Ontario Securities Commission
Commission des valeurs mobilières de l'Ontario
P.O. Box 55, 19th Floor 20 Queen Street West Toronto ON M5H 3S8
CP 55, 19e étage 20, rue queen ouest Toronto ON M5H 3S8

IN THE MATTER OF THE *SECURITIES ACT*,
R.S.O. 1990, c. S.5, AS AMENDED

- AND -

IN THE MATTER OF
PAUL DONALD

REASONS AND DECISION ON SANCTIONS AND COSTS
(Sections 127 and 127.1 of the Act)

Hearing:	September 13, 2012	
Decision:	January 30, 2013	
Panel:	Christopher Portner	- Commissioner and Chair of the Panel
	Paulette L. Kennedy	- Commissioner
Appearances:	Cullen Price	- For Staff of the Commission
	Joseph Groia Kevin Richard Tatsiana Okun	- For Paul Donald

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REASONS AND DECISION ON SANCTIONS AND COSTS

I. BACKGROUND

A. Introduction

[1] This was a hearing (the "**Sanctions and Costs Hearing**") before the Ontario Securities Commission (the "**Commission**") pursuant to sections 127 and 127.1 of the *Securities Act*, R.S.O. 1990, c. S.5, as amended (the "**Act**") to consider whether it is in the public interest to make an order with respect to sanctions and costs against Paul Donald ("**Donald**" or the "**Respondent**").

[2] Staff of the Commission ("**Staff**") had alleged that Donald purchased securities of Certicom Corp. ("**Certicom**") in August and September 2008 while he was a person in a special relationship with Certicom and while he had knowledge of material facts with respect to Certicom that had not been generally disclosed, contrary to subsection 76(1) of the Act and contrary to the public interest.

[3] Following a hearing to consider the merits of Staff's allegations (the "**Merits Hearing**"), Reasons and Decision on the merits were issued on August 1, 2012 (*Re Donald* (2012), 35 O.S.C.B. 7383) (the "**Merits Decision**"). As set out in the Merits Decision, the Panel concluded that, although Donald did not breach subsection 76(1) of the Act, his conduct was contrary to the public interest.

[4] On September 13, 2012, counsel for Staff and counsel for the Respondent appeared and made submissions at the Sanctions and Costs Hearing.

B. The Merits Decision

[5] Staff's allegations related to Donald's conduct while he was a Vice President of Research in Motion ("**RIM**"). On August 20, 2008, Donald attended a golf tournament and dinner that RIM hosted for its executives (the "**2008 RIM Golf Event**"). At the 2008 RIM Golf Event, Donald had a conversation regarding Certicom with Chris Wormald ("**Wormald**"), RIM's Vice President of Strategic Alliances. On the following day, August 21, 2008, Donald instructed his broker to purchase $300,000 worth of Certicom shares and, by September 15, 2008, Donald had acquired 200,000 shares of Certicom at a total cost of $305,000 (Merits Decision at paras. 5 to 7).

[6] As set out in the Merits Decision, the Panel concluded that, as a result of his conversation at the 2008 RIM Golf Event, Donald had knowledge of material facts with respect to Certicom that were not generally disclosed (the "**Three Facts**", as defined in the Merits Decision) when he purchased Certicom shares, but that he was not in a special relationship with Certicom at the time. Consequently, as described below, the Panel concluded that Donald did not breach subsection 76(1) of the Act:

> We find that (i) Donald was in possession of material facts that were not generally disclosed when he purchased Certicom shares in August and September 2008; (ii) RIM had been interested in acquiring Certicom, but Certicom was not interested

> in pursuing a transaction at that time; (iii) RIM personnel were in the process of recommending to RIM's senior management that RIM take steps to acquire Certicom; and (iv) Certicom was undervalued based on RIM's valuation of its patents and licensing agreements and how important Certicom's ECC technology was to technology providers that required security for their electronic devices, including RIM.
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> We cannot, however, find that Donald was a person in a special relationship with Certicom at the time that he purchased Certicom shares. To reach such a conclusion, RIM would have to have been proposing to make a take-over bid for Certicom, or proposing some other arrangement or business combination with Certicom as of August 21, 2008. Although RIM's acquisition of Certicom was a serious possibility as of August 21, 2008, RIM had not at that time reached the stage of proposing to make a bid to acquire Certicom securities.
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> We must therefore conclude that Donald did not breach subsection 76(1) of the Act when he purchased Certicom shares in August and September 2008.
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> (Merits Decision at paras. 286 to 288)

[7] With respect to the allegation that Donald's conduct was contrary to the public interest, the Merits Decision states as follows:

> Donald, who was an officer and employee of RIM, learned of material facts about Certicom in the context of a confidential discussion with another RIM Vice President. Not only did Donald learn the Three Facts on August 20, 2008, but he learned of them directly from Wormald, the RIM officer who was the head of the Strategic Alliances Group. Donald was an experienced investor who had sophisticated knowledge of the wireless industry.
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> Market participants and the officers of public companies, such as Donald, are expected to adhere to a high standard of behaviour. In our view, by purchasing securities with knowledge of material facts which had not been generally disclosed, Donald clearly failed to meet that standard and did so in a manner that impugns the integrity of Ontario's capital markets.
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> (Merits Decision at paras. 318-319)

[8] The Panel concluded that, although Donald did not breach subsection 76(1) of the Act, his purchases of Certicom shares while he was in possession of undisclosed material facts constituted conduct contrary to the public interest and his conduct was abusive of the capital markets and confidence in the capital markets (Merits Decision at para. 324).

