3.2 Court Decisions, Orders and Rulings

3.2.1 Piergiorgio Donnini v. Ontario Securities Commission (Ont. C.A.)*

DATE: 20050128

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COURT OF APPEAL FOR ONTARIO

ROSENBERG, MOLDAVER and MACPHERSON JJ.A.

IN THE MATTER OF THE *SECURITIES ACT,* R.S.O. 1990, c.S.5, as amended

B E T W E E N :	)	
	)	
PIERGIORGIO DONNINI	)	***Alan J. Lenczner, Q.C.* and Colin Stevenson,**
	)	**for Piergiorgio Donnini**
(Respondent/ Appellant by way of cross-appeal)	)	
	)	
- and -	)	
	)	
ONTARIO SECURITIES COMMISSION	)	**Johanna M. E. Superina for the Ontario Securities Commission**
	)	
(Appellant/ Respondent by way of cross-appeal)	)	
	)	
	)	**Heard: December 15, 2004**

On appeal from the judgment of the Superior Court of Justice (Divisional Court) (Justice Dennis Lane, Justice William Somers and Justice Susan Greer) dated September 15, 2003.

MACPHERSON J.A.:

A. <u>OVERVIEW</u>

[1] A panel of the Ontario Securities Commission (the "Commission") conducted a hearing in respect of certain activities of Piergiorgio Donnini ("Donnini"), the head trader of Yorkton Securities Inc. ("Yorkton"). The Commission found that Donnini had engaged in unlawful insider trading contrary to s. 76(1) of the *Securities Act,* R.S.O. 1990, c.S.5 (the "Act").

[2] The Commission imposed severe penalties on Donnini, including suspension of his registration as a securities trader for 15 years. The Commission also ordered Donnini to pay investigation and hearing costs of $186,052.30.

[3] Donnini appealed all aspects of the Commission's order - liability, penalty and costs. A panel of the Divisional Court dismissed the appeal from liability, but allowed the appeal in respect of the sanctions imposed on Donnini and the award of costs. In particular, the Divisional Court reduced Donnini's suspension from 15 to 4 years. The court also directed the Commission to reconsider its costs award against Donnini by following certain specific procedural steps.

[4] The Commission was granted leave by this court to appeal the sanctions and costs components of the Divisional Court's order.

[5] Donnini cross-appealed with respect to the Divisional Court's affirmation of the Commission's finding of liability for insider trading. He also cross-appealed on the sanctions issue, taking the position that his suspension should have been reduced from 15 to 2 years, not 4 years as the Divisional Court had held.

* Source: Canadian Legal Information Institute.

B. FACTS

(1) The parties and the events

[6] Donnini was a part-owner of Yorkton. In February 2000, he held the position of head institutional trader.

[7] On February 10 and 11, 2000, the investment banking group of Yorkton arranged financing for a technology company, Kasten Chase Applied Research Limited ("KCA"). The financing raised $5,000,000 for KCA by issuing four million special units at $1.25 each. Each unit was made up of one KCA share and one-half of one common share purchase warrant which entitled the owner to buy one KCA share at $1.75 per share for every full warrant. These warrants were to be exercised six months from the time the prospectus was cleared by the Commission.

[8] As compensation for the financing, KCA paid Yorkton a cash commission and the equivalent of 600,000 shares of KCA, including 200,000 full share purchase warrants.

[9] The Chairman and Chief Executive Officer of Yorkton, Scott Paterson ("Paterson"), was aware that even with the cash infusion realized by Yorkton as a result of the sale of the KCA units, KCA was still in a precarious cash position. On February 29, 2000, he spoke with Michael Milligan ("Milligan"), the Chief Financial Officer of KCA, and proposed that KCA initiate another financing.

[10] Paterson initially suggested securing financing through a form of hedge fund. Milligan was surprised that Paterson would suggest a second financing so soon after the closing of the first special warrants financing and inquired as to what Paterson meant by the involvement of hedge funds. Paterson told Milligan to call Donnini who could explain hedge funds to him.

