In the Court of Appeal of Alberta

Citation: Walton v Alberta (Securities Commission), 2014 ABCA 273

Date: 20140829
Docket: 1301-0201-AC; 1301-0207-AC;
1301-0209-AC; 1301-0210-AC; 1301-0253-AC
Registry: Calgary

1301-0201-AC

Between:

Gayle Marie Walton

Appellant
(Respondent)

- and -

Alberta Securities Commission

Respondent
(Applicant)

- and -

John Herbert Holtby, Kenneth Michael Burdeyney, Randall George Kowalchuk, Dale Francis Holtby, and John Jacob Shepert

Not Parties to the Appeal

1301-0207-AC

And Between:

John Herbert Holtby

Appellant
(Respondent)

- and -

Alberta Securities Commission

Respondent
(Applicant)

- and -

Neil Donald Tanner (merits stage only), Kenneth Michael Burdeyney, Eric John Jaschke (merits stage only), Gayle Marie Walton, Ken Landsiedel (merits stage only), Randall George Kowalchuk, Dale Francis Holtby, and John Jacob Shepert

Not Parties to the Appeal

1301-0209-AC

And Between:

Kenneth Michael Burdeyney

Appellant
(Respondent)

- and -

Alberta Securities Commission

Respondent
(Applicant)

- and -

John Herbert Holtby, Neil Donald Tanner (merits stage only), Eric John Jaschke (merits stage only), Gayle Marie Walton, Ken Landsiedel (merits stage only), Randall George Kowalchuk, Dale Francis Holtby, and John Jacob Shepert

Not Parties to the Appeal

1301-0210-AC

And Between:

Randall George Kowalchuk

Appellant
(Respondent)

- and -

Alberta Securities Commission

Respondent
(Applicant)

- and -

Neil Donald Tanner (merits stage only), Eric John Jaschke (merits stage only), Ken Landsiedel (merits stage only), John Herbert Holtby, Kenneth Michael Burdeyney, Gayle Marie Walton, Dale Francis Holtby, and John Jacob Shepert

Not Parties to the Appeal

1301-0253-AC

And Between:

Alberta Securities Commission

Respondent
(Applicant)

- and -

John Jacob Shepert

Appellant
(Respondent)

- and -

John Herbert Holtby, Neil Donald Tanner, Kenneth Michael Burdeyney, Eric John Jaschke, Gayle Marie Walton, Ken Landsiedel, Randall George Kowalchuk, and Dale Francis Holtby

Not Parties to the Appeal

The Court:

The Honourable Mr. Justice Peter Martin
The Honourable Mr. Justice Frans Slatter
The Honourable Madam Justice Rosemary Nation

Memorandum of Judgment

Appeal from the Decisions by the Alberta Securities Commission
Filed on the 11th day of February, 2013 and
Filed on the 27th day of June, 2013
(2013 ABASC 45; 2013 ABASC 273)

Memorandum of Judgment

The Court:

[1] These five appeals have been launched against a decision of the Alberta Securities Commission reported as ***Re Holtby***, 2013 ABASC 45. The five appellants (and others) were found culpable of insider trading, and other various types of improper conduct, with respect to the shares of Eveready Inc. The appellants appeal the findings of culpability, as well as the sanctions subsequently imposed in the decision ***Re Holtby***, 2013 ABASC 273.

Summary of the Charges

[2] In the most general terms, the allegations of the Securities Commission Staff were that the appellants obtained knowledge of a proposal by Clean Harbors Inc. to take over Eveready Inc. (the non-public "material fact"), and then traded in shares of Eveready making improper use of that non-public information. The linchpin of the entire factual matrix is the appellant John Herbert "Bert" Holtby. He was a founder of the original business, and one of the directors of Eveready, and admittedly knew about the Clean Harbors takeover discussions. The Securities Commission Staff alleges that Holtby improperly passed on knowledge about the material fact (the Clean Harbors takeover discussions) to others, who then also misused it in various ways.

[3] The particular findings of culpability against the appellants can be briefly summarized. The Commission found that Holtby engaged in insider trading, and improperly disclosed the material fact to others (including his brother Dale Holtby, his investment advisor Richard Kowalchuk, and the appellant Burdeyney). He also improperly encouraged others to trade in Eveready shares before the Clean Harbors takeover became generally known. Finally, he concealed his beneficial ownership of the "Douglas account" through which Eveready shares were traded, thereby hindering the investigation.

[4] The appellant Randall "Randy" Kowalchuk is the brother of Richard Kowalchuk, Bert Holtby's investment advisor. Richard Kowalchuk admitted that Bert Holtby told him about the material fact, and that he then engaged in insider trading. Richard Kowalchuk entered into a settlement agreement with the Securities Commission admitting his culpability. The Commission found that Richard told his brother Randy about the material fact, and that Randy then engaged in insider trading.

[5] The Commission found that the appellant John Shepert gained knowledge of the material fact from Dale Holtby, whom Shepert should have known had been informed of it by his brother Bert Holtby. Shepert then engaged in insider trading.

[6] The appellant Burdeyney was Holtby's longtime personal accountant (but not Eveready's accountant). The Commission found that Holtby told Burdeyney about the takeover, making

Burdeyney a person in a special relationship with Eveready. Burdeyney then engaged in insider trading, and also improperly told the appellant Gayle Walton about the material fact.

[7] The appellant Gayle Walton was also an accountant, and worked in the same office as Burdeyney. The Commission concluded that she found out about the material fact from Burdeyney, she "ought to have known" that Burdeyney was in a special relationship with Eveready, such that she also became a person in a special relationship. She then improperly encouraged her husband Thane Walton to purchase shares of Eveready.

Facts

[8] Eveready Inc. (formerly the Eveready Income Fund) was at all material times a reporting issuer listed on the Toronto Stock Exchange. Eveready provided services to the industrial and oilfield sectors. It had approximately 2,900 employees, and operated a fleet of over 2,400 truck and trailer units. Its existence and operations were generally known in the areas in which it operated, including in the town of Peace River, which has a population of approximately 7,000.

[9] In late 2008 Eveready's unit price was depressed, parallel with the global economic downturn at the time. Eveready became a potential takeover target, and eventually attracted the attention of Clean Harbors, and negotiations between the two companies commenced.

[10] At the relevant time there were many who thought that the shares of Eveready were undervalued. Investment analysts predicted an increase in the value of the shares of between 143% and 200%. Market commentators identified Eveready as a potential "buy". A number of the persons interviewed by the Commission Staff indicated that they thought that Eveready was an attractive investment opportunity at the time. Trading volumes were high. The fact that Eveready shares were undervalued, that it was an attractive investment opportunity, and that it was a potential takeover target would not be information that would support charges of insider trading or tipping. Since this information was generally available to the investing public, it would not be insider information.

[11] Knowledge of a particular takeover attempt, or specific negotiations for a takeover would fall into a different category. The Commission found (reasons, paras. 54, 505) that the potential takeover of Eveready by Clean Harbors was a "material fact" within the meaning of the *Securities Act*, RSA 2000, c. S-4, s. 1(gg):

> 1 In this Act, . . .
>
> > (gg) "material fact", when used in relation to securities issued or proposed to be issued, means a fact that would reasonably be expected to have a significant effect on the market price or value of the securities;

This finding is not challenged on appeal. The Commission found that at the latest by January 26, 2009 the prospect of a takeover by Clean Harbors became sufficiently clear to meet the threshold of being a "material fact" (reasons, para. 515). Between that date and the press release of April

29, 2009 announcing a tentative agreement, the Commission found that the existence of this material fact was known to the appellants, but was not known to the general investing community (reasons, para. 516).

[12] During the relevant time period, a number of things happened with respect to Eveready which would have had an effect on its share price and trading:

(a) In January 2008 the Eveready Income Fund stopped making distributions in cash, and instead commenced making distributions in further units, which had a negative effect on the unit price.

(b) On September 11, 2008 the Eveready Income Fund announced its intention to convert to a corporation at the end of the year, and announced it intended to restore cash distributions of 5.7% for the third and fourth quarters (reasons, paras. 17-8).

(c) On December 31, 2008 the Eveready Income Fund converted to a corporation (reasons, para. 19).

(d) As noted, in the last half of 2008 Eveready's price was generally depressed. Units of the Eveready Income Fund that traded for $6.00 in early 2007 were trading at $1.11 by December 31, 2008. After the conversion to a corporation, the equivalent share price of Eveready would have been $5.55 on January 1, 2009, but by March 16 they had fallen 58% to $2.33 (reasons, para. 29). The share price in March ranged from $1.45 to $2.80, and closed at the end of the month at $2.42 (reasons, paras. 31, 35).

(e) Clean Harbors first expressed an interest in Eveready in late October, 2008 (reasons, para. 41), although the Commission found that the discussions did not rise to the level of a "material fact" until later, but no later than January 26, 2009 (reasons, paras. 54, 515). The potential acquisition was discussed at several Board meetings during this period (reasons, paras. 43-68).

(f) On March 11, 2009 the Board suspended dividend payments to conserve cash (reasons, para. 31).

(g) The 2008 financial statements of Eveready were released on March 12, 2009, generating some interest in and discussion of the company (reasons, para. 32).

(h) In mid-March a number of market analysts gave favourable reports on Eveready, with several of them recommending it as a "buy". While they expressed some reservations about Eveready's debt, they were all optimistic about its long-term value (reasons, para. 38).

(i) Eveready had a $100 million line of credit that matured on April 24, 2009. The renewal of this line of credit was critical to the success of the company, and its extension

on April 14 was itself a material event that had an impact on trading activity, and the price increased to approximately $2.30 in the next few days. (reasons, paras. 33, 39).

(j) On April 29, 2009, the proposed takeover by Clean Harbors for cash and shares with a value of $11.00 was announced. The previous day the Eveready shares had closed at $3.47, but on that date they rose to $10.40 (reasons, paras. 68-70).

Since the particular trades that form the basis of the allegations against the appellants occurred in this time period, they must be assessed against all of this other activity. As the Commission's Staff investigator conceded, many people gave legitimate reasons for trading in Eveready shares at this time (reasons, para. 37).

[13] Throughout this period, Bert Holtby fell within the definition of a "person in a special relationship" with Eveready, a concept outlined in s. 9 of the *Act*:

> 9. A person or company is in a special relationship with a reporting issuer if . . .
>
> (d) the person or company learned of a material fact or material change with respect to the reporting issuer while the person or company was [a director];
>
> (e) the person or company
>
> (i) learns of a material fact . . . from any other person or company described in this section . . ., and
>
> (ii) knows or ought reasonably to know that the other person or company is a person or company in a special relationship with the reporting issuer

Holtby, as a director, was a person in a special relationship under s. 9(d), and anyone that he told about the Clean Harbors takeover bid (such as some of the other appellants) became persons in a special relationship under s. 9(e) if they knew or ought to have known his special relationship status.

[14] The key provisions of the *Act* are:

> 147(2) 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.
>
> (3) No reporting issuer or person or company in a special relationship with a reporting issuer shall, other than when it is necessary in the course of business, inform another person or company of a material fact or material change with

> respect to the reporting issuer before the material fact or material change has been generally disclosed.
>
> (3.1) No reporting issuer or person or company in a special relationship with a reporting issuer with knowledge of a material fact or material change with respect to the reporting issuer that has not been generally disclosed shall recommend or encourage another person or company to
>
> (a) purchase or sell a security of the reporting issuer, or
>
> (b) enter into a transaction involving a security the value of which is derived from or varies materially with the market price or value of a security of the reporting issuer.

These sections of the *Act* impose various obligations on the special relationship class:

> (a) a prohibition on trading in the shares of the reporting issuer with knowledge of a material fact that has not been generally disclosed, sometimes called "insider trading": s. 147(2);
>
> (b) a prohibition on disclosing the material fact to others, before the material fact has been generally disclosed, sometimes called "tipping": s. 147(3);
>
> (c) a prohibition on recommending or encouraging others to trade in securities of the reporting issuer before the material fact is generally disclosed: s. 147(3.1).

The *Act* also prohibits concealing or withholding information reasonably required for an investigation: s. 93.4(1).

[15] There is an important distinction between a person in a special relationship passing on knowledge of a material fact ("tipping" under s. 147(3)), and that same person merely encouraging others to purchase the shares ("encouraging" under s. 147(3.1)). A person who is "tipped", and knows or ought to know that the source of the information is in a special relationship, also becomes a person in a special relationship under s. 9(e). The same consequences apply down a chain of tipping to everyone who ought to know that the source of the information was a person in a special relationship. On the other hand, someone who is merely "encouraged" to buy the stock will not become a person in a special relationship, and if that person encourages yet others, neither will they. Those who are merely "encouraged" do not offend the *Act* if they trade in the subject securities.

Issues and Standard of Review

[16] Each of the appellants raises slightly different issues, which are outlined below when each appeal is analyzed. Some general comments about the issues and the standard of review can be made.

[17] The Commission is an expert tribunal, charged with the administration of the *Act*. The standard of review of its decisions is presumptively reasonableness, particularly where the question relates to the interpretation of its enabling (or "home") statute. Its findings of fact, findings of mixed fact and law, and credibility findings are also entitled to deference, and will not be overruled on appeal unless they demonstrate palpable and overriding error: ***Alberta (Securities Commission) v Workum***, 2010 ABCA 405 at paras. 26-7, 41 Alta LR (5th) 48, 493 AR 1; ***Ironside v Alberta (Securities Commission)***, 2009 ABCA 134 at paras. 26-8, 11 Alta LR (5th) 27, 454 AR 285; ***Smith v Alliance Pipeline Ltd.***, 2011 SCC 7 at para. 26, [2011] 1 SCR 160. However deference to fact findings is not the same thing as immunity from review: ***H.L. v Canada (Attorney General)***, 2005 SCC 25 at paras. 73, 75, [2005] 1 SCR 401; ***R. v Regan***, 2002 SCC 12 at para. 118, [2002] 1 SCR 297; ***Wilde v Archean Energy Ltd.***, 2007 ABCA 385 at para. 102, 82 Alta LR (4th) 203, 422 AR 41; ***General Motors of Canada Ltd. v Johnson***, 2013 ONCA 502 at para. 51, 116 OR (3d) 457.

