

ALBERTA SECURITIES COMMISSION

DECISION

Citation: Somji, Re, 2012 ABASC 444

Date: 20121019

Nizar Jaffer Somji

Panel:

Stephen Murison
Webster Macdonald, QC
Roderick McKay, FCA

Appearing:

Deanna Steblyk and Andrew Wilson
for Commission Staff

Joseph Groia and Winston Tuttle
for the Respondent

Hearing:

13-16 August 2012

Decision:

19 October 2012

I. INTRODUCTION

[1] This case involves allegations of insider tipping levelled by Staff (**Staff**) of the Alberta Securities Commission (the **Commission**) against Nizar Jaffer Somji (**Somji**). Staff's 16 March 2012 notice of hearing (the **Notice of Hearing**) asserted that Somji informed his sister Sholina Somji-Healing (**Somji-Healing**) or his brother-in-law Kenneth Barry Healing (**Healing**) of certain as-yet non-public material information relating to Matrikon Inc. (**Matrikon**) on two occasions, contrary to section 147(3) of the *Securities Act*, R.S.A. 2000, c. S-4 (the **Act**) and to the public interest.

[2] The Notice of Hearing also alleged that Somji-Healing and Healing (together, the **Healings**) acted improperly and illegally in connection with the allegedly tipped information. However, before the matter came to a hearing, the allegations against Somji-Healing were withdrawn, and the allegations against Healing were resolved by a settlement agreement with Staff (the **Healing Settlement Agreement**).

[3] A hearing into the merits of the allegations against Somji was held in August 2012. We received documentary evidence, including a statement of facts agreed to by Staff and Somji, heard the testimony of Somji and three others, and received submissions from counsel for Staff and for Somji.

II. BACKGROUND

A. Matrikon

[4] Matrikon was an Alberta corporation in the business of developing "performance monitoring" systems for customers in various industrial sectors. It was a reporting issuer under the Act, with shares listed on the Toronto Stock Exchange.

B. Somji

[5] Somji, an Edmonton resident, was at all relevant times one of Matrikon's directors and its president and chief executive officer.

C. Developments at Matrikon

Business Activity

[6] Somji founded the Matrikon business in 1988. He guided the company to the point that, by 2010, it had a staff of almost 600 and did business on several continents. Somji stepped down from his leading role with the company in December 2005 but returned as president and chief executive officer in June 2007. There was some evidence of an expectation on the part of some observers that he might build Matrikon into a candidate for sale to an acquirer.

[7] The company was negatively affected by the aftermath of the 2008 economic downturn, experiencing a drop in earnings and suspending its dividend. Despite this, Matrikon in 2009 successfully pursued some sizeable business prospects, including three contract announcements in the summer of 2009 totalling over US\$15 million. The contract announcements attracted the attention of market analysts: published commentaries in August and September 2009 included remarks such as "Recent Deal Flow Highlights Improvement In Pipeline Of Opportunities"; and at least two analysts raised their estimates for Matrikon's share price.

[8] On 9 November 2009 Matrikon announced, by news release, improved fourth-quarter financial results and a reinstated quarterly dividend. Somji told analysts in an 18 November conference call that "we anticipate continued improvement . . . in fiscal 2010". Analyst publications that month included favourable comments such as Matrikon being "set up for a strong F2010", "Things Are Looking Up" and "Overall, we are pleased with the progress the company has made . . . and believe the next few quarters should see continued improvements".

[9] On 14 December 2009, Matrikon announced that a subsidiary in which it held a 49% interest had been awarded a US\$15.7 million oilfield contract, success in which could lead to a much larger arrangement involving "several thousand additional wells". Somji testified this was "the most significant contract in the history of the company". Analysts' published commentaries the next day were notably positive: "yet another blockbuster contract" and "Matrikon is on a roll"; "Matrikon is on track for a successful recovery in FY10"; "successful completion of the [US\$15.7 million] pilot [project] would be a multi-million [sic] opportunity for Matrikon"; and ". . . this win is positive". Some analysts raised their target prices for Matrikon shares (one to as high as \$4.00) and made or maintained "buy" recommendations.