[11] Milligan called Donnini (they had not spoken or met before) at 10:30 a.m. The conversation lasted about six minutes. The two men talked a second time, again about hedge funds, at 12:37 p.m.

[12] At 2:24 p.m., Paterson, Milligan and Mark McQueen, a vice-president in Yorkton's corporate finance group, had a conference call for about 20 minutes. Immediately after this call, Paterson called Donnini into his office and, in a three-minute meeting in the presence of McQueen, told Donnini that Yorkton and KCA were negotiating a second special warrants financing which would likely have a size of $10,000,000 and a price of $6.75 per unit. The financing did in fact close on those terms and was announced publicly two days later, on March 2, 2000.

[13] Donnini had traded in KCA shares after the February 10-11 financing. Between February 15 and 28, he traded a total of 656,400 KCA shares for Yorkton's inventory account. This represented 3.35 per cent of the total volume of trading in KCA shares during that period of time.

[14] On February 29, the pattern of trades by Donnini in KCA shares changed dramatically. On that date, Donnini traded 1,094,200 shares representing 29.3 per cent of the total volume of trades for KCA on that day. On March 1, he traded 437,200 shares representing 24.2 per cent of the total volume for KCA on that day. Between 2:40 p.m. on February 29 (immediately after the meeting with Paterson) and the close of the market on March 1, he sold short 539,700 KCA shares. All of these selling short trades were 'jitneyed', a process by which other members of the Toronto Stock Exchange execute and clear orders for the firm making them. This process has the effect of concealing the identity of the firm making the trades so that the transactions are not transparent in the market.

(2) The Commission hearing

[15] The Commission decided to conduct a two-stage inquiry into Donnini's activities. The first stage - the liability stage - focused on whether Donnini had violated the Act.

[16] Two of the three panel members decided that Donnini had violated the insider trading provision, s. 76, which provides, in relevant part:

> **76(1)** No person or company in a special relationship with a reporting issuer shall purchase or sell securities of the reporting issuer with the knowledge of a material fact or material change with respect to the reporting issuer that has not been generally disclosed.

[17] "Material fact" is defined in s. 1 of the Act:

> "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

[18] In particularly comprehensive reasons released on September 12, 2002, the majority of the Commission (Vice-Chair Paul Moore, Q.C. and Commissioner Kerry Adams) found that the proposed second special warrants financing was a material fact, that Donnini had knowledge of it by 2:45 p.m. on February 29, 2000, and that he intentionally traded in KCA shares on a "massive scale" on February 29 and March 1, thereby violating s. 76(1) of the Act.

[19] The third member of the panel, Commissioner Harold Hands, was not convinced that Donnini had sufficient knowledge of the KCA proposed second financing by 2:45 p.m. on February 29 to ground a conclusion that he violated s. 76(1). However, he found that Donnini possessed sufficient information to raise "red flags" and that Donnini's "failure to exercise proper due diligence to avoid a possible breach of section 76(1) was contrary to the public interest."

[20] The second stage of the hearing - the sanctions stage - then proceeded. The majority of the panel noted that Donnini was an experienced trader, the fourth largest shareholder of Yorkton, and its senior liability trader and senior institutional trader. He was "more a chief lieutenant than a common foot soldier."

[21] The majority of the panel characterized Donnini's activity in the marketplace relating to KCA shares on February 29 and March 1, 2000 as "influential.... He was trading on a massive scale while in possession of confidential material information."

[22] The majority of the panel also attached weight to other misconduct by Donnini, including his infractions of CDNX and TSE requirements and his violation of Yorkton's internal procedures, and to "his lack of appreciation of the seriousness of his conduct."