[18] The Commission concluded (reasons, paras. 453-5) that the charges against the appellants had to be proven on a balance of probabilities, based on clear, convincing and cogent evidence. The Commission set this high standard with good reason, because as the Commission has recognized, a finding of a breach of the *Act* can have a severe impact on the careers of those involved, and can result in significant penalties. The Commission was entitled to set those evidentiary standards for itself, and its findings should be measured against them.

[19] Further, it is firmly within the Commission's mandate to assess the credibility of witnesses. The Commission has the advantage not only of hearing all the witnesses testify, but also of having heard all of the evidence that is on the record.

[20] The adequacy of reasons is not a stand-alone basis for finding a decision unreasonable. Assessing the adequacy of reasons is an organic exercise involving reading the reasons together with the outcome, to see whether the result falls within a range of possible outcomes: ***Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)***, 2011 SCC 62 at para. 14, [2011] 3 SCR 708; ***Communications, Energy and Paperworkers Union of Canada, Local 30 v Irving Pulp & Paper, Limited***, 2013 SCC 34 at para. 54, [2013] 2 SCR 458. To the extent that ***Spinks v Alberta (Law Enforcement Review Board)***, 2011 ABCA 162, 46 Alta LR (5th) 84, 505 AR 260 is inconsistent with these principles, it should no longer be followed.

[21] The purpose of reasons is to explain to the parties how the decision was reached, and to provide a platform for judicial review. Reasons must be sufficiently transparent to justify the ultimate conclusion. But reasons need not be perfect, and need not explore every issue that was actually or potentially raised. A tribunal does not have to discuss every piece of conflicting evidence, every argument, or every authority cited to it. Some of the appellants argue that the Commission emphasized the evidence it did accept, and did not give as much (or any) attention to the evidence that it obviously did not accept. This alone does not make the reasons inadequate.

[22] Further, the appellants argue that the Commission did not give full reasons explaining why it did not believe particular witnesses or particular evidence. The Commission in several places indicated that it assessed credibility and weight in the overall context of all of the evidence, having regard to common sense and the likelihood of particular events having happened. That approach does not reflect any reviewable error: ***R. v R.E.M.***, 2008 SCC 51 at paras. 64-8, [2008] 3 SCR 3; ***R. v Vuradin***, 2013 SCC 38 at paras. 13, 19, [2013] 2 SCR 639. Assessing the internal and external credibility of witnesses is a complex process that is not easily put into words.

[23] The appropriateness of remedial orders or sanctions is also within the expertise of the Commission, and they will not be overturned on appeal unless they are demonstrably unfit, based on some error of principle, or are otherwise unreasonable: ***Cartaway Resources Corp. (Re)***, 2004 SCC 26 at paras. 48-52, [2004] 1 SCR 672; ***Ironside*** at para. 28; ***Workum*** at para. 123.

The Record before the Commission

[24] Some issues arose with respect to the evidence and record before the Commission, which have an impact on several of the appeals.

Circumstantial evidence

[25] First of all, it is not disputed that charges of illegal trading can be proven by circumstantial evidence. Indeed, the Commission Staff pointed out that (absent an admission) it is often only possible to prove insider trading based on inferences drawn from the conduct, and particularly the trading activity, of those involved (reasons, para. 457).

[26] The Commission recognized that inferences could be drawn from circumstantial evidence, but correctly noted (reasons, paras. 461-3) that speculation and conjecture were not the equivalent of proper inferences. The fundamental difference is explained in ***Alberta Union of Provincial Employees v Alberta***, 2010 ABCA 216 at paras. 37-8, 29 Alta LR (5th) 273, 482 AR 292:

> 37 There is a legal distinction between speculation and drawing inferences from the circumstantial and direct evidence on the record. The trier of fact is permitted to do the latter, but not the former. The standard of review for the drawing of inferences is deferential. Inferences drawn from the facts are reviewed for reasonableness, or palpable and overriding error. If the inference drawn is reasonable, a reviewing court should not intervene just because other inferences (even arguably better inferences) could also have been drawn: *H.L. v. Canada (Attorney General)*, 2005 SCC 25, [2005] 1 S.C.R. 401 at para. 74.
>
> 38 For these purposes, "speculation" can therefore be described as the drawing of an inference in the absence of any evidence to support that inference, or in situations where there is no "air of reality" to the inference: *R. v. Dubois*,

> [1980] 2 S.C.R. 21, adopting the dissenting reasons in (1979), 17 A.R. 541, 49 C.C.C. (2d) 501 at paras. 15-17 (C.A.); *R. v. Morrissey* (1995), 22 O.R. (3d) 514, 97 C.C.C. (3d) 193 (C.A.) at p. 530; *R. v. Martin*, 2010 NBCA 41 at paras. 34-6; *Caswell v. Powell Duffryn Associated Collieries Ltd*., [1940] A.C. 152 at pp. 169-70; *Kerr v. Ayr Steam Shipping Co*., [1915] A.C. 217 at pp. 233-4.

Drawing inferences when there is an evidentiary gap, based on an "educated guess", is speculation: ***U.S.A. v Huyhn*** (2005), 202 OAC 198 at para. 7, 200 CCC (3d) 305 (CA). These concepts were applied in a securities context in ***Re Suman***, (2012) 35 OSCB 2809 at paras. 294-300.

[27] The Commission concluded:

> [463] To summarize, when drawing an inference from circumstantial evidence, we must ensure that the inference is grounded on proved, not hypothetical or assumed, facts and is a reasonable one - one drawn using common sense, human experience and logic having considered the totality of the evidence and any competing inferences. . . .

As noted, where the inference drawn is available on the record, the standard of review is deferential.

[28] The process of drawing inferences from facts established by the evidence is not without limits. As was said in ***R. v Cavanagh***, 2013 ONSC 5757 at para. 74: ". . . there comes a time when the underlying facts may be so remote that there are just too many steps or leaps in the chain of reasoning to say that a particular inference can be reasonably drawn". As is discussed *infra*, paras. 31-4, proof of opportunity or motive is of limited value in drawing inferences. Phraseology in the reasons such as "it would not have been unreasonable", "could be" or "might have" cause concern, as they are more indicative of speculation than inferences. The syllogism "it would not have been unreasonable", with its double negative, particularly invites speculation, or a reversal of the burden of proof, or both. It is one thing to reason: "Where there is smoke, there is likely fire", but quite another thing to reason: "There was no smoke, but it would not have been unreasonable for there to be smoke, therefore there might have been fire as well".

[29] It is possible to draw an inference of insider trading from unusual or anomalous trading patterns, particularly "well-timed, highly uncharacteristic, risky and highly profitable trades" (reasons, paras. 467, 569). To decide if the trading pattern of the particular appellant is anomalous, one must obviously have regard to his or her historical trading patterns. If an investor had previously held shares of Eveready, it would not necessarily be remarkable that they traded in those shares during a period where confidential material changes were occurring. Whether any particular trading was unusual would also depend on other events and news concerning the business of Eveready (see *supra*, para. 12), as well as the personal financial circumstances of any particular investor. Finally, even if a certain trading pattern might be consistent with "tipping", it might equally be consistent with merely having been "encouraged". As the Commission pointed

out, given the serious consequences of a finding of culpability, clear and cogent evidence should be expected before any particular inference is drawn.

Admissions against Interest

[30] Admissions by a witness which are contrary to the interests of that witness can be compelling evidence (reasons, paras. 474-6). The common experience is that witnesses do not falsely admit to things which will result in severe consequences to them. In this case Richard Kowalchuk admitted that he had been "tipped" by Bert Holtby, and he entered into a settlement agreement with the Commission. That settlement agreement imposed severe sanctions on Richard Kowalchuk, including the loss of his career as a securities broker (reasons, paras. 182-3). The Commission was entitled to rely on his admissions, and his agreement to the sanctions in the settlement agreement, as being compelling evidence that securities offences actually occurred. These same observations apply to other witnesses who admitted misconduct and entered into settlement agreements.

Opportunity and Motive

[31] The Commission noted that Holtby knew many of the other respondents, and that some of the respondents were known to others. It also noted that there had been social events, meetings or communications between them during the relevant period of time. This evidence, at most, indicated "opportunity". Opportunity to commit an offence is mostly relevant in a negative sense; if a respondent can prove that there was no opportunity, that is compelling evidence that an offence never occurred. For example, if a respondent can prove that he never knew Holtby, or had no communications with Holtby during the relevant period, an offence of tipping or encouraging could not have been committed. Opportunity, however, has limited positive probative value. Evidence of opportunity, by itself, cannot realistically prove anything more than opportunity. Evidence of multiple meetings and communications during the relevant period does not change that; opportunity is still no more than opportunity.

[32] Similar comments can be made about "motive". The Commission found that several of the respondents might have a motive to confer a benefit on others. For example, Holtby would have a motive to benefit his brother Dale. Richard Kowalchuk might have a motive to benefit his brother Randy. Dale Holtby might have a motive to benefit his daughter Tracy Kaufman. Again, motive is mostly relevant in a negative sense. If someone had no motive to confer a benefit on another person, that would make an inference of tipping or encouraging less compelling. However, as the Commission noted (reasons, para. 464), the mere presence of a possible motive proves little. That is particularly so when the motive is not specific (for example, a discrete benefit in return for a specific favour granted), but rather is general (for example, the presumed generic motive to benefit one's friends and family).

[33] Evidence of motive and opportunity generally go to identity, not to whether an offence was committed. For example, if a person dies, and a suspect had the opportunity and motive to kill him, that might be probative evidence of identity. It is not, without more, evidence of murder

unless there is some indication that the death was other than accidental or natural. As the Court held in ***R. v Khan*** (1998), 129 Man R (2d) 32 at paras. 78-82, 113, 126 CCC (3d) 353 (CA):

> 78 . . . Standing by itself, however, motive neither proves nor permits an inference to be drawn that the relative was murdered. . . .
>
> 82 . . . without proof of other probative and significant facts establishing the commission of a crime, motive by itself is not a proper basis for a conviction . . .

Opportunity and motive can have probative value, so long as there is proof that some offence has actually been committed.

[34] In these appeals there is evidence that the appellants had the "opportunity" to receive information about the material fact. There is also evidence of relationships which might support a general motive to be benevolent to others, without any specific proof of any specific motive being in play. There were admittedly trades in the shares of Eveready during the relevant period. The inference that those trades must have resulted from knowledge of the material fact, merely because of opportunity and general motive, is weak.

Assessing Credibility

[35] Credibility findings were critical. A number of the key players denied under oath that there had been any tipping, encouraging or insider trading. The Commission disbelieved the denials of Bert Holtby, Dale Holtby, John Shepert, Ken Burdeney, Gayle Walton, Randy Kowalchuk, and Ken Landsiedel. The appellants note that the Commission even disbelieved the evidence of the Kaufmans, even though they did not testify; the Commission Staff had entered their Investigative Interviews as part of the Staff's case. The Commission essentially concluded that it was presented with a pattern of persistent perjury by a large group of people of previously good character, including several professionals. The appellants argue that these findings on credibility are so contrary to the evidence as to be unreasonable, requiring intervention by this Court. The reviewing Court should not, however, reverse findings of credibility just because it might have reached a different conclusion.

[36] It is an error for a tribunal to turn disbelief of a particular witness into positive proof of the opposite proposition. As noted in ***Steinberg v Federal Commissioner of Taxation*** (1975), 134 CLR 640 at p. 695 (Aust HC): "The fact that a witness is disbelieved does not prove the opposite of what he asserted". The fact that a witness's evidence is disbelieved on a particular point may have an impact on his overall credibility, but in order to prove the opposite of what he said some positive evidence is needed: ***R. v O'Connor*** (2002), 62 OR (3d) 263 at paras. 17-20 (CA).

[37] The appellants argue that in some cases they were not cross-examined by Commission Staff. In particular, they refer to instances where they denied that they were tipped or encouraged, and they denied any knowledge of the pending Clean Harbors takeover. While

cross-examination is, in some circumstances, expected or required by the rules of procedure, it is not always mandatory. In particular, cross-examination on a pure "denial" may result in nothing more than a bare repetition of the denial. For example, Holtby flatly denied tipping anybody, and such a denial does not lend itself to further exploration: ***R. v Sylvain***, 2014 ABCA 153 at paras. 45, 94-7, [2014] 7 WWR 485.

[38] Some of the appellants argued that the Commission had to instruct itself to be cautious in assessing the evidence of Douglas and Kowalchuk, relying on the principles in ***R. v Vetrovec***, [1982] 1 SCR 811. They argued that both of those witnesses had admitted to being involved in illegal activities, and their evidence should be suspect. The ***Vetrovec*** principle applies most directly where the witness is attempting to exonerate himself, or minimize his involvement, whereas Douglas and Kowalchuk quite freely implicated themselves in the alleged illegal trading. Implicating Holtby in the illegal trading was incidental to and necessary to disclosing their own involvement: ***Vetrovec*** at pp. 821-2. In any event, the Commission was alive to the need to weigh all of the evidence produced (reasons, paras. 472, 476, 488). The failure to specifically caution itself about particular witnesses, assuming the ***Vetrovec*** principles are engaged in these circumstances, was not *per se* a reviewable error.

Transcripts of Investigative Interviews

[39] The Commission Staff have the power, under s. 42(1)(b) of the *Act*, to examine potential witnesses and defendants under oath. The transcripts that result can be admitted in evidence. All of the appellants (and others) were examined in this way, and some of the transcripts were tendered as evidence. In some cases the witness also testified before the Commission, but in other cases only the transcript was placed on the record. The Commission was entitled to, and did, rely on that evidence (reasons, paras. 482, 486).

[40] During the hearing the Commission Staff attempted to enter portions of the Investigative Interviews into evidence. A number of the appellants objected, taking the position that either the whole of the Investigative Interviews should become exhibits, or no portion of them. The Commission ruled in favor of the appellants, and the entire transcripts of the Investigative Interviews of a number of witnesses were entered as exhibits.

