ALBERTA SECURITIES COMMISSION

DECISION

Citation: Re Imagine Research and Technology Inc., 2020 ABASC 77 Date: 20200604

Imagine Research and Technology Inc., Douglas Alexander Whyte and Brian Michael Jones

Panel:	Kari Horn Steven Cohen James Oosterbaan
Representation:	Adam Karbani for Commission Staff Douglas Alexander Whyte for himself and Imagine Research and Technology Inc. Brian Michael Jones for himself
Submissions Completed:	May 7, 2020
Decision:	June 4, 2020

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I. INTRODUCTION

[1] Staff (**Staff**) of the Alberta Securities Commission (the **ASC**) issued a notice of hearing (the **NOH**) dated May 27, 2019 against Imagine Research and Technology Inc. (**Imagine**), Douglas Alexander Whyte (**Whyte**) and Brian Michael Jones (**Jones**, and, collectively with Imagine and Whyte, the **Respondents**).

[2] The NOH set out Staff's allegations that the Respondents had engaged in illegal distributions of Imagine common shares (the **Shares**) and made misrepresentations in connection with the Shares, contrary to ss. 110(1) and 92(4.1) of the *Securities Act* (Alberta) (the **Act**), respectively.

[3] Staff and the Respondents entered into a Statement of Admissions and Joint Submission on Sanction, signed by the Respondents on March 3, 2020 and by Staff on April 12, 2020 (the **Statement**). The Statement set out details of the alleged illegal distributions and misrepresentations, as well as the Respondents' admissions to those allegations. The Statement also contained the joint submission of Staff and the Respondents as to the appropriate sanction and costs orders to be made in this case, based on the outlined facts, the admissions, and the other circumstances set out in the Statement. We received written submissions from Staff, including Staff's bill of costs detailing the investigative and hearing costs incurred in this matter (the **Bill of Costs**). We did not receive written submissions from the Respondents.

[4] An oral hearing (the **Hearing**) was held on May 7, 2020 by teleconference, at which the Statement and Bill of Costs were entered into evidence. We heard the oral submissions of Staff and of Whyte and Jones. Whyte indicated that he was acting for Imagine. In responding to our questions, Whyte and Jones also made various representations.

[5] For the reasons set out below, we conclude that the Respondents contravened the Act, as admitted in the Statement, and that sanctions are warranted against Whyte and Jones in the public interest. We are satisfied that the sanctions jointly proposed against Whyte and Jones by Staff and the Respondents are generally appropriate here, and we make the orders set out at the end of this decision. We also conclude that the proposal of Staff and the Respondents that each of Whyte and Jones pay $10,000 of the investigation and hearing costs reflected in the Bill of Costs is appropriate in these circumstances. We are satisfied that it is appropriate here to make no sanction or costs orders against Imagine

II. FACTUAL BACKGROUND

[6] The Statement set out the relevant facts, which we accept as accurate and summarize here.

[7] Imagine is a federally incorporated company that was registered in Alberta on March 5, 2013. Its head office is in Edmonton.

[8] Whyte, aged 72, is a resident of Edmonton. He is the founder, chief executive officer (**CEO**), guiding mind, a director and a shareholder of Imagine.

[9] Jones, aged 69, is a resident of Edmonton. He is the chief financial officer, a director and a shareholder of Imagine.

[10] From June 2013 to January 2018 (the **Relevant Period**), Imagine was in the business of developing an electronic circuits product. At the time of the Statement, the product had neither produced revenue nor been sold, but continued to be under development and in testing.

[11] Whyte and Jones were the only directors and officers of Imagine during the Relevant Period, and they continue to be. Whyte and Jones were not involved in capital-raising activities before their involvement with Imagine.

[12] Between 2014 and 2018, Imagine sold Shares to approximately 206 investors (153 of those resided in Alberta), raising approximately $1,445,140 in total. We were not told how much of the total was raised from Alberta residents. Most of the remaining investors resided in British Columbia (39 investors), with five investors in Nova Scotia, three in each of Manitoba and Ontario, and one in each of Saskatchewan, England and India.

[13] The Respondents admitted that, during the Relevant Period, Whyte made certain statements to existing or prospective investors.