[10] Meanwhile, Matrikon was pursuing an opportunity with the Norwegian company Statoil, in competition with some large international information-technology companies. On 11 January 2010 Matrikon announced that it had been selected for a project with an estimated value of €4.2 million. Somji testified that the selection later led to a firm contract.

[11] 11 January 2010 was also the date of Matrikon's annual shareholders' meeting. In a news release that afternoon Matrikon announced positive financial results for the quarter ended on 30 November 2009. At the annual meeting Somji commented on the quarterly results and gave an upbeat depiction of "recent project wins" and "solid" net income.

Potential Business Combinations

[12] Matrikon was also the subject of third-party interest culminating in its eventual sale:

- In May 2008 Matrikon was approached by a potential acquirer. Matrikon's board of directors established a special committee and engaged a financial adviser. However, the resulting proposals were considered inadequate and discussions ended in November 2008.
- In February 2009 Matrikon approached Honeywell International Inc. (**Honeywell**) to discuss some sort of arrangement, but the discussions were "suspended" in September 2009.
- In late October 2009 Matrikon received another acquisition approach. Matrikon's special committee was reconstituted and its financial adviser's engagement was renewed. Discussions ensued, and other parties were contacted to determine their interest in a transaction.

- In March 2010 Honeywell expressed interest in acquiring Matrikon. By the first week of April 2010, Matrikon's special committee and board of directors concluded that the Honeywell approach was superior. On 9 April 2010 Matrikon accepted a non-binding proposal under which Honeywell would pay \$4.50 per share to acquire Matrikon. Honeywell was granted a 30-day period of exclusivity for due diligence, extended on 7 May 2010 for a further week.
- On 12 May 2010, with outstanding issues resolved, Matrikon's special committee and board of directors recommended approval of the acquisition by Honeywell, and a definitive agreement was executed. Matrikon announced the Honeywell acquisition by news release issued before market opening on 13 May 2010.

D. The Healings and Their Trading in Matrikon Shares

General Trading Approach and Financial Situation

[13] Healing directed all securities trading in various individual and joint trading accounts of himself and his wife, Somji-Healing; she had little interest in such matters. Several of the accounts were full-service accounts with Red Deer broker Jim Beach (**Beach**). The Healings also had two direct trading accounts with a different institution.

[14] Beach, who communicated frequently and cordially with Healing, testified that the Healings' trading through their accounts with him was generally quite conservative, although Healing was "more adventuresome" or "more aggressive" than his wife. Beach never considered any instruction from Healing to have been suspicious or improper, and at the time of the hearing Beach continued to hold Healing in good regard.

[15] Although the Healings' investments tended to be with larger issuers (Canadian and foreign), Beach understood that the Healings (like Beach himself, he having been Somji's broker before the latter moved to Edmonton) were interested in, and invested in, Matrikon by reason of their association with its founder, Somji.

[16] The Healings had a history of repeated buying and selling of Matrikon shares, more than once accumulating a sizeable position and then liquidating it, in part or in whole, as and when (as Beach put it) there was opportunity to make 50 cents or so profit per share.

[17] In the latter part of 2009 Healing was anticipating retirement with a financial departure package from his employer. The evidence is that the Healings had, at the time, roughly \$3 million in real estate and investments. Canadian-dollar and US-dollar "margin" accounts with Beach also enabled them, in effect, to borrow almost \$250 000 to fund securities purchases. The Healings had made only limited use of margin to that point, typically to cover occasional timing mismatches of available cash.

December 2009 to January 2010

[18] Staff's investigator agreed with counsel for Somji that the Healings owned 29 200 Matrikon shares as of mid-December 2009.