II. SANCTIONS ANALYSIS

A. Sanctions requested by Staff

[9] Staff seeks the following sanctions against Donald and submits that they are appropriate in view of his serious misconduct, namely, that:

(a) Pursuant to paragraph 2 of subsection 127(1) of the Act, trading in any securities by him cease for a period of 10 years;

(b) Pursuant to paragraph 2.1 of subsection 127(1) of the Act, acquisition of any securities by him cease for a period of 10 years;

(c) Pursuant to paragraph 3 of subsection 127(1) of the Act, any exemptions contained in Ontario securities law do not apply to Donald for a period of 10 years;

(d) Pursuant to paragraph 8 of subsection 127(1) of the Act, he be prohibited from becoming or acting as an officer or director of a reporting issuer for a period of 10 years;

(e) Pursuant to paragraph 6 of subsection 127(1) of the Act, he be reprimanded; and

(f) Pursuant to subsection 127.1 of the Act, he be required to pay a portion of Staff's costs incurred in investigating and litigating this matter in the amount of $150,000.

[10] Staff submits that the allegation proven in this case involves serious conduct contrary to the public interest that deserves a severe sanction. Staff refers to our finding in the Merits Decision that Donald's conduct was abusive and impugned the integrity of Ontario's capital markets and directly engaged the fundamental principles of securities regulation and the purposes of the Act (Merits Decision at para. 323).

[11] Staff further submits that Donald has not recognized the seriousness of his misconduct and his failure to differentiate between confidential business information and casual discussion suggests that there is a real risk of future abuses by Donald if his participation in the capital markets is not restrained.

[12] Staff contends that, given the serious nature of the misconduct, significant sanctions are appropriate to deter Donald and like-minded individuals in similar positions. Staff submits that the role of an officer of a reporting issuer is one of great trust and requires great integrity to ensure responsible conduct and confidence in the capital markets.

[13] Staff submits that conduct that is abusive of the capital markets and to confidence in the capital markets (Merits Decision at para. 324) is a serious allegation that should be taken seriously. Further, Staff submits that the allegation of conduct contrary to the public interest was not a "secondary" allegation, and refers to the Particulars of Allegations provided to Donald prior to the Merits Hearing. Staff also submits that, despite the fact that there was no technical breach of the Act, the underlying conduct was just as serious; Staff treated the allegation of conduct contrary to the public interest seriously and so did the Commission in the Merits Decision.

[14] Staff submits that, unlike Staff and the Commission, Donald takes the position that conduct contrary to the public interest is less serious than a breach of the Act, which further lends support to Staff's submission that he has not appreciated the seriousness of his misconduct.

[15] Staff contests Donald's submission that he acted reasonably and honestly and submits that the Commission found to the contrary and that he had to have known the Three Facts were confidential and material.

B. Donald's submissions on sanctions

[16] Donald submits that a more appropriate conclusion to this case would be that:

(a) No order under subsection 127(1) of the Act be made as Donald is prepared to undertake to comply with Ontario securities law in the future and to take the Partners, Directors and Senior Officers Course (the "**PDO Course**") offered by the Canadian Securities Institute; or alternatively that

(b) Donald be reprimanded pursuant to paragraph 6 of subsection 127(1) of the Act; and

(c) Donald undertake not to become or act as an officer or director of a reporting issuer until his successful completion of a course such as the PDO Course.

[17] Donald submits that, when considering an appropriate sanction in this case, and in considering both general and specific deterrence, we must consider that:

(a) The Board of Directors of Certicom had at least the same information as reflected in the Three Facts when it approved the granting of options to employees and Board members of Certicom in June 2008;

(b) Karna Gupta ("**Gupta**") had at least knowledge of the Three Facts, and more, at the time he purchased 10,000 shares of Certicom on July 11, 2008;

(c) No proceedings have been taken against the foregoing parties by Staff; and

(d) Donald honestly and reasonably did not believe that the Three Facts were material, and it is only with the benefit of hindsight and additional information, not within Donald's knowledge, that the Panel came to a different conclusion.

(Respondent's Written Submissions on Sanctions and Costs at para. 8)

[18] Donald submits that a fair reading of the evidence would suggest that none of Donald, RIM or Certicom considered the Three Facts to be material. Further, Donald submits that there is no prohibition under the Act against buying or selling shares with knowledge of a material undisclosed fact when not in a special relationship with a reporting issuer.