[14] In 2015, Whyte sent correspondence stating the following (the **2015 Correspondence**):

> The reason the income figures discussed below are so staggering is because we are not dealing with the general public in sales; the process is not intended to be sold via storefront operations. It is used on the production line. This is very important to understand. Our clients are international level manufacturers who will use it in their electronic products during the manufacturing process, and who will pay us a royalty per unit treated. . . .
>
> **Returns**
>
> These numbers are considered quite conservative. These figures are projections only but are based on our analysis of the potential market for this process.
>
> 1. Considering Quantum Pooling only, we are targeting our first potential contract with industry clients to initially generate between $140M and $1 Billion per year net income. . .
>
> 3. We anticipate that this potential contract may grow to 4 or 5 times its initial level within three years, at a minimum of $500 - $600M and possibly as high as $3.5B. . .
>
> 6. All considered, we are comfortable targeting $5 – 10B in annual sales within 5 years. This translates to about $16-18,000 in annual dividends per $10 share at a $5B sales level. [Emphasis in original.]

[15] In October 2016, Whyte sent an email stating the following (the **2016 Email**):

> 5. **Share Pricing**
> The value of the company has increased and that is why the share price is higher. We now have patents and a licensing agreement plus a potential industry partner. This is the time when venture capitalists usually come in to buy out all the original shareholders at a premium. We don't want that so we are going to the original shareholders who supported us and offer them the opportunity to acquire the remaining shares.

[16] In October 2017, Whyte sent an email stating the following (the **2017 Email**):

> Initial Public Offering
>
> On the website we talk extensively about our plans to introduce the products to market. We reasonably project our annual sales growing to $11 Billion within 5-8 years starting from our first contracts, which we are working towards now. From there, sales are expected to continue to increase over the life of the patents and also as new products are introduced. Based on these first two products alone, we estimate our income over the 20 year life of the patents to be in excess of $300 Billion.

[17] The Respondents acknowledged that the 2015 Correspondence, the 2016 Email and the 2017 Email (collectively, the **Communications**) were made at a time when Whyte and Imagine knew or reasonably ought to have known that:

> (a) Imagine had no signed contracts;
>
> (b) Imagine did not earn any revenue at any time;
>
> (c) Imagine did not have any patents. It had a claim to be registered as an inventor on a patent pending which had not been recognized by the University of Akron, Ohio, USA, where the research for the patent was being conducted;
>
> (d) at the time of the [Communications], Imagine had not developed a marketable product, and significant funds and testing were still required to develop a marketable product;
>
> (e) there was no reasonable basis for the financial projections (**Projections**) referred to in [the Communications]; and
>
> (f) the representations about Projections in [the Communications] did not include reasonable cautionary language identifying material factors that could cause actual results to differ materially from the Projections, and did not include statements about the material factors and assumptions made in formulating the Projections. [Emphasis in original.]

[18] Facts which Staff and the Respondents agreed on and considered relevant to sanction are set out later in this decision.

III. ANALYSIS

A. Illegal Distributions

1. The Law

[19] Section 110(1) of the Act prohibits a distribution of securities unless a preliminary prospectus and prospectus have been filed and receipts have been issued therefor. Specific exemptions from this requirement are available under National Instrument 45-106 *Prospectus Exemptions* (**NI 45-106**, formerly titled *Prospectus and Registration Exemptions*). The onus is on those claiming reliance on an exemption to prove that the exemption was available and applicable in the circumstances, and that there was compliance with the terms of the exemption (*Re Homerun International Inc.*, 2015 ABASC 990 at para. 83).

[20] An ASC panel in *Re Aitkens*, 2018 ABASC 27 at para. 148 summarized the elements of an illegal distribution:

> To find that s. 110 of the Act was breached, we must conclude that: (i) the conduct involved a "security", a "trade" and a "distribution" (all as defined in the Act); (ii) prospectuses for the

> distribution were not filed with or receipted by the ASC; and (iii) no exemptions from the [s. 110 prospectus requirement] were available.

[21] A "distribution", as defined in s. 1(p)(i) of the Act, is a "trade" in "securities" of an "issuer", when those securities have not previously been issued. The definition of "security" in the Act is broad, including, for example, any "share" (in s. 1(ggg)(v)). Under s. 1(jjj)(i), a "trade" includes "any sale or disposition of a security for valuable consideration". Section 1(cc) provides that an "issuer" is a person or company which "has outstanding securities", "is issuing securities" or "proposes to issue securities".

2. Admissions

[22] The Respondents admitted that the Shares were "securities" under the Act, and that the sales of the Shares were "trades" and "distributions". They also admitted that Imagine was an "issuer" under the Act and had never filed a preliminary prospectus or prospectus with the Executive Director of the ASC or received a receipt for either. None of the Respondents were registered to sell securities or deal in securities.

[23] Although the Respondents purported to rely on NI 45-106 exemptions from the prospectus requirement, particularly the "family, friends and business associates" exemption, they admitted that they did not take reasonable steps to ensure purchasers qualified for an exemption. They also admitted that a prospectus exemption was not available for the majority of Share distributions, although there was no evidence as to the number or dollar amount of distributions which would have properly qualified for exemptions.

