

**ALBERTA SECURITIES COMMISSION**

**DECISION**

**Citation: Re Holtby, 2015 ABASC 891**

**Date: 20150928**

**John Herbert Holtby and Randall George Kowalchuk**

**Panel:**

Tom Cotter  
Richard Shaw, QC  
Fred Snell, FCA

**Representation:**

Lorenz Berner and Tom McCartney  
for Commission Staff

James Eamon, QC  
for John Herbert Holtby

Jeremy West  
for Randall George Kowalchuk

**Submissions Completed:**

August 19, 2015

**Decision:**

September 28, 2015

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## I. INTRODUCTION

[1] In decisions of a panel (the **Panel**) of the Alberta Securities Commission (the **ASC**) (together, the **ASC Decisions**; individually, the **ASC Merits Decision**, cited as *Re Holtby*, 2013 ABASC 45, and the **ASC Sanction Decision**, cited as *Re Holtby*, 2013 ABASC 273), John Herbert Holtby (**Bert Holtby**), Randall George Kowalchuk (**Randy Kowalchuk**) and four others were found to have contravened the *Securities Act* (Alberta) (the **Act**) and acted contrary to the public interest, and were sanctioned therefor.

[2] In an Alberta Court of Appeal (**ABCA**) memorandum of judgment (the **ABCA August Judgment**, cited as *Walton v. Alberta (Securities Commission)*, 2014 ABCA 273), portions of the ASC Decisions were overturned, and "the issue of sanctions against [Bert Holtby and Randy Kowalchuk was] remitted back to the [ASC] for reconsideration".

[3] The record before us, as agreed by the parties, consisted of: the amended notice of hearing dated December 7, 2011; the ASC Decisions; the ABCA August Judgment; a supplementary ABCA memorandum of judgment (the **ABCA December Judgment**, cited as *Walton v. Alberta (Securities Commission)*, 2014 ABCA 446, and, together with the ABCA August Judgment, the **ABCA Judgments**); the approved ABCA Judgment (the **Judgment Roll**); certain transcripts of the testimony of Bert Holtby and Randy Kowalchuk heard by the Panel; certain exhibits, or portions thereof, before the Panel; an affidavit sworn by Randy Kowalchuk on May 27, 2013; and an affidavit sworn by Bert Holtby on October 21, 2014. All parties made written and oral submissions.

[4] Our decision and the reasons for it follow.

## II. ASC DECISIONS

### A. The Allegations

[5] ASC staff (**Staff**) alleged that several individuals, including Bert Holtby and Randy Kowalchuk, engaged in illegal insider trading. More particularly, Staff alleged that these individuals, while in a special relationship with Eveready Inc. (**Eveready**) and with knowledge of a non-public material fact with respect to it (a proposed acquisition of Eveready, the **Proposed Acquisition**), illegally purchased common shares of Eveready (**Eveready Shares**). Staff also alleged that certain individuals, including Bert Holtby, while in a special relationship with Eveready, illegally informed others of the Proposed Acquisition, or, with knowledge of the Proposed Acquisition, illegally recommended or encouraged others to purchase Eveready Shares. Staff further alleged that Bert Holtby concealed or withheld information reasonably required for an investigation under the Act, or attempted to do so.

### B. ASC Merits Decision

[6] In the ASC Merits Decision, the Panel found that:

- Bert Holtby, a director of Eveready with knowledge of the Proposed Acquisition, purchased Eveready Shares contrary to section 147(2) of the Act and the public interest. This illegal insider trading occurred through an account in another's name (the **Douglas Account**), of which Bert Holtby, Richard Bruce Kowalchuk

(**Richard Kowalchuk**) and James Roger Douglas (**Douglas**) were beneficial owners.

- Bert Holtby illegally informed his investment advisor Richard Kowalchuk, his brother-in-law Allan Ross Wreggit (**Wreggit**), his brother Dale Francis Holtby (**Dale Holtby**) and his personal accountant Kenneth Michael Burdeyney (**Burdeyney**) of the Proposed Acquisition contrary to section 147(3) of the Act and the public interest, and illegally recommended or encouraged his casual friend Ken Landsiedel (**Landsiedel**) to purchase Eveready Shares contrary to section 147(3.1) and the public interest.
- Bert Holtby concealed or withheld, or attempted to conceal or withhold, information reasonably required for an investigation under the Act – information about his involvement in the Douglas Account – contrary to section 93.4(1) of the Act and the public interest.
- Randy Kowalchuk, who learned of the Proposed Acquisition from his brother Richard Kowalchuk, engaged in illegal insider trading contrary to section 147(2) of the Act and the public interest.
- Dale Holtby, who learned of the Proposed Acquisition from his brother Bert Holtby, engaged in illegal insider trading contrary to section 147(2) of the Act and the public interest. Dale Holtby also illegally informed his close friend John Jacob Shepert (**Shepert**) of the Proposed Acquisition contrary to section 147(3) and the public interest, and illegally recommended or encouraged his daughter and son-in-law (the **Kaufmans**) to purchase Eveready Shares contrary to section 147(3.1) and the public interest.
- Shepert, who learned of the Proposed Acquisition from his close friend Dale Holtby, engaged in illegal insider trading contrary to section 147(2) of the Act and the public interest.
- Burdeyney, who learned of the Proposed Acquisition from his client Bert Holtby, engaged in illegal insider trading contrary to section 147(2) of the Act and the public interest. Burdeyney also illegally informed Gayle Marie Walton (**Walton**), an accountant working in the same office, of the Proposed Acquisition contrary to section 147(3) and the public interest.
- Walton, who learned of the Proposed Acquisition from Burdeyney, illegally recommended or encouraged her spouse to purchase Eveready Shares contrary to section 147(3.1) and the public interest.

