CITATION: Finkelstein v. Ontario (Securities Commission), 2016 ONSC 7508
DIVISIONAL COURT FILE NO's.: 478/15, 479/15, 480/15 & 497/15
DATE: 20161202

ONTARIO
SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

MARROCCO A.C.J., NORDHEIMER & THORBURN JJ.

BETWEEN:	)	
	)	
MITCHELL FINKELSTEIN, PAUL AZEFF, KORIN BOBROW, HOWARD JEFFREY MILLER and MAN KIN (FRANCIS) CHENG	)	*G. Capern, J. Larry & J. Elders*, for the appellant, Mitchell Finkelstein
	)	*G. Azeff*, for the appellant, Paul Azeff
	)	*S. Bieber & T. Liu*, for the appellant, Howard Jeffrey Miller
	)	*J. Wright & G. Temelini*, for the appellant, Man Kin (Francis) Cheng
Appellants	)	
– and –	)	
ONTARIO SECURITIES COMMISSION	)	*A. Perschy, J. Lynch, P. Foy & A. Matushenko*, for the respondent
Respondent	)	
	)	**HEARD at Toronto:** October 24, 25 & 26, 2016

NORDHEIMER J.:

[1] There are four appeals, pursuant to s. 9(1) of the *Securities Act*, R.S.O. 1990, c. S.5 (the "*Act*") from a decision of a panel of the Ontario Securities Commission (the "Panel") dated March 24, 2015, where each of the appellants was found to have passed along material non-public information, other than in the necessary course of business, contrary to s. 76(2) of the *Act*. The appellants, other than Finkelstein, were also found to have engaged in insider trading and to

have acted contrary to the public interest. Each of the appellants also appeals from the decision and order of the Panel, dated August 24, 2015, imposing sanctions and costs.

I: Relationships between the appellants

[2] Mitchell Finkelstein was a successful corporate and commercial lawyer at Davies Ward Phillips & Vineberg LLP ("Davies") in Toronto from 1997 to 2010. Paul Azeff was employed as an investment advisor at CIBC in Montreal between 2004 and 2007, the period relevant to this proceeding. Azeff and Finkelstein were good friends. They attended each other's weddings. Azeff was Finkelstein's investment advisor during such time. Finkelstein and Azeff communicated frequently during the years 2004 through 2007.

[3] Azeff and Bobrow have been extremely close friends since high school. The pair have worked together since 1995, moving firms in lock step. While at CIBC, they worked together effectively as partners: they had adjacent desks, they shared a trading code for all their trading, they discussed investment ideas continuously, they shared their research, and they looked after each other's clients.

[4] Miller was a very experienced and successful investment advisor who had more than fifteen years' experience in the securities industry. He was a Vice-President and a senior investment advisor at TD Securities. He had been a registrant since 1995.

[5] Cheng was an investment advisor with approximately ten years' experience in the securities industry. He was registered as a salesperson with the OSC in the period between 1998 and 2008. Cheng worked for TD Securities in the same office as Miller.

II: Preliminary issue

[6] Before argument began on the appeal, the court was asked to determine a motion, brought by Azeff and Bobrow, to admit fresh evidence. The fresh evidence in question was an affidavit from Azeff outlining issues that arose from problems associated with an expert that he and Bobrow had retained for the hearing. At the conclusion of submissions, the court dismissed the

motion and stated that our reasons for doing so would be provided as part of our reasons on the appeal.

[7] The background facts to the motion can be stated briefly. Azeff and Bobrow had retained an expert to assist counsel in challenging the evidence to be led by the respondent. In February 2014, some months prior to the commencement of the hearing, the expert lost all of her work product through a computer error. While efforts had been made to reproduce the lost material, the evidence of the expert was that it would take her six to nine months to reproduce all of the lost work product.

[8] In July 2014, Azeff and Bobrow brought an application to adjourn the hearing. That application was refused by the Panel. In September 2014, Azeff and Bobrow sought judicial review of the Panel's decision on an urgent basis. The application for judicial review was dismissed. The hearing proceeded as scheduled on September 29, 2014.

[9] Azeff and Bobrow complain that they were not able to properly respond to the allegations against them because of the problems arising from their expert's lost work product. As I shall mention later, Azeff and Bobrow renew this complaint as a stand-alone ground of appeal. The stated purpose of, and need for, the fresh evidence was to establish that the ability of Azeff and Bobrow to respond to the allegations was seriously impaired by the expert's lost work product.

