important? One can point to the purposes of the Act, but we would suggest the answer can be summarized in a more simple manner. In *Canadian Tire*, the following was noted:

A transaction such as is proposed here is bound to have an effect on public confidence in the integrity of our capital markets and on public confidence in those who are the controllers of our major corporations. If abusive transactions such as the one in issue here ... are allowed to proceed, confidence in our capital markets will inevitably suffer and individuals will be less willing to place funds in the equity markets. That can only have a deleterious effect on our capital markets and, in that sense, it is in the public interest that this Offer be cease-traded...<sup>264</sup>

Ultimately, we believe that the abuse standard was a shorthand for a standard that was "future oriented";<sup>265</sup> focused simply on ensuring that conduct which would impact a reasonable investor's willingness to invest in the capital markets be prevented. In this way, the purposes of the Act can be addressed; such purposes being the protection of investors, enhancing market efficiency and promoting confidence. The question, however, is how do we create a new standard that, on the application of different facts and circumstances, would have predictable results while setting a high threshold for the application of the public interest power? We will discuss this point further in 4.3.2.

---

<sup>260</sup> See *Financial Models*, *supra* note 141 at para 63; Cristian Blidariu & Rene Sorell, "Can the OSC's Public Interest Power Be Used to Expand Insider Trading Liability?," *Canadian Securities Regulatory Monitor* (28 May 2014) online: <[www.securitiesregulationcanada.com/2014/05/can-the-oscs-public-interest-power-be-used-to-expand-insider-trading-liability/](http://www.securitiesregulationcanada.com/2014/05/can-the-oscs-public-interest-power-be-used-to-expand-insider-trading-liability/)> [Blidariu & Sorell].

<sup>261</sup> *Cablecasting*, *supra* note 2 at para 43.

<sup>262</sup> *Mithras*, *supra* note 98 at 1610-11 [emphasis added].

<sup>263</sup> *Asbestos SCC*, *supra* note 8 at para 41.

<sup>264</sup> *Canadian Tire*, *supra* note 6 at para 151 [emphasis added].

<sup>265</sup> Anand, Anita, "Carving the Public Interest Jurisdiction in Securities Regulation: Contributions of Justice Iacobucci" (2007) 57 UTLJ 293 at 293.

### 4.3.2 Justifiable Expectations Standard

#### 4.3.2.1 The Standard

In *Canadian Tire Divisional Court*, the court upheld the exercise of the public interest power by the Commission, noting that the "justifiable expectations" or "reasonable assumptions" of investors or others in the capital markets had not been met.<sup>266</sup> Indeed, the Commission has frequently reaffirmed this stance in a line of subsequent cases, including *HERO*,<sup>267</sup> *Financial Models*,<sup>268</sup> *Patheon*<sup>269</sup> and *Magna*.<sup>270</sup> The question is: What is meant by justifiable expectations?<sup>271</sup>

As suggested in 4.3.1.3, we would submit that in considering each decision in which the public interest power has been exercised, a broad principle arises which focuses primarily on the following question: Would a reasonable investor lose confidence in the capital markets and be less willing to invest if the Commission did not take action to deter a repetition of the conduct in question?<sup>272</sup> Investors may reasonably assume—and *expect*—that the Commission will regulate the capital markets in furtherance of the purposes and in accordance with the principles enumerated in sections 1.1 and 2.1 of the Act, respectively, which at their most basic level, aim to protect investors and instill confidence in the capital markets.<sup>273</sup>

Further, we believe that the Divisional Court's use of the word "justifiable" was intentional. It is not all expectations of a reasonable investor that will be protected under section 127 of the Act. There are limitations to the exercise of the public interest power, including those imposed by (i) the objects and purposes of the Act (see 4.1.1), (ii) the fact that such power may not be exercised to punish (4.1.2 and 4.1.3), (iii) the fact that the power may not be exercised to provide a private remedy (4.1.4), and (iv) the fact that a transactional nexus to Ontario is important in considering whether to exercise the power (4.1.5).

Finally, in determining whether the justifiable expectations of a reasonable investor are being met, we would suggest that the other guiding principles and facts and circumstances noted in 4.1 and 4.2 would prove helpful. In order to ensure that "justifiable expectations" does not become another label like "abuse," guiding principles and a mechanism to apply the standard are critical.

#### 4.3.2.2 Application of Standard

In order to more fully examine and explain the justifiable expectations standard, we will apply it to the facts of three more recent important decisions of the Commission, being *Biovail*, *Donald* and *VenGrowth*.

---

<sup>266</sup> *Canadian Tire Divisional Court*, *supra* note 76 at para 78.