### C. **ASC Sanction Decision**

[7] In consequence, the Panel in the ASC Sanction Decision ordered sanctions and made costs orders against Bert Holtby, Randy Kowalchuk, Dale Holtby, Shepert, Burdeyney and

Walton. In so doing, the Panel found (at para. 45) that Bert Holtby's "role was pivotal in the illegal activities that occurred here" and (at para. 128) that:

... Without Bert Holtby's misuse of the non-public material information he learned in his position as an Eveready director, none of the other illegal activities found to have occurred here would have occurred. And the profits attributable to misuse of non-public material Eveready information – in respect of Bert Holtby and his nominee, those Bert Holtby illegally informed or recommended or encouraged, and those illegally informed or recommended or encouraged by those Bert Holtby had illegally informed – totalled more than \$2 000 000.00[.]

[8] The Panel set out (at para. 72) "profits (net of commissions) attributable to illegal or improper purchases of Eveready Shares, including amounts from settlement agreements entered into between Staff and Richard Kowalchuk, Douglas and Jeffrey Scott Bratvold (**Bratvold**)":

Bert Holtby (40% of Douglas Account)	\$ 80 678.32
Richard Kowalchuk (including 40% of the Douglas Account)	\$ 100 000.00 (approx.)
Douglas (20% of Douglas Account)	\$ 40 000.00 (approx.)
Wreggit and his wife	\$ 138 113.23
Bratvold	\$ 185 000.00
Landsiedel	\$ 1 159 909.33
Burdeyney	\$ 8 270.42
[Walton] and [her husband]	\$ 89 386.00
Randy Kowalchuk and his wife	\$ 54 401.78
Dale Holtby	\$ 56 915.03
The Kaufmans	\$ 22 540.00
Shepert, his wife, daughter and son	\$ 139 843.84
Other clients of Richard Kowalchuk	\$ 136 319.00

[9] Therefore, the Panel found (at para. 75) that "Bert Holtby, with a 40% ownership interest in the Douglas Account, financially benefited to the extent of 40% of the profits earned in that account – \$80 678.32" and (at para. 80) that Randy Kowalchuk "financially benefited to the extent of the profits earned from his illegal purchases of Eveready Shares made by him on behalf of his wife – \$54 401.78".

[10] The Panel ordered against Bert Holtby (at para. 147) that:

- under section 198(1)(b) of the Act, he cease trading in or purchasing securities, permanently;
- under sections 198(1)(d) and (e), he resign all positions he holds as a director or officer of any issuer, registrant or investment fund manager, and he is prohibited from becoming or acting as a director or officer (or both) of any issuer, registrant or investment fund manager, permanently;
- under section 198(1)(i), he pay to the [ASC] \$80 678.32 obtained as a result of non-compliance with Alberta securities laws;
- under section 199, he pay an administrative penalty of \$1 750 000.00; and
- under section 202, he pay \$90 000.00 of the costs of the investigation and hearing.

[11] The Panel ordered against Randy Kowalchuk (at para. 150) that:

- under section 198(1)(b) of the Act, he cease trading in or purchasing securities, for 4 years to and including 27 June 2017, after which he may trade in or purchase securities only if the monetary sanctions ordered against him have been paid in full to the [ASC];
- under sections 198(1)(d) and (e), he resign all positions he holds as a director or officer of any reporting issuer, and he is prohibited from becoming or acting as a director or officer (or both) of any reporting issuer, for 4 years to and including 27 June 2017;
- under section 198(1)(i), he pay to the [ASC] \$54 401.78 obtained as a result of non-compliance with Alberta securities laws;
- under section 199, he pay an administrative penalty of \$55 000.00; and
- under section 202, he pay \$22 500.00 of the costs of the investigation and hearing.

### III. ABCA JUDGMENTS

[12] Bert Holtby, Randy Kowalchuk, Shepert, Burdeyney and Walton appealed from the ASC Decisions. In the ABCA August Judgment (read in conjunction with the ABCA December Judgment and the Judgment Roll):

- Shepert's, Burdeyney's and Walton's appeals from the ASC Decisions were allowed, with all findings of culpability and sanctions and costs orders against them set aside.
- Bert Holtby's appeal from the ASC Merits Decision was allowed in part, with the findings that he illegally informed Dale Holtby and Burdeyney of the Proposed Acquisition and that he illegally recommended or encouraged Landsiedel to purchase Eveready Shares set aside.
- Randy Kowalchuk's appeal from the ASC Merits Decision was dismissed.
- Bert Holtby's and Randy Kowalchuk's appeals from the ASC Sanction Decision were allowed, with "the issue of sanctions against them . . . remitted back to the [ASC] for reconsideration" by a three-member panel.

[13] In the ABCA August Judgment, in remitting for reconsideration "the issue of sanctions" against Bert Holtby and Randy Kowalchuk, the ABCA reasoned (at paras. 154-56):

- Ultimately, "the sanction must be proportionate and reasonable for each [respondent]". While general deterrence and specific deterrence "are legitimate considerations", "[t]he pursuit of general deterrence does not warrant imposing a crushing or unfit sanction on any individual [respondent]".
- That a respondent "fails to 'plead guilty' or fails to express remorse" is not an aggravating factor. "It is unreasonable to suggest that these appellants will, despite the findings of culpability, nevertheless think that there is nothing wrong

with what they did. . . . The ordeal and expense of the hearing, together with the publicity that accompanied it, themselves have a deterrent effect."

- It is not unreasonable that administrative penalties were imposed in addition to disgorgement "because if the maximum financial consequence of insider trading was a disgorgement of the profits realized, there would be no true deterrent. Anyone caught would at worst 'break even'." However, any additional administrative penalty "must still be proportionate to the offence, and fit and proper for the individual offender. An administrative penalty focussed purely on general deterrence of an unidentified and amorphous sector of the public could easily become disproportionate to the circumstances of the individual involved."