[10] The test for fresh evidence was established in *R. v. Palmer*, [1980] 1 S.C.R. 759. Four factors are to be considered:

> (i) The evidence should generally not be admitted if, by due diligence, it could have been adduced at trial provided that this general principle will not be applied as strictly in a criminal case as in civil cases;
>
> (ii) The evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue in the trial;
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> (iii) The evidence must be credible in the sense that it is reasonably capable of belief, and;
>
> (iv) It must be such that if believed it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result.

[11] We concluded that the contents of the affidavit did not satisfy the *Palmer* test for two principal reasons. First, the affidavit does not contain any facts or evidence. It essentially consists of submissions as to how Azeff and Bobrow were impaired in their ability to respond to the allegations arising from the expert's lost work product. There is nothing in the affidavit that adds to the ability of Azeff and Bobrow to argue this issue from the transcript of the hearing before the Panel.

[12] Second, as we understood it, the expert was retained for essentially two purposes. One was to assist counsel in his cross-examination of the respondent's witnesses. The other was to explore the possibility that there was an alternative source for the disclosure of the material non-public information, unconnected to Azeff and Bobrow.

[13] With respect to the first purpose, I have already dealt with the fact that the proposed fresh evidence does not reveal anything that would not be apparent from the transcript. In terms of the second purpose, there is no evidence from the expert, or any other source, of any substantive results from the expert's efforts to find an alternative source for the material non-public information. More than eighteen months have passed since the completion of the hearing, and the release of the merits decision, and yet nothing is offered by Azeff and Bobrow to substantiate their assertion that, if they had been given the time that they say that their expert needed to recreate her work product, some significant and relevant evidence would have been found. On this point, we did not accept the position advanced by Azeff and Bobrow that they were entitled to "stand pat", since the conclusion of the hearing, in terms of any pursuit of the end goal that the expert was retained to achieve. Consequently, the fresh evidence fails to show that, if the expert had been given the time that she claimed to need, any material evidence would have been obtained that could have affected the result.

[14] For these reasons, we dismissed the motion to admit fresh evidence.

III: Basic principles

[15] Before embarking on a consideration of the individual appeals, I believe it is necessary to restate some basic principles that apply to these appeals. First, of course, is the standard of

review. There is no dispute that the standard of review to be applied to the decisions of the Panel, in terms of the merits, is reasonableness. Insofar as the appellants have raised issues of procedural fairness, there is no standard of review to be applied. Instead, the court determines whether the requisite level of procedural fairness has been accorded, with reference to the factors in *Baker v. Canada (Minister of Citizenship and Immigration),* [1999] 2 S.C.R. 817.

[16] The proper treatment of circumstantial evidence is a more difficult issue. This case, like almost all "tipping" cases, is largely based on circumstantial evidence. All of the appellants submit that the Panel, in reaching its conclusions, improperly used the circumstantial evidence, either by drawing unreasonable inferences, or by drawing inferences for which there was no evidence from which those inferences could properly be drawn. A review of the basic principles surrounding the use of circumstantial evidence is therefore necessary.

[17] While there are any number of expressions of the basic principle underlying circumstantial evidence, I choose the following description from *R. v. Morrissey* (1995), 22 O.R. (3d) 514 (C.A.), where Doherty J.A. said, at p. 530:

> A trier of fact may draw factual inferences from the evidence. The inferences must, however, be ones which can be reasonably and logically drawn from a fact or group of facts established by the evidence.

[18] As is clear from the above quotation, inferences must flow from established facts. In other words, the evidence must establish the base facts from which the inference can then be reasonably drawn. This point is aptly made in *Caswell v. Powell Duffryn Associated Collieries Ltd.,* [1940] A.C. 152, where Lord Wright said, at pp. 169-70:

> There can be no inference unless there are objective facts from which to infer the other facts which it is sought to establish. In some cases the other facts can be inferred with as much practical certainty as if they had been actually observed. In other cases the inference does not go beyond reasonable probability. But if there are no positive proved facts from which the inference can be made, the method of inference fails and what is left is mere speculation or conjecture.

[19] On this point, it is important to remember the function of circumstantial evidence: it is to fill an evidentiary gap created by the fact that there is no direct evidence of a particular fact or

event. In other words, circumstantial evidence is used to establish a missing or absent fact that cannot be proved directly.