[19] Donald notes that he has had no history of regulatory misconduct and no prior violations of the Act and submits that this matter has already had a substantial effect on his livelihood and

reputation. He submits that there is no evidence that he poses a threat to the integrity of the capital markets.

[20] Donald further notes that there are no rules or legislation outlining what is and what is not conduct contrary to the public interest and that severely punishing a market participant such as Donald for what may amount to differing views about what is material and what is in the public interest would send a terrible message to the public markets and would cause damage to the integrity of the Canadian capital markets.

[21] Donald submits that the Commission's public interest powers should be used sparingly in these circumstances. He submits that when Staff choses to argue a breach of the Act and is unsuccessful, the Commission should be extremely reluctant to then penalize a respondent for conduct which it has just found to be lawful. Donald notes that the allegation of a breach of the Act was dismissed and that the Act does not preclude a person from trading in a company with knowledge of material facts unless that person is in a special relationship.

[22] Further, Donald submits that the Three Facts were also known to the directors of Certicom prior to and at the time of the grant of options and their purchases of Certicom shares in the summer of 2008 and that the seriousness of Donald's conduct has to be assessed in relation to the actions of Certicom's directors.

[23] Donald submits that to impose severe sanctions for conduct contrary to the public interest, in a case where the conduct was honestly and reasonably considered by the respondent to be proper at the time, and where others carried out similar conduct without incident or regulatory comment, would be to impose an almost impossible standard on market participants.

C. The Law

[24] The Commission's mandate as set out at section 1.1 of the Act is to (i) provide protection to investors from unfair, improper or fraudulent practices; and (ii) foster fair and efficient capital markets and confidence in capital markets.

[25] The primary means for achieving the purposes of the Act as set out at paragraph 2 of section 2.1 of the Act are:

> (a) Requirements for timely, accurate and efficient disclosure of information;
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> (b) Restrictions on fraudulent and unfair market practices and procedures; and
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> (c) Requirements for the maintenance of high standards of fitness and business conduct to ensure honest and responsible conduct by market participants.

[26] In exercising its public interest jurisdiction, the Commission must act in a protective and preventative manner. The role of the Commission is to impose sanctions that will protect investors and the capital markets from exposure to similar conduct in the future. As stated by the Commission in *Re Mithras Management Ltd.*:

> …[u]nder sections 26, 123 and 124 of the Act, the role of this Commission is to protect the public interest by removing from the capital markets -- wholly or partially, permanently or temporarily, as the circumstances may warrant -- 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, particularly under section 118 [now 122] of the Act. We are here to restrain, as best we can, future conduct that is likely to be prejudicial to the public interest in having capital markets that are both fair and efficient. In so doing we must, of necessity, look to past conduct as a guide to what we believe a person's future conduct might reasonably be expected to be; we are not prescient, after all. And in so doing, we may well conclude that a person's past conduct has been so abusive of the capital markets as to warrant our apprehension and intervention, even if no particular breach of the Act has been made out.
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> (*Re Mithras Management Ltd.* (1990), 13 O.S.C.B. 1600 at 1610-1611 ("***Mithras***"))

[27] The Supreme Court of Canada in *Committee for the Equal Treatment of Asbestos Minority Shareholders v. Ontario (Securities Commission)*, [2001] 2 S.C.R. 132 ("***Asbestos***") commented on the Commission's public interest jurisdiction. The Court described it, in part, as follows:

> … I agree with Laskin J.A. that "[t]he purpose of the Commission's public interest jurisdiction is neither remedial nor punitive; it is protective and preventive, intended to be exercised to prevent likely future harm to Ontario's capital markets". …
>
> …The role of the OSC under s. 127 is to protect the public interest by removing from the capital markets those whose past conduct is so abusive as to warrant apprehension of future conduct detrimental to the integrity of the capital markets: *Re Mithras Management Ltd.* (1990), 13 O.S.C.B. 1600. In contradistinction, it is for the courts to punish or remedy past conduct under ss. 122 and 128 of the Act respectively…
>
> …
>
> In summary, pursuant to s. 127(1), the OSC has the jurisdiction and a broad discretion to intervene in Ontario capital markets if it is in the public interest to do so. However, the discretion to act in the public interest is not unlimited. In exercising its discretion, the OSC should consider the protection of investors and the efficiency of, and public confidence in, capital markets generally. In addition, s. 127(1) is a regulatory provision. The sanctions under the section are preventive in nature and prospective in orientation. …
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> (*Asbestos, supra* at paras. 42-43 and 45)

[28] In addition, the Commission should consider general deterrence as an important factor when determining appropriate sanctions. In *Re Cartaway Resources Corp.*, [2004] 1 S.C.R. 672 ("***Cartaway***"), the Supreme Court of Canada stated that "… it is reasonable to view general deterrence as an appropriate, and perhaps necessary, consideration in making orders that are both protective and preventative" (at para. 60).