[19] Staff alleged that on or before 21 December 2009 Somji informed Healing or Somji-Healing of material undisclosed information relating to Matrikon. Specifically, Staff asserted that Somji told them about two developments not publicly disclosed until 11 January 2010: the Statoil "contract" and Matrikon's positive quarterly financial results (together, the **First Alleged Tip**). Staff posited that this "tip" occurred at a time when Somji's and his sister's families were both present, and in social contact, in Arizona. This, in Staff's submission, both led to and was evidenced by the Healings spending over \$90 000 to more than double their holding of Matrikon shares in a series of purchases (the **First Impugned Purchases**) from 21 December 2009 to 6 January 2010 (as summarized by the Staff investigator and not disputed by counsel for Somji):

<u>Purchase Order Date</u>	<u>Matrikon Shares Bought</u>	<u>Purchase Price Per Share</u>
21 December 2009	100	\$2.78
22 December 2009	1 900	\$2.869
22 December 2009	6 700	\$2.824
23 December 2009	2 000	\$2.81
29 December 2009	2 100	\$2.813
30 December 2009	900	\$2.85
31 December 2009	3 000	\$2.84
4 January 2010	200	\$2.83
6 January 2010	12 200	\$2.838
6 January 2010	1 800	\$2.80
6 January 2010	<u>1 800</u>	\$2.80
	<u>32 700</u>	

[20] Soon after these purchases, the Matrikon share price rose significantly. Staff's summary indicates that the Healings profitably sold a total of 59 900 shares – the bulk of their holding – from 12 January to 3 February 2010 at prices ranging from \$3.492 to \$3.876. Staff alleged that the Healings thereby profited to the extent of \$28 662 on the shares they bought from 21 December 2009 to 6 January 2010.

[21] Somji denied making the First Alleged Tip. It was his position that the First Impugned Purchases and the Healings' subsequent sale of most of their Matrikon holding were not great departures from their past trading practice, and were reasonably explicable by something other than an improper insider tip from Somji.

May 2010

[22] The second block of Matrikon share purchases by the Healings that Staff alleged were associated with misconduct by Somji occurred on 10 and 11 May 2010 (the **Second Impugned Purchases**). Staff alleged that these followed a tip given by Somji about the Honeywell deal, to one or other of the Healings, by telephone on 9 May 2010.

[23] Telephone records in evidence confirm a nearly 10-minute call on the evening of Sunday 9 May 2010 between a mobile telephone number of Somji and the Healings' telephone number. Somji did not dispute that there was such a call, in which he spoke with his sister. His testimony was to the effect that the impugned conversation (the **9 May Conversation**) probably took place while he was driving his car with his family. There was a suggestion that the conversation,

which took place on Mother's Day shortly after a separate telephone conversation between Somji's sister and their mother, had something to do with their mother. Somji denied telling Healing or Somji-Healing anything about the proposed Matrikon sale, either during the 9 May Conversation or at any time during the course of the negotiations with Honeywell.

[24] Before the 9 May Conversation, the Healings' Matrikon holdings had apparently diminished to a total of 6000 shares. Information compiled by the Staff investigator showed that, on 7 May 2010 (a Friday), Healing placed an order for 1000 shares of Matrikon at \$3.60 through a direct online investment account, but that order remained unfilled over the weekend. After the 9 May Conversation, the Healings bought a total of 62 700 Matrikon shares on 10 and 11 May 2010 – the Second Impugned Purchases:

<u>Purchase Order Date</u>	<u>Matrikon Shares Bought</u>	<u>Purchase Price Per Share</u>
10 May 2010	100	\$3.84
10 May 2010	2 600	\$3.85
10 May 2010	15 500	\$3.90
10 May 2010	4 700	\$3.90
10 May 2010	100	\$3.89
10 May 2010	3 900	\$3.90
10 May 2010	22 500	\$3.903
11 May 2010	1 300	\$3.92
11 May 2010	<u>12 000</u>	\$3.929
	<u>62 700</u>	

[25] The table above understates the intensity of the buying activity. The evidence shows numerous order placements and order changes by Healing, in multiple accounts, effected through his broker Beach and directly through his direct online investment account. Thus, for example, on the Sunday evening – within 15 minutes after the end of the 9 May Conversation – Healing used a direct online account to place a buy order for 2500 Matrikon shares at \$3.66, and increased his still-outstanding 7 May buy order from 1000 to 2500 shares.