[41] The Investigative Interviews of Richard Kowalchuk were not formally entered as an exhibit. The appellant Holtby entered as Exhibit 24 several binders of documents, which contained a reference to the Richard Kowalchuk transcripts in the table of contents, although copies of the transcripts were not included behind the tab at that location in the binders. Instead, the following proviso was inserted:

> Although not required by Rule 7.2, we notify you that we may rely on the transcripts of Kowalchuk and Douglas for cross-examination. The inclusion of these transcripts should in no way suggest that Bert Holtby adopts the evidence therein.

While the table of contents for Exhibit 24 included a "page count" for each tab, and lengthy page counts were shown for these transcripts, in fact no actual pages of the transcript were included in the clerk's copy of the Exhibit.

[42] During Richard Kowalchuk's cross-examination, counsel for Holtby did put to him parts of his transcripts, but no portions of the transcripts were actually entered as exhibits, even "for identification". Notwithstanding that the Investigative Interviews of Richard Kowalchuk were never entered on the record, the panel of the Commission referred to them extensively in its reasons. How the panel came to have copies is unexplained, although the obvious inference is that one of the parties, at some unknown point during the hearing, included copies in the voluminous material that was provided to the panel.

[43] The use by the panel of documentation that was never made a part of the record was obviously irregular. However, in the circumstances of this case it did not result in any reviewable error. The Commission expressed caution about the use of the Investigative Interviews:

> [486] Overall, we have been cautious with the Investigative Interview evidence, generally assigning little or no weight to unchallenged portions of the Investigative Interviews when also inconsistent with or not supported by other evidence. Also, we have not relied solely on any investigative interview content in reaching our conclusions or making our findings.

The Commission had first hand evidence from Kowalchuk, who testified at the hearing. They also had in evidence his Settlement Agreement, as well as significant documentary evidence on his involvement. No critical portion of the Commission's findings originated exclusively from his Investigative Interviews.

Spousal Privilege

[44] Thane Walton, the husband of the appellant Gayle Walton, asserted a spousal privilege over communications between himself and his wife. The Commission upheld that privilege: ***Re Holtby***, 2012 ABASC 242. Gayle Walton now asserts that the Commission nevertheless relied on that evidence when it stated:

> [389] . . . Other than from Gayle Walton, he [Thane Walton] had not heard any rumours from any other source with respect to the potential take-over of Eveready.

This approach obviously comes perilously close to undermining the privilege. The witness cannot be asked directly if he received information from his spouse, but the same result is accomplished indirectly by asking him to confirm that he had no other source. However, during discussion of the spousal privilege issue counsel specifically invited the Commission Staff to pose questions in that way. In the circumstances, no reviewable error is disclosed.

Substance of the Charges

[45] As previously noted, the main breaches alleged against the appellants fell into three broad categories:

> (a) trading in the shares of the reporting issuer with knowledge of a material fact that has not been generally disclosed, sometimes called "insider trading": s. 147(2);
>
> (b) disclosing the material fact to others, before the material fact has been generally disclosed, sometimes called "tipping": s. 147(3);
>
> (c) recommending or encouraging others to trade in securities of the reporting issuer before the material fact is generally disclosed: s. 147(3.1).

All of these offences have as a common element a "material fact" that is not publicly known.

[46] There is nothing inadequate about the Notice of Hearing, which was drafted with great precision. The "material fact" alleged was the potential takeover of Eveready by Clean Harbors. That was made clear in the Notice of Hearing:

> 29. The facts and information regarding the anticipated acquisition of Eveready by Clean Harbors were "material facts", as that term is defined in the Act ("**Material Fact**").

All of the allegations are then tied back to this defined "Material Fact". The hearing panel of the Commission recognized this, when it defined the term "Proposed Acquisition":

> 41. In late October 2008 Clean Harbors' vice-president contacted Vandenberg indicating its interest in exploring a business combination with Eveready, including acquisition of a part or all of Eveready (the Proposed Acquisition).
>
> . . .
>
> 515. . . . We find that the Proposed Acquisition was a material fact by 26 January 2009.

The Commission used this defined term throughout its reasons. "Proposed Acquisition" and "Material Fact" relate to the Clean Harbour takeover and no other.

[47] In order for a potential takeover to be a material fact, it is not necessary for the insider to reveal or the investor to know the identity of the potential acquirer, or other details, so long as the illicit disclosure relates to the particular "fact" in issue. That background concept must be considered together with the exact wording of the charges against the appellants, which related specifically to the Clean Harbors takeover. In order to find the appellants culpable on the charges of tipping or insider trading, it was necessary for the Commission Staff to prove on a balance of probabilities that the appellants had knowledge of that material fact, and not just material facts in

general. To be clear, it was not necessary to prove that Holtby specifically used the words "Clean Harbors", but it was necessary to prove that any information he passed along related to that particular "Proposed Acquisition". On the other hand no other "material fact" (such as the renewal of Eveready's credit facility) could support these charges.

[48] The appellants having been charged with respect to a particular transaction, they could not be found culpable of any other offence: ***Anderson v Alberta Securities Commission***, 2008 ABCA 184 at paras. 46-9, 437 AR 55; ***Nowoselsky v Alberta College of Social Workers (Appeal Panel),*** 2011 ABCA 58 at paras. 18-9, 505 AR 93; ***Visconti v College of Physicians and Surgeons of Alberta***, 2010 ABCA 250 at paras. 11-2, 31 Alta LR (5th) 1, 482 AR 244. Thus, it was necessary for the Commission to find, on a balance of probabilities, that any information that was disclosed or used related specifically to the Clean Harbors takeover, and not just to takeover prospects generally, nor the fact that Eveready might have been a "takeover target" at the time.

[49] The Commission considered the *mens rea* requirement of the offences in the following terms:

> [503] Illegal insider trading, informing, and recommending or encouraging are referred to as strict liability offences because there is no requirement to prove mens rea – motivation and intent are irrelevant. In *R. v. Woods*, 1994 CarswellOnt 1080 (Gen. Div.) (leave to appeal refused 1994 CarswellOnt 1081 (C.A.)), Justice Farley observed (at para. 24) that "[t]he offence then is in essence *not* a question of *using* insider information *but of buying or selling securities* of a company *while possessed of insider information*" (emphasis in original). He continued (at para. 26): "The critical aspect is not of course that insider information is in fact used to make the trading decision but rather that a person with a special relationship with a reporting issuer cannot trade while possessed of insider information." Thus, a person need not specifically use insider information to run afoul of the Act. A person who purchases or sells securities with knowledge of non-public material information will have breached the Act regardless of the motivation for the purchasing or selling. Further, there is no requirement that an alleged informer or recommender or encourager know or intend that the recipient will buy or sell the particular securities, thus making use of non-public material information or a recommendation or encouragement. Rather, "[t]he mere fact of informing another person of confidential material information constitutes an offence" (*Re Rankin* (2008), 31 OSCB 3303 at para. 32).

This interpretation of the Commission's home statute is entitled to deference, and should not be disturbed on appeal unless it is unreasonable.

[50] The Commission's interpretation of the requirements of "insider trading" and "tipping" is reasonable, and amply supported by the case law. Its interpretation of "recommending or encouraging", however, cannot be sustained. The wording of the statute (*supra*, para. 14) is key.

The insider trading provision (s. 147(2)) requires only "knowledge of a material fact". The tipping provision (s. 147(3)) requires "informing", which is the mere passing on of information. The recommending or encouraging provision (s. 147(3.1)) requires both "knowledge of a material fact" and also an act of recommending or encouraging. Mere knowledge is not sufficient, because s. 147(3.1) clearly requires something more. It may not be necessary for the encourager to "know or intend that the recipient will buy" the security, but that does not exhaust the analysis. The ordinary meaning of "recommending or encouraging" includes some intention to convey information with the expectation that it might be relied on; that is the essence of "recommending". The quote from ***Re Rankin*** is not on topic, because that was a "tipping" case. Overall, the Commission's interpretation is unreasonable.

[51] Just because a person in a special relationship with the issuer says something positive about the issuer would not necessarily amount to recommending or encouraging. That would be so even if the comment piqued the interest of the recipient of the information, or caused him to make further inquiries, or to purchase the security. The concept of "recommending or encouraging" must involve the conveying of opinions or information intending or knowing that it is likely that the recipient will act on that information in some way.

[52] Hypothetical examples can be postulated. Assume that at a social occasion the topic of Eveready came up. Holtby might have directly told those present that: "I recommend you all go out and buy Eveready". That would clearly violate the prohibition against recommending and encouraging. Alternatively, one can imagine a conversation where Holtby and another guest came around to discussing what "Holtby is up to", to which he replied that he was still associated with Eveready. The guest, by way of social conversation, might well ask: "How is the company doing?". Holtby could reply: "I can't talk about it", which would only arouse interest and suspicion, and cause the guest to conclude that something was up. The director is placed in an awkward position. The more likely alternative is that Holtby, being a director of the company, might say something like: "Eveready is a sound company, its price is depressed right now because of market conditions, but I think it has good prospects". None of that would be in breach of securities law. Holtby could hardly be expected to say: "Eveready is in serious trouble", even if it faced some risks, such as the non-renewal of its credit. Merely saying generic positive things about the company is generally not the sort of conduct that is prohibited under the *Act*.

[53] In summary, the Commission's findings with respect to tipping or insider trading are not undermined by its legal assumptions. However, its findings about "recommending and encouraging" must be examined having regard to the appropriate legal standard.

John Herbert "Bert" Holtby

[54] The appellant Holtby argues that the Commission erred with respect to four issues:

(a) finding that Holtby had an interest in the Douglas account, or failing to give adequate reasons for that finding, or finding he misled the Staff on that issue;

(b) finding that Holtby disclosed the material fact to others;

(c) finding that Holtby encouraged Landsiedel to purchase Eveready shares;

(d) imposing an unreasonable sanction.

The first three issues are largely issues of fact and credibility, and attract a deferential standard of review. The reasonableness of the sanction is discussed *infra*, paras. 158ff.

The Douglas Account

[55] Holtby testified and denied all the allegations. He specifically denied having any ownership interest in the Douglas account, and testified that he only lent money to Douglas. Douglas and Richard Kowalchuk testified that the Douglas account was beneficially owned by the three of them. The Commission had conflicting evidence on this point. Its decision to accept the evidence of Douglas and Kowalchuk over that of Holtby was available on this record. As Holtby points out, other findings of credibility and other inferences would have been possible and plausible, but none of the findings made were unreasonable. The Commission's fact findings on the first issue do not disclose any reviewable error. The Commission gave extensive reasons (reasons, paras. 208-223) for reaching this conclusion; as noted, a tribunal does not have to discuss every piece of conflicting evidence, every argument, or every authority cited to it. It follows that it was also open to the Commission to find that Holtby misled the Commission Staff on this issue. There is no merit to this ground of appeal.

Tipping of Others

[56] Holtby also denied telling the other charged persons about the potential takeover. Other evidence contradicted his denials. In particular, Richard Kowalchuk and Allan Wreggit admitted that Holtby told them about the takeover, and both subsequently entered into settlement agreements with the Commission admitting their involvement, and agreeing to be subject to sanctions as a result. The finding of the Commission that Holtby disclosed the material fact to them was one of credibility, supported by these admissions, and the Commission's decision is entitled to deference.

[57] Holtby notes that over time Kowalchuk changed his evidence about the Douglas account. He argues that the Commission should have made note of this, and should have instructed itself with a ***Vetrovec*** caution. On this record, it must have been obvious to the Commission that Kowalchuk's evidence on a number of points had changed over time. Variations in a witness's evidence will affect the credibility of any witness, not just those who might be of previous questionable character.

[58] Richard Kowalchuk admitted that Holtby "tipped" him about the takeover, and admitted that he then engaged in insider trading. As Holtby points out, there are several unanswered questions as to why Richard Kowalchuk would engage in such self-destructive behavior, which caused him to suffer significant financial penalties, and lose his career and occupation. He notes

that there are inconsistencies in the evidence, and that the Commission did not resolve every disputed fact that was identified, nor did it discuss every piece of contested evidence. Kowalchuk changed his evidence at the hearing. Nevertheless, the weighing of all the evidence was for the Commission, and there was sufficient evidence on the record to support its findings. It was not obliged to articulate in its reasons how it dealt with every piece of conflicting evidence: ***Newfoundland Nurses*** at para. 16. The reasons are transparent and sufficient to permit a determination of whether the Commission's conclusions fall within the range of acceptable outcomes. No reviewable error has been shown.

[59] The allegations that Holtby informed Dale Holtby and Burdeyney of the material fact are discussed later in these reasons (*infra*, paras. 90ff and 116ff).

Encouraging Landsiedel

[60] The Commission also found that Holtby "encouraged" Landsiedel to purchase Eveready shares while Holtby was aware of the material fact, but it did not find there was sufficient evidence to conclude that Holtby actually "tipped" him. Holtby challenges the former finding as being unreasonable.

[61] Holtby and Landsiedel were, at most, acquaintances. They both were connected to a loose group of golfers who played together occasionally in Phoenix (reasons, paras. 95, 294-5). Landsiedel was an experienced investor, with a significant portfolio. His investment strategy included purchasing securities in issuers where he knew somebody involved with the company, who "when they said something, you could rely on it to some degree" (reasons, para. 297). He had a history of investing significant amounts in small cap companies (reasons, paras. 299-303).

[62] Landsiedel started following Eveready in 2005. In the summer of 2008 he instructed his broker to purchase Eveready Units at below $3.00, and in September and October of that year he acquired 90,000 Units when the price fell sufficiently (reasons, paras. 309-10). These purchases were consistent with his prior trading patterns, and obviously happened before the Clean Harbors takeover was under discussion. In early 2009, after Eveready converted to a corporation, Landsiedel continued to follow it, and discuss it with his broker (reasons, paras. 312-4).