[14] In the ABCA August Judgment, specifically concerning the sanctioning of Bert Holtby, the ABCA reasoned (at paras. 159-62):

- Bert Holtby's arguments that it would not have been contrary to the public interest to allow him to trade in his own portfolio or at least to transfer his portfolio into an arm's-length blind trust "are not without merit, but there is a more obvious remedy. The [ASC] has the ability to vary an order at any time, or to carve out exceptions. It is always open to [Bert] Holtby to apply for approval of particular transactions, or classes of transactions."
- The \$1,750,000 administrative penalty ordered against Bert Holtby "is very severe" and arguably "extends well beyond what the public interest might require". Further, "[t]he reasons for setting this penalty are so general as to preclude any meaningful review, or to provide [Bert] Holtby with any understanding of how it was set. The [ASC] failed to explain why a lesser penalty (such as the \$400,000 suggested by [Bert] Holtby) would not act as a meaningful and substantial general deterrent. It failed to explain how this penalty was appropriate to [Bert] Holtby personally."
- The administrative penalty ordered against Bert Holtby also "appears to have had some (albeit unsaid) relationship to the amounts that Landsiedel, [Shepert], Burdeyney, and Walton gained. Since the findings with respect to those persons have been set aside, the basis for the sanction has in part disappeared."
- "On this record, it is impossible to say if the sanction is reasonable. Its severity leaves cause for concern, and it lacks the justification, transparency and intelligibility that the decision making process requires."

[15] In the ABCA August Judgment, specifically concerning the sanctioning of Randy Kowalchuk, the ABCA reasoned (at paras. 163-66):

- It is "not obvious" why a \$55,000 administrative penalty was ordered against Randy Kowalchuk. "While the [ASC] had recognized . . . that individual deterrence was diminished in this case, all of the specific matters mentioned relate

to [him] personally. It is unclear exactly what aspect of the public interest the [ASC] was attempting to address with this extremely onerous administrative penalty."

- "[T]he [ASC] rejected the use of any kind of formula for setting administrative penalties. Yet there is a pattern in the penalties imposed: in some cases they are very similar to the amount of profit that was realized. If some other basis was used for setting the quantum, it is not disclosed." It is not obvious why a \$55,000 administrative penalty was needed to deter "other persons in the circumstances of Randy Kowalchuk". Such an administrative penalty "seems, on the surface, to be disproportionate to his conduct, and his personal circumstances. . . . An administrative penalty that is imposed for general and specific deterrence should be sufficient to reasonably accomplish that end, but no more."
- Whether "[m]onetary penalties" are imposed "in the criminal or regulatory context", "there are overlapping considerations", despite the inexact analogy. In this regard, "[o]ne purpose of fines, at least, is to remove the profit from offences. That sort of penalty must be large enough so that it does not simply become a 'licencing fee' for the offence." As well, general deterrence is "a legitimate consideration, but at some point the monetary penalty must be proportionate to the circumstances of the individual offender . . . . A monetary penalty that is beyond the capacity of the individual offender cannot be justified on the basis that it will deter others who are in a better financial condition."
- "The sanction [against Randy Kowalchuk] lacks justification, transparency and intelligibility . . . . On its face, it would appear that the amount of the sanction was determined after overemphasizing the requirement of general deterrence, without having sufficient regard to the individual circumstances of this appellant."

[16] The ASC applied for, but was refused, leave to appeal the ABCA August Judgment to the Supreme Court of Canada. Before this leave application was decided, the ABCA gave directions in the ABCA December Judgment (at para. 17) concerning money – in excess of \$1.8 million – paid to the ASC by Bert Holtby in satisfaction of the monetary sanctions ordered against him in the ASC Sanction Decision, including:

- (a) the [ASC] shall continue to hold the disputed funds until its application for leave to appeal to the Supreme Court of Canada is decided;
- (b) if the Supreme Court of Canada grants leave to appeal, then the [ASC] should continue to hold the funds until the appeal is resolved . . . ;
- (c) if the Supreme Court of Canada refuses leave to appeal, then the [ASC] should forthwith return 50% of the disputed funds to [Bert] Holtby, pending reconsideration of the sanctions; . . .

#### **IV. SCOPE OF REMIT**

[17] As noted, according to the ABCA August Judgment and the Judgment Roll, "the issue of sanctions against [Bert Holtby and Randy Kowalchuk] is remitted back to the [ASC]" for

reconsideration. This issue of sanctions is in respect of the following findings in the ASC Merits Decision that were not disturbed on appeal: that Bert Holtby engaged in illegal insider trading, illegally informed Richard Kowalchuk and Wreggit of the Proposed Acquisition, and concealed or withheld, or attempted to conceal or withhold, information reasonably required for an investigation, all contrary to the Act and the public interest; and that Randy Kowalchuk engaged in illegal insider trading contrary to the Act and the public interest.

[18] The parties agreed that the disgorgement and costs orders imposed on Bert Holtby and Randy Kowalchuk are not in issue. Bert Holtby did not take issue with the types of capital-market bans imposed on him, or with the ordering of an administrative penalty against him. He contested the duration and extent of the capital-market bans imposed on him, and the amount of the administrative penalty ordered against him. Randy Kowalchuk did not take issue with the types of capital-market bans imposed on him (indeed, he did not contest the director-and-officer ban imposed on him), or with the ordering of an administrative penalty against him. He contested the duration of the trading ban imposed on him, and the amount of the administrative penalty ordered against him. Accordingly, the issues for our determination are:

- the duration and extent of the trading and director-and-officer bans imposed on Bert Holtby;
- the duration of the trading ban imposed on Randy Kowalchuk; and
- the amount of the administrative penalty ordered against each of Bert Holtby and Randy Kowalchuk.