[29] In determining the appropriate sanctions in this matter, we must ensure that the sanctions imposed are proportionate to the conduct of the Respondent (*Re M.C.J.C. Holdings Inc.* (2002), 25 O.S.C.B. 1133 ("***M.C.J.C. Holdings***") at 1136).

[30] The Commission has previously identified the following as some of the factors that it should be considering when imposing sanctions:

(a) The seriousness of the conduct and the breaches of the Act;

(b) The respondent's experience in the marketplace;

(c) The level of a respondent's activity in the marketplace;

(d) Whether or not there has been recognition by a respondent of the seriousness of the improprieties;

(e) Whether or not the sanctions imposed may serve to deter not only those involved in the matter being considered, but any like-minded people, from engaging in similar abuses of the capital markets;

(f) The size of any profit obtained or loss avoided from the illegal conduct;

(g) The size of any financial sanction or voluntary payment;

(h) The effect any sanctions may have on the ability of a respondent to participate without check in the capital markets;

(i) The reputation and prestige of the respondent;

(j) The effect any sanction might have on the livelihood of the respondent;

(k) The shame, or financial pain, that any sanction would reasonably cause to the respondent;

(l) The remorse of the respondent; and

(m) Any mitigating factors.

(See *Re Belteco Holdings Inc.* (1998), 21 O.S.C.B. 7743 at 7746 and *M.C.J.C. Holdings, supra* at 1136)

[31] The Commission did point out, however, that these were only some of the factors that might be considered, observing that "there may be others, and perhaps all of the factors we have

mentioned may not be relevant in this or another particular case" (*M.C.J.C. Holdings, supra* at 1136).

[32] The sanctions imposed must be sufficient both to respond to the specific misconduct of the Respondent and to send a message to other market participants about the importance of fulfilling their statutory duties.

[33] As stated by the Divisional Court in *Erikson v. Ontario (Securities Commission)*, [2003] O.J. No. 593, "participation in the capital markets is a privilege and not a right" (at para. 55).

D. Application of the factors

[34] Having regard to the factors that are summarized in paragraph [30] above, we consider the following to be of particular relevance:

(i) The seriousness of the conduct

[35] Although we concluded that Donald did not breach subsection 76(1) of the Act, we did find that his conduct was abusive of the capital markets and to confidence in the capital markets, As we stated in the Merits Decision:

> We find that Donald's purchases of Certicom shares in August and September 2008, while he was in possession of undisclosed material facts regarding RIM's interest in Certicom, constituted conduct contrary to the public interest. We find that Donald's conduct was abusive of the capital markets and to confidence in the capital markets.
>
> (Merits Decision at para. 324)

[36] In his submissions, Donald stated that he did not believe that the information provided to him was material and that his evidence was honest and forthright. It was our finding in the Merits Decision that Donald's suggestion that his decision to purchase Certicom shares was based solely on his independent analysis of Certicom undertaken immediately prior to placing his purchase order was simply not credible (Merits Decision at para. 311).

[37] Donald also submitted that the seriousness of his conduct has to be assessed in relation to the actions of Certicom's directors who, Donald submits, granted options to purchase Certicom shares to themselves and employees of Certicom with knowledge of at least the same information that was provided to Donald. We agree with Staff's view that Donald's submissions relating to the knowledge of, or imputed to, Certicom's directors including Gupta, the Chief Executive Officer, are simply not relevant to this matter.

(ii) The Respondent's experience and knowledge

[38] Donald is an experienced investor who has a deep understanding of the stock market and maintains an active portfolio of publicly-traded securities.

[39] As an officer of RIM, which was a reporting issuer during the period of Donald's employment, Donald was a market participant as defined by subsection 1(1) of the Act.

(iii) Recognition of the seriousness of the improprieties and remorse

[40] Donald has demonstrated no recognition of the fact that his activities were inappropriate and continues to assert that he honestly and reasonably believed that the Three Facts were not material when he acquired shares of Certicom.

[41] Given Donald's assertion that he reasonably believed he was acting appropriately at the time, it follows that Donald shows no remorse, a factor that should not be given much, if any, weight in a contested proceeding such as this.

(iv) The size of any profit obtained

[42] As noted in the Merits Decision, the value of the Certicom shares purchased by Donald, although high at $305,000, was not inconsistent with his previous trading patterns. That said, the size of the profit realized by Donald from the sale of the shares was substantial. Following the implementation of RIM's plan of arrangement relating to Certicom, Donald received the proceeds from the sale of his Certicom shares in the amount of $600,000 which represented a gross profit of $295,000.

(v) The reputation of the Respondent and effect of sanctions on livelihood

[43] Donald's counsel made submissions on his behalf to the effect that the "proceeding has had a significant impact on Mr. Donald and his reputation and ability to earn a living" (Respondent's Written Submissions on Sanctions and Costs at para. 67). Although it would be reasonable to expect that allegations of insider trading would have a serious and adverse effect on Donald's reputation, no evidence was provided to the Panel in this regard. Similarly, no evidence was provided as to the effect that any sanction might have on Donald's livelihood.