[20] It is also the case that it is not necessary, before drawing an inference, that the requisite inference must be easily drawn. If the inference can be reasonably and logically drawn from established facts, it is of no moment that it does not flow easily from the established facts. As Moldaver J.A said in *R. v. Katwaru* (2001), 52 O.R. (3d) 321 (C.A.) at p. 330:

> In order to infer a fact from established facts, all that is required is that the inference be reasonable and logical. The fact that an inference may flow less than easily does not mean that it cannot be drawn. To hold otherwise would lead to the untenable conclusion that a difficult inference could never be reasonable and logical.

[21] A further principle is that inferences drawn by a court or tribunal are not to be overturned by a reviewing or appellate court just because there may be other inferences that could have been drawn, even if those other inferences might be said to be more persuasive. This point is made in *H.L. v. Canada (Attorney General)*, [2005] 1 S.C.R. 401 where Fish J. said, at para. 74:

> Appellate scrutiny determines whether inferences drawn by the judge are "reasonably supported by the evidence". If they are, the reviewing court cannot reweigh the evidence by substituting, for the reasonable inference preferred by the trial judge, an equally - or even more - persuasive inference of its own. [original emphasis]

[22] The role that an appellate court plays in reviewing findings of facts and inferences drawn from factual findings is a limited one. A high threshold must be met before an appellate court will interfere with either. The test is set out in *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235 where Iacobucci and Major JJ. said, at para. 23:

> We reiterate that it is not the role of appellate courts to second-guess the weight to be assigned to the various items of evidence. If there is no palpable and overriding error with respect to the underlying facts that the trial judge relies on to draw the inference, then it is only where the inference-drawing process itself is palpably in error that an appellate court can interfere with the factual conclusion. The appellate court is not free to interfere with a factual conclusion that it disagrees with where such disagreement stems from a difference of opinion over the weight to be assigned to the underlying facts.

[23] Consequently, if certain facts are proven, and from those facts, the Panel drew reasonable and logical inferences, then there is no basis for this court to interfere with those findings, even though this court might not have drawn the inference, or might have drawn a different inference. To do otherwise, is not only contrary to the well-established principles that I have set out above, it would involve this court in retrying the case. As I believe shall become apparent below, there are many instances where the appellants sought to have this court do that very thing – retry the case.

[24] Finally, in terms of basic principles, conclusions are to be drawn from the whole of the evidence. Each piece of evidence is not to be viewed in isolation from the other evidence. Rather, the evidence in total is to be examined and weighed in reaching a conclusion. The importance of this principle is particularly evident in cases such as this that involve a chain of events. Evidence from further down the chain may be important in reaching conclusions as to what happened higher up the chain. As the court said in *R. v. Uhrig*, [2012] O.J. No. 3011 (C.A.) at para. 13:

> When arguments are advanced, as here, that individual items of circumstantial evidence are explicable on bases other than guilt, it is essential to keep in mind that it is, after all, the cumulative effect of all the evidence that must satisfy the standard of proof required of the Crown. Individual items of evidence are links in the chain of ultimate proof: *R. v. Morin*, [1988] 2 S.C.R. 345, at p. 361. Individual items of evidence are not to be examined separately and in isolation, then cast aside if the ultimate inference sought from their accumulation does not follow from each individual item alone. It may be and very often is the case that items of evidence adduced by the Crown, examined separately, have not a very strong probative value. But all the evidence has to be considered, each item in relation to the others and to the evidence as a whole, and it is all of them taken together that may constitute a proper basis for a conviction: *Cote v. The King* (1941), 77 C.C.C. 75 (S.C.C.), at p. 76.

IV: The appeals

[25] Before beginning my analysis of each of the appeals, I want to discuss what I consider to be the proper approach to appellate review of a tribunal's decision. Appellate review does not require a minute examination of each piece of evidence or of each witness. It does not require a response to every argument advanced or every challenge made to the findings below. Nor does

it require a re-writing of the tribunal's decision or a re-examination of every aspect of the case. What is required is a general review of the process used by the tribunal in arriving at its factual findings, the analysis undertaken, the legal principles applied, and the ultimate result reached, all with a view to determining whether that result is a reasonable one. Appellate review also does not turn on being able to point to a single error in the tribunal's reasons, or to one error of fact, unless that error goes to a core finding. It is not unheard of to find small individual errors in lengthy reasons arising out of a complex proceeding. Reasons are seldom perfect. The real question is whether any such errors are fundamental to the reasonableness of the conclusion reached.

A. Finkelstein - Masonite

[26] The tipping chain is alleged to begin with Finkelstein. The Panel concluded that Finkelstein had provided material non-public information to Azeff regarding three corporate transactions: Masonite, Dynatec, and Legacy. I begin with Masonite.