[23] The majority of the panel imposed the following sanctions pursuant to s. 127(1) of the Act:

(1) the registration granted to Donnini under Ontario securities law be suspended for 15 years;

(2) trading in any securities by Donnini cease for 15 years, with the exception that Donnini be permitted to trade in securities

(a) in personal accounts in his name in which he has sole beneficial interest, and

(b) in registered retirement savings plans in which he, either alone or with his spouse, has sole beneficial interest;

(3) Donnini resign all positions that he holds as a director or officer of an issuer that is a registrant, or that directly or indirectly holds more than a 5% interest in a registrant; and

(4) Donnini is prohibited for 15 years from becoming or acting as a director or officer of an issuer that is a registrant, or that directly or indirectly holds more than a 5% interest in a registrant.

[24] Finally, the majority of the panel turned to the question of costs. Section 127.1 of the Act permits the Commission to order a person or a company to pay the costs of both the investigation and the hearing if the Commission considers that the person or company has not acted in the public interest.

[25] Counsel for the Commission staff submitted a single page bill of costs for $186,052.30. Donnini's counsel objected strenuously to the lack of detail in the document, saying that it gave him no means to test the claim for costs.

[26] The majority of the panel held that "cost recovery is the purpose of s. 127.1" and that it was not desirable to examine dockets or a summary of dockets for staff. The majority of the panel made a costs order against Donnini for the full amount sought by Commission counsel, $186,052.30.

[27] Commissioner Hands did not address the sanctions and costs issues, although he did sign the formal order which records the Commission's disposition on liability, sanctions and costs.

[28] Donnini appealed all three components of the Commission's order - liability, sanctions and costs.

(3) The Divisional Court's appeal decision

[29] An experienced Divisional Court panel (Lane, Somers and Greer JJ.) heard Donnini's appeal.

[30] The court upheld the Commission's finding of liability against Donnini. It held that there was "clear and cogent evidence before the OSC to support their findings."

[31] The court allowed Donnini's appeal from the sanctions imposed on him and reduced his suspension from 15 years to 4 years. In so doing, the court expressed concern about three factors - (1) the fact that one member of the panel was of the view that Donnini was not guilty of insider trading; (2) the comment made by the chair of the panel in his oral reasons following the liability hearing, but before the sanction hearing was convened, that Donnini "has been unrepentant and unwilling to acknowledge that his conduct was not becoming a registrant and contrary to the public interest"; and (3) the difference in sanctions between Donnini (suspension for 15 years) and Paterson (suspension for 2 years, pursuant to a settlement agreement in which he admitted to a failure in management and supervisory functions). These factors, taken together, led the Divisional Court to conclude that "the penalty imposed on him does not stand up to a somewhat probing analysis." The court substituted a sanction of suspension for four years.

[32] The Divisional Court also allowed Donnini's appeal from the Commission's costs award. The court agreed with Donnini's submission that the one-page bill of costs, unsupported by dockets, made it impossible for him to challenge the appropriateness of the amount sought by the Commission staff. Accordingly, the court directed the matter back to the Commission, with instructions as to disclosure to be made by Commission staff in respect of the bill.

[33] The Commission appeals from the sanction and costs components of the order of the Divisional Court. Donnini cross-appeals from the liability and sanction components of the order.

C. ISSUES

[34] I find it convenient to address the issues in the same order as the Commission and the Divisional Court - namely, liability, sanction and costs. Accordingly, I would frame the issues as follows:

(1) Did the Divisional Court err by upholding the Commission's finding that Donnini was guilty of insider trading contrary to s. 76(1) of the Act? (Cross-appeal issue)

(2) Did the Divisional Court err by substituting a sanction of suspension for 4 years for the 15 years ordered by the Commission? (Appeal and cross-appeal issue)

(3) Did the Divisional Court err by referring the matter of costs back to the Commission for a re-hearing in which the Commission would follow certain specific procedural steps? (Appeal issue)

D. ANALYSIS

(1) The liability issue

[35] Donnini contends that the Divisional Court erred in its liability finding in three respects.

[36] First, the Divisional Court stated:

> In the case at bar, the evidence suggests that the discussions had gone well beyond expressions of mutual interest and had got down to negotiating the very finest of points. The OSC held that the information Donnini held was factual and that his subsequent actions proved it.