(vi) The effect any sanctions might have on the ability of the Respondent to participate without check in the capital markets

[44] It is Staff's submission that the serious nature of Donald's misconduct justifies significant sanctions for the purposes of both specific and general deterrence.

[45] In Donald's submission, the sanctions sought by Staff are grossly excessive and wholly disproportionate to the Commission's findings in the Merits Hearing. He also submits that there is no risk that he will repeat the conduct which was the subject of this proceeding.

[46] Donald also indicated in his submissions that a more appropriate outcome would be a reprimand and that he provide undertakings to the Commission to comply with Ontario securities law and to take the PDO Course offered by the Canadian Securities Institute.

[47] While we do not accept Donald's submission that his actions in this matter were the result of honest mistakes of fact and law, we are inclined to accept his counsel's submission that there is no (or, in our view, little) risk that Donald would repeat the conduct which has been the subject matter of this proceeding in the future.

(vii) Mitigating Factors

[48] Although no material mitigating factors were in evidence, Donald did cooperate with Staff in connection with the Merits Hearing, including in the preparation of a statement of agreed facts.

(viii) Deterrence of the Respondent and like-minded people

[49] The sanctions imposed should serve to deter Donald, as well as other like-minded individuals, from engaging in similar conduct in the future. As we noted in paragraph [47], we find that there is little risk that Donald will repeat the conduct at issue in this proceeding.

[50] Although the conduct of Donald that we found to be contrary to the public interest in the Merits Decision involved trading in securities, the conduct was more related to his role as an officer of RIM than to his general trading activities in the capital markets. Our concern was with Donald's use of confidential information he obtained as a result of his position as an officer of RIM, and the sanctions we impose should serve to deter such behaviour by Donald and others in similar positions of trust in the future. Accordingly, we consider a prohibition on acting as an officer or director of a reporting issuer more appropriate in this case than a prohibition on trading securities.

E. Previous sanctions decisions

[51] Staff refers to previous Commission decisions that Staff submits should provide guidance as to the scope of sanctions appropriate in this case and support the submission that significant sanctions are appropriate and necessary. Staff provides examples of decisions in the insider trading cases *Re Suman* (August 22, 2012), (Ontario Securities Commission) ("***Suman***"), *Re Donnini* (2002), 25 O.S.C.B. 6225 ("***Donnini***") and *Re Landen* (2010), 33 O.S.C.B. 6225 ("***Landen***"). Having reviewed the cases, we find that this case is distinguishable.

[52] Donald provides examples of other cases which he submits are more comparable to the circumstances in this case. We consider the sanctions in the cases cited by Staff and Donald below.

(i) Insider trading cases – Donnini and Landen

[53] Although the allegation in this case was a breach of subsection 76(1) of the Act, we found in the Merits Decision that Donald's conduct and the circumstances of this case did not provide a basis for a finding that subsection 76(1) of the Act had been breached. Staff submits that we should consider sanctions in the range ordered in *Donnini* and *Landon*, 15-year and 12-year bans, respectively. We disagree. In *Donnini*, the Commission determined that subsection 76(1) had been breached; in *Landen*, the respondent had been convicted of insider trading in a quasi-criminal proceeding.

[54] Given our finding that Donald's conduct was not contrary to Ontario securities law, we do not consider that sanctions orders resulting from breaches of Ontario insider trading law provide guidance as to the appropriate sanctions in this case.

(ii) Suman

[55] In *Suman*, the Panel presiding at the merits hearing determined that one of the respondents, Mr. Suman, breached subsection 76(2) of the Act (tipping) and that he and the other respondent, Ms. Rahman, engaged in conduct contrary to the public interest in purchasing securities with knowledge of a material fact that was not generally disclosed (*Suman, supra* at para. 9). Mr. Suman was permanently prohibited from trading and acquiring securities, Ms. Rahman was prohibited from trading and acquiring securities for five years and both respondents were permanently prohibited from becoming or acting as an officer or director of reporting issuers. Mr. Suman was also ordered to disgorge the amount he obtained as a result of his non-compliance with the Act and pay an administrative penalty (*Suman, supra* at para. 53).

[56] Staff submits that the five-year trading and acquiring prohibitions against Ms. Rahman in *Suman* should be balanced against the fact that she was also permanently prohibited from acting as a director or officer of a reporting issuer. Staff further submits that the position occupied by Ms. Rahman in the capital markets (the wife of an information technology professional employed by a reporting issuer) was of far less significance than Donald's position as an officer of a reporting issuer. Accordingly, having regard for the importance of specific and general deterrence, there is a sound basis for ordering a more severe prohibition in the case of Donald than was ordered in the case of Ms. Rahman.