[63] During the relevant period of time, the evidence disclosed only two possible points of contact between Holtby and Landsiedel. The first was after a golf game in late February, which was described by the Commission as follows:

> 314 In approximately late February 2009 Landsiedel recalled running into Bert Holtby while visiting four friends at his former golf course in Arizona. Landsiedel said that when they were leaving the golf course he had an opportunity to speak with Bert Holtby alone and so asked Bert Holtby why Eveready had done the 5:1 share consolidation in December 2008. Bert Holtby told Landsiedel that he had not been involved in the transaction and so could not comment. Although Landsiedel could not specifically recall the conversation, he thought it possible

> that Bert Holtby might have told him that Eveready was doing well, with good sales and profits, as those were typically the types of comments he made about Eveready. Landsiedel recalled that Bert Holtby seemed "a little elusive" on the subject but that Landsiedel “just left it at that”. Landsiedel said that he and Bert Holtby did not discuss a potential acquisition involving Eveready at that time or ever.

The second was a possible telephone call described as follows:

> 315 Bert Holtby’s telephone records show a one to two minute telephone call to Landsiedel’s phone in Arizona on 27 March 2009. There was no evidence as to who placed the call or whether an actual conversation took place.

If any “encouraging” took place, it had to have happened on one of these two occasions. The Commission could not have found that it happened during the telephone call, because there was absolutely no evidence that a conversation actually took place, or what was said. Further, by March 27 most of the challenged purchases had already been made.

[64] Landsiedel and his broker (an independent witness and participant in the securities industry, whose evidence the Commission appeared to accept) testified that in the last half of March, 2009, Landsiedel embarked on an organized plan to purchase further shares of Eveready, in various tranches, based on the price of the shares from time to time (reasons, paras. 317-22). Between March 17 and March 31, Landsiedel purchased an additional 151,900 shares. Landsiedel had made investments of this magnitude before, although not quite as quickly (reasons, para. 323).

[65] Landsiedel’s broker testified that when he advised Landsiedel of the Clean Harbors takeover on April 29, Landsiedel seemed surprised. After further discussions, and consideration of his tax position, Landsiedel attempted to sell 18,000 shares in May, and did sell 18,000 shares in August, and then converted the balance of his holdings into Clean Harbors shares as a result of the takeover. He then sold the Clean Harbors shares in the 17 months between August 2009 and December 2010.

[66] Based on this evidence, the Commission concluded that Holtby “recommended or encouraged” Landsiedel, but that there was not sufficient evidence that he “tipped” him (reasons, para. 573). Even having due regard to the deferential standard of review, this former finding is unreasonable.

[67] The Commission gave detailed reasons, in nine bulleted sub-paragraphs, for reaching this conclusion (reasons, para. 574). Some of the factors relied on (first, end of the second and third bullets) amount to nothing more than evidence of opportunity, and could only support speculation and not justifiable inferences. They merely confirmed that there was an “opportunity” for information about the material fact to have passed between Holtby and Landsiedel. Without more, this is inconclusive (see *supra*, paras. 31-5).

[68] The reasoning of the Commission is too tenuous to support the findings it made. For example, in the third bullet the Commission noted that Landsiedel was contemplating the purchase of a large number of shares in the same period in which he had discussed Eveready with Holtby, which "could be supportive of an inference" that he had been encouraged. Absent any evidence that there was any confidential information conveyed, this is mere speculation. If Landsiedel had not purchased shares in the relevant period, there obviously would not be any issue. But the mere fact that he purchased shares is equally consistent with him being encouraged, or with him investing in securities in accordance with his previous patterns.

[69] With respect to other appellants, who were relatives or friends of Holtby, the Commission put significant weight on a presumed motive on the part of Holtby to confer financial benefits on others. Landsiedel was a mere acquaintance, and there was no such motive to be imputed. While that is in no sense conclusive, it is troubling that the Commission ignored this factor, which it found so compelling with respect to others who were involved with Eveready at the time. Why would Holtby encourage a bare acquaintance on the eve of the pending takeover?

[70] The Commission noted in the fourth bullet that Landsiedel's trading in Eveready was "consistent with the evidence of Landsiedel's historical trading". This conclusion was supported by Landsiedel's evidence, the evidence of his broker, and the expert evidence that was called. Yet the Commission concluded that this evidence did not "in all the circumstances rule out such an inference", namely that he had been encouraged by Holtby. Because evidence does not "rule out an inference" does not mean it supports that inference. The Commission then went on in the fifth and following bullets to undermine this exculpatory evidence by pointing out that Landsiedel had never previously made exactly this type of investment, within a similar time period. This disinclination to give proper weight to the full body of the evidence is unreasonable.

[71] In the sixth bullet, the Commission found Landsiedel's supposed strategy of averaging down to be "illogical". Landsiedel had continued to buy as the market fell, calculating that if the share price changed direction, and went up by only $1, he would recover his investment. The Commission found this was "illogical" because it did not account for the risk of the market continuing to go down. Landsiedel had lost money on the market before, and he was obviously aware that the price could continue to fall. However, no rational investor buys a stock unless he believes that, on balance, it is likely to go up, not down. Implementing an investment strategy that assumes that the stock price will eventually increase is only logical, and it is the contrary investment strategy that would be illogical.

[72] The Commission also concluded in the sixth bullet that Landsiedel's "confidence was markedly inconsistent with prevailing market conditions, his investment advisor's advice, and Eveready's public disclosures", and was instead "strongly supportive of an inference" that he had been encouraged. Landsiedel had a history of trading in small, high-risk securities, and despite his advisor's advice that Eveready was a high risk investment, the Commission found these transactions were not entirely inconsistent with his historical trading. He had in fact taken a

significant position in Eveready (90,000 units) well before the Clean Harbors transaction was ever contemplated. His purchases must be assessed against the market background (summarized *supra*, para. 12). Contrary to what the Commission suggested, the market opinion and public disclosures of Eveready were not all negative at the time. The financial statements had been issued on March 12, and by mid-March a number of analysts were expressing confidence in Eveready, subject to it resolving its debt situation. None of this optimism had anything to do with any takeover, much less the Clean Harbors transaction. Landsiedel's purchases occurred between March 17 and 31, during this time of cautious market optimism.

[73] The only possible occasion when encouraging could have taken place was at the golf course, as previously discussed (*supra*, para. 63). The only evidence of what happened on that occasion came from Landsiedel. The Commission admitted that it was impossible to know what precisely was said on that occasion. It was not satisfied that any "tipping" took place, because it was unreasonable to assume that Holtby would have told Landsiedel about the "Proposed Acquisition". It concluded (reasons, para. 576):

> . . . However, we are compelled to conclude on the evidence before us that Bert Holtby must have conveyed information recommending or encouraging Landsiedel to purchase Eveready shares; the confidence demonstrated by Landsiedel in making his March 2009 investment in Eveready admits of no other reasonable or logical explanation.

There is, obviously, a certain amount of hyperbole in this conclusion. There were clearly other reasonable and logical explanations, given both by Landsiedel, and the expert witness Stewart. While the Commission's selection of one reasonable inference among several does not disclose reviewable error, this understatement of the possible options is problematic.

[74] The Commission relied on the fact that Landsiedel's purchases occurred "shortly after" he was supposedly encouraged by Holtby (reasons, para. 575). The only evidence was that the golf course meeting took place in late February, whereas Landsiedel did not start purchasing until March 17. The Commission found that he continued to give his broker instructions to purchase as the market fell, and demonstrated no urgency in the need to acquire more Eveready shares. While not conclusive, this conduct is inconsistent with somebody who has been "tipped" or "encouraged", and believes that he has secret information that will soon become public.

[75] In the second bullet of its reasons, the Commission repeated again what Landsiedel testified happened at the golf course, and then went on as follows:

> In his 23 June 2010 Investigative Interview Landsiedel (under oath and not represented by counsel) initially told Staff that he only asked Bert Holtby about Eveready's share consolidation -- to which Bert Holtby responded "he didn't really know; he hadn't been involved in the decision" -- and, because of Bert Holtby's position with Eveready, Landsiedel "didn't think it was a proper thing to ask him other questions". However, pressed why he did not ask Bert Holtby anything

> more about Eveready given Landsiedel had said that he was then considering whether to purchase additional Eveready Shares and that a part of his investment research strategy was to talk to company people, Landsiedel responded that he *probably* asked about how Eveready was doing and that Bert Holtby *probably* gave his typical response that Eveready was busy and was making money. Given that one of Landsiedel's trading strategies is to preferably know someone involved with the company to whom he could speak and on whom he could rely, we think it reasonable to infer that Landsiedel would have talked to Bert Holtby, his only contact at Eveready, about more than Eveready's share consolidation before investing hundreds of thousands of dollars in Eveready in March 2009. What is clear is that Landsiedel had contact and communications with Bert Holtby -- a person in a special relationship with Eveready with knowledge of the non-public Proposed Acquisition -- shortly before Landsiedel's purchases of Eveready Shares. In short, Landsiedel had opportunity to learn of the non-public Proposed Acquisition or to be recommended or encouraged by Bert Holtby to purchase Eveready Shares. Such facts could be supportive of an inference that Bert Holtby informed Landsiedel of the non-public Proposed Acquisition, or recommended or encouraged Landsiedel to purchase Eveready Shares. (Emphasis in original)

The Commission was clearly entitled to rely on the Investigative Interview, although it was of limited value. As previously noted, on its face it showed opportunity, but little more.

[76] This analysis of the golf course meeting reflects two errors. First of all, it focusses on Landsiedel's state of mind, without considering Holtby's state of mind. Secondly, it fails to come to grips with exactly what Holtby might have said.

[77] In this passage, the Commission focusses on Landsiedel's thought processes, and the kinds of things he might have been interested in knowing at the time. In deciding Holtby's culpability (that is whether Holtby had unlawfully "recommended or encouraged" purchases in Eveready), it is necessary to focus on Holtby's state of mind. As previously noted, it is not sufficient that Holtby merely said generically positive things about the company (*supra*, paras. 46-8). A director must obviously be cautious about what he says about his company while in possession of confidential information, but Landsiedel's evidence is entirely consistent with that. He notes that Holtby was "evasive" about giving details. Landsiedel recognized the sensitivity of Holtby's position by noting he "didn't think it was a proper thing to ask him other questions". This, the only evidence of what actually went on at the golf course, is inconsistent with Holtby making any recommendation with respect to Eveready.

[78] The Commission Staff had to prove that Holtby said something that he knew or should have known would likely motivate Landsiedel to go out and purchase Eveready shares (*supra*, paras. 51-2). Holtby's "typical response that Eveready was busy and was making money" cannot reasonably fall within the type of comments that the *Act* is designed to prohibit and punish

(*supra*, para. 52). In order to find that Holtby encouraged Landsiedel, the Commission had to find that Holtby said something sufficiently precise and focused that Holtby knew or should have known that Landsiedel would rely and act on it. As the Commission itself realized (reasons, para. 570): "We think it likely that Bert Holtby would in general be cautious in his sharing of non-public material information". The Commission never made a finding about Holtby's state of mind, and indeed on this limited record it would have been impossible to find he had the requisite intention to "encourage or recommend". The fact that Landsiedel might have been encouraged by Holtby's general attitude, the overall market conditions, the movement in the Eveready shares, and his other investment strategies, cannot lead to an inference about what Holtby should have known.

[79] That leads to the second flaw in the analysis. Without having some finding about what was said at the golf course meeting, it is not possible to draw a reasonable inference that Holtby encouraged Landsiedel. As the Commission acknowledged, it was unreasonable to find that Holtby said anything about Clean Harbors, takeover discussions, or anything similar. The only evidence before the Commission was that Holtby *probably* "gave his typical response that Eveready was busy and was making money". A finding that anything more than this was said would be speculation, not inference (*supra*, para. 26). There is nothing on this record that would support an inference that Holtby did anything amounting to "encouraging".

[80] The Commission was entitled to draw inferences about what the appellants said to each other, but only if there was evidence to support those inferences. Evidence that Holtby may have said generically positive things about Eveready cannot be turned into a finding that he told Landsiedel about the Clean Harbors takeover, nor that he recommended or encouraged the purchase of Eveready shares. There is nothing on this record that would justify an inference that Holtby told Landsiedel anything in the parking lot, other than what Landsiedel testified to. He said that Holtby was making his "typical types of comments", that "Eveready was doing well with good sales and profits". Holtby seemed a "little elusive" and Landsiedel did not press him. All of this is perfectly plausible, and is exactly what one would expect a director of a reporting issuer to say to an acquaintance in a parking lot at a golf course. As the Commission put it at para. 463, it is consistent with "common sense, human experience and logic having considered the totality of the evidence". Even if the Commission did not believe Landsiedel, disbelief cannot support an inference that Holtby tipped or encouraged Landsiedel (*supra*, para. 36). There is nothing on this record that would support an inference (as opposed to speculation) that Holtby said anything to Landsiedel about the Clean Harbors takeover.

[81] Evidence that Holtby "*probably* gave his typical response that Eveready was busy and was making money" cannot be turned into a finding that Holtby probably encouraged Landsiedel to buy Eveready shares on the eve of the Clean Harbors takeover. Contrary to what the Commission found, this evidence is not "supportive of an inference that Bert Holtby informed Landsiedel of the non-public Proposed Acquisition", nor an inference that Holtby "recommended or encouraged Landsiedel to purchase Eveready Shares". There is no evidence at all that Landsiedel or Holtby

ever discussed the desirability of purchasing Eveready shares, much less anything related to the Proposed Acquisition by Clean Harbors.

[82] In summary, a reviewing court must always be mindful of the standard of review. That standard is particularly deferential with respect to findings of fact. Examining each piece of circumstantial evidence separately, and concluding that it is possibly benign, is not an appropriate approach; the entire body of the evidence must be considered together: ***R. v J.M.H.***, 2011 SCC 45 at para. 31, [2011] 3 SCR 197. However, the finding that Holtby encouraged Landsiedel is unreasonable, and it is not one that was available on this entire record, having regard to the facts and the law. There were only two pieces of evidence that might support an inference of encouraging. The first was the evidence of the meeting at the golf course, in which some vague, generic statements were made about Eveready. The second was the fact that Landsiedel purchased a significant number of shares during the relevant period. However, as just discussed, when all the evidence is considered together it was unreasonable to think that the charge of encouraging had been proven on a balance of probabilities, much less to the standard of clear and cogent evidence the Commission established for itself. This finding must be set aside.