[37] Donnini submits that the discussions involving him, especially his three-minute conversation with Paterson at about 2:40 p.m. on February 29, 2000, could not have offered any certainty that there would be a new financing involving KCA shares. Accordingly, Donnini asserts, the Divisional Court misapprehended the evidence.

[38] Second, the Divisional Court stated:

> It was also reasonable for the OSC to imply, as the panel did, from the fact that Paterson had arranged for McQueen to be present during the 2:45 p.m. meeting, that Yorkton's corporate finance group was obviously involved with Paterson in moving the second special warrants financing forward. Materiality is at the core of the OSC's expertise.

[39] Donnini contends that this conclusion is in error because, on the basis of McQueen's testimony, Paterson called him into the conference call so that he could see how a deal was done and then prepare an engagement letter to be considered by more senior personnel when they returned to the office.

[40] Third, in the next paragraph the Divisional Court stated:

> Another example of this application of special expertise can be found at paragraph 143 of the OSC's Reasons, where the panel expressed the view that it would have been reasonable to conclude that the second special warrants financing would add significantly to the intrinsic value of KCA's shares. These factors were among the grounds upon

> which they concluded that the proposed second special warrants financing and the negotiations surrounding it were material facts.

[41] Donnini contends that the price of KCA shares rose sharply after the second financing, which means that they were issued too cheaply and were not an enhancement to the company.

[42] I do not agree with these submissions. They do not, as Donnini asserts, amount to errors of law on the part of the Divisional Court. Rather, Donnini's submissions on the liability issue are nothing more than an invitation to overturn the factual findings made by the Commission.

[43] Donnini made the same arguments before the Divisional Court, which observed:

> Much of this appeal was based upon an attempt to have the Court reassess the findings made by the panel in the course of its Reasons. This of course is not the function of this court, unless it can be determined that there is no reasonable way in which the facts as presented could establish the conclusion drawn by the tribunal. This is particularly so in cases where the tribunal has a special expertise which it is called upon to apply during the course of its deliberations.

[44] I agree with this description, and rejection, of Donnini's arguments on the liability issue; it is entirely consistent with the leading authorities dealing with judicial review of decisions made by provincial securities commissions: see, for example, *Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557; *Committee for Equal Treatment of Asbestos Minority Shareholders v. Ontario (Securities Commission)*, [2001] 2 S.C.R. 132; and *Re Cartaway Resources Corp.*, [2004] 1 S.C.R. 672.

[45] Moreover, on the record before the Commission, there was ample evidence to support the Commission's conclusion that Donnini had engaged in unlawful insider trading. The Commission's findings that the proposed second special warrants financing (including its size and price) was a material fact, that Donnini knew of the material fact by 2:45 p.m. on February 29, 2000, and that he acted on this knowledge by trading in KCA shares on a "massive scale" on February 29 and March 1, before the information was known publicly on the market, are all amply supported by the record and, especially, in the comprehensive reasons of the Commission.

[46] Donnini made a submission in oral argument before this court, which he conceded he had not advanced in front of the Commission or the Divisional Court; nor did he make it in his cross-appeal factum. The argument was that the Commission had paid only "lip service" to the wording of s. 76(1) of the Act. The words "material fact", which anchor s. 76(1), are defined as "a fact that would reasonably be expected to have a significant effect on the market price or value of the securities". Donnini asserts that the Commission did not analyze whether his trading in KCA shares on February 29 and March 1 met this standard.

[47] I disagree. I note that the argument has nothing to do with the Divisional Court's reasons; it ignores them and returns to the Commission's decision. In addition, on an objective basis (which the definition of "material fact" commands), the sheer volume of Donnini's trades on February 29 and March 1 (29.3 and 24.2 per cent of the market for KCA shares, respectively), and the Commission's description of Donnini's motivation for his trades on those days ("Donnini acted in the same manner that a hedge fund intending to participate in the second special warrants financing might have behaved"), support only one conclusion - Donnini's activity easily came within the definition of "material fact".