<sup>267</sup> *Supra* note 106 at 3776.

<sup>268</sup> *Supra* note 141 at para 50.

<sup>269</sup> *Supra* note 7 at para 119.

<sup>270</sup> *Supra* note 178 at para 184.

<sup>271</sup> For the purposes of our paper, we have decided to limit the labelling of this standard to "justifiable expectations," as "reasonable assumptions" may be confused with the term "reasonable expectations," which has clear jurisprudential meaning under the oppression remedy in corporate law. See e.g. *BCE Inc, Re* 2008 SCC 69 at paras 61–62.

<sup>272</sup> See *Canadian Tire*, *supra* note 6 at para 151.

<sup>273</sup> See Borden Ladner Gervais LLP, *Securities Law and Practice*, 3rd ed (Toronto: Carswell, 2013) (loose-leaf revision 2014-5) vol 1 at INT-9.1 ("[t]he various examples of investor protection are designed to serve a common purpose — to instil adequate confidence in members of the public to encourage their participation in the capital markets of Ontario"); *Five Year Review of Securities Legislation in Ontario — Request for Comments*, OSC Notice, (2000) 23 OSCB 3034 ("[s]ecurities regulation that is firm, fair and effective instills investor confidence which is fundamental to economic growth and job creation" at Appendix 1 – Advisory committee appointed to review securities law, quoting Finance Minister Ernie Eves).

In *Biovail*, the founder and principal officer of a well-known Canadian public company was directly involved in, made decisions related to, and had final approval over public disclosures that were untrue or misleading. Biovail disclosed that the Accident contributed significantly to an unfavourable variance in previously issued guidance related to revenue and income for the third quarter, with the revenue impact being in the range of \$10 to \$20 million. The Commission found that the Accident had no impact on third quarter results, but rather impacted fourth quarter results. The revenue impact to the fourth quarter results was only \$5 million. Biovail made misleading or untrue statements in four press releases relating to the Accident. The Commission found that Biovail and Melnyk knew or should have known that such statements made in the press releases were misleading or untrue. The Commission also held that Melnyk did not exercise due care and diligence. In fact, there was evidence that Melnyk had a role in requiring disclosure of some of the impugned statements.

In applying the facts to the justifiable expectations standard, we first consider the expectations of a reasonable investor. We would expect that the repetition of the conduct engaged in by Melnyk, if left unchecked, would have a significant negative impact on the confidence of a reasonable investor and would cause a reasonable investor to be less willing to invest in the Ontario capital markets. The capital markets cannot function efficiently if senior officers of public companies are not deterred from making repeated public disclosures that are both important and false.

We next consider whether the expectation is justifiable. In this regard, we note that Section 2.1 of the Act provides that the primary means for achieving the purposes of the Act include requirements for accurate disclosure and the maintenance of high standards of business conduct to ensure honest and responsible conduct by directors and officers of public companies. In addition, there are numerous provisions in the Act that make it clear that the disclosure of misleading or untrue information is contrary to the key principles underlying the Act. We would therefore conclude that the expectation is justifiable and the exercise of the public interest power in *Biovail* was required under the justifiable expectations standard. Accordingly, although we do not agree with key aspects of the legal reasoning in *Biovail*, we concur with the conclusion reached by the Commission.

Next we turn to *Donald*. In *Donald*, an officer of a large iconic Canadian public company obtained information from a fellow officer in respect of a possible acquisition by the company and in respect of the proposed acquisition target. Donald knew that this information was confidential, material and was not publicly disclosed, and yet he traded on this information the morning following receipt of the information. We would expect that the repetition of the conduct engaged in by Donald, if left unchecked, would have a significant negative impact on the confidence of a reasonable investor and would cause a reasonable investor to be less willing to invest in the Ontario capital markets. The capital markets simply cannot function efficiently if officers of public companies are not deterred from knowingly trading on confidential, material and undisclosed information.

With respect to whether the expectation is justifiable, we would repeat the comments made above in the analysis relating to *Biovail* with respect to Section 2.1 of the Act. We would also note that the Act specifically contemplates that the trading of undisclosed material information runs counter to its fundamental principles.

It has been argued, however, that in light of the fact that the insider trading provisions of the Act are detailed and Donald's actions were not contrary to such provisions, it was "foreign to the rule of law" to sanction him.<sup>274</sup> "That the Legislature has amended the insider trading provision since Donald only underscores" that the "bounds" of the insider trading offence is for the Legislature to determine.<sup>275</sup> Although we have significant sympathy for this argument, we would note that section 127 of the Act is clear and it should not be a surprise to anyone that the public interest power can be exercised absent a breach of the Act. In fact, the public interest

---

<sup>274</sup> Campbell et al, *supra* note 10 at 171.