[24] The Respondents each admitted that they:

> . . . breached section 110(1) of the [Act] by distributing, or participating in distributions of, securities of Imagine without having filed and received a receipt for a preliminary prospectus or a prospectus, and without an exemption from that requirement for some or all of the relevant distributions of securities.

3. Conclusion

[25] We are satisfied on the balance of probabilities that Imagine was an issuer, the Shares were securities, the sales to investors were trades and distributions, and there were no exemptions available under NI 45-106 for the majority of the distributions.

[26] Therefore, we find – consistent with the Respondents' admissions – that the Respondents contravened s. 110(1) of the Act.

B. Misrepresentations

1. The Law

[27] Section 92(4.1) of the Act provides that:

> (4.1) No person or company shall make a statement that the person or company knows or reasonably ought to know
>
> (a) in any material respect and at the time and in the light of the circumstances in which it is made,

> (i) is misleading or untrue, or
>
> (ii) does not state a fact that is required to be stated or that is necessary to make the statement not misleading,
>
> and
>
> (b) would reasonably be expected to have a significant effect on the market price or value of a security. . . .

[28] The ASC panel in *Aitkens* (at para. 134) set out the test for proving a contravention of s. 92(4.1) of the Act:

> . . . to establish a misrepresentation under s. 92(4.1), Staff must prove that:
>
> (a) a statement was made by a respondent;
>
> (b) the respondent knew or reasonably ought to have known that the statement was, in a material respect, untrue or omitted a fact required to be stated or necessary to make the statement not misleading; [and]
>
> (c) the respondent knew or reasonably ought to have known that the statement would reasonably be expected to have a significant effect on the market price or value of a security.

[29] That panel also stated (*Aitkens* at para. 138):

> A hearing panel will find that a statement or omission would reasonably be expected to have a significant effect on the market price or value of a security if it can reasonably be concluded that the misrepresentation would influence an investor's decision to purchase the security and the price that investor would be prepared to pay for it. Stated another way, the determination is "whether there is a substantial likelihood that such facts would have been important or useful to a reasonable prospective investor in deciding whether to invest in the securities on offer at the price asked" ([*Re Arbour Energy Inc.*, 2012 ABASC 131] at para. 765, citing [*Sharbern Holding Inc. v. Vancouver Airport Centre Ltd.*, 2011 SCC 23] at para. 61).

2. Admissions

[30] The Statement included admissions that Whyte and Imagine made the Communications, and that Jones authorized, permitted or acquiesced in the Communications. Accordingly, we are satisfied that each of the Respondents took responsibility for making the Communications to investors.

[31] The Respondents admitted that they knew or reasonably ought to have known that the Communications "were, in a material respect, misleading or untrue or failed to state a fact that was required to be stated or was necessary to make the [Communications] not misleading". They also acknowledged that the Communications "would reasonably be expected to have a significant effect on the market price or value of the [Shares]".

[32] The Respondents admitted that the statements and omissions in the Communications were, individually and collectively, "materially misleading as they created a significantly inaccurate

picture as to the risk level of the investment in terms of the likelihood of success of the business, and the degree of success of the business."

[33] The Respondents each admitted that they:

> . . . breached section 92(4.1) of the [Act] by making representations, by act or omission, which they knew or reasonably ought to have known were materially misleading or untrue, or both, and that would reasonably be expected to have a significant effect on the market price or value of a security.

3. Conclusion

[34] We are satisfied on the balance of probabilities – and we find – that:

- despite some inconsistent wording in the Statement, each of the Respondents made the Communications;
- the Communications were misleading or untrue (or both), given the evidence before us that, at that time, Imagine had no signed contracts, no revenue, no patents, no marketable product, and no reasonable basis for, or sufficient cautionary language about, the projections set out in the Communications;
- the Respondents knew or reasonably ought to have known that the Communications were misleading or untrue (or both);
- the Communications would reasonably be expected to have had a significant effect on the market price or value of the Shares, as we conclude that the content of the Communications "would have been important or useful to a reasonable prospective investor in deciding whether to invest in the [Shares] at the price asked"; and
- the Respondents knew or reasonably ought to have known that the Communications would reasonably be expected to have had a significant effect on the market price or value of the Shares.

[35] Therefore, we find – consistent with the Respondents' admissions – that the Respondents contravened s. 92(4.1) of the Act.