[57] Donald submits that, with respect to his conduct, this case is closer to cases such as *Re Nash*, 2012 ABASC 253 ("***Nash***"), in which less severe sanctions were ordered, than to *Suman*. He submits that his conduct can be distinguished from the conduct in *Suman*, in which harsh credibility findings were made about the respondents and the Panel found that they had destroyed evidence and traded substantial volumes of shares and options in the target company in a manner that was completely inconsistent with their prior trading habits. In particular, Donald notes that he made no attempt to conceal his purchases of Certicom shares:

> … Donald did not attempt to hide his purchases of Certicom shares, but traded in his customary manner… Donald did not attempt to conceal the purchases from RIM later in 2008 and disclosed them when RIM announced its intention to make an offer for Certicom in December 2009.
>
> The value of Certicom shares purchased by Donald, although high at $305,000, was not inconsistent with his previous trading patterns. It was by no means an insignificant investment, but we do note that the value of Donald's portfolio at the time exceeded $10 million. It may be that Donald did not consider that his trading was improper, however, we have come to a different conclusion.
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> (Merits Decision at paras. 312 to 313)

(iii) Insider trading cases from other jurisdictions referred to by Donald

[58] In *Nash*, the Alberta Securities Commission (the "**ASC**") found that the elements of illegal insider trading were proved against the respondent in breach of the Alberta *Securities Act*, notwithstanding the fact that the Panel found that the respondent was operating under honestly held but erroneous and misguided assumptions (at paras. 39 and 40). The Panel in *Nash*

determined that, in what it described as highly unusual and unique circumstances, appropriate protection of the public would be achieved were the respondent to provide an undertaking to comply with all Alberta securities laws in future (*Nash, supra* at para. 47). The decision states:

> Although we have found that Nash contravened section 147(2) of the Act and acted contrary to the public interest, his trading was not, in our view, the type of improper insider trading with which securities regulation is primarily concerned. This was an isolated incident – apparently an intense emotional response made under a misapprehension. This was not a planned and deliberate attempt to use undisclosed material information for personal gain (by either making a profit or avoiding a loss).
>
> (*Nash, supra* at para. 43)

[59] Donald refers to cases in which respondents did not engage in intentional misconduct or mistakenly believed material information had been generally disclosed (*Re Torudag*, 2009 BCSECCOM 339 (CanLII), *Re Conrad*, 2009 ABASC 69 and *Re Gorrie*, 2006 ABASC 1087). Donald submits that, if there is no intentional misconduct and little or no profit made as a result of the trading, minimal or no sanctions should be imposed. In contrast to the cases cited by Donald, in this case, we found that:

> … Donald had to have known that (i) the information he received from Wormald was confidential and had not been made public; (ii) if the information had been generally disclosed, it would have had a significant effect on the market price or value of Certicom shares; and (iii) the information was provided to him on a confidential basis in the expectation that he would not use the information for personal gain.
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> (Merits Decision at para. 314)

[60] In *Re Seto*, [2003] A.S.C.D. No. 270 ("***Seto***"), the ASC considered joint sanctions submissions of the parties. On the remaining issue to be resolved, whether the conduct of the respondent contravened the Alberta *Securities Act* or was conduct contrary to the public interest, the ASC found that there was a "technical gap in the legislation" and concluded that the respondent's conduct was prejudicial to the capital markets and contrary to the public interest (*Seto, supra* at paras. 43 and 55). The parties in *Seto* jointly submitted that, if the ASC found it in the public interest to make an order, the appropriate order should be that the respondent cease trading in securities for one year, be prohibited from acting as a director an officer of an issuer for two years, pay an administrative penalty of $5,000 and costs of $10,000. The ASC was satisfied that the jointly proposed sanctions were in the public interest (*Seto, supra* at paras. 64 to 66).

(iv) Other cases where there was no technical breach of the Act

[61] In *Re Albino* (1991), 14 O.S.C.B., 365, cited by Staff, the Commission ordered sanctions for conduct that was abusive of the capital markets though the Panel did not agree that there had been a technical breach of the illegal insider trading prohibition. The Commission found that the

respondent's conduct was "so abusive of the capital markets as to warrant our apprehension of future harm and our intervention to prevent such harm" (*Re Albino, supra* at 31).

[62] Staff also referred to the Commission's finding in *Re Banks* (2003), 26 O.S.C.B. 3377 in which the Commission permanently prohibited the respondent from trading in securities and becoming or acting as a director or officer of an issuer following a finding of conduct contrary to the public interest. In that case, the Commission noted:

> Banks pleaded guilty to intentionally engaging in a scheme constituting a systematic ongoing course of conduct with intent to defraud. This was criminal conduct and it was securities-related. This conduct arose in Banks' capacity as a director and officer of an issuer. Together with his conduct in connection with the Roll Program, the criminal conduct demonstrated to us that Banks should be restricted from acting as a director and officer of any issuer and be prevented from participating in our capital markets.
>
> In addition, Banks' admission of criminal guilt in a securities-related matter calls for a vigorous package of preventative sanctions. If we do not restrain Banks properly, confidence in our markets would be weakened.
>
> (*Re Banks, supra* at paras. 126 and 127)

F. Conclusion as to trading and other bans

[63] As stated by the Supreme Court in *Asbestos*, "In exercising its discretion, the OSC should consider the protection of investors and the efficiency of, and public confidence in, capital markets generally. In addition, s. 127(1) is a regulatory provision. The sanctions under the section are preventative in nature and prospective in orientation…." (*Asbestos, supra* at para. 45).