[26] The next morning – before 08:00 (Alberta time) on Monday 10 May 2010 – Healing again changed his 7 May buy order to increase the price from \$3.60 to \$3.90. At about the same time, at 07:47, he emailed an instruction to Beach to buy Matrikon shares "under \$4", using all of the available cash in two of the Healings' accounts and all of the available margin in their Canadian-dollar margin account. The orders through Beach garnered the Healings a total of 28 200 shares. By 08:19 that morning, Healing had also used a direct online account to place four more buy orders for a total of 17 500 shares, which were filled almost immediately at \$3.90 and \$3.91. On 11 May he again placed several buy orders in this account, and made several changes to those orders (increasing the price).

[27] Following the 13 May 2010 public announcement of the Honeywell acquisition, the market price of Matrikon shares rose to approximately the \$4.50 acquisition price, where it then remained. The Healings sold the bulk of their Matrikon shares by 20 May 2010.

III. THE LAW

A. Prohibited Conduct

[28] The Act prohibits a person "in a special relationship with a reporting issuer" from engaging in certain conduct while in possession of a material fact or material change with respect to the reporting issuer before such fact or change has been generally disclosed. Thus, section 147(3) (the express focus of the allegations here) prohibits someone in such a special relationship from informing another person of an undisclosed material fact or material change about the reporting issuer other than when necessary in the course of business.

[29] The Act defines material fact and material change as a fact or change (respectively) "that would reasonably be expected to have a significant effect on the market price or value of" the relevant issuer's securities (sections 1(ff) and (gg)).

[30] "Special relationships" include the position of director or officer of a reporting issuer (section 9 of the Act).

B. Evidentiary Matters and Standard of Proof

[31] It is well settled that allegations of misconduct levelled by Staff in a Commission enforcement proceeding such as this are provable on the balance of probabilities, on the basis of clear and cogent evidence – see, for example, *Re Keith*, 2012 ABASC 382 at paras. 43-45; *Re Kusumoto*, 2007 ABASC 40 at para. 72; and *F.H. v. McDougall*, 2008 SCC 53 at para. 46. A Commission hearing panel is to receive all evidence tendered that is relevant (subject to exclusions on grounds of privilege not asserted in this case), then assesses the probative value and weight to be assigned to such evidence.

[32] That evidence may be circumstantial, as distinct from direct. That is, a hearing panel may deduce, or infer, misconduct from circumstances even without direct evidence such as a respondent's confession or third-party witnesses' identification of a respondent as a wrongdoer. Indeed, evidence of illegal insider trading or tipping will typically, of necessity, be primarily or entirely circumstantial; as stated in *Keith* at para. 47, "Nothing precludes even exclusive reliance on circumstantial evidence". In *Re Suman* (2012), 35 O.S.C.B. 2809, the Ontario Securities Commission discussed inferences and speculation, particularly when evidence is circumstantial, then concluded (at para. 295):

Accordingly, it is clear that we may properly make inferences that are reasonably and logically drawn from the facts established by the evidence. Staff and the Respondents agree that is the applicable legal test. Any such inferences must be based on clear, convincing and cogent evidence. The question is whether the inferences that [s]taff invites us to draw from the evidence in this matter are reasonable and supportable inferences or impermissible speculation.

C. Indicia of the Misconduct Alleged

[33] Counsel for Somji did not dispute the important role that circumstantial evidence might play in a case such as this. Rather, he essentially argued that Staff were relying wholly on circumstantial evidence, and doing so in the face of other, more compelling evidence – including Somji's denial – and thus that the circumstantial evidence fell far short of proving Staff's case. We discuss this crucial aspect of the case below.

[34] Here, however, we comment on a particular aspect of counsel's associated arguments. Somji's counsel pointed to *Suman* as having established factors (among them, for example, that the impugned activity involved extremely risky and highly profitable trading) to be demonstrated to prove the sort of impropriety alleged here. *Suman* was indeed a clear case of egregious misuse of material undisclosed information. However, to the extent that counsel may have been implying that proof of illegal insider trading requires the *Suman* factors all to be present, or to be as pronounced as they were there, we cannot agree. Conversely, we cannot conclude that the presence of one or more of those factors in a given case necessarily demands a finding of misconduct. *Suman* is illustrative of some things that might be considered in assessing whether misconduct occurred; beyond that, it was of limited assistance to our task in this proceeding.