<sup>275</sup> *Ibid* at 172.



power is more likely to be exercised the more a legislative provision required to deal with an impugned transaction or conduct is foreshadowed by clearly set out principles and provisions in the Act. The Commission so held in 1978 in *Cablecasting*. It is also important to note that the sanctions that can be meted out under section 127 of the Act, absent a breach of the Act, are limited compared to the penalties that are available for a breach of the Act. We believe this addresses some of the concerns relating to the "rule of law." In any event, the Legislature has granted significant powers to the Commission under section 127 of the Act and it would appear justifiable that such powers were exercised in *Donald*.

The reader may well ask: if our "new" standard would lead to the same conclusions as reached by the Commission in *Biovail* and *Donald*, then what purpose does it serve? We would submit that transparency, clarity and consistent reasoning are goals in and of themselves, and we are hopeful that the justifiable expectations standard proves helpful in that regard. Nevertheless, we believe that the application of the facts in *VenGrowth* to the justifiable expectations standard may provide the reader with more insight.

In *VenGrowth*, GrowthWorks obtained, through solicited irrevocable Support Agreements, the right to vote the Subject Shares (being the shares subject to the Support Agreements) at any meeting to approve GrowthWorks' hostile merger Proposal and to vote against competing transactions. The Support Agreements would be suspended if there was a "superior proposal." GrowthWorks submitted at the hearing that at the time a shareholders' meeting was called to approve its Proposal, a circular and form of proxy would be provided to VenGrowth shareholders that complied with applicable law. No shareholders of VenGrowth had made any complaint regarding the Support Agreements or the solicitation thereof. GrowthWorks had received 26 revocation requests and had offered to send a letter to each party to a Support Agreement offering to allow for the revocation of the powers granted to GrowthWorks.

On the facts as found by the Commission, there were no complaints made by VenGrowth shareholders; shareholders who were parties to Support Agreements would be offered the right to revoke the agreements; and, in connection with the meeting to be called to approve the Proposal, revocable proxies would be solicited. In these circumstances, it is not clear what expectations of reasonable investors were being defeated.

However, in assuming that expectations required the exercise of the public interest power, we will examine whether the exercise of such power would have been justified.

The Commission held that the Support Agreements were not solicited contrary to section 86(1) of the Act, due to the fact that the Support Agreements were not proxies. Nevertheless, the Commission held that the solicitation was contrary to the public interest, because the Support Agreements were by their terms irrevocable. Under the Act, proxies were not required to be revocable; however under the *BCA* they could not be irrevocable. The Commission noted that the withdrawal right of shareholders under take-over bid rules was, in its view, similar to the shareholders' right under the *BCA* to revoke proxies if shareholders desired to change their decision about how to vote in respect of a proposed merger or acquisition transaction. The Commission viewed the right of withdrawal or revocation as being fundamental and required by "the principles underlying the take-over bid and proxy solicitation provisions of the Act."<sup>276</sup>

We will first consider the argument made by the Commission equating revocation rights under a proxy granted in connection with a shareholder-approved merger with withdrawal rights under a take-over bid. In Canada, the vast majority of acquisitions of public companies are effected by way of plans of arrangement or mergers that require the approval of security holders. Such plans of arrangement and mergers are specifically excluded from

---

<sup>276</sup> *VenGrowth*, *supra* note 187 at para 59.

the definition of take-over bid due to the protection afforded to such transactions by the requirement for shareholder approval.<sup>277</sup> In *VenGrowth*, the Proposal was to be a merger completed by way of an asset purchase transaction to be approved by VenGrowth shareholders pursuant to which the net assets of VenGrowth would be acquired. It is interesting that the Commission equated rights not granted under the Act to shareholder-approved merger transactions, to rights granted under take-over bids. There are numerous important protections granted under the Act to shareholders of companies subject to take-over bids that are not granted to shareholders of target companies subject to shareholder-approved mergers, including (i) a financing condition cannot generally accompany a take-over bid; and (ii) restrictions on purchases of shares prior to making a take-over bid. It is therefore not clear why the lack of revocation rights is more important than the rights noted above. It is also difficult to understand the basis for equating rights applicable to take-over bid transactions to transactions that have been specifically excluded under the Act from the definition of take-over bid and the rules under Part XX of the Act.

