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“The New Administrative Law”

It is a great pleasure to be here today.

Dispute resolution by administrative bodies plays a crucial role in modernizing and consistently updating economic regulation. Decision-making by tribunals like the OSC needs to be flexible and responsible to ever-changing market dynamics and issues. For this reason, decision-making criteria such as the “public interest” are not formally defined. However, often parties to administrative proceedings, and the counsel who act for them find our processes too mysterious, and do not fully understand how decisions are made. To address this problem, tribunals need to fully articulate their policy goals and objectives, and should strive to make their process and criteria as transparent as possible when making quasi-judicial decisions.

I welcome the opportunity to participate in this dialogue today, and I thank and applaud the Law Society for providing it for all of us.

It is the mandate of the OSC to provide protection to investors from unfair, improper or fraudulent practices and to foster fair and efficient capital markets and confidence in capital markets.

Consideration of the public interest frames virtually every decision or act of the Commission, and is the primary factor in a majority of its proceedings. As an expert tribunal, the Commission’s public interest power is an important tool for market regulation generally, and for enforcement proceedings in particular.

Market participants, investors, public companies seeking to raise money in the capital markets, brokers, advisers, financial institutions are all affected by decisions made in the course of

proceedings brought before us. And the things we do, like the things all administrative tribunals do, matter to them and, sometimes, can determine how, and if, they can earn a livelihood or otherwise participate in the capital markets of Ontario – which, by the way, is a privilege, not a right.

For this reason, certainty in decision-making is a high goal which we all strive to achieve. Market participants have a right to effectively predict how a regulator will respond when a matter comes before it in an administrative proceeding. The challenge for securities adjudicators is to effectively balance that necessary “certainty” with the flexibility built into the exercise of a “public interest” jurisdiction.

In the short time that I have today, I will try to provide a brief overview of the scope of our “public interest” jurisdiction, and how it has been used by adjudicators over the years. I will try to illustrate how the OSC has tried to exercise its jurisdiction with a view to fulfilling its statutory mandate. Impelled by restraint, reflecting the need for consistency and certainty, I then will try to highlight some of the safeguards within our processes and procedures which serve to direct decision-makers toward certainty.

The Commission’s power to make orders in the public interest is enshrined in s. 127 of the Act. It reads, quite simply: “The Commission may make one or more of the following orders if in its opinion it is in the public interest to make the order or orders”. For example, the Commission can order that a stock be cease-traded, that an exemption doesn’t apply to a person or company, that information be filed, that a person be forbidden from becoming a director or officer, or that an administrative penalty be paid. The latter, along with the power to disgorge profits improperly obtained, requires a finding of a breach of securities laws. Section 127.1 allows the Commission to order the payment of investigation or hearing costs. In addition to s. 127, the Commission is mandated to consider the public interest in several other situations, such as whether to grant an exemption (s. 74), whether to revoke an order of the Commission (s. 144), or in overseeing the conduct of a stock exchange (s. 21).

A quick reading of the Act, and s. 127 in particular, makes it clear that the Commission should consider the public interest in all major decisions and has wide-ranging power to do so.

One of the biggest challenges for Commissioners as adjudicators is that the Act does not define “public interest”. One who watches or participates in proceedings at the Commission will hear many different positions as to what the public interest means. While one party frames the public interest as being coincident with shareholder protection, another may argue that it requires the promotion of the free flow of capital and unhindered functioning of the capital markets. Of course, the promotion of both fall squarely within the Commission’s mandate, and enhancing both is clearly in the public interest. But, the Commission’s application of its power is necessarily a balancing act.

But the absence of prescriptive guidelines on what is meant by the “public interest” does not create an unbridled discretion in Commission panels to do whatever it feels like doing:

- It is very much directed by widely recognized standards and market practices;

- It is guided by principles of behaviour that are reflected throughout the Act, and local and national rules and policy statements made under the authority of the Act; and
- It is informed and focused by judicial pronouncements and jurisprudence, and heavily influenced by previous Commission decisions, as well as those of other Canadian securities authorities.

Securities commissions adjudicate within a common law tradition in which certainty is promoted through consistent and responsible decision-making.

Over time, the Commission’s public interest power has evolved considerably. Originally, orders were only made granting cease-trade orders or refusing an exemption from securities law. These powers were explicitly within the legislative authority of the Commission and were used to protect the public from immediate harm by ordering that a stock not be traded, and/or that an unfair transaction be stopped through the removal of exemptions. While the powers of the Commission expanded with legislative reform over time, many commentators view the greatest change occurred through a series of Commission decisions. In this, it is difficult to overlook the impact that a trilogy of Commission cases, made from 1987 to 1990, have had on Commission jurisprudence. It has been widely recognized that those three cases shaped the contemporary scope of the Commission’s “public interest” jurisdiction.