C. Sanction and Cost Recovery

1. The Law

(a) Sanction

[36] In a sanction decision, *Re Homerun International Inc.*, 2016 ABASC 95 at paras. 12-46 (all further references in this decision to *Homerun* are to that sanction decision), an ASC panel set out the principles and factors relevant to sanction determinations. Staff cited the principles from *Homerun*, but referred to factors from an older decision (*Re Cloutier*, 2014 ABASC 170 at para. 13). As the principles and factors listed in *Homerun* are set out in conjunction with each other, we discuss and apply those here, although we do not set out every detail from the *Homerun* framework.

(i) Sanctioning Principles

[37] The panel in *Homerun* stated that, in protecting investors and fostering a fair and efficient capital market, the ASC exercises its sanctioning powers under ss. 198 and 199 of the Act in the public interest. Those powers are protective and preventive, not punitive or remedial (at para. 12, citing *Committee for the Equal Treatment of Asbestos Minority Shareholders v. Ontario (Securities Commission)*, 2001 SCC 37 at paras. 39-45).

[38] In determining appropriate sanctions, a panel considers the need to deter future misconduct both by the same respondent (specific deterrence) and by others (general deterrence), with sanctions required to "be proportionate and reasonable" (*Walton v. Alberta (Securities Commission)*, 2014 ABCA 273 at para. 154, referred to in *Homerun* at para. 13).

[39] We also note the panel's remarks in *Re Stewart*, 2019 ABASC 47 at para. 26 regarding monetary sanctions:

> . . . we are also mindful that in *Maitland Capital Ltd. v. Alberta (Securities Commission)*, 2009 ABCA 186 (at para. 21), the Court of Appeal cautioned that "[i]f sanctions under this legislation are so low as to communicate too mild a rebuke to the misconduct, or perhaps a licensing fee for its occurrence, the opposite to deterrence may result".

[40] The panel in *Homerun* further stated (at paras. 14-16):

> The determination in a particular case of whether deterrence is required and, if so, the type and extent of sanctions appropriate for that purpose, will turn on the circumstances of the misconduct and of the particular respondent, and on an assessment of the risk posed to investors and the capital market by a particular respondent or by others who might be minded to emulate the respondents' misconduct.
>
> Pertinent to assessing the proportionality and reasonableness of a contemplated sanction is the Alberta Court of Appeal statement in *Walton* (at para. 154) that "general deterrence does not warrant imposing a crushing or unfit sanction on" a respondent. Specifically in the context of an administrative penalty, the Court of Appeal stated (at para. 156) that it must "be proportionate to the offence, and fit and proper for the individual offender".
>
> Ensuring that sanctions are proportionate involves appropriate consideration of other decisions and settlement outcomes, while recognizing that decisions or outcomes seldom involve identical factual circumstances or wrongdoing.

(ii) Sanctioning Factors

[41] The panel in *Homerun* set out the following factors to be considered (see, in general, paras. 20-46):

- **Seriousness of the Misconduct** – this involves three aspects: "the nature of the misconduct; intention (whether the misconduct was planned and deliberate, not deliberate but attributable to recklessness, or simply inadvertent); and the harm to which the misconduct exposed identifiable investors or the capital market generally" (at para. 22);

- **Respondent's Characteristics and History** – these "may be important indicators of the degree of risk posed and, in turn, the extent of deterrence required" and "may

also be relevant to assessing the proportionality of sanctions under consideration" (at para. 27). Relevant aspects "may include education, work experience, registration or other participation in the capital market, any disciplinary history and (with particular reference to proportionality) claimed impecuniosity" (at para. 28).

- **Benefit Sought or Obtained by Respondent** – "relevant here is the seeking, or the obtaining, of a benefit through capital-market misconduct. This can present an obvious incentive for, and therefore a risk of, similar misconduct in future, by the respondent or by others" (at para. 37).

- **Mitigating or Aggravating Considerations** – "something in the circumstances of a case [which] mitigates or aggravates a conclusion that might otherwise be drawn in light of any of the factors just discussed, or more generally affects the assessment of risk and deterrence required" (at para. 39). Mitigating considerations may include efforts to undo the harm (paying financial restitution, for example), "[p]ersuasive indications that a respondent appreciates the wrong done, and its seriousness", and "a genuine acceptance of responsibility" (at paras. 40-42). Aggravating considerations may include "a respondent displaying a belligerent contempt for either the victims of the misconduct or the law", which may indicate an increased risk of future misconduct (at para. 46).

(b) Cost Recovery

[42] A hearing panel may order, under s. 202 of the Act, that a respondent pay costs of an investigation or hearing (or both), after concluding that the respondent has contravened Alberta securities laws or acted contrary to the public interest. A costs order is not a sanction, as stated in *Re Marcotte*, 2011 ABASC 287 at para. 20:

> A costs order is . . . a means of recovering, from a respondent found to have engaged in capital-market misconduct, certain investigation and hearing costs that would otherwise be borne indirectly by law-abiding market participants whose fees fund the [ASC's] operations. It is generally appropriate that a respondent pay at least some portion of the relevant costs. Determination of the appropriate portion may involve assessing parties' contributions to the efficient conduct and ultimate resolution of the proceeding.