Randy Kowalchuk

[83] The appellant Randy Kowalchuk argues the Commission erred by:

(a) making an unreasonable finding that Richard Kowalchuk had informed him of the material fact;

(b) misapprehending the evidence of Richard Kowalchuk and relying on presumptions and drawing inferences which were not supported by the evidence and which were speculative;

(c) specifically relying on selective portions of the investigative interviews of Richard Kowalchuk which did not form part of the evidentiary record and were not raised by Staff, or the Panel, during argument;

(d) rejecting Randy Kowalchuk's testimony without providing adequate reasons and accepting or giving weight to evidence, submissions and assertions which were not put to the Appellant in cross-examination in breach of the duty of procedural fairness;

(e) imposing sanctions and costs which were unreasonable.

The first, second and fourth issues overlap and are largely ones of fact and credibility, attracting a deferential standard of review. The reasonableness of the sanctions is discussed *infra*, paras. 165-7. The third issue has already been discussed (*supra*, paras. 39-43). In determining the culpability of Randy Kowalchuk, the Commission did not rely exclusively on the challenged

Investigative Interviews, but also Richard Kowalchuk's settlement agreement and his testimony (reasons, para. 636). No reviewable error has been shown with respect to the third issue.

[84] Randy Kowalchuk challenges the finding that he was tipped, and that he engaged in insider trading. Randy Kowalchuk and Richard Kowalchuk both testified, and in their testimony they both denied that there was any communication of the material fact. However, in his Settlement Agreement Richard Kowalchuk had admitted passing on this critical information to his brother Randy. The Commission (reasons, para. 636) found their denials during their testimony to be "at times evasive or conveniently forgetful". As Randy Kowalchuk argues, other inferences could have been drawn, but there was evidence upon which the Commission could conclude that there was communication of the material fact, and the Commission's reasons in so finding are sufficiently transparent and comprehensive. Having regard to the standard of review, no reviewable error has been shown.

[85] Randy Kowalchuk purchased Eveready shares on April 13, 14, and 15, 2009, and it was critical to the findings against him that his brother Richard advised him of the material fact prior to those dates. The exact date on which the information was communicated was never clear, but the Commission concluded that it happened after the end of March, but before April 13 (reasons, paras. 637-8). The improper disclosure accordingly occurred prior to the first impugned Eveready purchase.

[86] An important piece of evidence was an email between Richard and Randy on April 21, 2009, which inferred that Randy did not yet know about the Clean Harbors takeover. After a break during his cross-examination, Richard Kowalchuk asked the Chair if he could clarify some of his answers about this email. He then volunteered that at this point in time he did know about the Clean Harbors takeover, and that this email had been deliberately crafted to make it appear as if he did not know. In other words, this email was intended to "cover his tracks", and conceal the fact that Randy also knew about the takeover. Since the only "tracks" that needed to be covered were the April 13, 14, and 15 trades, this was evidence that the Commission was entitled to rely on in setting the date of the disclosure. While the Commission might have drawn different inferences from the evidence, this inference as to the date of disclosure was available on the record, and no reviewable error has been shown. Further, while the reasons could have discussed more evidence, the content of the reasons on this issue does not undermine the ultimate reasonableness of the decision.

[87] In summary, the first, second and fourth issue raised by Randy Kowalchuk attack the fact findings of the Commission. While other findings would have been possible, the standard of review is deferential, and no reviewable error has been shown.

John Shepert

[88] The allegation against Shepert was that he engaged in insider trading. The Commission Staff alleged that Bert Holtby told his brother Dale Holtby about the potential takeover of

Eveready by Clean Harbors. Dale Holtby then passed knowledge of the material fact on to Shepert, and asked Shepert to purchase some Eveready shares on his behalf.

[89] The appellant Shepert alleges the Commission erred by:

(a) inferring that Bert Holtby informed Dale Holtby of the Proposed Acquisition, inferring that Dale Holtby informed Shepert of the Proposed Acquisition and inferring that Shepert knew that Bert Holtby was a director of Eveready;

(b) rejecting or failing to consider relevant evidence given by Bert Holtby, Dale Holtby, Tracy Kaufman, Arnold Kaufman and Shepert;

(c) imposing a penalty unreasonably harsh in the circumstances.

The first two grounds raise questions of fact and credibility. The reasonableness of the sanctions is discussed *infra*, paras. 150ff.

[90] The uncontradicted evidence was that while Bert Holtby and Dale Holtby are brothers, they did not have a close relationship. The evidence from the two of them, as well as from Dale's daughter and son-in-law (the Kaufmans), and Shepert, was that Bert and Dale led completely different and separate lives. Bert was a wealthy man who never provided any financial assistance or advice to Dale. Dale was dyslexic, dropped out of school at grade 7, never invested in the market, and worked as a handyman until he retired. While the Commission found their relationship was "close enough" (reasons, para. 565 #1) it would be unreasonable on this record to find they were "close".

[91] The Kaufmans' uncontradicted evidence was that they did not know that Bert Holtby (Tracy Kaufman's uncle) was a director of Eveready, or even what he did for a living or where he lived. Shepert testified that he knew Dale had a brother, but he also knew that the two of them were barely in contact with each other. It would appear that Shepert's only meeting with Bert Holtby in the previous 45 years was at a barbecue on March 21, 2009. His uncontradicted evidence was that he did not know that Bert Holtby was a director of Eveready.

[92] Dale Holtby and Shepert (both in their 70s) had been friends for over 50 years. On March 19, 2009 Dale Holtby inherited $57,000 from his mother's estate, and a few days after the barbecue he asked Shepert to invest it in Eveready for him. Shepert agreed to do so. He also testified that Dale's request caused him to think about Eveready, and he decided to buy some for himself and his family members.

[93] The Commission did not find that Bert Holtby told Shepert about the material fact at the barbecue, nor did he encourage Shepert to purchase Eveready shares (reasons, para. 568). Indeed, it would be remarkable if Bert Holtby essentially told a stranger (someone he had not seen for 45 years) such important information. The Commission did, however, find that Bert Holtby told his brother Dale Holtby the material fact. As counsel for Shepert points out, the

evidence in support of this inference is not compelling, and indeed the inferences drawn by the Commission are not the most obvious ones. As counsel noted, all of the inferences relied on by the Commission are equally consistent with Bert Holtby having "encouraged" Dale Holtby, as opposed to "tipping" him. As previously noted (*supra*, para. 15), the differences are significant.

[94] The Commission concluded not just that Bert Holtby encouraged Dale Holtby, but that he actually tipped him, and also that Dale Holtby tipped Shepert. In other words, Shepert was not just directly or incidentally "encouraged" by Dale Holtby's interest in Eveready, but was actually told of the material fact: that Clean Harbors was making a takeover bid. Again, the difference is critical. If Shepert was (a) "tipped", and (b) he knew an insider was the source of the information, he engaged in insider trading. If Shepert was merely "encouraged" by an insider, the person who encouraged him committed an offence, but Shepert did not (*supra*, para. 15).

[95] The Commission relied heavily (reasons, para. 594 #7) on the relationship between Dale Holtby and Shepert:

> The 50-year close and trusting personal relationship between Dale Holtby and Shepert and the substantial investment in Eveready made by Shepert are, in our view, more consistent with Dale Holtby having informed Shepert of the non-public Proposed Acquisition than with recommending or encouraging Shepert to purchase Eveready Shares. We are satisfied that Dale Holtby would not have considered himself at risk in sharing such confidential information with Shepert, and Dale Holtby was motivated to do so because he would benefit from Shepert's purchases of Eveready Shares made on Dale Holtby's behalf. (Emphasis added)

It is unreasonable to suggest that this evidence of a relationship is more consistent with tipping than with encouraging; that is not a conclusion that is available on the facts and the law. The relationship itself is at most evidence of opportunity, or perhaps motivation, and even then it is weak. On substantially similar evidence the Commission found that Holtby only encouraged the Kaufmans, and did not tip them (reasons, para. 597); the different result is striking. To conclude that the relationship is probative of tipping, as opposed to mere encouraging, reflects a reviewable error.

[96] The inferences drawn by the Commission with respect to Shepert are simply unreasonable, and do not rise above bare speculation. All those involved (Bert Holtby, Dale Holtby, Shepert, and the Kaufmans) denied that there was any tipping, or indeed any encouragement. All gave plausible explanations for the trading that admittedly occurred. Everything that happened was equally consistent with Bert Holtby only "encouraging" Dale Holtby to buy Eveready, and in any event everything that happened was also equally consistent with Dale Holtby only "encouraging" Shepert, even if Dale Holtby had actually been "tipped". As previously noted, this "encouragement" would involve an offence by Dale Holtby, but not by Shepert. The Commission has repeatedly recognized that misconduct should not be found when there is an equally plausible innocent inference: ***Re Podorieszach***, 2004 ASCD No. 360 at para. 78; ***Re Roche Securities***, 2004 ASCD No. 400 at para.42.

[97] There was no evidence to support an inference that Shepert actually knew that Bert Holtby was in a special relationship with Eveready. One of the Commission's bases for finding that Shepert "ought to have known" that Bert Holtby was a director was that a search of public records would have disclosed that (reasons, para. 602). That, however, is an unreasonable standard, because it would mean that everybody ought to know about all persons in a special relationship with all reporting issuers, because that is all a matter of public record.

[98] Shepert and Holtby both testified that at the barbecue Shepert asked Holtby what was going on with Eveready, and Holtby replied to the effect that he could not talk about it. There is no evidence on this record to support an inference that anything else was said on that occasion, nor is there any other evidence about the thought processes of the two persons involved. A generic answer to the generic question "what's happening" would not amount to recommending or encouraging (*supra*, paras. 51-52). This meager evidence of a generic conversation cannot reasonably support an inference that knowledge of the particular material fact relating to Clean Harbors was conveyed. The Commission's supposition (para. 602) that a reference to "your company" could support an inference of knowledge of a "special relationship" within the meaning of the *Act* is speculative.

[99] The Commission premised its disbelief of Dale Holtby's and Shepert's denial of any tipping as follows (para. 593):

> Dale Holtby and Shepert would have us believe that Shepert chose to purchase Eveready Shares on his own initiative, without any input or assistance from Dale Holtby. Dale Holtby and Shepert would also have us believe that Shepert's substantial purchases of Eveready Shares, which commenced immediately following a telephone call with Dale Holtby on or before 25 March and were all completed before the issuance of the 29 April 2009 News Release, were a fortuitous coincidence.

This passage misstates the position of Dale Holtby and Shepert in a prejudicial way.

[100] First of all, Shepert never suggested that he purchased the shares on his own initiative "without any input or assistance" from Dale Holtby. Dale Holtby was admittedly a person of limited literacy and education, with no investment experience, and of no financial means through most of his life. Any "assistance" from him would be fanciful. Shepert testified that Dale Holtby's interest in Eveready, and his request of Shepert to buy some shares, caused Shepert himself to have another look at Eveready. That was Dale Holtby's "input". Its depressed share price caused Shepert to believe it was an attractive investment. His knowledge that Dale Holtby's brother had something to do with the company both reassured him, and caused him to think there might be reason to invest. All of those explanations are entirely plausible, and nothing arising from them is an offence under the *Securities Act*. But implying that Shepert attempted to "have the Commission believe" that his interest in Eveready was unrelated to Dale Holtby was unfair to Shepert.

[101] Similarly, neither Dale Holtby nor Shepert suggested that the purchase of the Eveready shares was a “fortuitous coincidence”. Dale Holtby had never had any money to invest prior to the receipt of his inheritance on March 19. His need to invest the money naturally arose then, Eveready was the only public company he knew of, his brother was involved in it, and his stated reasons for investing in Eveready at that point in time were never put forward as a “fortuitous coincidence”. Likewise, Shepert testified that Dale Holtby’s request that Shepert purchase shares in Eveready for him piqued Shepert’s own interest. That was Shepert’s explanation for his investment in Eveready; he never suggested it was a “fortuitous coincidence”.

[102] Having misstated the position of these two parties, the Commission reasoned (reasons, para. 594) that Dale Holtby had passed on the material fact to Shepert. The Commission averted to the equally consistent inference that Holtby, without actually telling him the material fact, at best “encouraged” Shepert, either overtly, or implicitly because Dale Holtby had shown an interest in Eveready. The Commission concluded, however, that the facts were “more consistent” with tipping than with encouraging. This conclusion is unreasonable, because the two inferences are equally supported by the record. The burden of proof was on the Commission Staff, and it was unreasonable to find that they had met the burden of proving “tipping”.

[103] The Commission reasoned that Dale Holtby’s request that Shepert buy Eveready shares for him was “unusual”. Presumably the Commission thought that Dale Holtby should simply open his own account. However, the uncontradicted evidence was that Dale Holtby was inexperienced, illiterate, and never before had any money to invest. The evidence was also uncontradicted that he trusted his longtime friend Shepert. In this context, there is nothing suspiciously “unusual” about this request. Further, the Commission assumed that this inexperienced and illiterate retired handyman was sufficiently sophisticated to devise a scheme to invest money outside the country, in another person’s name, by transfers under $10,000, in order to confuse securities regulators. These inferences are contradictory to and unsupportable on this record.

[104] With respect to Shepert’s denial that he was “tipped” by Dale Holtby, the Commission reasoned (para. 594):

> We do not believe Shepert’s testimony on this point; rather, in all the circumstances, we think it reasonable and logical to infer that Shepert would have questioned, and did question, his long-time close friend Dale Holtby as to why he had decided to purchase Eveready Shares, and why through Shepert’s trading account.