## V. RELEVANT FINDINGS SUSTAINED

[19] In their written submissions, Staff enumerated certain factual determinations concerning Bert Holtby that were made in the ASC Merits Decision and were not disturbed on appeal (these were not contested by Bert Holtby):

- a. [Bert] Holtby had a financial interest in the Douglas Account and was a beneficial owner of the account . . . ;
- b. [Bert] Holtby principally directed the purchase[s] and sales of securities in, and thus had control and direction over, the [Douglas Account] . . . ;
- c. [Bert] Holtby introduced Richard Kowalchuk and Douglas, and arranged the meeting amongst the three of them in September 2005 . . . ;
- d. A principal purpose of the Douglas Account was to permit Bert Holtby to purchase or sell Eveready securities when he was unable to do so because of blackout periods or legal impediments and with some assurance of non-detection . . . ;
- e. [Bert] Holtby was a seasoned and successful businessman who was very well acquainted with prohibitions on insider trading and informing, and who knew he needed help from others he trusted, preferably who were without apparent connection to Eveready . . . ;
- f. There were far more purchases of Eveready securities in the Douglas [A]ccount than any other security, from its inception through August 2009 . . . ;

- g. Purchases of Eveready securities into the Douglas [A]ccount were made in 2005 and 2006, while [Bert] Holtby was in an Eveready-issued blackout period . . . ;
- h. [Bert] Holtby, a person in a special relationship with Eveready with knowledge of the [Proposed Acquisition], purchased Eveready [S]hares through the Douglas [A]ccount between 19 March and 28 April, 2009 . . . ;
- i. [Bert] Holtby informed Richard Kowalchuk of the [Proposed Acquisition] (who in turn informed others such as [Randy] Kowalchuk, [Bratvold], and Dale Stock), of the [Proposed Acquisition] . . . ; and
- j. [Bert] Holtby informed [Wreggit] of the [P]roposed [A]cquisition . . . .

[20] In his written submissions, Bert Holtby noted that the Panel in the ASC Sanction Decision "calculated the financial harm to the market as \$2,211,376.95". He also noted: "This financial harm is reduced by \$1,468,594.20 after accounting for the findings set aside by the [ABCA], and the revised amount of financial harm found by the Panel would be \$742,782.75." (Our calculations indicate that "[t]his financial harm is reduced by" \$1,476,864.62, and thus that "the revised amount of financial harm found by the Panel would be" \$734,512.33.)

[21] In their written submissions, Staff enumerated certain factual determinations concerning Randy Kowalchuk that were made in the ASC Merits Decision and were not disturbed on appeal (these were not contested by Randy Kowalchuk):

- a. He was a self-employed property developer . . . ;
- b. He and his wife had five trading accounts with CIBC[:]; he was self-described as a "medium/high risk investor" . . . ;
- c. [Randy] Kowalchuk purchased [Eveready Shares], using his wife's accounts, over the course of three days in mid April, 2009, after being tipped by his brother Richard [Kowalchuk], and roughly two weeks in advance of Eveready's public announcement of the [Proposed Acquisition] . . . ;
- d. With respect to [two] of these purchases, [Randy] Kowalchuk . . . sold other securities in [one of] his wife's account[s] in mid April, 2009 and used [much] of the proceeds to purchase Eveready [S]hares . . . ;
- e. [Randy] Kowalchuk's purchases were "well-timed" and put him in a position to benefit financially from favourable market reaction to news of the [P]roposed [A]cquisition, once disclosed . . . ; and
- f. [Randy] Kowalchuk knew or ought to have known that his brother Richard [Kowalchuk] had learned of the [Proposed Acquisition] from Bert Holtby, whom he knew to be a director of Eveready . . . .

## **VI. SANCTIONING PRINCIPLES AND FACTORS**

### **A. The Law**

#### **1. Sanctioning Generally**

[22] The ASC's sanctioning powers, under sections 198 and 199 of the Act, are protective and preventative, not punitive or remedial (*Committee for the Equal Treatment of Asbestos Minority Shareholders v. Ontario (Securities Commission)*, 2001 SCC 37 at paras. 39-45). Sanctions are

aimed at protecting investors and our capital market by preventing future harm, whether caused by a particular respondent (specific deterrence) or like-minded others (general deterrence): *Re Cartaway Resources Corp.*, 2004 SCC 26 at paras. 52-62; and *Re Podorieszch*, 2004 ABASC 567 at para. 17.

[23] In determining what, if any, sanctions are appropriate in a particular case for a particular respondent, we consider relevant sanctioning factors (as set out at para. 11 of *Re Lamoureux*, [2002] A.S.C.D. No. 125 (affirmed on other grounds 2002 ABCA 253), as restated at para. 43 of *Re Workum and Hennig*, 2008 ABASC 719 (affirmed 2010 ABCA 405)):

- the seriousness of the findings against the respondent and the respondent's recognition of that seriousness;
- characteristics of the respondent, including capital market experience and activity and any prior sanctions;
- any benefits received by the respondent and any harm to which investors or the capital market generally were exposed by the misconduct found;
- the risk to investors and the capital market if the respondent were to continue to operate unimpeded in the capital market or if others were to emulate the respondent's conduct;
- decisions or outcomes in other matters; and
- any mitigating considerations.

[24] We note, as well, that the ASC's sanctioning powers are regulatory, not criminal, in nature. Appropriate administrative penalties – in fact, appropriate sanctions – are "determined by regulatory considerations distinct from the principles of criminal liability and sentencing" (*Rowan v. Ontario (Securities Commission)*, 2012 ONCA 208 at para. 54, referenced in *Guindon v. Canada*, 2015 SCC 41 at para. 80).

## **2. Sanctioning in Illegal Insider Trading and Informing Cases**

### **(a) United States Cases**

[25] Staff pointed us to several United States (US) decisions in which illegal insider trading and informing were sanctioned. We do not find these helpful. There are material differences between the Act and the statutory regime under which the US decisions were made. Most notably, the sanctions in the US decisions were imposed under a statute that has punishment of wrongdoers as one of its objectives. We reiterate that the ASC's sanctioning powers are not punitive.

### **(b) Canadian Cases**

[26] The parties also cited several decisions of Canadian securities regulatory authorities, including the ASC, in which illegal insider trading and informing were sanctioned, and pointed to settlement outcomes in relation to such misconduct. We discuss these later in this decision, but here make some general observations about decisions and outcomes in other matters.