[27] Kohlberg Kravis Roberts & Co. ("KKR") is an American private equity firm. In 2004, it was interested in buying all of the outstanding shares of Masonite. Masonite was a reporting issuer in Ontario. It was also a client of Davies. Finkelstein was the lead lawyer on the proposed takeover.

[28] The potential deal for Masonite had been ongoing since at least July, 2004. On November 16, 2004, an urgent meeting was called by Masonite with the Davies lawyers. While Finkelstein, in his evidence, attempted to downplay the importance of this meeting, a senior partner at Davies, Connelly, who was also involved in the transaction, gave contrary evidence. The Panel accepted Connelly's evidence as to the urgency of the meeting. It was entirely open to the Panel to prefer the evidence of Connelly over that of Finkelstein. The Panel gave cogent reasons for that conclusion and there is no basis for this court to interfere with it.

[29] The Panel concluded that Finkelstein not only knew on November 16 that KKR and Masonite had agreed to a transaction, but also that it was priced at approximately $40 per Masonite share, that it was to be paid for in cash, and that it was to be completed, quickly, likely

by Christmas. Finkelstein challenges each of those findings. In my view, none of those challenges can succeed.

[30] On the first point, the conclusion, that there was an agreed deal, comes directly from the evidence of Connelly, who said that it was the November 16 meeting where it became clear that the transaction "was for real". The nature of, and reason for, the November 16 meeting, and the spike in the activity of the Davies lawyers involved in the transaction directly after that meeting, all serve to confirm that conclusion.

[31] The source for the conclusion that Finkelstein knew of the price is less clear. To be fair, the respondent had contended that Finkelstein knew that the price "was around" $40, not that it was precisely $40. Finkelstein contended that he did not know the price until November 24. Connelly did not recollect price being discussed at the November 16 meeting. There were, however, other pieces of evidence from which a conclusion could be drawn that Finkelstein knew that the price would be around $40. KKR had said, as early as July, that it valued Masonite at $40-$42 per share. In October 2004, the President of Masonite had told its Board that that price range was still the range for a transaction.

[32] In addition, Finkelstein himself, in his compelled interview with the respondent, had said that Masonite had a threshold, or minimum, price of $40 for the transaction.[1] In that same interview, Finkelstein was asked whether the $40 price was communicated to him at the November 16 meeting. His response was:

> I can't say specifically whether it was or it wasn't. I would imagine that it was, yes.

[33] Finkelstein resiled from that statement in his evidence before the Panel. However, it was open to the Panel to rely on his earlier sworn statement, rather than his later recollection at the hearing, in reaching their factual findings.

[34] Given all of those facts, given the urgency of the meeting of November 16, and given that the result of that meeting was that the transaction was now "real", it was a reasonable inference

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[1] Pursuant to s. 13 of the *Act*, an OSC investigator may compel a person to give evidence under oath.

for the Panel to draw that Finkelstein knew that the transaction was priced "at approximately $40" per Masonite share.

[35] The timing for the transaction flows more easily from the established facts. First, the November 16 meeting, where the transaction was confirmed, was called on an urgent basis. Second, there is the spike in activity of the Davies lawyers assigned to the transaction directly after that meeting. Third, there is the draft timetable that Osler, Hoskin & Harcourt LLP, the law firm for KKR, sent to Davies for the transaction, that showed an anticipated date for Board approval, and the public announcement, of the deal prior to Christmas. Fourth, is the evidence that Finkelstein gave before the Panel that everyone was working under the assumption that the transaction "was to be done as quickly as possible".

[36] It is clear from the above that Finkelstein possessed material non-public information about the Masonite transaction as of November 16. The fact of the transaction alone would constitute such information. What then happened?

[37] The answer to that question raises the issue of telephone records and the first challenge to the inference, that the Panel drew, that Finkelstein disclosed this material non-public information to Azeff. The Panel had before it the following telephone records:

(a) the home telephone records of Finkelstein and Azeff. Those records only show long distance calls but since Finkelstein lived in Toronto and Azeff lived in Montreal, they provide more assistance than might normally be the case.

(b) the cell phone records for Finkelstein and Azeff.

(c) the telephone records of Davies. Those records, however, proved to be of little value as they did not track toll-free calls. Consequently, with one minor exception, those records did not capture any outgoing calls that Finkelstein might have made from his office at Davies to Azeff.