By this line of reasoning the Commission essentially turned Shepert’s disbelieved denial into positive proof (see *supra*, para. 36). There was simply no evidence on the record to support the inference that any such questioning took place. If there had been such evidence, it might have been a “reasonable and logical” course of conduct, but in the absence of any such evidence this conclusion was bare speculation (see *supra*, para. 26).

[105] The theory of the Commission Staff was that the "tipping" likely took place at the barbecue on March 21, 2009. Dale Holtby did not contact Shepert until March 25, and he did not transfer any money to Shepert until March 30 and April 16 and 17. Shepert purchased shares for Dale Holtby on March 31 and April 20. Again, this pattern of trading is inconsistent with Dale Holtby having been "tipped", and intending to trade on confidential information of a takeover before it became public. In the normal course, one would expect a greater urgency on the part of those who are supposedly trying to run ahead of the market.

[106] The only evidence in support of the Commission's conclusions was the fact that Shepert did, at the relevant time, make significant investments in Eveready. However, the mere making of investments is not contrary to the *Securities Act*, even if Shepert had been "encouraged" to do so by a person in a special relationship. Shepert had invested in speculative stocks before, without engaging in any scientific research. The circumstances under which Dale Holtby and Shepert came to purchase the shares were plausible and uncontradicted. The mere disbelief of their testimony cannot be turned into positive proof that Shepert actually knew about the Clean Harbors takeover.

[107] The Commission seems to have been particularly influenced by the fact that Dale Holtby and Shepert transferred funds in several tranches, each under $10,000 (reasons, para. 565). Shepert testified that this was to avoid falling under scrutiny by the banking regulators, because he believed that transfers over $10,000 were subject to reporting requirements. The Commission concluded that this was evidence of "consciousness of guilt", and consistent with an attempt to conceal insider trading.

[108] Firstly, it should be noted that Shepert's explanation was plausible. Transfers over $10,000 are, in some instances, subject to review under the *Proceeds of Crime (Money Laundering) and Terrorist Financing Regulations*, SOR/2002-184. Although these particular transfers might not be caught by the regulation, that does not make Shepert's belief unreasonable. Secondly, the attempt to avoid the paperwork and bureaucracy involved in reporting may be seen as being socially undesirable, but it is not any realistic indication of a general willingness to disobey the law. Thirdly, even if the attempt to avoid scrutiny was improper, its use in this context amounts to little more than evidence of "general bad character". While the Commission is not bound by the rules of evidence, that does not give probative value to evidence that is otherwise without any weight. It leads to faulty reasoning to conclude that because someone tried to evade one statute, they are generally of a lawless character, and therefore they are likely to have committed the offence with which they are now charged.

[109] Further, the Commission's line of reasoning is strained. It depends on Shepert believing that the federal bureaucrats involved in regulating the *Proceeds of Crime* regulations would find the transactions between Shepert and Dale Holtby to be somehow improper. An examination of the underlying records would have shown that it was entirely appropriate for Shepert to transfer Dale Holtby's money back to his own account, and likely any investigation would have ended there. The Commission assumed, however, that not only would the federal bureaucrats find

something improper about the transactions, they would then relate them back to insider trading in Eveready, because somehow they would figure out that Shepert knew Dale Holtby, who is Bert Holtby's brother, who was a director of Eveready, and who at the relevant time had knowledge of a material fact. This line of reasoning then assumes that the federal bureaucrats would realize that they should alert the provincial securities regulators. This entire line of reasoning is so implausible as to be unreasonable. This is an example of what was alluded to in ***Cavanagh*** at para. 74: ". . . there comes a time when the underlying facts may be so remote that there are just too many steps or leaps in the chain of reasoning to say that a particular inference can reasonably be drawn". If Shepert was really paranoid enough to believe in this unlikely series of events, one would expect that he would have done much more to conceal the base trading in Eveready that was the supposed cause of all the problems. Shortly put, the reliance by the Commission on the sizes of the transfers of funds was unreasonable.

[110] Once again it should be noted that it is an error to examine each piece of circumstantial evidence, dismiss it if it is capable of a benign interpretation, and then conclude that the case has not been proven. In a circumstantial case, all of the evidence must be examined together. However, even taking such a holistic view of this record the conclusions of the Commission with respect to the culpability of Shepert are unreasonable. While the standard of review of findings of fact is high, where error is shown the reviewing court has a positive obligation to intervene. As was stated in ***H.L.*** at para. 75: ". . . appellate courts not only may -- but must -- set aside all palpable and overriding errors of fact shown to have been made . . .".

[111] There is very little on this record that would justify a finding of any kind of misconduct on the part of Shepert. There is nothing that justifies an inference that what happened was "tipping" as opposed to merely "encouraging". There is nothing to support an inference that Shepert should have known that any information he received originated in a person in a special relationship with Eveready. The finding that Shepert engaged in insider trading is unreasonable and must be set aside.

<u>Burdeyney, Walton and Jaschke</u>

[112] The evidence against Burdeyney, Walton and Jaschke is intertwined. The three of them practiced public accounting together in Peace River. Burdeyney and Jaschke had practiced together for over 30 years, and Burdeyney and Walton had practiced together for 14 years. Burdeyney was Bert Holtby's personal accountant, but not the accountant for Eveready. There was a significant age difference between Burdeyney and Walton, and they had no social relationship. Walton and Jaschke knew that Bert Holtby was a client of the firm, but they had no dealings with him beyond exchanging greetings in the hallway. Holtby no longer resided in Peace River.

[113] In summary, the Commission found that Holtby tipped Burdeyney about the pending Clean Harbors transaction, which made Burdeyney a person in a special relationship with Eveready. Burdeyney traded on that information, and also tipped Gayle Walton, who also knew that the information must have come from Holtby, placing her in a special relationship. She then

encouraged her husband Thane Walton to trade in Eveready shares. The Commission concluded that Burdeyney neither encourage nor tipped Jaschke, even though he traded in Eveready during the relevant period. (reasons, para. 623).

[114] The appellant Burdeyney alleges the Commission erred by:

(a) inferring that Burdeyney had been informed by Holtby of the Eveready acquisition, and in turn tipped Walton in the absence of or in conflict with the evidence;

(b) inferring that by Walton's comment and its material uncertainty Burdeyney had to have had knowledge of the Eveready acquisition, and tipped Walton;

(c) improperly relying upon evidence of communications between Walton and her husband to draw inferences that Burdeyney had knowledge of the Eveready acquisition and had informed Walton to purchase Eveready shares, notwithstanding its previous spousal privilege ruling;

(d) imposing an unreasonably harsh penalty in all the circumstances of this case.

The third issue has already been dealt with (*supra*, para. 44). The reasonableness of the sanctions is discussed *infra*, para. 157.

[115] The appellant Walton asserts the following grounds of appeal:

(a) a breach of the duty of fairness by not observing the rule in *Browne v Dunn*;

(b) that the Commission relied on evidence ruled inadmissible as being protected by spousal privilege;

(c) that the Commission imposed sanctions and costs that were unreasonable in all the circumstances.

The second issue has already been dealt with (*supra*, para. 44). The reasonableness of the sanctions is discussed *infra*, para. 157.

Background Findings

[116] Burdeyney, Walton and Jaschke were all aware of Eveready, which was a prominent business in the Peace River community. They had all invested in Eveready from time to time before the critical period in early 2009.

[117] The Commission found that Bert Holtby did tip Burdeyney. Bert Holtby was not frequently in Peace River, and so was rarely in the accountants' office. Holtby and Burdeyney communicated by email, but there was nothing incriminating in those emails. An examination of

the telephone records showed one conversation between Holtby and Burdeyney, on February 2, 2009. If any tipping took place, it had to be during that call. There was no evidence of any other communications, and a finding that there was any other communication would be speculation based on mere suspicion.

[118] The Commission relied on a "concession" that there might have been other calls than the one on February 2nd (reasons, para. 579):

> . . . While there is no evidence of any other telephone calls between them [Holtby and Burdeyney] between January and the end of April 2009, Burdeyney conceded it was possible that there were other such telephone calls. (Emphasis added)

[119] Burdeyney testified (transcript, p. 967) that he and Holtby seldom talked on the telephone, and that they spoke only once during the relevant time, and that was about a family trust. His contemporaneous handwritten note of the February 2nd call confirmed that. He testified positively that he did not recall any other telephone calls, and when asked whether "you only had one phone call between you and him during that entire time?", he replied "It's entirely possible". Testifying that it is "possible" that he had "only one call" cannot be turned into evidence, much less a "concession", that there were possibly other calls. "No evidence" of other calls, cannot be turned into evidence of other calls. So the Commission was in error in thinking there was such a "concession", and in any event Burdeyney's purported "concession" that "it was possible" there were other telephone calls would support speculation, not legal inferences. The Commission Staff had the burden of proof, they had obtained copies of the relevant telephone records, and the absence of evidence of any other calls is insurmountable. The reliance by the Commission on this supposed "concession" of "possibility" to draw an inference of "probability" was unreasonable.

[120] The Commission's reasoning on tipping included a number of presumptions that had no basis in the evidence. For example (reasons, para. 579):

> Given the longstanding professional relationship and trust that had developed between Bert Holtby and Burdeyney, it would not have been unreasonable for Bert Holtby to disclose information about his business affairs to Burdeyney with the expectation that any such information would go no further.

This hypothetical narrative is largely speculation. There was no evidence about Holtby's beliefs or understandings about what would happen to information he gave to Burdeyney. There was no evidence that a pending takeover by Clean Harbors would have any effect on Holtby's past or future accounting requirements, or why it would be necessary for Holtby to pass that information along to Burdeyney. As previously noted (*supra*, para 28), the syllogism "it would not have been unreasonable" invites speculation.

[121] The Commission reasoned that Burdeyney had no source of information about Eveready other than Holtby (reasons, para. 579):

> . . . There is no evidence that in the same period Burdeyney knew another person who was connected to Eveready or who, more importantly, had knowledge of the non-public Proposed Acquisition. Such facts could be supportive of an inference that Bert Holtby informed Burdeyney of the non-public Proposed Acquisition, or recommended or encouraged Burdeyney to purchase Eveready Shares.

Burdeyney was never asked if he had another source of information about Eveready. Eveready was a well-known business in the community, and Burdeyney had owned its securities in the past. The reasoning is troublingly circular, because it assumes that Burdeyney was informed of the "Proposed Acquisition", and then reasons that the source of that information must have been Holtby. As recognized, this evidence of possible opportunity is equally consistent with tipping and encouraging. It was unreasonable for the Commission to build its final conclusions on a number of vague and ambiguous factors such as this.

[122] The Commission recited a number of facts that it said "could be supportive of an inference" that Holtby tipped Burdeyney (reasons, para. 579). They included a) the longtime professional relationship between the two, b) the fact that Holtby knew about the takeover, and c) the fact that the two of them actually communicated from time to time. These facts, individually or collectively, provide an inference of nothing more than opportunity. The Commission's phraseology that "it would not have been unreasonable" for tipping to occur in this environment cannot support a legal inference of tipping, much less proof on a balance of probabilities.

The Burdeyney Comment

[123] It is not disputed that Burdeyney, Walton and Jaschke traded in Eveready shares during the relevant period. Apart from generalized evidence of "opportunity", there was only one piece of evidence that could positively support the Commission's findings. That evidence came from Gayle Walton.

[124] During her Investigative Interview Gayle Walton volunteered a comment made by Burdeyney. It was summarized by the Commission as follows (reasons, paras. 380-4):

> 380 In her 3 November 2010 Investigative Interview, Gayle Walton (under oath and represented by counsel) gave the following evidence regarding her knowledge of the Proposed Acquisition:
>
> > Q Ms. Walton, are you aware that on March 2 of 2009, [Eveready], and [Clean Harbors] signed a letter of intent with the purpose being to follow up on discussions of the parties concerning the interest of Clean Harbors in acquiring all the outstanding shares of Eveready?
> >
> > A I was not aware of all those details that you listed.

Q What details were you aware of?

A I was told that there sounds like there might be a deal or a merger, and I cannot remember the exact words, but that's the gist of it.

Q Who told you that?

A Ken Burdeyney.

Q When did he tell you that?

A I don’t recall the day that he told me that.

Q Do you recall the month?

A But yeah, I mean it was around the end of February, beginning of March so it would have been some time last week of February, first week of March.

Q Did it provide you any comfort?

A Provide me any comfort? Not really. You know, I didn't know if a merger necessarily meant, you know, more money for the -- like you know, a buyout of X dollars, I -- you know, I didn't know what exactly that -- the impact that would have.

Q Impact on what?

A Well, if that would impact the price, if that would, you know -- if that was even -- if that has happening, if that was true, how far along the negotiations were. I really didn't know and I didn't ask any -- I didn’t ask Ken any questions about it.

381 Gayle Walton in her testimony elaborated on this information from Burdeyney. She explained that during her Investigative Interview she had guessed when it had been conveyed. In preparation for the Merits Hearing, she had reviewed her records and was quite certain that the latest date this information could have been conveyed was Friday 27 February 2009. She recalled that the information had not been conveyed in her meeting with Burdeyney in which they discussed the stop-loss rules and other tax implications involving Eveready Shares held by one of her clients. Rather, she recalled that Burdeyney “was walking by my office and he poked his head in” and made the five-second passing “scant comment” with not much “substance or detail”. Gayle Walton in her testimony

described it as a “comment”, not a conversation – “Conversation meaning that I would -- we would have dialogue back and forth and that's not how it was.” Gayle Walton testified that she did not remember the exact words used by Burdeyney and that her words in the transcript “sounds like there might be a deal or merger” were not his exact words, with her now only remembering him saying “might be” and “deal”.

382 Gayle Walton testified that Burdeyney did not indicate the source of his information. She also did not recall Burdeyney specifically referencing Eveready or Clean Harbors when he made the comment, saying anything about Eveready buying or selling, any talk of status of negotiations or any particular timing. She said that, because they had shortly before been discussing the stop-loss rules concerning the conversion of Eveready Units to Eveready Shares for one of her clients, from those circumstances she “took it to mean that [Eveready] was what he was talking about”. Gayle Walton testified that at the time of her Investigative Interview she had assumed the "deal" Burdeyney was referring to was the Proposed Acquisition because:

> . . . I did make that leap or that connection in my mind that what [Burdeyney] was referring to back at the end of February was an Eveready deal when -- when the comment was made. And then two months later Eveready actually does make a deal. It's -- it -- that was the leap I made in my mind that this must be the same thing.