[48] For these reasons, I would dismiss Donnini's cross-appeal on the liability issue.

(2) <u>The sanction issue</u>

[49] The Commission appeals the reduction by the Divisional Court of Donnini's suspension from 15 to 4 years. Donnini cross-appeals, and contends that the Divisional Court did not go far enough; his suspension should have been two years, the same as the suspension received by Paterson, his supervisor at Yorkton.

[50] It is well-settled law that the standard of review to be applied to the decisions of the Commission is reasonableness *simpliciter*: see *Pezim*; *Asbestos Minority Shareholders*; *Deloitte & Touche LLP v. Ontario (Securities Commission)*, [2003] 2 S.C.R. 713; and *Cartaway*.

[51] In two important decisions, *Law Society of New Brunswick v. Ryan*, [2003] 1 S.C.R. 247, and *Dr. Q. v. College of Physicians and Surgeons of British Columbia*, [2003] 1 S.C.R. 226, the Supreme Court of Canada elaborated on the application of the reasonableness standard to decisions of administrative tribunals. In both cases, the court overturned the lower appellate decision and restored the decision of the tribunal.

[52] In *Ryan*, the court provided an analysis which included the precise question a reviewing court must ask. Iacobucci J. stated, at para. 47:

> The content of a standard of review is essentially the question that a court must ask when reviewing an administrative decision. The standard of reasonableness involves asking "After a somewhat probing examination, can the reasons given, when taken as a whole, support the decision?"

[53] The court went on to say that there is a good deal of deference built into this question. The reviewing court must focus on the reasoning of the tribunal and not engage in its own *de novo* reasoning. The force of the deference context for judicial review of a tribunal's decision on a reasonableness standard is particularly apparent in this passage in Iacobucci J.'s reasons, at para. 55:

> A decision will be unreasonable only if there is no line of analysis within the given reasons that could reasonably lead the tribunal from the evidence before it to the conclusion at which it arrived. If any of the reasons that are sufficient to support the conclusion are tenable in the sense that they can stand up to a somewhat probing examination, then the decision will not be unreasonable and a reviewing court must not interfere.

[54] I make one final introductory point about the leading case authorities which, in my view, govern this appeal. The high level of deference which a reviewing court must show to a security commission's decision extends to the question of sanctions because of the expertise of the commission regarding securities matters. As expressed by LeBel J. in *Cartaway*, at para. 45:

> The core of this expertise lies in interpreting and applying the provisions of the Act, and in determining what orders are in the public interest with respect to capital markets. In this case, the question of whether general deterrence is an appropriate consideration in formulating a penalty in the public interest falls squarely within the expertise of the Commission.

[55] It is clear that the Divisional Court was aware of, and purported to apply, the leading authorities. In the liability section of its reasons, it explicitly referred to *Asbestos Minority Shareholders*. In the sanctions section, the court summarized its conclusion using the language of *Ryan*: "We agree with Donnini's counsel that the penalty imposed on him does not stand up to a somewhat probing analysis."

[56] However, the Commission asserts that the Divisional Court erred in two respects in its reasoning and disposition with respect to sanctions: (1) it did not focus its review, as *Ryan* requires, on the Commission's stated reasons for imposing the sanctions it chose; and (2) it injected irrelevant or minor factors into the analysis and used them as a lynchpin for its reversal of the Commission's decision. I agree with both of these submissions.

[57] The Commission wrote careful and extensive reasons on the sanctions issue. The Commission considered the extent and seriousness of the unlawful conduct, Donnini's experience in the market, his position in the industry, his other violations of securities law and Yorkton's own internal rules and, of particular importance, general deterrence.

[58] It is fair to say that the Divisional Court's reasons are silent on all of these matters, except Donnini's previous violations. As such, the Divisional Court's reasons do not comply with the instruction in *Ryan* to reviewing courts to stay close to the tribunal's reasons in exercising the review function under a reasonableness standard.