But before the trilogy was *Cablecasting*. In that case, the panel considered issuing a cease-trade order, in the absence of an explicit breach of the Act. While acknowledging that it had the power to do so, it declined to do so based on the facts.

The first case in the so-called “Trilogy” is *Canadian Tire Corp*. In that case, the Commission found that a transaction, while technically legal, was nonetheless abusive of (not just unfair to) a certain class of shareholders.

The panel in *Canadian Tire*, quoting approvingly from *Cablecasting*, agreed that no breach of the Act or even a policy statement was necessary, declaring:

A regulatory agency charged with oversight of the capital markets must have the capacity to move quickly to stop transactions which it considers to be injurious to the capital markets. Regardless of its rate of production, the Commission cannot possibly issue policy statements that cover, much less keep up with, the types of transactions that are conceived in the marketplace. It is in that sense that we adopt and reaffirm the statement quoted above from *Cablecasting*.

The panel recognized that in order to effectively fulfil its mandate, flexibility in the exercise of its power and ability to make orders was absolutely necessary. However, the panel also recognized the novelty of the situation and sensed the perceived uncertainty and unfairness that

could result from this type of order. It cautioned that this use of the public interest power, absent a breach of the Act, should be made sparingly. Specifically, it said:

We would also adopt the statement in *Cablecasting* that this is an area in which we “must move with caution”.

That panel held that the Commission should only invoke this power in cases of clear abuse of the markets which speaks to the panel’s sense of self-restraint. The Divisional Court upheld the Commission’s decision on appeal.

Selkirk Communications, a case that was argued twice – once in front of a panel of four members who were unable or otherwise unwilling to make a decision, and again in front of an unprecedented panel of nine Commissioners. Even then it proved controversial enough that the panel split evenly, with three groups of three members all ruling differently.

All nine Commissioners agreed that the Commission had the power and the jurisdiction to issue a cease-trade order even without a breach of the Act or policy, should the correct situation arise. However, they disagreed on the standard that needed to be met.

The final Trilogy case, *H.E.R.O. Industries Ltd. (H.E.R.O.)*, emphasised the obligation of issuers to comply with the underlying spirit of securities law. The panel in *H.E.R.O.* commented on the *Selkirk* decision, the reasoning from which they approved, as such:

Each group acknowledged that the Commission had the mandate, and the responsibility, to protect the public interest against a transaction of the kind there in issue if the transaction crossed the appropriate threshold of harm to warrant such intervention. The three groups may have disagreed on the height of that threshold, but not on its existence.

More recently – *Sears* – in the context of going private transactions, followed *Canadian Tire* and *H.E.R.O.*

The Commission decision in *Financial Models* perhaps brings a bit more clarity to the situation. The decision suggests that there are two discreet instances when the Commission will intervene in the public interest, even if the Act has not been violated:

- (a) The Commission should intervene in cases of clear abuse of the capital markets.
- (b) The Commission should intervene if the conduct in question is contrary to the underlying principle or policy of a rule.

Again, the Commission recognized the limits of its powers, saying:

However, the Commission has stated that caution should be exercised where intervention in the public interest would amount to an amendment of existing policies.

The Public Interest in the Context of Enforcement Proceedings

While the “Trilogy” occurred in the context of mergers and acquisitions, their principles have been applied in disciplinary and enforcement matters at the Commission. By the late 1990s, many enforcement proceedings at the Commission were based upon s. 127 exclusively, without referring to breaches of specific provisions of the Act, or used it almost as a back-up to an alleged direct violation of the Act.

Preventing vs. Punishing

There is tension inherent in the use of the public-interest jurisdiction as an enforcement tool. The Commission, in its mandate to protect the investing public and maintain the capital markets, is meant to wield its power in a preventative and prospective manner. However, given the heightened public pressure for strong enforcement and heavier penalties, combined with the increasingly punitive nature of s. 127, the line may now be somewhat blurred. The Commission espoused the view that the public-interest jurisdiction was meant as a preventative tool, and not to punish. In *Mithras Management*, they stated:

...the role of this Commission is to protect the public interest against those whose conduct in the past leads us to conclude that their conduct in the future may well be detrimental to the integrity of those capital markets. We are not here to punish past conduct; that is the role of the courts...We are here to restrain, as best we can, future conduct that is likely to be prejudicial to the public interest in having capital markets that are both fair and efficient.