[43] In assessing appropriate cost recovery, a panel will examine the amount of costs which should be recoverable and will allocate those costs among the respondents. The panel will then consider the efficiency or inefficiency brought to the proceeding as a whole by each party, which may lead to "moderation – sometimes substantial – in the extent of cost recovery to be ordered against a particular respondent" (*Homerun* at paras. 50-52).

2. Relevant Circumstances from the Statement

[44] According to the Statement, the following were relevant to sanction:

- By entering into the Statement, the Respondents "made an effort to demonstrate exemplary cooperation" (in accordance with ASC Policy 15-601 *Credit for Exemplary Cooperation in Enforcement Matters* (the **Cooperation Policy**)).

- In a January 2020 communication, the University of Akron stated that it would be appropriate to add Whyte as inventor to a specified patent, particularly because of his contributions relating to method and electrical contact. The University of Akron also anticipated being paid approximately $35,000 from Imagine for reimbursement of past patent expenses, as invoiced in 2018 and 2019. Jones represented to the panel during the hearing that the amount owed to universities (including Akron) was actually $400,000.

- Calculated over the four-year period from January 2014 to December 2017, Whyte and Jones received, from investor funds, a total of $694,000. This was an average of $8,000 per month for Whyte and $6,000 per month for Jones. $514,000 of this amount was taken by them as shareholder loans. (All numbers are approximate.)

- Each Respondent is "on the verge of insolvency with limited ability to repay investors", although they are not in bankruptcy or insolvency proceedings.

- No investors have received any returns, and their principal has not been paid back.

- "Whyte and Jones take full responsibility for their actions and state they intend to devote all of their efforts to rectifying their misconduct. They acknowledge and apologize without reservation for the harm their actions have caused investors and their families."

- Whyte and Jones do not wish to raise money from the public or to deal or advise in securities. Although they would work for Imagine, that would not include raising money from the public or otherwise acting as directors or officers.

- The Respondents have no history of regulatory discipline or sanctions.

3. Clarifications and Representations from the Hearing

[45] During the Hearing, the parties clarified some information, and Whyte and Jones made several representations that we consider relevant:

- Staff clarified there were no proposed sanctions against Imagine, in large part so that the company could, for example, be purchased or acquired, and if such a transaction arose, it could benefit the Imagine shareholders.

- Whyte and Jones stated that there was an agreement relating to the sale of one patent. They intend that some proceeds be used to pay Imagine's bills and hope that some of the money could eventually go to Imagine shareholders.

- Whyte stated that he intends to continue to work with Imagine as a scientist, but not as a businessperson. He also indicated that he will be working to facilitate a smooth transition to a new management team.

- Whyte stated that most of the money he and Jones received from Imagine was as shareholder loans rather than salary because they considered it to be the shareholders' money and still intend to repay those amounts.

- Whyte stated his intention to transfer ownership of relevant patents to Imagine.

- Whyte and Jones each expressed regret about harm caused to Imagine shareholders and confirmed their intention to rectify such harm.

[46] Although those clarifications and representations were not evidence, we gave some weight and consideration to that information in the circumstances. In particular, we appreciated the evident sincerity and cooperation of Whyte and Jones during the Hearing.

4. Undertaking

[47] As noted, we considered statements and representations made during the Hearing, even though those were not in the form of sworn evidence. During the Hearing, in response to questions from the panel relating to Whyte's representations that he would be transferring ownership of relevant patents to Imagine and that money from the sale or use of those patents would be for the benefit of Imagine shareholders, Whyte offered to swear an affidavit regarding some of that information.

[48] As a result of Whyte's offer, the panel suggested to the parties that if Whyte were to agree to a form of undertaking confirming his intention to transfer intellectual property to Imagine and to facilitate the orderly transition of Imagine's management and board of directors (as he and Jones would no longer be officers and directors if the panel were to accept that aspect of the parties' joint recommendation on sanction), the panel would take such an undertaking into account when assessing the appropriateness of the jointly recommended sanctions against Whyte and Jones.

[49] Following the Hearing, it was confirmed through the Registrar that Whyte signed, and Staff were satisfied with, an undertaking (the **Whyte Undertaking**) with the following two commitments:

- "Mr. Whyte shall take all steps to transfer and assign to Imagine all interests, titles and rights in any intellectual property held by Mr. Whyte which relates to the business of Imagine, without payment of any consideration, no later than Monday, November 16, 2020 unless an extension is granted beforehand by the Executive Director upon application by Mr. Whyte."