[59] In addition, the Divisional Court identified three factors which it clearly regarded as troubling, and which served as a foundation for the 11-year reduction in Donnini's suspension.

[60] The first factor was the minority reasons of Commissioner Hands on the liability issue. According to the Divisional Court, his reasons suggested that he viewed Donnini's conduct as "less reprehensible than many and not deserving of a suspension for such an extended period of time." Implicitly, the Divisional Court shared this view.

[61] I have two problems with this analysis. First, this factor, not surprisingly, is completely missing in the majority of the panel's reasons relating to sanctions. Hence, the Divisional Court's reliance on it strays from the *Ryan* instruction referred to above - the reviewing court must stay close to the tribunal's reasons. Second, I can see no principled basis for establishing a direct link between a minority member's views on liability and the majority's reasons on sanctions. Indeed, they strike me as logically disconnected.

[62] The second factor that troubled the Divisional Court was a comment made by the chair of the panel when he delivered brief oral reasons after the liability stage of the hearing. He said that Donnini "has been unrepentant and unwilling to acknowledge that his conduct was unbecoming a registrant and contrary to the public interest." The Divisional Court was critical of this statement: "An accused not pleading guilty is not and should not be subject to increased penalties simply because he has chosen to defend himself."

[63] In my view, this rather blunt criticism fails to recognize the context in which the impugned comment was made. To begin, the chair's full comment in his oral reasons was: "Donnini was not a credible witness. He has been unrepentant and unwilling to acknowledge that his conduct was unbecoming a registrant and contrary to the public interest."

[64] In response to concerns raised by Donnini's counsel at the commencement of the sanctions stage of the hearing, the Commission addressed both the comment and counsel's concerns regarding it. In its written reasons, the Commission described the matter in this fashion:

> We advised counsel that this statement did not preclude him from putting Donnini on the stand in the sanctions part of the hearing and testifying that he was repentant. As we stated in rendering our decision on June 11, 2002, "In order to give counsel guidance in presenting evidence, if any, and argument as to appropriate sanctions, we will now give a brief outline of our principal findings and conclusion." We felt it was necessary to inform counsel of our finding as to Donnini's credibility and state of remorse, based on the evidence we had heard in the merits portion of the hearing. Our decision of June 11 was not our reasons. As we stated on June 11, "We will issue reasons for our decision after we have made a decision as to appropriate sanctions." We assured counsel that we would listen attentively to anything Donnini had to say in the sanctions portion of the hearing and that we would take that into account in coming to a decision as to appropriate sanctions.

[65] In my view, this was an appropriate explanation for a single sentence in oral preliminary reasons that probably could have been better worded. Moreover, Donnini did testify during the sanctions stage of the hearing and the Commission dealt fully and, in some respects, favourably (for example, Donnini's description of the "tremendous stress on his family") with his testimony.

[66] The third factor that troubled, and influenced, the Divisional Court was "the difference between the penalty imposed by the OSC on Paterson of 2 years and the 15-year ban imposed on Donnini."

[67] The Paterson settlement was addressed in a comprehensive fashion by the Commission in the sanctions component of its reasons. The Commission summarized its analysis in this fashion:

> Counsel for the respondent argued that Paterson engaged in the same events as Donnini, and that, in fact, Paterson was the instigator who initiated the transactions and the deal: Donnini was never part of it. However, as counsel for staff pointed out, Paterson did not engage in the illegal insider trading, and there was no evidence before the Commission in the Paterson settlement hearing that Paterson encouraged or instructed Donnini to do so. There was nothing wrong in Paterson's instigating and promoting the second special warrants financing or in seeking Donnini's input. Paterson's failure, according to the settlement agreement, was a failure in management and supervisory functions. We find Paterson's conduct as admitted in the settlement agreement, and Donnini's conduct as evidenced in the case before us, very different in degree and nature.