The analysis in *Mithras* and other cases emphasize a prospective orientation – the Commission should, in exercising its public interest jurisdiction, be looking forward to how the respondent may act in the future and how those actions might negatively impact the capital markets, not to the past and how the respondent might be punished for past breaches of the law or the public interest.

Justice Iacobucci on behalf of the Supreme Court in the 2001 *Asbestos* case reaffirmed the position of the Commission in *Mithras* and other cases that the role of the Commission is protective, not punitive.

Scandals, such as Enron, WorldCom, Nortel and Bre-X, led to calls for more effective weapons for securities regulators to fight improprieties and abuse in the capital markets. In 2002, the legislature added “administrative penalties” and disgorgement of profits to the Commission’s arsenal under s. 127. Currently, if in the opinion of the Commission a person has not complied with securities laws, an administrative penalty of up to \$1,000,000 can be levied for each infraction. These provisions are clearly geared towards use in enforcement actions and some argue that these begin to look very much like punitive measures. However, courts to date have upheld their validity. As stated, their use requires a finding that securities law has been breached, enhancing the Commission’s mandate to invoke the public interest jurisdiction otherwise in the absence of a similar breach.

In the context of enforcement proceedings, the Supreme Court has said that general deterrence is a relevant factor when fashioning a sanction under their public-interest jurisdiction.

Justice LeBel, for the Court, referred to American securities jurisprudence in support of the deterrence proposition, and after quoting from *Asbestos* to confirm the B.C. Securities Commission's prospective and preventative nature, ruled:

... it is reasonable to view general deterrence as an appropriate, and perhaps necessary, consideration in making orders that are both protective and preventive. Ryan J.A. recognized this in her dissent: "The notion of general deterrence is neither punitive nor remedial. A penalty that is meant to generally deter is a penalty designed to discourage or hinder like behaviour in others."

There is no question that the power to impose administrative penalties, and to an extent, cost awards, and to consider general as well as specific deterrence as a valid consideration, challenges Commissioners to stay within the proper "public interest" parameters, as reflected in the Supreme Court decision of *Asbestos*. As some commentators, such as Professor Anand, observe, the line between a punitive and protective approach is not readily definable.

Professor Mary Condon and others have written that criminalization of Commission proceedings is not necessarily a welcome development. Increasingly long trials, constitutional motions and procedural motions impede the Commission's efforts to oversee the market. She argues that the efficiency advantages of the OSC are reduced, with the average case taking somewhere in the neighbourhood of two years to complete. Judicialization and so-called "criminalization" hinders the efforts of the Commission to be flexible in regulating the markets and disciplining wrongdoers.

The Supreme Court, in *Asbestos*, emphasized the dynamic nature of the public-interest jurisdiction saying:

However, the public interest jurisdiction of the OSC is not unlimited. Its precise nature and scope should be assessed by considering s. 127 in context. ... in considering an order in the public interest, it is an error to focus only on the fair treatment of investors. The effect of an intervention in the public interest on capital market efficiencies and public confidence in the capital markets should also be considered.

Cases such as *Re Belteco Holdings* ("Belteco"), a decision from 1997, and followed in *MCJC Holdings* in 2003 have set out a list of factors for securities commissions to consider when sanctioning under their public interest jurisdiction.

While these enumerations assist in creating some certainty as to how the public interest power could be used in enforcement proceedings, they are not exhaustive.

Commentators and task forces such as the Allen Report (Task Force to Modernize Securities Legislation in Canada), published in October of 2006, remind us of the need for clarity and certainty in the exercise of the public interest jurisdiction:

The Task Force recommends that the “contrary to the public interest” regulatory tool be used sparingly and only with the greatest care if the behaviour which is criticized has not been publicly identified in advance as unacceptable. Where the behaviour that is criticized has not been publicly identified, the contrary to the public interest provision should only be used if the conduct is egregious and a reasonable person in the circumstances would view it to be contrary to the public interest. If the conduct is not egregious, it should be publicly identified before any enforcement action is taken. The risk that so-called “gotcha” enforcement brings the entire securities enforcement apparatus into disrepute must not be overlooked.

Current Commission panels have recognized those risks. We have signalled that the Commission will attempt to be judicious and sparing in their application of s. 127, particularly absent breaches of the Act. This is the case both in enforcement proceedings and in the context of corporate transactional matters where the panel is of the view that a policy perspective could be better and more fairly articulated in advance, in the form of guidance, rather than through intervention in the context of a Commission proceeding.