- "Mr. Whyte shall take all steps necessary and in his control to facilitate the orderly transition of Imagine, including the appointment of new directors and officers, no later than Monday, November 16, 2020 unless an extension is granted beforehand by the Executive Director upon application by Mr. Whyte."

5. Joint Submission

[50] Staff and the Respondents proposed the following sanction orders:

- an administrative penalty of $60,000 against each of Whyte and Jones; and

- an array of director-and-officer bans and market-access bans (with a limited carve-out for registered accounts and tax-free savings accounts) against each of Whyte and Jones, for the later of four years and the date by which their respective administrative penalty is paid in full.

[51] Staff and the Respondents proposed that each of Whyte and Jones pay $10,000 of the investigation and hearing costs for this matter.

[52] The Statement did not propose any sanction or costs orders against Imagine, and Staff contended such orders were not necessary in the circumstances.

[53] As set out in *Re Currey*, 2018 ABASC 34 at paras. 51-52, joint proposals by the parties to an enforcement proceeding "generally carry considerable weight", but are not binding on a panel (citing *Re Bradbury*, 2016 ABASC 272 at para. 58). In making our own determination as to what orders, if any, are in the public interest, we will order jointly recommended sanctions if we are satisfied in all the circumstances that they are within a range of reasonableness and are in keeping with the ASC's public interest mandate (see also *Re Allan*, 2015 ABASC 919 at para. 21).

6. Discussion on Sanctioning Factors

(a) Seriousness of the Misconduct

[54] As stated, the panel in *Homerun* (at para. 22) set out three aspects to consider in determining the seriousness of misconduct: its nature, the respondents' intentions, and the harm to which identifiable investors and the capital market were exposed.

[55] Misrepresentations and illegal distributions are serious misconduct (see, for example, *Re Magee*, 2015 ABASC 846 at paras. 147-48 and *Re Planned Legacies Inc.*, 2011 ABASC 278 at paras. 33-34). Misrepresentations mean that investors may make investment decisions based on inaccurate information. Illegal distributions through the misuse of exemptions deny investors fundamental protections, including the protection of full, true and plain disclosure. Both types of misconduct place individual investors at risk and harm the integrity of the capital market.

[56] We have limited information about the Respondents' intentions at the time they contravened the Act. We do know that Imagine is not a sham, but a real business – meaning the misconduct was less serious than had a sham or fraud been involved. Based on the Statement, the Respondents' cooperation, and Whyte's and Jones's demeanour before us, we conclude that the illegal distributions were likely reckless, rather than planned and deliberate. Although still serious, reckless misbehaviour is less so than deliberate misbehaviour. However, it would be difficult for the misrepresentations to be other than deliberate, as they involved the provision of wrong information which was material and which the Respondents knew to be both wrong and material.

[57] By their nature, illegal distributions and misrepresentations cause harm to specific investors and to the capital market in general. Imagine raised approximately $1.45 million, including from Alberta investors, and no returns have been paid or principal repaid. Whyte and Jones indicated during the Hearing that they intend to see that investors receive money back through the sale of various patents, although that has not yet materialized. However, the Whyte Undertaking did reinforce the sincerity of that intention.

[58] Overall, this was serious misconduct requiring significant sanction for both specific and general deterrence.

(b) Respondents' Characteristics and History

[59] None of the Respondents have a history of regulatory discipline or sanction, and there was no indication that they had prior experience in the capital market. Whyte is 72 and Jones is 69. The Statement disclosed that they do not intend to raise money from the public, or to deal or advise in securities. They are both close to insolvent. They represented that they intend to stay involved with Imagine – not as directors or officers – so they can help rectify their misconduct.

[60] Both Whyte and Jones expressed sincere regret and remorse during the Hearing, and we are satisfied that they intend to do what they can for the Imagine shareholders. That conclusion was supported by Whyte's offer to swear an affidavit regarding some of the representations made during the Hearing, and by his giving the Whyte Undertaking. Whyte, as the founder, CEO and guiding mind of Imagine was the appropriate person to give an undertaking in these circumstances. No discussion arose during the Hearing regarding an undertaking from Jones, and we infer nothing negative against Jones for not giving an undertaking. Given these circumstances, we conclude that Whyte and Jones have learned from their misconduct and thus "present a diminished risk of future misconduct" (*Homerun* at para. 32).