383 Gayle Walton said that she was not aware of any negotiations between Eveready and third parties, nor that Eveready was going to be acquired by a third party. Gayle Walton said that Burdeyney never mentioned Clean Harbors to her. The first time Gayle Walton learned of Clean Harbors was when one of her clients faxed her the 29 April 2009 News Release.

384 Gayle Walton said that she passed on Burdeyney’s comment that there “might be a deal with Eveready” to Thane Walton around the same time as she had been told -- on or about 27 February 2009 and certainly not later than 1 March 2009. Gayle Walton said that there was not much discussion between her and Thane Walton concerning Burdeyney’s comment. Gayle Walton reiterated that at the time she told her husband this information she had been proceeding on her assumption that Burdeyney had been referring to Eveready. Gayle Walton confirmed that she gave Thane Walton this information before he made his first repurchase of Eveready securities on 4 March 2009.

It was primarily based on this disclosure by Walton that the Commission concluded that Holtby tipped Burdeyney, who tipped Gayle Walton, who encouraged her husband Thane.

[125] The Commission concluded that Burdeyney did not tip Jaschke (reasons, para. 630). The only meaningful difference in the evidence against Jasckke, as compared to Burdeyney and Walton, was this one disputed comment. That illustrates the key effect the disputed comment had on the fact findings. The Commission proceeded on the basis this comment was "the most striking evidence". (reasons, para. 579 #6)

[126] The Commission found this evidence to be compelling (reasons, para. 579 #6):

> We agree with Staff that this evidence of Gayle Walton should be accorded great weight, it being evidence against her own interest as well as that of her partner Burdeyney. We discern no reasonable motive for Gayle Walton to have given such evidence were it not true. Having considered Gayle Walton's evidence in light of all other evidence, we find ourselves unable to reach any reasonable or logical conclusion but that, in making the comment about which Gayle Walton gave evidence, Burdeyney informed Gayle Walton of the non-public Proposed Acquisition.

Gayle Walton volunteered this information during her Investigative Interview, she expanded on it when asked, and she repeated it during her testimony. As the Commission noted, it could be regarded as an "admission against interest".

[127] As noted, the only date for any tipping of Burdeyney by Holtby supported by this record was February 2, 2009 (*supra*, para. 117). Burdeyney did not make his comment about a "deal that might be" until the end of February, which would mean that if he tipped Walton as alleged he kept this information to himself for almost a month.

[128] In the passage just quoted the Commission found Walton's evidence of the comment to be compelling and believable evidence, but then the Commission went on to disbelieve large parts of it and almost everything else Gayle Walton said. Gayle Walton said that something vague was said about a "deal" that "might be". She jumped to the conclusion at the time that it had to do with Eveready, although nothing was said about specifics. She denied knowing that it came indirectly from Holtby. The Commission disbelieved all of this. It came to the conclusion that the information had to do not only with Eveready, but specifically with the "Proposed Acquisition", and that Walton "must have known" that Burdeyney got it from Holtby. While a trier of fact is entitled to accept some of the witness's evidence, all the witness's evidence, or none of the witness's evidence, this treatment of Gayle Walton's evidence is strained and unsupported by the evidence.

[129] All that Gayle Walton testified to was a five second "scant" conversation, containing the words "might be" and "deal". She denied that any other detail was given, and denied that she knew anything more definite, such as the object or source of this information. The Commission disbelieved all of that, and effectively filled in all the details. It concluded that she "must have known" Burdeyney was referring specifically to Eveready, she did not merely guess after-the-fact that the reference was to Eveready, and that she had a "clear understanding" that

Eveready was involved in some sort of merger (reasons para. 579 #6). The Commission essentially turned Walton's denials into positive proof of the opposite fact, a line of reasoning that is unreasonable (see *supra*, para. 36).

The Burdeyney Denial

[130] Burdeyney could not recall ever having this conversation. He denied having been told by Holtby about any pending takeover, and he denied passing on any information about Eveready to Walton or Jaschke. The Commission disbelieved this evidence, partly because of the form of his evidence (reasons para. 579 #6):

> Burdeyney denied that Bert Holtby ever told him something or words to the effect "sounds like there might be a deal or a merger". Asked if he told Gayle Walton in late February or early March 2009 that "there sounds like there might be a deal or a merger" or words to that effect, Burdeyney testified: "I don't recall the conversation." We find this testimony internally inconsistent. If Burdeyney had no such information, he would have had no information about Eveready to pass on to Gayle Walton. If such were the case, he could not have made the impugned comment to Gayle Walton at all, and thus would have denied doing so.

Live testimony is a dynamic process, requiring the witness to give answers without consideration or reflection of the nuances of how an answer is structured. In this context it was unreasonable to put too much weight on exactly how the question was answered.

[131] Burdeyney was under oath to tell the truth, the whole truth and nothing but the truth. If he did not recall making this comment to Walton, the only honest answer he could give was "I don't recall the conversation". There was nothing facially inaccurate about his testimony.

[132] The Commission minutely analyzed his answer, and concluded that if he had not been tipped, he could not know the information, and therefore it was impossible for him to have made the statement. Therefore he should have answered "No", not "I don't recall the conversation". In fact, in his Investigative Interview Burdeyney had given exactly the sort of nuanced answer that the Commission expected:

> Q Mr. Burdeyney, sometime near the end of February or early March of 2009, did you tell Eric Jaschke that there sounds like there might be a deal or a merger with respect to Eveready Inc. being acquired by Clean Harbors or words to that effect?
>
> A I do not recall telling him that.
>
> Q Were you aware of a deal or a merger taking place?
>
> A No.

> Q Is it that you don't recall? I guess I'm looking for something more specific, that being either a yes or a no, that you told him that. Is it possible that you told him that?
>
> A In my own memory, I'm thinking that we couldn't have had the discussion because I didn't know about it, so I would say no, is the short answer. (Emphasis added)

This transcript was placed on the record by Commission Staff, and it formed a part of the evidence before the Commission. In the circumstances, it was unreasonable for the Commission to disbelieve Burdeyney merely based on the form of his answer when testifying at the hearing 20 months later.

[133] In order to show that Burdeyney was in a special relationship with Eveready, it was not sufficient to show that he knew something about the Clean Harbors negotiations (as opposed to generic discussions about takeover prospects, or the fact that Eveready was a "takeover target"). It was also necessary to show that Burdeyney obtained that information from a person in a special relationship with Eveready, namely Holtby. There was no evidence whatsoever on the record as to the source of Burdeyney's information. The statement attributed to him was very generic, that there "might be a deal", and the circumstances could only support the weakest of inferences that he was talking about Eveready, or that the information came from Holtby. His only potential contact with Holtby was one month earlier. Given the general knowledge in the market that Eveready was a potential takeover target, and especially given that Eveready was well known in the Peace River area, this statement cannot reasonably support an inference that he knew the material fact itself.

[134] The need for evidence to support an inference of the source of the information was discussed in ***R. v Rankin*** (2006), 42 CR (6th) 297, leave refused 2007 ONCA 127, 221 OAC 184, a case involving a prosecution for tipping:

> 58 The circumstantial case clearly fails for the very reason identified by the trial judge. It is tempting to tag Andrew Rankin as the tipster given his personal connection to Daniel Duic. It no doubt provides a simple and convenient answer to the central issue in the case. That personal connection, however, cannot reasonably give rise to anything more than active suspicion. Suspicion is simply speculation by another name. It can never be elevated to the very high standard of proof beyond a reasonable doubt.

While ***Rankin*** was a criminal case, the principles regarding the drawing of inferences apply equally here. Apart from the relationship between Bert Holtby and Burdeyney, there is no evidence as to the source of any information he might have had. The inference that whatever information Burdeyney had came from Holtby is unreasonable.

[135] The findings of insider trading were also inconsistent with Burdeyney's purchases. The only evidence on the record was that any tipping that occurred took place on February 2, 2009. Any other conclusion would be speculative. Yet Burdeyney did not even attempt to enter the market until March 31, almost 2 months later. Even if Holtby tipped him about the time he made the disputed comments to Walton on about February 27, it was still over a month until he attempted to trade. Due to some miscommunications with his broker and other technical problems with his accounts (reasons paras. 351-5), no actual purchases were made until April, which the Commission acknowledged did not "exhibit the urgency often seen in cases of legal insider trading". His total investment was $2,500, which was inconsequential in relation to his net worth, consistent with his other investments, and inconsistent with the conduct of someone who is in the possession of insider information.

The Walton Denial

[136] The Commission disbelieved Walton's denial that she was tipped, that she knew the source of any information, or that she had unlawfully encouraged her husband to buy Eveready shares. As noted, the Commission accepted her acknowledgment that Burdeyney told her something about a "deal" that "might be". It rejected her assertion that she knew any other details, and then turned disbelief of her denial into a finding of the opposite positive facts.

[137] The Waltons had a plausible explanation for their dealing in Eveready at the time. In 2008 Thane Walton exercised some stock options he had received through his employment. He realized a significant gain that would be taxable in 2008. At the same time he held a large block of Eveready units, that were trading at a much lower value than his cost base. If he sold those units, he would realize a capital loss. On December 30, 2008 Thane Walton in fact sold all his Eveready units. All of these facts are undisputed, and they clearly occurred before any negotiations with Clean Harbors became material.

[138] Gayle Walton testified that she and her husband planned to sell the Eveready units to generate tax losses, and then purchase them back after the waiting period required by s. 54 of the *Income Tax Act*. She assumed that the 60 day "superficial loss" period (during which replacement units could not be purchased) commenced on the date of sale, and therefore expired at the end of February. Consistently with that belief, Thane Walton repurchased Eveready shares in early March, 2009.

[139] It turned out that Gayle Walton was mistaken in several respects. First of all, Thane Walton's employer unexpectedly issued a T4 slip for the gains he made on his stock options. This meant that the income gain on the stock options could not be set off against the capital losses on sale of the Eveready units. Further, the 60 day superficial loss period is actually 30 days before and 30 days after the transaction, not 60 days after the transaction. While Gayle Walton was mistaken in these respects, the key point is that she and her husband conducted themselves as if they believed that their original assumptions were true.

[140] The Commission disbelieved this explanation, and their disbelief played a large factor in their rejection of all of Gayle Walton's testimony (except the volunteered information that she was told about a "deal that might happen"):

> [628] . . . We agree with Staff that Gayle Walton's explanation for the Walton's March 2009 repurchase of Eveready securities – that she and her husband had planned to repurchase Eveready securities but could not do so earlier than 60 days after the sale of all of their Eveready Units at the end of December 2008 – is not credible. First, Gayle Walton testified that she and her husband sold their Eveready Units to create a capital loss intended to offset an anticipated capital gain from Thane Walton's exercise of Galleon options. However, as it turned out, there was no capital gain to be offset. Second, Gayle Walton testified that they did not repurchase Eveready securities earlier because she mistakenly believed that the stop-loss tax rules prohibited them from repurchasing Eveready securities for 60 days following, rather than surrounding, the transaction. In fact, under the "superficial loss" or stop-loss rules, the Waltons could have repurchased Eveready securities 30 days after they had sold them – at the end of January 2009. Instead they did not make any purchases of Eveready Shares until after Gayle Walton learned of the non-public Proposed Acquisition from Burdeyney. <u>It defies belief that Gayle Walton, an accounting professional with knowledge of or easy access to guidance about tax rules (and, in particular, access to plainly-worded guidance about the stop-loss rules), would have been so mistaken on both issues.</u> (emphasis added)

The Commission's reliance on this line of reasoning is, in context, unreasonable.

[141] First of all, it fails to give any weight to the fact that the Waltons conducted themselves as if they believed their assumptions to be true. It is a fact that Thane Walton sold all his units on December 30. There can be only two plausible explanations for that: either he was trying to generate a tax loss, or he had simply "given up" on Eveready. Given the timing of the sale, his admitted taxable gain, and Gayle Walton's testimony, the former is clearly the most logical inference. The trading was all consistent with their testimony, and normal trading practices.

[142] Further, the fact that there was "no capital gain to be offset" misses the point. The issue was whether Gayle Walton believed there was a capital gain, and if that belief was reasonable. Likewise, the fact that she misunderstood how the superficial loss rule works was less significant than if her erroneous belief was reasonable.

[143] The biggest problem with this analysis is that it was never put to Gayle Walton in cross-examination that she was being dishonest in her evidence, and that her professed ignorance was unreasonable. The Commission not only found that she was lying under oath, but that it was "beyond belief" that an accounting professional could operate under this sort of misapprehension about the tax rules. Yet Gayle Walton was never asked anything about the nature of her practice,

whether she had extensive experience with stock options, or whether she had ever had to apply the superficial loss rule before.

[144] This was a violation of the rule in ***Browne v Dunn***, (1893), 6 R 67 at p. 70 (HL):

> Now, my Lords, I cannot help saying that it seems to me to be absolutely essential to the proper conduct of a cause, where it is intended to suggest that a witness is not speaking the truth on a particular point, to direct his attention to the fact by some questions put in cross-examination showing that that imputation is intended to be made, and not to take his evidence and pass it by as a matter altogether unchallenged, and then, when it is impossible for him to explain, as perhaps he might have been able to do if such questions had been put to him, the circumstances which it is suggested indicate that the story he tells ought not to be believed, to argue that he is a witness unworthy of credit.

That rule is one of simple fairness; if a witness is to be contradicted, it is only fair that the subject of the contradiction be put to the witness. It is also important to the weight of any contradictory evidence, because it is unreasonable to rely on untested evidence. In this case there was no evidence to contradict Gayle Walton, and the Commission's finding of a lack of credibility rested merely on the Commission Staff's bold assertion that her testimony was "unbelievable". This considerably weakens any inferences that could be drawn.