(d) the telephone records of CIBC. Azeff worked for CIBC. Unfortunately, the CIBC records were only available from November 2006. They are consequently of no

> direct assistance regarding what might have happened in 2004 regarding the Masonite transaction.

[38] The evidence before the Panel was that Finkelstein and Azeff usually communicated from their places of work. It was not from their homes, and it was not on their cell phones.

[39] The Panel made reference to four calls that occurred in the early morning hours of November 17 where Azeff made four attempts, in about a forty-five minute period, to reach Finkelstein. In three instances, Azeff called Finkelstein on his cell phone and in one instance he called Finkelstein's home. Two of the calls to Finkelstein's cell phone were for thirty seconds (the minimum call time for his cell phone at the time) and the other was for thirty-six seconds. The call to the home phone was also thirty seconds. I accept the point made by Finkelstein that nothing can be taken from these calls because it is not established that any of these calls led to actual conversations.

[40] There was another call from Azeff to Finkelstein's home on November 19 at 7:20 a.m. that lasted for four minutes and forty-eight seconds. Finkelstein did not remember this call, but said it was not likely with him because he would have left for work prior to 7:00 a.m. Azeff said it was a call from him to Finkelstein's wife, whom he often chatted with because they were the social organizers for their respective spouses. Finkelstein's wife was not called as a witness.

[41] The November 19 call is of some consequence, because it was two hours later, at 9:24 a.m., that Azeff and Bobrow commenced to buy Masonite shares. By 10:55 a.m., Azeff and Bobrow had bought 10,100 shares at a value of $346,450 for their parents, siblings, themselves and some clients. By the end of the day, Azeff and Bobrow had bought 33,150 shares for a value of $1,134,578, representing approximately 48% of the total trading of Masonite on the Toronto Stock Exchange that day.

[42] The Panel concluded that Finkelstein informed Azeff about the Masonite transaction sometime between November 16 and 19. The Panel found that this communication occurred:

> … either in the telephone call of November 17, or in a work-to-work call between November 17 and 19 or in text messages.

[43] Finkelstein contends that the Panel erred in drawing an inference that there were work-to-work calls in this period, between Finkelstein and Azeff, because there was "no evidence" of those calls. That contention is overstated.

[44] There is no direct evidence of those calls because of the lack of records, but there is, nonetheless, indirect evidence of those calls. I accept that there is no foundation in the evidence for the finding that there could have been communication between Finkelstein and Azeff through text messages. The available evidence was that Finkelstein and Azeff did not communicate in this fashion in 2004. However, that does not undermine the finding that communication could have taken place in work-to-work calls.

[45] The CIBC telephone records showed that, in 2007, there were 190 work-to-work calls between Azeff and Finkelstein. That amounts to almost one call per working day. Further, there was the evidence that Azeff and Finkelstein were good friends and that they communicated regularly. Still further, neither Azeff nor Finkelstein, in their evidence to the Panel, made any suggestion that the volume of calls in 2007 was somehow unusual, or more frequent, than in prior years. I reject the contention by Finkelstein that there was no obligation on him to bring any such evidence forward.

[46] By the time Finkelstein gave his evidence, he knew that the respondent was alleging that he had "tipped" Azeff about the Masonite transaction. All of the telephone records were in evidence. If Finkelstein was going to ultimately suggest that the volume of calls in 2007 was not reflective of the volume of calls that occurred between Azeff and him in other years, then it rested on Finkelstein to say so, when he had the opportunity. It does not now lie with Finkelstein to complain that the Panel could not draw, what was otherwise a reasonable and logical inference, based on the evidence that the Panel did have, when one of the reasons why there was no direct evidence on the point, is because Finkelstein declined to provide that direct evidence.

[47] That said, I do accept the point made by Finkelstein that all that that evidence does is show the opportunity for contact, not the fact of actual contact. However, as I noted above, factual conclusions are not based on viewing the evidence in water tight compartments. Rather, factual conclusions are drawn from a consideration of all of the evidence. When one pieces

different portions of the evidence together, factual conclusions may be available that are not apparent from a single piece of evidence.

[48] On that point, the Panel was entitled to look at what others did in the time period leading up to November 19. I have already set out the initial purchases of Masonite shares made by Azeff and Bobrow on November 19. As I shall mention later when I come to address their appeals, there was evidence that Azeff and Bobrow told others about the Masonite transaction at this time and those persons, too, began to purchase Masonite shares. Further, at least one of those other purchasers expressly stated that he got the information regarding the Masonite transaction from Azeff. Accepting that evidence, as the Panel did, leaves no doubt that Azeff had material non-public information regarding the Masonite transaction.