Further, the revocation of proxies was not a requirement under the Act, only under the *CBCA*. The policy basis for intervening thus resided under another statute. In such circumstances, we would have thought that the comments in *Cablecasting* and *Lindzon* would be applicable. The Commission in both cases emphasized the need for self-imposed restraint when considering breaches of other statutes, except in cases of flagrant abuse amounting to fraud or similar conduct; and we would apply similar restraint in circumstances where the policy basis for exercising the public interest power is under another statute. This is particularly true where it is not clear why VenGrowth urgently sought relief from the Commission and not a court. In this regard, the initial relief sought by VenGrowth was, among other things, an order preventing GrowthWorks from voting the Subject Shares at any VenGrowth shareholders' meeting, which relief the Commission had no power to grant.<sup>278</sup>

In summary, notwithstanding that the animating principles under the Act might have been engaged in *VenGrowth*, we do not believe that the public interest power should have been exercised – at least not under the justifiable expectations standard.

## 5. CONCLUSION

There has been significant debate recently as to whether the public interest power should be exercised, absent a breach of securities laws, only in circumstances where the conduct or transaction is clearly "abusive" of shareholders and the capital markets, or whether it may also be exercised "where the conduct engages the animating principles of the Act."<sup>279</sup> We would suggest that the jurisprudence reviewed above supports neither position.

In reviewing prior jurisprudence, it would appear to us that one standard should be used to determine if the public interest power should be exercised. In *Canadian Tire Divisional Court*, the court noted that the conduct in question confounded the "justifiable expectations" of shareholders and the capital markets in general. We would suggest that this standard may be more appropriate and would allow the Commission and practitioners to move away from labels, such as "abusive," which are difficult to define and may be simply unhelpful. Ultimately, we believe that application of an appropriate standard starts with a fairly straightforward question: Would a reasonable investor lose confidence in the capital markets and be less willing to invest if the Commission did not take action to deter a repetition of the conduct in question? If the answer is clearly yes, then the Commission should exercise its public interest power, provided there are no overriding policy concerns.

---

<sup>277</sup> Section 89(1) of the Act defines a take-over bid and includes that a take-over bid "does not include an offer to acquire if the offer to acquire is a step in an amalgamation, merger, reorganization or arrangement that requires approval in a vote of security holders."

<sup>278</sup> *VenGrowth*, *supra* note 187 at para 6.

<sup>279</sup> See *Leon & Carlo*, *supra* note 10; See also *Atkinson & Price*, *supra* note 11.

In considering whether a transaction or conduct defeats the justifiable expectations of shareholders and the capital markets in general, prior jurisprudence has provided us with the following guidelines:

1. As a threshold issue, the conduct or transaction must contravene or be inconsistent with the policy and animating principles underlying securities laws and must have an impact on the capital markets.
2. The more the conduct or transaction is not specifically regulated under the securities laws, the more outrageous or egregious (or outside acceptable business conduct) the conduct or transaction must be. In fact, if the conduct or transaction is regulated under a statute not assigned to the Commission, the term "flagrant" may be more appropriate.
3. If the conduct or transaction has been addressed by the Legislature without being made subject to regulation, then the exercise of the public interest power is highly unlikely.
4. The following conduct or transactions are more likely to be sanctioned: (i) artificial transactions; (ii) transactions structured intentionally to "end run the statutory scheme or exploit a loophole"<sup>280</sup>; and (iii) conduct or transactions which would otherwise be illegal, but are not caught by provisions in the securities regulations based on a technical matter, and are clearly (and intentionally enacted) contrary to the underlying principles of the statutory provision in question.
5. Conduct or transactions which run contrary to the "fundamental principles" under the Act, particularly those set out in section 2.1(2) of the Act including the "requirements for timely, accurate and efficient disclosure of information" and "requirements for the maintenance of high standards of fitness and business conduct to ensure honest and responsible conduct by market participants,"<sup>281</sup> are more likely to be subject to the exercise of the public interest power.

While the justifiable expectations standard does not allow for simple answers, we believe it sets a relatively high threshold and affords market participants more transparency and predictability regarding the exercise of the public interest power by the Commission than the standards currently being used.

Finally, our hope is that this paper serves as a catalyst for an ongoing debate regarding the standards and principles which should be used to determine when the public interest power will be exercised. The public interest power is a powerful, necessary and important tool that has been given to the Commission. In light of the fact that "[e]ffective and responsive securities regulation requires timely, open and efficient administration and enforcement of"<sup>282</sup> the Act, it is incumbent on the Commission to exercise the public interest power in a manner that is transparent and cogent, where the results are predictable and easily understood by securities law practitioners and market participants alike.

---

<sup>280</sup> Blidariu & Sorell, *supra* note 260.

<sup>281</sup> *Securities Act*, RSO 1990, c S 5, s 2.1(2).

<sup>282</sup> *Ibid*, s 2.1(3).