IV. ANALYSIS

A. Matters to be Proved

[35] To prove their case, Staff must establish the following:

- Somji was in a special relationship with Matrikon at all relevant times. This was the case and was not disputed.
- The Statoil contract and Matrikon's 30 November 2009 quarterly financial results constituted material facts or material changes not generally disclosed until 11 January 2010.
- Somji conveyed such information to Healing or Somji-Healing before it was generally disclosed.
- The Honeywell deal was a material fact or material change not generally disclosed until 13 May 2010. This was not in dispute, and we agree.
- Somji informed Healing or Somji-Healing of the Honeywell deal before it was generally disclosed.

B. Settlement Admissions

[36] As noted, Staff's allegations against Healing were resolved by the Healing Settlement Agreement, a copy of which was in evidence.

[37] This document was, in parts, rather cryptic, and we had not the benefit of explanation or elaboration from Healing. Although the Notice of Hearing asserted that the Healings had breached the Act and acted contrary to the public interest in respect of both their First and Second Impugned Purchases, the Healing Settlement Agreement was silent as to the former and made no mention of any associated tip of insider information by Somji. In respect of the Second Impugned Purchases, the Healing Settlement Agreement stated:

10. On May 9, 2010, a Sunday, Somji had telephone discussions with Somji-Healing, and Healing overheard some of the discussions.
11. Beginning moments after and as a result of this telephone discussion, Healing placed orders to buy Matrikon shares. Between May 9, 2010 and May 11, 2010, Healing placed and amended various buy orders and purchased 62,700 Matrikon shares.
- ...
14. ... Healing admits:

- a. that he failed to comply with Alberta securities laws; and
- b. that his actions were contrary to the public interest.

[38] As counsel for Somji noted, "Alberta securities laws" include not only provisions of the Act, but also rules made under the Act and a variety of orders and decisions. Thus, precisely what it was that Healing "failed to comply with" is unclear – as is whether this last-quoted phrase was meant as a synonym for "breached" or "contravened", or something different.

[39] The most we can glean from the Healing Settlement Agreement is that something said in, or heard or interpreted from, the 9 May Conversation between Somji and his sister prompted Healing almost immediately to start making the Second Impugned Purchases, and that in so doing Healing acted improperly and in some way illegally.

C. Somji's Testimony

[40] Somji's testimony included explicit denials of having tipped the Healings with any of the undisclosed information alleged by Staff before its general disclosure in Matrikon news releases.

[41] Other evidence (including testimony of a fellow former Matrikon director, and of Beach) persuades us that Matrikon, with Somji's support, adhered to high standards of corporate governance and that Somji himself was well aware, both as a matter of general principle and quite specifically, of the care with which a person in his position at Matrikon had to handle not-yet-public material company-related information. We conclude that it was his practice to conduct himself with care in this area.

[42] We found Somji's testimony to be generally forthright, and his specific denials credible. In short, we believed him.

D. Investigative Interviews of the Healings

[43] In their sworn investigative interviews, both Healing and Somji-Healing denied receiving the First Alleged Tip from Somji before the public disclosure on 11 January 2010, and information about the Honeywell deal before it was publicly disclosed on 13 May 2010.

[44] The transcripts of these investigative interviews were relevant, and they were in evidence. Because the Healings did not testify in the hearing, there was no opportunity there to question or cross-examine them on the issues or their interview statements. As such, Somji's counsel characterized the denials in their interview statements as the only evidence as to Somji's alleged tipping from the alleged tip-recipients' perspective. Be that as it may, we do not consider that such evidence must therefore be accepted as wholly uncontradicted. We are not precluded from finding the Healings' interview statements to have been inaccurate merely because we did not hear directly from them. Healing's interview predated the Healing Settlement Agreement, in which he admitted that a telephone conversation – which other evidence tells us was the 9 May Conversation – prompted Healing to buy shares, and that those purchases and subsequent sales constituted some sort of misconduct on Healing's part. However, Healing did not admit to possessing or trading with undisclosed material information of the Honeywell deal. Further, as

already noted, the Healing Settlement Agreement did not refer to any of the circumstances surrounding the First Impugned Purchases.