[68] The Divisional Court did not refer to this reasoning, let alone attempt to explain why it was unreasonable within the strict parameters set out in *Ryan* - "only if there is no line of analysis within the given reasons that could reasonably lead the tribunal from the evidence before it to the conclusion at which it arrived." Instead, the Divisional Court rather openly and, with respect, impermissibly substituted its own view of the evidence for that of the Commission: "[Paterson] admitted to the OSC that he ought to have exercised a greater degree of management and control of Donnini's activities, but it seems to us that he played a more significant role in all that took place in what was the subject matter of this particular part of the over all investigation."

[69] There is a second feature of the Divisional Court's reasons relating to the Paterson settlement factor that deserves comment. The Divisional Court stated that, "Whether or not it was the intention of the OSC to do so, it has generated a message, through its actions, that the OSC will agree to lesser sanctions when an accused person has the 'good sense' to admit liability and make a substantial 'voluntary payment'. Donnini did neither of these."

[70] With respect, this inference is directly contrary to an explicit statement by the Commission in its reasons: "Donnini should not receive more severe sanctions than otherwise appropriate just because he did not agree to settle the case against him."

[71] I make one final observation on the Commission's appeal on the sanctions issue. There is no question that, for purposes of this appeal, the case most on point is *Cartaway*. Indeed, the Divisional Court explicitly adopted the reasoning of the British Columbia Court of Appeal in *Cartaway* at one point in its reasons on the sanctions issue.

[72] The Supreme Court of Canada allowed the appeal in *Cartaway* and restored the decision of the British Columbia Securities Commission. *Cartaway* is a sanctions case. The Divisional Court did not have the benefit of the Supreme Court of Canada's decision, which was released on April 22, 2004. In my view, if the Divisional Court had had this advantage, it almost certainly would not have overturned the Commission's decision in the present case.

[73] In *Cartaway*, the British Columbia Court of Appeal interfered with the sanctions decision made by the British Columbia Securities Commission: see (2002), 218 D.L.R. (4th) 470. The court reduced the $100,000 maximum penalty imposed by the Commission on Hartvikson and Johnson and substituted a penalty of $10,000. The court upheld the Commission's findings and decision on liability. Concerning sanctions, however, the majority of the court held that the imposition of the maximum penalty

was too severe and unreasonable in the circumstances. In reviewing the sanctions levied by the Commission, the majority held that it was inappropriate for the Commission to consider general deterrence in fashioning sanctions. The court also took into account the settlements reached by other offenders which were viewed as being significantly less onerous than the sanctions imposed on Hartvikson and Johnson.

[74] The Supreme Court of Canada set aside the decision of the British Columbia Court of Appeal and restored the sanctions imposed by the Commission. The court stated that a sanctions decision imposed by a securities commission should be reviewed globally to determine whether it is reasonable, that general deterrence is an appropriate factor for a commission to consider, that there appeared to have been reasonable grounds for the Commission to impose a heavier sanction on two offenders who did not settle having regard to the Commission's finding that they were more culpable than other offenders who had entered into settlement agreements and, of particular importance, that sanctions decisions of securities commissions are entitled to deference because they fall squarely within their expertise. In my view, all of these statements are directly applicable to the present appeal and compel the conclusion that the Divisional Court erred in overturning the sanctions component of the Commission's decision.

[75] There is no doubt that the 15-year suspension of Donnini's registration is a substantial penalty. However, the Commission took into account the appropriate factors in imposing such a severe sanction - Donnini's senior position at Yorkton, his experience in the industry, his other misconduct in the market and, perhaps most importantly, the devastating impact insider trading can have on the integrity of the market and on investor confidence. In my view, these factors stand up to "a somewhat probing analysis".

[76] For these reasons, I would allow the Commission's appeal on this issue and restore Donnini's 15-year suspension. It follows, of course, that Donnini's cross-appeal on this issue, in which he seeks a further reduction in the period of his suspension to two years, must be dismissed.