[61] On balance, we conclude that this factor argues for a modest level of specific deterrence, but a greater amount of general deterrence. In other words, we are not concerned that there is a strong risk these Respondents will engage in future misconduct, but it is still important to deter others from emulating their misconduct.

(c) Benefit Sought or Obtained by Respondents

[62] Imagine itself obviously benefited from the misconduct as it received approximately $1.45 million of investor money through the illegal distributions and misrepresentations. The Statement noted that "the majority" of the distributions of the Shares did not qualify for exemptions. It is likely that some investment decisions (whether to buy or to hold Shares) were made based on the information contained in the Communications, which would have financially benefited the Respondents.

[63] As noted, Whyte and Jones personally benefited by together receiving approximately $694,000 in investor funds from Imagine, with Whyte receiving more than Jones.

[64] This factor favours significant sanction on the grounds of general deterrence because being able to obtain a large financial benefit through misconduct increases the risk that others may try to emulate the misconduct found here. However, in all the circumstances, we consider the need for specific deterrence less important on the basis of financial benefit – discussed below as a mitigating factor.

(d) Mitigating or Aggravating Considerations

[65] We have already discussed some factors which could be considered mitigating, such as Whyte's and Jones's remorse and the Whyte Undertaking. Their cooperation in putting forward the Statement with Staff – and as shown throughout the Hearing – reinforces that conclusion. Staff

submitted that Whyte and Jones should be given credit pursuant to the Cooperation Policy. As stated in *Homerun* at para. 44, cooperation is generally more relevant to cost-recovery orders than to sanction, but "may reinforce a mitigating consideration (for example, appreciation of wrongdoing and acceptance of responsibility for it)". In these circumstances, we do find it to be a mitigating consideration.

[66] In addition, approximately 75% of the money paid to Whyte and Jones was in the form of shareholder loans. Whyte stated during the Hearing that he and Jones took that part of the money as shareholder loans because they needed the money to do the work for Imagine, but considered that it was "the shareholders' money; it's not ours [and] we're going to pay them back". Based on the representations we heard regarding the Whyte Undertaking and the planned sale of certain of Imagine's technology, that goal appeared to be possible. That would mean that the financial benefit ultimately received by Whyte and Jones through their misconduct would be much less substantial.

[67] The mitigating considerations as a whole tend toward a reduced need for significant sanction. We did not find any aggravating considerations here.

7. Outcomes of Other Proceedings

[68] Outcomes of other proceedings assist in ensuring that sanction orders are proportionate, while recognizing that such other proceedings "seldom involve identical factual circumstances or wrongdoing" (*Homerun* at para. 16).

[69] Staff referred us to several previous decisions, including: *Re McKenzie*, 2014 ABASC 506; *Re Bennett*, 2017 ABASC 177; and *Re Johnston*, 2013 ABASC 456. We also found *Stewart* to be helpful here. Each of those cases involved contraventions of the Act somewhat comparable to those here. There were admissions and a joint recommendation on sanction in each of *McKenzie* and *Stewart*; sanctions were a contested matter in *Bennett*; and both the merits and sanctions were contested in *Johnston*. The range of administrative penalties in those four decisions was from $20,000 to $100,000 (*Johnston* being the highest). The range of director-and-officer bans was from 4 years to permanent (*Bennett* being the highest). Market-access bans were not imposed in *McKenzie* and ranged from 8 years to permanent in the other three decisions.

8. Conclusion on Sanctioning Factors

[70] We agree with the parties that administrative penalties, director-and-officer bans and market-access bans are warranted in the public interest against each of Whyte and Jones. In considering the appropriate administrative penalty here as part of the package of sanctions, we take Whyte's and Jones's financial circumstances into account. As stated in *Currey* (at para. 65; cited in *Stewart* at para. 45), a respondent's "agreement to the sanctions jointly recommended . . . alleviates concerns that the financial penalties contemplated would be unreasonable, disproportionate or 'crushing'".

[71] Considered together, we conclude that the appropriate package of sanctions here for Whyte and Jones must convey significant general deterrence and a lower level of specific deterrence. We also conclude that, in the best interests of Imagine shareholders – as submitted to us by Staff – no sanctions are appropriate here against Imagine.

[72] We are satisfied that the sanctions proposed by the parties in the Statement are within the range of reasonableness for this situation, with the exception of the immediate resignations of Whyte and Jones as directors and officers of Imagine.

[73] Regarding the jointly recommended resignations of Whyte and Jones as directors and officers of Imagine, the evidence indicated that this may impede Whyte's fulfillment of the provision in the Whyte Undertaking that he "take all steps necessary and in his control to facilitate the orderly transition of Imagine, including the appointment of new directors and officers". In the circumstances, we consider it appropriate to delay both Whyte's and Jones's required resignations as directors and officers of Imagine until the earlier of 60 days from the date of this decision and the date on which Imagine's board of directors consists of at least two directors other than Whyte and Jones.