[45] Given the limited conclusions we can draw from the Healing Settlement Agreement itself, and given Somji's express, clear denial of having tipped the Healings with the material Matrikon-related information alleged, Staff's case turns on the circumstantial evidence. It is that, and the inferences we were urged to draw or avoid, that we now consider.

E. December 2009 to January 2010

[46] We accept that the Healings', and Somji's, concurrent stays in Arizona in December 2009 afforded an opportunity during which the First Alleged Tip could have been made. The evidence is that communication between Somji and his sister was not unusual (although it was less common between Somji and Healing, whose relationship seems not to have been particularly close). As relatives occasionally in contact, whether in the same city or not, the opportunity for tipping was always there. Therefore, Somji's physical proximity to the Healings in Arizona at the time tells us very little. We note that the mere fact of direct interaction among them in December 2009 might have triggered in the Healings a revived and perfectly innocent interest in Matrikon.

[47] We turn now to the materiality of the information allegedly tipped in December 2009.

[48] Information as to the materiality of the Statoil selection (which did not turn into a firm contract for some time) and the quarterly financial results may have been material – or it might have operated more as confirmation of existing market and investor expectations than as something reasonably likely, alone, to significantly affect the Matrikon share price. In the event, it is unnecessary for us to determine whether this information was material, because the evidence falls short of persuading us, on the balance of probabilities, that Somji communicated it to either of the Healings before it was generally disclosed.

[49] First, we do not consider the First Impugned Purchases (with or without the Healings' subsequent sale of most of their Matrikon holding) to represent a dramatic departure from their past practice, which had seen them amass and dispose of sizeable Matrikon holdings at a profit before. Staff suggested that the purchase was inconsistent with the Healings' retirement-investment plan at the time, but the evidence falls short of demonstrating this (or, indeed, that such a plan had crystallized). In any event, we think there was enough public information about Matrikon and its continuing positive news since the summer of 2009 reasonably to account for the First Impugned Purchases.

[50] Second, we believed Somji's credible denial of what Staff alleged. This was also consistent with the Healings' earlier denials in their investigative interviews (the latter not contradicted by the Healing Settlement Agreement, silent as it was on the First Impugned Purchases).

[51] In short, the circumstances of the First Impugned Purchases do not strike us as so suspicious as to demand, or warrant, an inference of impropriety, whereas the evidence as a whole supports an innocent explanation.

[52] We are, therefore, not persuaded on the balance of probabilities that the Healings' 21 December 2009 to 6 January 2010 purchases of Matrikon shares were prompted by a tip from Somji of undisclosed material information relating to either, or both, Matrikon's selection by Statoil or Matrikon's quarterly financial results. It follows, and we find, that the allegation of an associated breach by Somji of section 147(3) of the Act is not proved.

[53] Somji was also alleged to have acted contrary to the public interest. As discussed below in connection with the May 2010 period, Staff argued that such an allegation could (and should) be sustained even were we unpersuaded that Somji breached the Act. Although that position seemed to relate more to the later period, we also considered it in respect of this earlier period. It suffices to note that the evidence does not persuade us that Somji communicated the information particularized in the Notice of Hearing, or in any other way acted improperly in December 2009. The allegation that Somji acted contrary to the public interest at the time is, therefore, not proved.

F. May 2010

[54] Staff's case relating to May 2010 is that Somji tipped the Healings, in the 9 May Conversation, about the undisclosed material fact or change of Matrikon's imminent acquisition by Honeywell, thereby contravening section 147(3) of the Act and acting contrary to the public interest. Somji conceded that information about the acquisition was material, although he denied tipping the Healings.

1. Breach of Section 147(3)?

The Second Impugned Purchases

[55] The essence of Staff's case was that Healing's conduct shortly after the 9 May Conversation between Somji and his sister – making the Second Impugned Purchases on 10 and 11 May 2010 – was more likely than not prompted by the Healings having learned of the imminent Honeywell acquisition, and that the obvious source of that information was Somji.