(3) The costs issue

[77] Section 127.1 of the Act permits the Commission to order a person to pay the costs of both the investigation and the hearing if the Commission considers that the person has not acted in the public interest.

[78] Counsel for the Commission staff submitted a one-page bill of costs for $186,052.30. Donnini objected to this sparse document, to no avail.

[79] The Commission stated that it "did not believe it desirable in this case to examine dockets or a summary of dockets for staff." The Commission also indicated that "cost recovery is the purpose of section 127.1." The Commission concluded, "We do not see any reason, in exercising our discretion regarding costs, to arbitrarily cut the recovery level to an amount lower than what is stated in the bill of costs before us." Accordingly, the Commission ordered Donnini to pay the full amount of costs sought by Commission staff.

[80] The Divisional Court was sharply critical of the Commission's reasons relating to costs, saying that, in its view, "a claim for costs in this amount justifies a more intense and searching examination than the OSC is prepared to allow."

[81] The Divisional Court allowed the appeal and returned the matter to the Commission with these instructions:

> Accordingly, we direct that the matter of costs be referred back to the OSC to conduct an inquiry into the extent of the bill and to make available to counsel for Donnini all dockets, time dockets, journal and/or diary entries and any other back-up material in support of it, and to make available all of the participants whose names appear on it for cross-examination by counsel for Donnini at a mutually convenient time.

[82] The Commission appeals the Divisional Court's costs disposition. The Commission accepts that the matter of costs must be returned to the panel on fairness or natural justice grounds, but contends that the court's detailed instructions to the panel are inappropriate.

[83] A different panel of the Divisional Court commented on the costs order in *Donnini* in *Costello v. Ontario (Securities Commission)*, [2004] O.J. No. 2972. Lane J., who was also a member of the panel in *Donnini*, said at para. 86:

> I agree entirely that the Commission is master of its procedure, subject to the requirement, noted earlier in these reasons, that whatever procedure it adopts meets the test of fairness. The refusal of the Commission to provide any real support for its assessment of the costs is, with great respect, manifestly unfair to the appellant. It is not for this court to devise a procedure for the Commission, nor, in my view, did the panel in *Donnini* (of which I was a member) purport to do so. But the decision to levy such a costs penalty cannot stand in the absence of a fair opportunity for the appellant to test the validity of the demand. I would remit the amount of the costs to the Commission for

> reconsideration on the basis set out in *Donnini*, or *in accordance with whatever procedure the Commission adopts in lieu thereof to meet its obligation of fairness and due process to the appellant* [emphasis added].

[84] In argument, counsel were asked for their comments on the emphasized portion of this passage. Both agreed that this would be an appropriate order. Donnini simply wants an opportunity, in accordance with the principles of fairness and natural justice, to examine and potentially challenge the Commission's position on costs. The Commission accepts this, but is concerned about the detailed specific instructions in the Divisional Court order. Their positions are reconciled by Lane J.'s language in *Costello*, which I am also attracted to and prepared to adopt.

[85] I make a final observation on this issue. I agree with the Divisional Court's rather robust criticism of the Commission's reasons relating to costs in this case. The Commission's reasons on liability and sanctions are comprehensive, balanced and, in my view, highly persuasive. They easily meet the reasonableness standard.

[86] The same cannot be said for the Commission's reasons on costs, which strike me as, in a word, cavalier. A costs award, especially a massive one, is about real money for a real person. There is not a hint of recognition of this reality in the Commission's costs reasons. On the contrary, the process followed by the Commission and its reasons were unfair to Donnini.

[87] I would allow the appeal on costs, but only to the extent of returning the matter of costs to the panel for consideration in accordance with a procedure that meets its obligation of fairness and due process to the appellant.

E. DISPOSITION

[88] I would allow the appeal and dismiss the cross-appeal.

[89] The Commission is not seeking costs. I would make no order as to costs.

RELEASED: January 28, 2005 ("MR")

"J. C. MacPherson J.A."

"I agree M. Rosenberg J.A."

"I agree M. J. Moldaver J.A."