[27] In several decisions in which administrative penalties for illegal insider trading have been imposed, the penalty amount has been determined by applying a multiplier to (up to triple the amount of) the "enrichment" ascribed to the respondent by reason of such trading (*Re Torudag*, 2009 BCSECCOM 339; *Re Kapusta*, 2011 ABASC 521; *Re Hu*, 2011 BCSECCOM 514; and *Re Greenway*, 2012 BCSECCOM 59). Such enrichment has been characterized in different ways: the profit made by the respondent from such trading (*Kapusta*); the profit that could have been

made by the respondent – the respondent's notional profit – from such trading (*Torudag, Kapusta* and *Greenway*); and the total notional profit created by the respondent's illegal insider trading, regardless of the degree, if any, to which the respondent personally profited (*Hu*). The enrichment characterization in *Hu* has since been applied in *Re McLeary*, 2015 BCSECCOM 281. We also note that section 194(4)(b) of the Act contemplates use of a multiplier of three.

[28] We accept that (as stated in *Kapusta* at para. 80) "clarity and simplicity (both of which can assist in conveying the desired message of deterrence) may favour the use of a formula, including multipliers, provided that the results so derived are appropriate given the circumstances of each Respondent and his misconduct in light of the sanctioning principles and factors, and are consistent with the public interest". We note, though, that applying a multiplier is less likely to be appropriate where the enrichment ascribed to a respondent by reason of illegal insider trading is insignificant.

[29] Concerning the guidance to be taken from settlement outcomes in general, as was stated in *Re Anderson*, 2009 ABASC 126 (at para. 33):

As the [ASC] has noted in other decisions, settlements are the product of negotiations between parties, and settlement outcomes can reflect a variety of considerations unknown to a hearing panel. (Among such considerations may be the effect that a settlement can have on the timely, efficient resolution of a matter without the need for a hearing – an effect that may with perfect propriety be recognized and rewarded through relatively favourable terms of settlement.) Settlement outcomes are thus not necessarily a helpful guide to determining the appropriate outcome of a hearing.

[30] That said, settlement outcomes are relevant in determining the appropriate outcomes of a hearing when the settlement outcomes are in relation to the same enforcement matter – dealing with the same factual background and the same, or similar, allegations.

## **B. Parties' Positions**

### **1. Staff**

[31] Staff sought the following against Bert Holtby:

- an affirmation of the capital-market bans ordered in the ASC Sanction Decision (that is, permanent trading and director-and-officer bans with no carve-outs); and
- a \$500,000 administrative penalty.

[32] Concerning the proposed capital-market bans against Bert Holtby, Staff submitted that "nothing has changed and . . . any reconsideration should lead to the same result". Concerning the proposed administrative penalty, Staff contended that Bert Holtby "was the reason [the Douglas Account] came to exist and for all the trading and illegal profits that were generated through it". Staff further contended that Bert Holtby's "deliberateness, planning, efforts at concealment, attitude towards insider trading, breach of trust, harm to shareholders and others, lying to [Staff], and cavalier sharing of material corporate secrets with the aim of personal gain, all weigh in favour of" a \$500,000 administrative penalty.

[33] Staff sought the following against Randy Kowalchuk:

- an affirmation of the capital-market bans ordered in the ASC Sanction Decision (that is, four-year trading and director-and-officer bans with no carve-outs); and
- a \$50,000 administrative penalty.

[34] Staff submitted that the capital-market bans ordered against Randy Kowalchuk in the ASC Sanction Decision "were appropriate and should be re-issued". Concerning the proposed administrative penalty, Staff contended that, given "the circumstances relating to [Randy] Kowalchuk's illegal conduct", an administrative penalty "nearly equivalent to the value of his profits" is "fit and proper".

## 2. Bert Holtby

[35] Bert Holtby acknowledged that "the Panel's findings imply a need for" trading and director-and-officer bans. He submitted that such bans not exceeding 10 to 15 years "would be indicated by the findings". He further submitted that it would not be contrary to the public interest that the bans ordered not apply to:

- a. One RRIF and TFSA account on appropriate conditions (that account locations and numbers have been provided to the Executive Director and a copy of the relevant decisions has been given to the registrant(s) where the accounts are maintained),
- b. Serving as a director or officer of private companies owned by any of [Bert] Holtby, members of his family or the family trust,
- c. Permitting him to acquire securities in non-public companies.

[36] Bert Holtby acknowledged that "some amount of administrative penalty will be imposed . . . to provide additional specific and general deterrence against the incidents of dishonesty the Panel has found, specific and general deterrence against insider trading and tipping, and to ensure that others do not see a sanction as simply a cost of doing business". He submitted that an administrative penalty of \$200,000 to \$300,000 "is fit". Bert Holtby elaborated:

. . . It would be . . . significantly in excess of the amount the Panel found that [Bert] Holtby personally received. It would be reasonably in the range for serious misconduct cases. It would recognize that the financial harm, while not insignificant, is on the lower end of the scale in cases where a significant administrative penalty has been imposed. It would be significantly greater than the sanction agreed to by Richard Kowalchuk and the Executive Director. It would provide for a significant amount of additional penalty to recognize the Panel's other misconduct findings. It would send a firm message to the market that the misconduct found by the Panel will not be tolerated.

## 3. Randy Kowalchuk

[37] As noted, Randy Kowalchuk did not contest the director-and-officer ban imposed on him in the ASC Sanction Decision. He acknowledged that, given the Panel's findings, a trading ban against him "may be appropriate". Randy Kowalchuk submitted, however, that the four-year trading ban proposed by Staff would be "unnecessary, punitive and excessive particularly when compared to other decisions of [the ASC]". He suggested that an appropriate trading-ban duration would be "effectively time served".

[38] Randy Kowalchuk submitted that a \$15,000 administrative penalty would be "sufficient to meet the regulatory and policy objectives of the Act and [his] conduct and personal circumstances".

### **C. Application of Sanctioning Principles and Factors**

#### **1. Seriousness of Misconduct and Recognition of Seriousness**

[39] Bert Holtby illegally purchased 28,000 Eveready Shares through seven purchases in the Douglas Account from March 19 to April 28, 2009. Randy Kowalchuk illegally purchased 7,000 Eveready Shares through three purchases in his spouse's accounts from April 13 to 15, 2009. Illegal insider trading is serious misconduct. This was not disputed by Bert Holtby or Randy Kowalchuk.