Issues of policy can have broad effects on the capital markets and its participants. Therefore, it is recognized to be prudent for the Commission to exercise caution in its decision-making so as to avoid to the greatest extent possible, the creation of policy through litigation, rather than the enforcement of clearly understood and articulated principles.

Mechanisms and Procedures which Help Focus Discretion

As I mentioned before, our statutory and regulatory system provides a number of mechanisms and procedures which effectively focus the exercise of discretion and provide a sense of consistency and focus necessary to maintain and enhance confidence in decision-making by the Commission. These factors further the degree of certainty and consistency in our decision-making.

1. Statutory Provisions, Rules and Published Policy Statements

These set a context and frame our decision-making and our conception of the “public interest” must reflect principles underlying statute, rules and policy statements.

2. The Adversarial System

Tried and true, the adversary system serves as a check on decision-making. Recognized as an expert tribunal, the Commission conducts its proceedings like a court: it hears arguments from both sides, providing each with an opportunity to respond to each parties’ position. As well,

panel members are encouraged to ask questions of parties and to trough out theories and ideas and explore them with all counsel.

3. Adherence to Fundamental Principles of Procedural Fairness in Accordance with the Seriousness of the Consequences and Matters at Issue

Our procedural requirements include clearly articulated Statements of Allegations from staff which accompany Notices of Hearing. These require staff to publically proclaim what is and what is not, in its view, in the public interest in the circumstances of each case. This permits the parties to adequately prepare and respond and present any contrary view for the panel's consideration.

Disclosure and production rules have been entrenched in process, requiring staff to provide parties with the “fruits of its investigation” well in advance of a hearing. Particularly important when the proceeding is most like a disciplinary or enforcement matter, it strengthens fairness in the system increasing the likelihood that we will “get it right”.

4. Published Rules of Practice

Our new rules are currently out for public comment and are extremely extensive and detailed particularly for an administrative body. This reflects our appreciation that clearly defined rules of proceedings make our proceedings more transparent and this leads to a greater demystification of our process, and a better safeguarding of the rights of the parties before us.

5. Published Code of Conduct

Again, the preparation of a code of conduct for eventual publication is a practice we are engaged in to make our process more transparent and to foster greater confidence that decisions will be made fairly and without the taint of conflict or bias.

6. Public Proceedings Except in Extraordinary Circumstances

Again, this is intended to demystify the process and be more transparent. Where closed, in camera proceedings are warranted, such as when approval of a settlement is sought or where the matter affects interests that have otherwise been protected by previous protective order pursuant to the Act, the Commission has endeavoured to only limit the nature of and time frame for any publication restrictions. In almost every case, the results of the closed proceeding eventually make those proceedings public at the earlier possible time.

7. Substantial Written Reasons that Justify the Basis of our Decisions and Address Arguments Made by the Parties

All of our decisions are posted on the OSC website. If you review them over the past five years, you will note that our decisions today are longer and significantly more detailed than they have been in the past. While length is hardly something we strive for, generally there is a view that if

counsel have taken the time to develop and articulate an argument, for the most part, we should address those arguments, if appropriate.

In doing so, we set the wheels in motion for discussion and/or criticisms which is an essential control on our decision-making. We are interested in what market participants and academics and other observers have to say about our decisions and our view(s) of the public interest.

8. Adherence with Previously Articulated Principles

Each panel is not bound by decisions of a previous panel, even on the same or similar issue. Nonetheless, Commission decisions, clearly and fully articulated are of great assistance in recognizing and defining the public interest.

9. Encouragement of Discourse Through Academic Writings/Critiques and Participation in Programs such as these

These and other mechanisms, processes and procedures have become an entrenched feature of adjudicating at the OSC. And they serve to provide direction to the exercise of discretion, and make decision-making more transparent and predictable.

Conclusion

The Commission's view in *Sterling* reflects a recognition of the potential nature of the public-interest jurisdiction:

The Commission's "public interest" jurisdiction is broad and powerful, and must be exercised with caution, as recognized in the *Re Canadian Tire* decision. When considering the exercise of this jurisdiction, the Commission needs to have regard to all of the facts, all of the policy consideration at play, all of the underlying circumstances of the case, and all of the interests affected by the matter and the remedy sought.

Transparency, consistency and public discourse assist in finding the appropriate balance between the flexibility necessary to fulfill the Commission's mandate, and provide certainty and fairness.

Commissioners recognize that the public-interest jurisdiction is an essential tool for flexible and responsive decision-making in the context of securities adjudication. At the same time, the discretion is not unlimited and open-ended, and must be exercised with caution to ensure fairness, certainty and consistency. Mechanisms and processes described above help us to better achieve this often delicate balancing act.