[64] We are also mindful of the Supreme Court's statement in *Cartaway* that "it is reasonable to view general deterrence as an appropriate, and perhaps necessary, consideration in making orders that are both protective and preventative" (at para. 60).

[65] The conduct of Donald which was the subject of the Merits Decision and which we found improper arose from his misuse of confidential information of which he became aware in his capacity as an officer of RIM. While we acknowledge the Divisional Court's view in *Erikson v. Ontario (Securities Commission)*, [2003] O.J. No. 593 at para. 55, cited by Staff, that, when assessing sanctions, it should be remembered that "participation in the capital markets is a privilege and not a right", banning Donald from trading while at the same time severely constraining his ability to earn a livelihood would not be warranted in the circumstances.

[66] In our view, the 10-year bans sought by Staff exceed that which is required to ensure that we exercise our public interest jurisdiction by acting in a protective and preventative manner and continue to communicate the Commission's concerns with respect to improper trading.

[67] We are also of the view that, notwithstanding Donald's apparent lack of appreciation that his conduct was improper, there is no evidence before us that would suggest that there is a

serious risk of future abuses by him if he is not banned from participating in the public markets for such a lengthy period of time. At the same time, Donald's proposed sanctions, which are summarized above, would be patently inadequate given his prior failure to comply with an undertaking he provided pursuant to RIM's Business Standards and Principles which, among other things, banned the unauthorized use of confidential information.

[68] We do not find it appropriate to prohibit Donald from trading in or acquiring securities. We find that a five-year prohibition on his participation in the capital markets as a director or officer of a reporting issuer more appropriately reflects our concerns with Donald's conduct contrary to the public interest and sufficiently addresses the protective and preventative requirements for sanctions ordered by the Commission, including principles of general and specific deterrence. We should note that, in concluding that a five-year prohibition is appropriate, we took into account the passage of time since the commencement of this proceeding.

III. COSTS ANALYSIS

A. Staff's costs request

[69] Staff seeks the amount of $150,000 in costs, inclusive of fees and disbursements. The amount represents approximately 69% of the total fees and disbursements of $217,084.55 described in Staff's Bill of Costs filed with the August 31, 2012 Affidavit of Julia Ho. The Bill of Costs includes the hours worked and hourly rates for two individuals involved in the investigation and hearing, namely, Marcel Tillie, Senior Forensic Accountant for Staff, and Cullen Price, Senior Litigation Counsel for Staff.

[70] Staff submits that the allegations in this matter were serious and Staff had a good faith basis for advancing the subsection 76(1) allegation. Staff submits that, notwithstanding that Staff ultimately was not successful with respect to the allegation of a breach of subsection 76(1), Staff would have led the same evidence if the case was only one alleging conduct contrary to the public interest, so no more time was required or used with respect to proving the allegation of conduct contrary to the public interest.

[71] Staff submits that the request for costs takes into account the fact that Donald agreed to a statement of agreed facts, and that the costs sought are reasonable given the relative complexity of the matter. Staff notes that they are only seeking discounted costs relating to the time of two Staff professionals who worked on the matter, despite the fact that many individual members of Staff assisted with the assessment, investigation and litigation of this matter.

B. Donald's submissions on costs

[72] Donald submits that Staff's request for $150,000 in investigation and litigation costs is excessive and unreasonable in the circumstances.

[73] Donald submits that he demonstrated the utmost respect for the Commission's procedure and cooperated with Staff and the Commission during the investigation and hearing, including the preparation of a statement of agreed facts and agreeing to the majority of the exhibits, all of which contributed to a shorter, more efficient and more effective proceeding.

[74] Donald notes that Staff was not successful with respect to their insider trading allegation and cannot be awarded costs of an investigation and a hearing with respect to an allegation that was dismissed. Donald submits that the majority of the evidence led by Staff directly touched on work that RIM was doing of which Donald had no knowledge. He submits that most of the evidence was intended to show that RIM and Wormald were in a special relationship with Certicom.

[75] Donald submits that it is apparent that some amount of work done by Staff prior to the issuance of the Notice of Hearing on May 20, 2010 was investigation work undertaken in relation to people other than Donald. Donald refers to an Enforcement Notice sent to Wormald on October 15, 2009 and Staff correspondence which states that Staff held without prejudice discussions with Wormald's counsel. Thereafter, Staff exercised its discretion not to bring proceedings against Wormald in relation to this matter and Wormald and RIM agreed to provide their full cooperation, consistent with OSC Staff Notice 15-702, Credit for Cooperation. Donald notes that approximately two-thirds of Mr. Tillie's time spent on this matter was prior to May 20, 2012.