[56] As discussed, the direct evidence as to what transpired in the 9 May Conversation did not support Staff's position. The Healings, in their investigative interviews, denied being informed by Somji of the Honeywell transaction. Staff would have us disregard those denials. Somji himself, in his testimony before us in the hearing, also denied conveying such information, although his recollection as to what actually did transpire in the 9 May Conversation was vague. Staff would also have us reject Somji's denial, in part because he could not recall the specifics of that conversation.

[57] A considerable portion of the evidence and argument in the hearing centred on the Second Impugned Purchases themselves. Through a small flurry of trading instructions that Healing began making on Sunday night 9 May 2010, the Healings bought Matrikon shares, hurriedly and using a good deal of the funds then available to them, as well as a significant portion (perhaps all that they understood to be available for the purpose) of their available but seldom-used margin. They thereby acquired some 62 000 Matrikon shares at a cost of almost \$245 000, just in time for the 13 May 2010 announcement of the lucrative Honeywell acquisition. Within a further week they sold 58 700 shares (later tendering all their remaining

shares as part of the Honeywell deal), and thus realized a profit that Staff alleged exceeded \$36 000.

[58] This activity, we find, represented a departure from the Healings' past investment practice (even taking into account their fairly long history of relatively frequent purchases and sales of Matrikon shares). The Second Impugned Purchases – including the timing and seeming urgency of Healing's multiple, concentrated order placements and adjustments – are not plausibly explained by the information then in the public domain. Healing's explanation in his investigative interview, about which he could not be further questioned or cross-examined, was that he was pursuing his usual pattern of buying Matrikon shares hoping the value would increase, with part of the impetus for the volume of these purchases being an attempt to compensate for recent losses from another investment. While this may be partially true, we cannot conclude that it completely explains the Healings' deviation from their typical trading pattern.

[59] In the result, we conclude that the Healings' purchases of Matrikon shares on 10 and 11 May 2010 can be plausibly explained only by something Healing learned or inferred from the 9 May Conversation to the effect that a prompt investment in Matrikon could be profitable.

[60] We can only speculate as to the content of that discussion. One possibility is that Somji told his sister about the Honeywell transaction, which information Healing either overheard or learned second-hand from Somji-Healing. Other possibilities might include unspecific information – perhaps merely an impression conveyed by Somji – that interesting things might be happening at Matrikon. We could posit that the Honeywell negotiations – whose successful conclusion would present Somji with millions of dollars – might naturally have engendered in him on that day a degree of excitement or elation that could have communicated itself in the course of a family-centred telephone conversation. Conceivably, this might have been expressed in a way that conveyed an impression that Somji foresaw himself soon realizing a financial reward for his years of effort at the company, or even that anyone with faith in the company might find it a particularly opportune time to invest. If we find that the first possibility is more likely than not what happened, then we must conclude that Somji tipped the Healings about the Honeywell deal and thereby contravened section 147(3) of the Act. Otherwise, we must conclude that Somji did not tip the Healings about the Honeywell deal and, therefore, did not contravene section 147(3) as alleged.

Prohibited Tip by Somji?

[61] Staff's allegation on this point was very specific – the Notice of Hearing was clear that Somji's alleged breach of section 147(3) of the Act involved his having communicated to the Healings Matrikon's then-imminent acquisition by Honeywell, and Staff's case was that this occurred in the 9 May Conversation.

[62] We do not fault Somji for failing to remember the details of what, at the time, may have seemed an inconsequential conversation. We are convinced that he was sufficiently aware – and respectful – of the laws and Matrikon policies on the handling of undisclosed material information that it would be highly uncharacteristic of him to disclose the Honeywell deal as alleged, or at all. We also consider Somji too astute a businessman to have jeopardized

something as important, and lucrative (to him and others), as the Honeywell acquisition – for which negotiations were then approaching their final hours – by a leak of deal-specific information. Further, given his knowledge of the relevant law and policies, it would be illogical and careless of him to pass along such a tip in the circumstances of that telephone call (in a car with the conversation audible to all present). Crucially, as noted, we believed Somji's testimony, finding his denial credible. That denial does not stand alone, and it is open to us to find – as we do – that the denial is in accord with the other evidence.