[145] Walton brought an application to admit fresh evidence on appeal, that evidence consisting of testimony she might have given if she had been cross-examined on this topic. The fresh evidence can be admitted, not so much for the truth of its contents, as to demonstrate that the failure to cross-examine likely had some impact on the outcome of the proceedings. If cross-examined, Gayle Walton would have testified that her accounting practice seldom related to stock market transactions, and she had never previously had occasion to apply the superficial loss rule. She would have testified that her husband was not an "employee" but worked as a contractor, that his employer had not made any source deductions when it paid out the stock options, and that the subsequent issuance of a T4 slip was a surprise. She first found out about the correct interpretation of the superficial loss rule on March 3, 2009, when she had to research the point for another client. Absent a fair consideration of this evidence, it was not reasonable for the Commission to conclude that her explanations "defied belief".

[146] The Commission Staff was required to prove that Gayle Walton was tipped about the Clean Harbors transaction specifically (although the precise name or identity of the buyer was not necessary). It is also necessary that she knew or ought to know that it came from a person in a special relationship with Eveready. That meant that she had to have known that Burdeyney was speaking to her about Eveready, and that his information probably came from Holtby. The previous comments (*supra*, para. 134) on the dangers of drawing inferences of knowledge from mere personal connection apply here. Walton's fresh evidence suggested she could have explained that her relationship with Burdeyney was such that she would not expect to get sensitive information from him, and there were many other places where she might have

assumed Burdeyney's information originated. Since the only possible tipping of Burdeyney by Holtby occurred on February 2, and Walton had no information whatsoever about when or how Burdeyney and Holtby communicated, it was unreasonable to draw an inference that she "ought to have known" in late February where this information came from.

[147] It is clear that Thane Walton traded in Eveready shares in early March 2009. However, a plausible, and even likely, explanation was given for the trading. There was a pattern of conduct going back to 2008, based on undisputed facts, that supported Gayle Walton's explanations. Considering the entire record, and having due regard to the standard of review, the Commission's findings that Gayle Walton was in a special relationship with Eveready, and that she was tipped, are unreasonable.

Summary

[148] The findings of fact and credibility of the Commission are entitled to deference, but the findings that Holtby tipped Burdeyney, that Burdeyney tipped Walton, and that Walton encouraged her husband are unreasonable. The clear, convincing and cogent evidence that the Commission realized was needed was missing from this record.

Sanctions

[149] All of the appellants appeal the sanctions imposed on them, arguing that they were demonstrably unfit in the circumstances.

[150] The Commission has a wide range of sanctions available to it. It can exclude persons from the market, by directing that they are not permitted to trade in any securities, and by restricting their ability to become a director of a reporting issuer (s. 198(1)(b) and (e)). Those sorts of market exclusions can be for a fixed period of time, or for life, and can be absolute or subject to exceptions. The Commission can also order that a person disgorge any profits made by illegal trading (s. 198(1)(i)). It can also impose "administrative penalties" (s. 199(1)), and assess costs of the hearing (s. 202(1)).

[151] These remedies are not intended to be directly punitive, but rather are "exercised prospectively in the public interest" to protect the capital markets (sanction reasons para. 39). Nevertheless, individual and general deterrence is considered to be one of the legitimate considerations in formulating an appropriate sanction: ***Cartaway Resources***. As such, the penal aspects of sanction orders cannot be ignored.

[152] The Commission imposed the following sanctions on the appellants in its reasons reported as ***Re Holtby***, 2013 ABASC 273:

Appellant	Market Exclusion	Disgorge Profit	Administrative Penalty	Costs
Bert Holtby	Permanent	$80,678	$1,750,000	$90,000
Randy Kowalchuck	4 years	$54,402	$55,000	$22,500
John Shepert	5 years	$139,844	$100,000	$25,000
Kenneth Burdeyney	5 years	$8,270	$20,000	$27,000
Gayle Walton	4 years	$89,386	$90,000	$22,500

As previously noted (*supra*, para. 23) the standard of review is deferential. As noted in ***Cartaway Resources*** at para. 64, the sanctions order must be reviewed "globally". No one factor should be considered in isolation, although unreasonable weight given to one factor may render the sanction unreasonable.

[153] The Commission adopted the following factors from ***Re Workum and Hennig***, 2008 ABASC 719 as being relevant to the imposition of a sanction:

> [43] In our assessment of appropriate sanction, we are guided by the principles set out by this Commission in *Lamoureux* and refined in later decisions. These factors include:
>
> • the seriousness of the findings against the respondent and the respondent's recognition of that seriousness;
>
> • characteristics of the respondent, including capital market experience and activity and any prior sanctions;
>
> • any benefits received by the respondent and any harm to which investors or the capital market generally were exposed by the misconduct found;
>
> • the risk to investors and the capital market if the respondent were to continue to operate unimpeded in the capital market or if others were to emulate the respondent's conduct;
>
> • decisions or outcomes in other matters; and
>
> • any mitigating considerations.

The Commission discussed the applicability of each of these factors to the various appellants.

[154] The Commission determined that general and specific deterrence were important factors in assessing the sanctions required to protect the public interest, while recognizing that the circumstances of some of the appellants made specific deterrence less important for them (sanction reasons para. 45). Those are legitimate considerations, but at the end of the day the sanction must be proportionate and reasonable for each appellant. The pursuit of general deterrence does not warrant imposing a crushing or unfit sanction on any individual appellant.

[155] The Commission was concerned that none of the appellants "admitted they committed the seriousness misconduct found or indicated they are repentant for that misconduct", referring to the first factor listed in ***Workum and Hennig*** (sanction reasons para. 55). Care must be taken not to overemphasize this factor. It is not an aggravating factor that the respondent fails to "plead guilty" or fails to express remorse. It is unreasonable to suggest that these appellants will, despite the findings of culpability, nevertheless think that there is nothing wrong with what they did. The appellants were entitled to mount a defence before the Commission, and they were entitled to make arguments in their favour. Just because they were unsuccessful does not mean that they fail to understand the seriousness of what happened. The ordeal and expense of the hearing, together with the publicity that accompanied it, themselves have a deterrent effect.

[156] The Commission found that it was appropriate to order that each of the appellants disgorge any profits that they made. Further, it found that particular appellants should also be required to disgorge profits made by their immediate family members (such as spouses) (sanction reasons paras. 79-83, 88, 117-8). In addition to disgorgement, the Commission found that it was appropriate to impose further financial administrative penalties. That is not unreasonable, because if the maximum financial consequence of insider trading was a disgorgement of the profits realized, there would be no true deterrent. Anyone caught would at worst "break even". However, any further administrative penalty must still be proportionate to the offence, and fit and proper for the individual offender. An administrative penalty focussed purely on general deterrence of an unidentified and amorphous sector of the public could easily become disproportionate to the circumstances of the individual involved.

Shepert, Burdeyney, and Walton

[157] Since the findings of culpability against Shepert, Burdeyney, and Walton must be set aside, nothing further need be said about their sanctions.

Bert Holtby

[158] The Commission found that the conduct of Holtby was the most serious. He was the director of Eveready who obtained the confidential information, and all the other illegal activities cascaded down from him. Further, as an insider and director of the company, he was in breach of his fiduciary duties (sanction reasons paras. 45, 50). The Commission concluded that, in addition to disgorgement of profits, further financial administrative penalties were called for.

[159] Bert Holtby complains, firstly, that his exclusion from the market was unconditional. He argues that it would not have been contrary to the public interest to allow him to trade in his own portfolio. He has a significant portfolio, and the present absolute order would suggest that he can neither buy nor sell any securities, and that essentially he must hold his existing portfolio forever. Even if he intended to put his portfolio into the hands of an arm's-length blind trust, to be managed by a professional portfolio manager, he would have no ability to transfer his portfolio over. These observations are not without merit, but there is a more obvious remedy. The Commission has the ability to vary an order at any time, or to carve out exceptions. It is always open to Holtby to apply for approval of particular transactions, or classes of transactions.

[160] The administrative penalty assessed against Holtby was $1,750,000. The Commission declined to determine administrative penalties by any formula (sanction reasons para. 126), and did not indicate how it arrived at this amount. It noted that the Commission Staff suggested a penalty of $1,800,000, that Holtby proposed something in the range of $400,000, and that the total profits earned by all of those who were found to have been directly or indirectly tipped by Holtby was $2 million. The Commission gave no reasons for setting this penalty other than saying that "in all the circumstances" they concluded that it was appropriate (sanction reasons para. 130). The resulting penalty is very severe, and one can argue that it extends well beyond what the public interest might require. The reasons for setting this penalty are so general as to preclude any meaningful review, or to provide Holtby with any understanding of how it was set. The Commission failed to explain why a lesser penalty (such as the $400,000 suggested by Holtby) would not act as a meaningful and substantial general deterrent. It failed to explain how this penalty was appropriate to Holtby personally.

[161] Further, this administrative penalty appears to have had some (albeit unsaid) relationship to the amounts that Landsiedel, Shepherd, Burdeyney, and Walton gained. Since the findings with respect to those persons have been set aside, the basis for the sanction has in part disappeared.

[162] On this record, it is impossible to say if the sanction is reasonable. Its severity leaves cause for concern, and it lacks the justification, transparency and intelligibility that the decision making process requires. In the circumstances, it is not appropriate for this Court to attempt to fashion a new sanction. Rather, the sanction imposed against Holtby should be set aside, and the entire matter remitted to the Commission for reconsideration.

Randy Kowalchuk

[163] The Commission recognized that the conduct of Randy Kowalchuk was less serious, because he was not a "true insider" (sanction reasons paras. 52-3). It ordered a four year market exclusion, and a disgorgement of profits of $54,402. In addition, it directed an administrative penalty of $55,000:

> 133 Randy Kowalchuk committed serious contraventions of Alberta securities laws, albeit much less serious than those of most of the other Respondents. We

> have concluded that the public interest demands significant sanctions, providing strong specific and general deterrence, be imposed on Randy Kowalchuk, which must include in addition to the capital-market bans and disgorgement discussed above a substantial administrative penalty. In deciding the appropriate administrative penalty quantum, we are mindful of: the quantities of Eveready Shares illegally purchased by him; and the potentially very serious adverse consequences for his reputation and future career prospects. We also take into account the overall effect of the combination of sanctions to be imposed. In all the circumstances, we believe that an administrative penalty much less than that sought by Staff would provide the measure of specific and general deterrence necessary in this case. We therefore conclude that an administrative penalty of $55 000.00 against Randy Kowalchuk is appropriate and in the public interest.

While the Commission gave more extensive reasons with respect to the culpability of Randy Kowalchuk, the justification for the amount of the administrative penalty is still not obvious. While the Commission had recognized (sanction reasons, paragraph 45) that individual deterrence was diminished in this case, all of the specific matters mentioned relate to Randy Kowalchuk personally. It is unclear exactly what aspect of the public interest the Commission was attempting to address with this extremely onerous administrative penalty.

[164] As noted, the Commission rejected the use of any kind of formula for setting administrative penalties. Yet there is a pattern in the penalties imposed: in some cases they are very similar to the amount of profit that was realized. If some other basis was used for setting the quantum, it is not disclosed. It is not obvious why, in the future, other persons in the circumstances of Randy Kowalchuk who needed to be deterred would have to be aware that a $55,000 administrative penalty was possible in the circumstances. That seems, on the surface, to be disproportionate to his conduct, and his personal circumstances. As a further illustration, it is not obvious why the public interest demands that a person like Walton (who allegedly encouraged her husband to buy shares) should be visited with a staggering administrative penalty of $90,000. As was noted in ***Cartaway Resources*** at para. 64: ". . . unreasonable weight given to a particular factor, including general deterrence, will render the order itself unreasonable." An administrative penalty that is imposed for general and specific deterrence should be sufficient to reasonably accomplish that end, but no more.

[165] Monetary penalties are most often imposed in the criminal or regulatory context. While the analogy is not exact, there are overlapping considerations. One purpose of fines, at least, is to remove the profit from offences. That sort of penalty must be large enough so that it does not simply become a "licencing fee" for the offence. General deterrence is also a legitimate consideration, but at some point the monetary penalty must be proportionate to the circumstances of the individual offender: ***R. v Tracy*** (1992), 12 BCAC 150, 71 CCC (3d) 329. As was said in *Magna Carta*:

> 20. For a trivial offence, a freeman shall be fined only in proportion to the degree of his offence, and for a serious offence correspondingly, but not so heavily as to deprive him of his livelihood. . . .

A monetary penalty that is beyond the capacity of the individual offender cannot be justified on the basis that it will deter others who are in a better financial condition.

[166] In summary, on this record the basis upon which the sanction against Randy Kowalchuk was set cannot be determined. The sanction lacks justification, transparency and intelligibility: ***Newfoundland Nurses*** at paras. 13-14. On its face, it would appear that the amount of the sanction was determined after overemphasizing the requirement of general deterrence, without having sufficient regard to the individual circumstances of this appellant. The sanction is set aside, and the entire matter remitted to the Commission for reconsideration.

Summary

[167] In summary, the appeals of Shepert, Burdeyney, and Walton are allowed, and the findings of culpability and the sanctions against them are set aside. The appeal of Holtby is allowed with respect to the allegation that he encouraged Landsiedel. The sanction appeals of Holtby and Randy Kowalchuk are allowed, and the issue of sanctions against them is remitted back to the Commission for reconsideration.

Appeal heard on June 11 and 12, 2014

Memorandum filed at Calgary, Alberta
this 29th day of August, 2014

Martin J.A.

Slatter J.A.

Authorized to sign for: Nation J.

Appearances:

S.M. Renouf, Q.C. and L. Anaka
for the Appellant Gayle Marie Walton

J.T. Eamon, Q.C.
for the Appellant John Herbert Holtby

W.R. Pieschel, Q.C.
for the Appellant Kenneth Michael Burdeyney

J.D. West
for the Appellant Randall George Kowalchuk

R.S. Abells, Q.C.
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T.G. McCartney and L. Berner
for the Respondent Alberta Securities Commission