9. Discussion on Costs

[74] Staff's written submissions indicated that, in addition to considering the financial circumstances of Whyte and Jones, "appropriate credit" was given pursuant to the Cooperation Policy in arriving at the parties' joint submission that each of Whyte and Jones pay $10,000 towards the total of $62,240.09 noted in the Bill of Costs.

[75] In light of the considerations set out above from *Marcotte* and *Homerun* – particularly the Respondents' contribution to the efficiency of this proceeding and, therefore to the public interest in general – we are satisfied that the proposed cost-recovery orders are within the range of reasonableness and that no cost-recovery order should be made against Imagine.

IV. CONCLUSION

[76] For the reasons given, we make the orders set out below.

Whyte

[77] Against Whyte, we order that:

- under s. 198(1)(d) of the Act, he must resign all positions he holds as a director or officer (or both) of any issuer, registrant, investment fund manager, recognized exchange, recognized self-regulatory organization, recognized clearing agency, recognized trade repository, designated rating organization or designated benchmark administrator, except that he may remain as a director and officer of Imagine until the date on which at least two persons other than Whyte and Jones have become directors of Imagine or 60 days from the date of this decision, whichever is the earlier;

- for a period of four years from the date of this decision or until the administrative penalty set out below is paid in full, whichever is the later:

    - under s. 198(1)(b), he must cease trading in or purchasing any security or derivative, except that he may trade in and purchase securities for his own benefit, or for the benefit of his spouse and dependent children, in registered accounts or tax-free savings accounts purchased through a registrant who shall first be provided with a copy of this decision;

- under s. 198(1)(c), all of the exemptions contained in Alberta securities laws do not apply to him;

- under s. 198(1)(e), he is prohibited from becoming or acting as a director or officer (or both) of:

    - any issuer or other person or company that is authorized to issue securities, except of Imagine for the period set out above; or

    - a registrant, investment fund manager, recognized exchange, recognized self-regulatory organization, recognized clearing agency, recognized trade repository, designated rating organization or designated benchmark administrator;

- under s. 198(1)(e.2), he is prohibited from becoming or acting as a registrant, investment fund manager or promoter; and

- under s. 198(1)(e.3), he is prohibited from acting in a management or consultative capacity in connection with activities in the securities market;

- under s. 199, he must pay an administrative penalty of $60,000; and

- under s. 202, he must pay costs in the amount of $10,000.

Jones

[78] Against Jones, we order that:

- under s. 198(1)(d) of the Act, he must resign all positions he holds as a director or officer (or both) of any issuer, registrant, investment fund manager, recognized exchange, recognized self-regulatory organization, recognized clearing agency, recognized trade repository, designated rating organization or designated benchmark administrator, except that he may remain as a director and officer of Imagine until the date on which at least two persons other than Whyte and Jones have become directors of Imagine or 60 days from the date of this decision, whichever is the earlier;

- for a period of four years from the date of this decision or until the administrative penalty set out below is paid in full, whichever is the later:

    - under s. 198(1)(b), he must cease trading in or purchasing any security or derivative, except that he may trade in and purchase securities for his own benefit, or for the benefit of his spouse and dependent children, in registered accounts or tax-free savings accounts purchased through a registrant who shall first be provided with a copy of this decision;

- under s. 198(1)(c), all of the exemptions contained in Alberta securities laws do not apply to him;

- under s. 198(1)(e), he is prohibited from becoming or acting as a director or officer (or both) of:

    - any issuer or other person or company that is authorized to issue securities, except of Imagine for the period set out above; or

    - a registrant, investment fund manager, recognized exchange, recognized self-regulatory organization, recognized clearing agency, recognized trade repository, designated rating organization or designated benchmark administrator;

- under s. 198(1)(e.2), he is prohibited from becoming or acting as a registrant, investment fund manager or promoter; and

- under s. 198(1)(e.3), he is prohibited from acting in a management or consultative capacity in connection with activities in the securities market;

- under s. 199, he must pay an administrative penalty of $60,000; and

- under s. 202, he must pay costs in the amount of $10,000.

[79] An interim order dated April 4, 2018 and cited as *Re Imagine Research and Technology Inc.*, 2018 ABASC 50, imposed certain restrictions on the Respondents. By its terms, that order expires with the issuance of this decision.

[80] This proceeding is concluded.

June 4, 2020

For the Commission:

"original signed by"
Kari Horn

"original signed by"
Steven Cohen

"original signed by"
James Oosterbaan