[63] Based on all the evidence before us, we cannot find it more likely than not that Somji told his sister in the 9 May Conversation about the Honeywell transaction and that it was imminent. Indeed, we believe the contrary: Somji did not communicate to his sister (or to Healing) that information – or any other specific undisclosed material information about Matrikon. Although we recognize that Healing gleaned something from the 9 May Conversation that was striking enough to prompt him to make the Second Impugned Purchases, we appreciate the distinction (acknowledged by Staff) between abstract expectation and "concrete knowledge". We find it more likely than not that Healing acted on something (perhaps his own interpretation or assumption) from the 9 May Conversation, without a tip of material undisclosed information from Somji. Therefore, we conclude that Somji did not breach section 147(3) of the Act.

[64] Our conclusion is bolstered by the Healing Settlement Agreement. Healing's key admissions in the Healing Settlement Agreement were very general. Notably absent was a declaration that Healing had breached section 147(2) of the Act by buying securities with knowledge of undisclosed material information (particularized or not). Although he did acknowledge that he made the Second Impugned Purchases "[b]eginning moments after *and as a result of* this telephone discussion" (emphasis added), we were not told what it was about the 9 May Conversation that led to that "result", nor what aspect of Alberta securities laws he thereby failed to comply with. Therefore, there is no indication from the Healing Settlement Agreement that Healing traded with knowledge of undisclosed material facts or changes relating to Matrikon. Because, as stated, we believed Somji's denial and the evidence supporting that denial, we need not, and do not, reach any conclusions as to what exactly Healing gleaned from the 9 May Conversation. We cannot hold Somji responsible under section 147(3) of the Act for what someone may have interpreted.

[65] The allegation of Somji having breached section 147(3) of the Act is not proved.

2. Conduct Contrary to the Public Interest?

[66] Staff further alleged that whether or not the alleged breach of section 147(3) were proved, Somji communicated something to the Healings in the 9 May Conversation in a way that amounted to conduct contrary to the public interest.

[67] Staff are correct that such a finding of conduct contrary to the public interest does not require a contravention of the Act (see, for example, *Re Fletcher*, 2012 ABASC 222 at para. 96). The Act establishes a regulatory framework to protect and foster the public interest. Our related public interest jurisdiction enables us to make findings and, where warranted, issue orders to that end, whether or not a breach of the Act has been established. That said, breach or no breach, there must be compelling evidence of actual conduct contrary to the public interest.

[68] As we understood Staff's position, even if we do not find that Somji communicated what was alleged, we ought to infer that he communicated something so improper as to prove this alternative allegation – perhaps some sort of trading encouragement or recommendation of a sort possibly barred by section 147(3.1) of the Act.

[69] With the evidence not enabling us to determine what actually transpired in the 9 May Conversation (apart from our finding that Somji did not tell the Healings of Matrikon's imminent acquisition by Honeywell, and our belief that he did not convey any other specific undisclosed material information about the company), we are, as noted earlier, left to speculate as to what Somji may have said to his sister – or just what it was that Healing may have inferred from the communication.

[70] Given the high degree of particularity with which the Notice of Hearing addressed the allegations relating to May 2010 – its express emphasis on elements of a breach of section 147(3) of the Act, contrasted with silence as to any alternative theories of alleged misconduct – we think that only a strained reading would support the interpretation of the "conduct contrary" allegation urged by Staff. In any event, mere speculation would not suffice for such a finding.

[71] The evidence does not establish on the balance of probabilities wrongdoing by Somji in May 2010 amounting to conduct contrary to the public interest. We find that allegation to be unproved.

V. CONCLUSION

[72] The allegations against Somji in respect of both December 2009 to January 2010 and May 2010 have not been proved. The allegations are therefore dismissed and this proceeding is concluded.

19 October 2012

For the Commission:

"original signed by"
Stephen Murison

"original signed by"
Webster Macdonald, QC

"original signed by"
Roderick McKay, FCA