[40] Bert Holtby was also found to have illegally informed Richard Kowalchuk and Wreggit, and to have concealed or withheld, or attempted to conceal or withhold, in his investigative interview information about his involvement in the Douglas Account. This misconduct, too, was serious.

[41] That Bert Holtby engaged in illegal insider trading and informing when he was a director of Eveready, and that his illegal trading as well as his investigative interview involved efforts to deceive and conceal, are aggravating considerations. In short, Bert Holtby's misconduct was very serious.

[42] The seriousness of Bert Holtby's and Randy Kowalchuk's respective misconduct calls for significant sanction against each of them, but more so against Bert Holtby given the greater magnitude of his misconduct and the noted aggravating considerations concerning him.

[43] We accept that Bert Holtby and Randy Kowalchuk recognize the seriousness of their respective misconduct. This recognition moderates somewhat the identified need for significant sanction.

#### **2. Personal Characteristics**

[44] Bert Holtby was an experienced businessman, who was very well acquainted with prohibitions on insider trading and informing. He undoubtedly knew that his insider trading and informing were illegal. Moreover, he surely knew that forthrightness was expected of him at his investigative interview. This factor argues for significant sanction against him, despite his not having been the subject of any previous regulatory proceedings.

[45] Randy Kowalchuk had considerable capital-market experience as an investor and thus knew or ought to have known that his insider trading was illegal. This factor argues for significant sanction against him but moderated somewhat to account for his not having been a director, officer or employee of Eveready when he engaged in such trading.

#### **3. Harm to Capital Market and Benefits Received**

[46] Bert Holtby's misconduct caused considerable harm, and Randy Kowalchuk's misconduct caused harm, to the Alberta capital market. Illegal insider trading and informing undermines the

fairness of our capital market, thereby jeopardizing the confidence on which that market depends to survive and flourish. When insiders of reporting issuers are able to benefit themselves and others financially because their positions give them access to non-public material information, this results in an unfair capital market that fails to inspire confidence or a willingness to invest.

[47] As for benefits received, the profits attributable to misuse of non-public material Eveready information – in respect of Bert Holtby and his nominee, those Bert Holtby illegally informed, and those illegally informed in consequence – totalled \$734,512.33. Bert Holtby, with a 40% ownership interest in the Douglas Account, financially benefited to the extent of 40% of the profits earned in that account – \$80,678.32. Randy Kowalchuk financially benefited to the extent of the profits earned from his illegal purchases of Eveready Shares made by him on behalf of his spouse – \$54,401.78.

[48] The harm done and benefits received call for significant sanction against Bert Holtby and Randy Kowalchuk, but more so against Bert Holtby given the substantial harm done by his misconduct and the benefits (personal or otherwise) resulting therefrom.

#### **4. Risk of Future Harm – Need for Deterrence**

[49] Bert Holtby acknowledged that "[t]he Panel's findings imply a need for specific and general deterrence".

[50] Bert Holtby knowingly and repeatedly breached the Act and his misconduct involved efforts to deceive and conceal. Moreover, his role was pivotal in the illegal activities that occurred here. Accordingly, we perceive a need for substantial specific deterrence in respect of Bert Holtby. We accept that this need is moderated somewhat by reason of: his recognition of the seriousness of his misconduct (previously noted); the deterrent effect of the ordeal and expense of the hearing and accompanying publicity; his age; and the fact that he is less likely to be privy in future to non-public material information.

[51] Given the seriousness of Randy Kowalchuk's misconduct and the resulting harm and benefit, we perceive a need for relatively substantial specific deterrence. We accept that this need is moderated somewhat by reason of: his recognition of the seriousness of his misconduct (previously noted); and the deterrent effect of the ordeal and expense of the hearing and accompanying publicity.

[52] Equally, there is a need for meaningful general deterrence to dissuade like-minded others from engaging in illegal insider trading and informing, and from concealing or withholding information when being questioned by Staff investigators. We are mindful of the ABCA's admonition that considerations of proportionality require that sanctions, specifically administrative penalties, not be "focussed purely on general deterrence of an unidentified and amorphous sector of the public". In deciding the issue of appropriate sanctions, we have been careful to assess the need for general deterrence having specific regard to the segments of market participants relevant here – in the case of Bert Holtby, directors (or other principals) of public issuers entrusted with non-public material information, and in the case of Randy Kowalchuk, those who learn of such information in circumstances in which they become persons in a "special relationship" with the public issuer.

## **5. Other Decisions and Outcomes**

[53] As noted, the parties cited several decisions of Canadian securities regulatory authorities, including the ASC, in which illegal insider trading and informing were sanctioned, and pointed to settlement outcomes in relation to such misconduct. The parties also cited several other decisions of such authorities in which other misconduct was sanctioned.

[54] We have considered all of those decisions, as well as *Re Azeff* (2015), 38 OSCB 7382 and a few others noted in this decision, in determining what sanctions would be appropriate here. A consideration of previous decisions and settlement outcomes, particularly those involving the same or similar factual background and allegations, is essential in determining what sanctions are proportionate to the circumstances of a respondent's misconduct and to the personal circumstances of the respondent.

## **6. Mitigating Considerations**

[55] We discern, apart from the moderating considerations identified elsewhere in this decision, one additional such consideration, this in respect of Randy Kowalchuk. Randy Kowalchuk provided some evidence of reduced financial circumstances. This was not, we note, evidence of impecuniosity or bankruptcy. That said, we accept Randy Kowalchuk's financial circumstances as a moderating consideration applicable to our determination of an appropriate administrative penalty in respect of him.

## **7. Conclusion on Principles and Factors**

[56] For the reasons given, we conclude that significant sanctions providing protection through substantial or relatively substantial specific deterrence and meaningful general deterrence, tailored to take into account the differing circumstances of and findings against each of Bert Holtby and Randy Kowalchuk and moderated appropriately (as noted), are warranted in the public interest.

## **D. Appropriate Sanctions**

[57] We are tasked with deciding the combination of sanctions appropriate for each of Bert Holtby and Randy Kowalchuk, mindful of the extant and uncontested disgorgement order against each.