[76] Donald submits that the fact that there is no provision in the Act to award costs to a respondent is a relevant factor to consider when a significant allegation is dismissed, and if there was such a provision, the Commission would have to determine the costs to be awarded to Donald for the dismissal of Staff's core allegation.

[77] Donald further submits that if a costs award is made, such an award should be significantly less than in other cases where actual breaches of insider trading provisions were found to have occurred, with no intentional misconduct. Donald refers specifically to the following decisions on costs: no costs order in *Nash, supra*; no costs order in *Re Torudag*, 2009 BCSECCOM 339; $10,000 in *Seto, supra*; $3,000 in *Re Gorrie*, 2006 ABASC 1087; and $15,000 in *Re Conrad*, 2009 ABASC 69.

C. The law on costs

[78] Section 127.1 of the Act permits the Commission to order a person to pay costs of or related to the hearing that are incurred by or on behalf of the Commission if, after conducting the hearing, the Commission is satisfied that the person has not complied with or is not complying with Ontario securities law or considers that the person has not acted in the public interest.

[79] In *Re Ochnik*, the Commission lists the following criteria that have been considered in awarding costs:

(a) Failure by staff to provide early notice of an intention to seek costs may result in a reduced costs award, as early notice may have facilitated early settlement, thereby reducing overall costs (see *Re Tindall* (2000), 23 O.S.C.B. 6889 at para. 74);

(b) The seriousness of the charges and the conduct of the parties (see *Re YBM Magnex International Inc.* (2003), 26 O.S.C.B. 5285 at para. 608)

(c) Abuse of process by a respondent may be a factor in increasing the amount of costs (see *Re YBM Magnex International Inc.* cited above at para. 606);

(d) The greater investigative/hearing costs that the specific conduct of a respondent tends to require in the case (*Re YBM Magnex International Inc.* cited above at para. 606);

(e) The reasonableness of the costs requested by staff (see *Re Lydia Diamond Exploration of Canada*,(2003), 26 O.S.C.B. 2511 at para. 217).

(*Re Ochnik* (2006), 29 O.S.C.B. 5917 at para. 29)

[80] The Commission's *Rules of Procedure* (2012), 35 O.S.C.B. 10071[1] also sets out factors to be considered with respect to costs:

> **18.2 Factors Considered When Awarding Costs** – In exercising its discretion under section 127.1 of the Act to award costs against a person or company, a Panel may consider the following factors:
>
> (a) whether the respondent failed to comply with a procedural order or direction of the Panel;
>
> (b) the complexity of the proceeding;
>
> (c) the importance of the issues;
>
> (d) the conduct of Staff during the investigation and during the proceeding and how Staff's conduct contributed to the costs of the investigation and the proceeding;
>
> (e) whether the respondent contributed to a shorter, more efficient, and more effective hearing, or whether the conduct of the respondent unnecessarily lengthened the duration of the proceeding;
>
> (f) whether any step in the proceeding was taken in an improper, vexatious, unreasonable, or negligent fashion or in error;
>
> (g) whether the respondent participated in the proceeding in a way that helped the Commission understand the issues before it;
>
> (h) whether the respondent participated in a responsible, informed and well-prepared manner;
>
> (i) whether the respondent co-operated with Staff and disclosed all relevant information;

[1] This is the current version of the *Rules of Procedure* which came into force on October 25, 2012. There has been no change to Rule 18.

(j) whether the respondent denied or refused to admit anything that should have been admitted; or

(k) any other factors the Panel considers relevant.

D. Analysis and conclusion as to costs

[81] Although Staff was not successful with respect to their insider trading allegations against Donald, the facts of this matter were complex and a significant amount of time and effort was required on the part of Staff to introduce the evidence necessary for the Panel to reach an informed conclusion. Staff proceeded with the Merits Hearing efficiently and the costs requested are not excessive in the circumstances.

[82] Allegations of insider trading are not, and should not be, made lightly and are obviously consequential to a respondent. Although Donald and his counsel participated in the proceedings in a responsible, informed and competent manner, we are satisfied that Staff is justified in their request for costs and that their proposal to seek the payment of $150,000 which, as noted above, is less than 70% of the costs incurred which already do not include all time spent by Staff in connection with the matter is reasonable.

IV. CONCLUSIONS

[83] For the reasons set out above, we have concluded that it is in the public interest to make the following orders, namely, that:

(a) Pursuant to paragraph 8 of subsection 127(1) of the Act, Donald be prohibited from becoming or acting as an officer or director of a reporting issuer for a period of five years;

(b) Pursuant to paragraph 6 of subsection 127(1) of the Act, Donald be reprimanded; and

(c) Pursuant to section 127.1 of the Act, Donald be required to pay a portion of Staff's costs incurred in investigating and litigating this matter in the amount of $150,000.

Dated at Toronto this 30th day of January, 2013.

"Christopher Portner" *" Paulette L. Kennedy"*

Christopher Portner Paulette L. Kennedy