### **1. Capital-Market Bans**

[58] As noted, Bert Holtby acknowledged that "the Panel's findings imply a need for" trading and director-and-officer bans. He submitted that such bans not exceeding 10 to 15 years "would be indicated by the findings".

[59] Mindful of the circumstances of and findings against Bert Holtby, and of the moderating considerations noted, we are satisfied that Bert Holtby's conduct contrary to the Act and the public interest (falling far below what we would expect of an individual in his circumstances) warrants in the public interest the imposition of 10-year trading and director-and-officer bans against him.

[60] Further, we are prepared to provide certain carve-outs to these bans. One such carve-out will allow for Bert Holtby's limited trading or purchasing of particular types of securities in one registered retirement income fund (**RRIF**) and one tax-free savings account (**TFSA**), provided this is done through a registrant who has been given a copy of this decision. (We would also have made this carve-out conditional on Bert Holtby paying in full the monetary sanctions ordered against him, but this has already occurred.) The other carve-out provided will allow Bert Holtby to act as a director or officer (or both) of any issuer that is wholly owned by one or more of him, his family members and the Holtby family trust and does not issue or propose to issue securities to the public. We are satisfied that these carve-outs will not jeopardize the public interest, in that they will not afford him any opportunities to engage in the misconduct for which he is here being sanctioned.

[61] In our view, such 10-year trading and director-and-officer bans, together with the extant disgorgement order against him and the administrative penalty we impose on him below, will sufficiently deter Bert Holtby from engaging in the same or similar misconduct, as well as deter similarly-situated others who might be inclined to engage in similar misconduct. In so finding, we note that such bans are proportionate, that is commensurate with bans ordered against others in similar circumstances in other securities regulatory decisions.

[62] As noted, Randy Kowalchuk did not contest the director-and-officer ban imposed on him in the ASC Sanction Decision, and he acknowledged that, given the Panel's findings, a trading ban against him "may be appropriate".

[63] Randy Kowalchuk's appeal from the ASC Merits Decision was dismissed. Having regard to the circumstances of and findings against him, and the moderating considerations noted, we are satisfied that Randy Kowalchuk's misconduct warrants in the public interest an affirmation of both capital-market bans ordered in the ASC Sanction Decision (that is, four-year trading and director-and-officer bans with no carve-outs).

[64] In our view, such four-year trading and director-and-officer bans, together with the extant disgorgement order against him and the administrative penalty we impose on him below, will sufficiently deter Randy Kowalchuk from engaging in illegal insider trading, as well as deter similarly-situated others who might be inclined to engage in such trading. In so finding, we note that such bans are commensurate with bans ordered against others in similar circumstances in other securities regulatory decisions.

## **2. Administrative Penalties**

[65] We agree with Bert Holtby that "some amount of administrative penalty will be imposed . . . to provide additional specific and general deterrence against the incidents of dishonesty the Panel has found, specific and general deterrence against insider trading and tipping, and to ensure that others do not see a sanction as simply a cost of doing business". That said, we are of the view that a \$600,000 administrative penalty against Bert Holtby for his contraventions of the Act would be in the public interest for the following reasons:

- Administrative penalties and disgorgement orders are both aimed at protecting through deterrence. That said, a disgorgement order is directed at ensuring that a

respondent does not retain any financial benefit from breaching Alberta securities laws, whereas an administrative penalty imposes a direct financial cost on a respondent for the respondent's breach of Alberta securities laws.

- To paraphrase *Kapusta* (at para. 80), "clarity and simplicity (both of which can assist in conveying the desired message of deterrence)" favour the use of a formula, including a multiplier. Thus, similar to what was done in *Kapusta* and other securities regulatory decisions, we start by quantifying the enrichment to Bert Holtby by reason of his illegal insider trading and derive from that (using a multiplier) an indication of what might be an appropriate administrative penalty for such trading.
- We consider the enrichment to Bert Holtby by reason of his illegal insider trading, for administrative penalty purposes, to be the total profit of approximately \$200,000 made in the Douglas Account. This, in our view, is appropriate because, although Bert Holtby had a 40% ownership interest in the Douglas Account, he principally directed the purchases and sales of securities in, and thus had control and direction over, that account, and a principal purpose of that account was to permit Bert Holtby to purchase or sell Eveready securities when he was unable to do so because of blackout periods or legal impediments and with some assurance of non-detection. As discussed, for the purpose of determining an administrative penalty amount, the enrichment ascribed to a respondent by reason of illegal insider trading has been characterized in different ways; there may be circumstances, such as those in this instance, in which the profit made (or that could have been made) by the respondent from such trading is not the best characterization.
- We further consider a multiplier of three to be most appropriate given that Bert Holtby engaged in illegal insider trading when he was a director of Eveready, that he undoubtedly knew that his insider trading was illegal, that he engaged in multiple (seven) instances of illegal insider trading, and that this misconduct involved efforts to deceive and conceal. In this regard, we note that a multiplier of three has been used in other securities regulatory decisions in relation to illegal insider trading with aggravating aspects.
- Applying this multiplier to this enrichment indicates that an appropriate administrative penalty for Bert Holtby's illegal insider trading would be approximately \$600,000.
- We are satisfied that an administrative penalty for Bert Holtby's illegal informing of Richard Kowalchuk and Wreggit of \$80,000 (\$40,000 for each contravention) would fall within (perhaps at the lower end of) a range we consider reasonable and adequate to serve the public interest, having regard to other securities regulatory decisions. Other securities regulatory decisions also indicate that an appropriate administrative penalty for Bert Holtby's efforts to deceive and conceal in his investigative interview would be \$20,000 (*Re Singh*, 2012 ABASC 344; and

*Re Hagerty*, 2014 ABASC 348). Thus, in our view, a total administrative penalty of approximately \$700,000 for Bert Holtby's contraventions is broadly appropriate. (Indeed, in our view, such a total administrative penalty is also broadly appropriate having regard to the profits attributable to misuse of non-public material Eveready information totalling \$734,512.33, which misuse originated with Bert Holtby.)

- That total must be reduced to account for the moderating circumstances noted. We are satisfied that a reduction to \$600,000 for this purpose is appropriate.
- In our view, a \$600,000 administrative penalty, together with the extant disgorgement order against him and the capital-market bans we are ordering, will sufficiently deter Bert Holtby from engaging in the same or similar misconduct, as well as deter similarly-situated others who might be inclined to engage in similar misconduct. In so finding, we are satisfied that such an administrative penalty is proportionate, being commensurate with administrative penalties ordered against others in similar circumstances in other securities regulatory decisions. We are also satisfied that it is commensurate with the \$200,000 settlement amount to which Richard Kowalchuk agreed. In that regard, we note that settlement amounts cannot be categorized as either administrative penalties or disgorgement orders, that "settlement outcomes can reflect a variety of considerations unknown to a hearing panel" (*Anderson* at para. 33), that the timely resolution of a matter without a hearing may be "rewarded through relatively favourable terms of settlement" (*Anderson* at para. 33), and that Richard Kowalchuk was a key witness for Staff. Moreover, and importantly, the administrative penalty we order against Bert Holtby must pay sufficient heed to his pivotal role in the illegal activities that occurred here.
- Finally, we note that, in ordering a \$600,000 administrative penalty against Bert Holtby, we are not limited by Staff's position in determining the appropriate amount to be ordered in the public interest (*Maitland Capital Ltd. v. Alberta (Securities Commission)*, 2009 ABCA 186 at para. 19).

[66] As noted, Randy Kowalchuk did not take issue with the ordering of an administrative penalty against him, but contested the amount. We are of the view that a \$45,000 administrative penalty against Randy Kowalchuk for his illegal insider trading would be in the public interest for the following reasons:

- Similar to what was done in *Kapusta* and other securities regulatory decisions, we start by quantifying the enrichment to Randy Kowalchuk by reason of his illegal insider trading and derive from that (using a multiplier) an indication of what might be an appropriate administrative penalty for such trading.
- Randy Kowalchuk financially benefited to the extent of the profits earned from his illegal purchases of Eveready Shares made by him on behalf of his spouse –

\$54,401.78. We consider the enrichment to Randy Kowalchuk by reason of his illegal insider trading, for administrative penalty purposes, to be this amount.

- We further consider a multiplier of one appropriate. To that end, we note that Randy Kowalchuk had no role in, or any direct relationship with, Eveready when he engaged in his illegal insider trading, and that his illegal trading did not involve efforts to deceive and conceal.
- Thus, in our view, an administrative penalty of approximately \$54,400 for Randy Kowalchuk's illegal insider trading is broadly appropriate.
- That amount must be reduced to account for the moderating circumstances noted, including the evidence of Randy Kowalchuk's reduced financial circumstances. We are satisfied that a reduction to \$45,000 for this purpose is appropriate. (We consider the costs order made against Randy Kowalchuk irrelevant to our assessment of an appropriate administrative penalty. Costs orders are not sanctions; they differ in function.)
- In our view, a \$45,000 administrative penalty, together with the extant disgorgement order against him and the capital-market bans we are ordering, will sufficiently deter Randy Kowalchuk from engaging in illegal insider trading, as well as deter similarly-situated others who might be inclined to engage in such trading. In so finding, we are satisfied that such an administrative penalty is proportionate, being commensurate with administrative penalties ordered against others in similar circumstances in other securities regulatory decisions, and on the evidence before us not disproportionate to his personal circumstances.

## VII. CONCLUSION

[67] For the reasons given, we make the following orders.

[68] In respect of Bert Holtby, we order in the public interest that:

- under section 198(1)(b) of the Act, he cease trading in or purchasing securities, for 10 years (from the date of the ASC Sanction Decision) to and including June 27, 2023, except that this order does not preclude him from trading or purchasing:
  - mutual funds, exchange-traded funds, government bonds and guaranteed investment certificates in one RRIF and one TFSA (as defined in the *Income Tax Act* (Canada)), of which he has sole beneficial ownership; and
  - through a registrant, who has first been given a copy of this decision;
- under sections 198(1)(d) and (e), he resign all positions he holds as a director or officer of any issuer, registrant or investment fund manager, and he is prohibited from becoming or acting as a director or officer (or both) of any issuer, registrant

or investment fund manager, for 10 years (from the date of the ASC Sanction Decision) to and including June 27, 2023, except that these orders do not preclude him from becoming or acting as a director or officer (or both) of any issuer that is wholly owned by one or more of him, his family members and the Holtby family trust and does not issue or propose to issue securities to the public; and

- under section 199, he pay an administrative penalty of \$600,000.

[69] These orders are in addition to the following extant orders made in the ASC Sanction Decision against Bert Holtby:

- under section 198(1)(i) of the Act, he pay to the ASC \$80,678.32 obtained as a result of non-compliance with Alberta securities laws; and
- under section 202, he pay \$90,000 of the costs of the investigation and hearing.

[70] In respect of Randy Kowalchuk, we order in the public interest that:

- under section 198(1)(b) of the Act, he cease trading in or purchasing securities, for four years (from the date of the ASC Sanction Decision) to and including June 27, 2017, after which he may trade in or purchase securities only if the monetary sanctions ordered against him have been paid in full to the ASC;
- under sections 198(1)(d) and (e), he resign all positions he holds as a director or officer of any reporting issuer, and he is prohibited from becoming or acting as a director or officer (or both) of any reporting issuer, for four years (from the date of the ASC Sanction Decision) to and including June 27, 2017; and
- under section 199, he pay an administrative penalty of \$45,000.

[71] These orders are in addition to the following extant orders made in the ASC Sanction Decision against Randy Kowalchuk:

- under section 198(1)(i) of the Act, he pay to the ASC \$54,401.78 obtained as a result of non-compliance with Alberta securities laws; and
- under section 202, he pay \$22,500 of the costs of the investigation and hearing.

[72] This proceeding is concluded.

September 28, 2015

**For the Commission:**

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"original signed by"  
Tom Cotter

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"original signed by"  
Richard Shaw, QC

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"original signed by"  
Fred Snell, FCA