[49] When one takes the possession by Azeff of material non-public information, adds it to the share purchases made by Bobrow and him, then adds the passing of that material non-public information to others and their share purchases, then adds the direct evidence of one of those purchasers that the information came from Azeff, then adds the timing of those purchases (late November 16 meeting and early November 19 purchases), then adds the personal relationship between Finkelstein and Azeff, and then adds the opportunity for communication between Finkelstein and Azeff, the conclusion that Finkelstein provided the material non-public information to Azeff becomes at least probable, if not compelling. At the very least, it was open to the Panel to conclude that it was more likely than not that Azeff's source was Finkelstein. As will be important throughout the consideration of all of these appeals, one must always remember that the standard of proof before the Panel is proof on a balance of probabilities. It is not the higher criminal standard of proof beyond a reasonable doubt.

[50] On the evidence that was before the Panel, both direct and circumstantial, there is no basis for questioning the reasonableness of the Panel's conclusion that Finkelstein "tipped" Azeff.

AA. Finkelstein - Dynatec

[51] On February 14, 2007, Dynatec signed a confidentiality agreement with Sherritt International Company. On February 27, 2007, Dynatec set up a special committee to consider any proposals from Sherritt. On April 3, 2007, the special committee recommended accepting a proposal that Dynatec essentially be purchased by Sherritt. By April 17, 2007, a fairness opinion was ready and the negotiations were substantially complete.

[52] On April 19, 2007, the special committee recommended the deal to the Board of Dynatec, who approved it and announced it the next morning. The price was a 29% premium to the price of Dynatec shares the day before the announcement.

[53] Davies was counsel to Dynatec, but Finkelstein was not one of the lawyers working on the transaction. However, on April 18, 2007, Finkelstein accessed documents relating to the Dynatec transaction. There is no dispute that those documents contained material non-public information.

[54] What is noteworthy is the fact that, while Finkelstein was accessing one of those documents, the Voting Agreement, he also made a call to Azeff. The call lasted two minutes and twelve seconds. Six minutes later, Finkelstein called him again for one minute. Later that day, there was another call between the two, and that evening there was a call from Finkelstein's home to Azeff.

[55] Just over ten minutes after Finkelstein first called Azeff, Azeff called another friend of his. Nine minutes after that call, that friend bought 40,000 shares of Dynatec. The same friend bought a further 15,000 shares a short time later, and then yet another 7,000 shares the next day. Those shares in total had a purchase price of over $200,000.

[56] The same day, another friend of Azeff's, L. K, began buying Dynatec shares. L.K. had also purchased Masonite shares in 2004. It was L.K. who had acknowledged that he made the Masonite purchases because of information given to him by Azeff. L.K. similarly acknowledged that he purchased the Dynatec shares because of information given to him by Azeff.

[57] Meanwhile, on the same day, Bobrow called a client of his, who bought 20,000 shares of Dynatec the next day. Further, also on the same day, an assistant to Azeff and Bobrow bought

5,000 shares of Dynatec, as did her husband, for a total of 10,000 shares. The assistant did not suggest that the purchases were based on anything other than information from Azeff and Bobrow. The total shares purchased in this two day period was 595,000 – which the Panel found was a significant volume.

[58] Finkelstein does not dispute that he accessed the documents. However, he contends that he did so as a "precedent" for other transactions he was working on. He points to the fact that it was common for lawyers at Davies to access documents on other matters for this purpose and that, indeed, other lawyers at Davies had accessed the same Dynatec documents. Finkelstein also says, that the reason that the Voting Agreement was important to him, was because it was one of the first transactions that followed a decision recently released by the Court of Appeal for Ontario. Finkelstein said that he was directed to these documents by another lawyer at Davies.

[59] The Panel rejected Finkelstein's explanation for accessing the documents. Contrary to Finkelstein's submission, the Panel did give reasons for that rejection. In particular, it noted that the Voting Agreement did not appear to, in any way, address any issue that had arisen from the Court of Appeal's decision – a conclusion that Finkelstein does not appear to quarrel with. The Panel also noted that the lawyer, who Finkelstein said directed him to the documents, did not give evidence.

[60] The Panel properly concluded that Finkelstein had material non-public information regarding Dynatec. In fact, Finkelstein does not appear to dispute that he did but, rather, says that he had known about the Dynatec transaction prior to April 18, 2007 and that, if he had intended to tip Azeff, "he would have done so before April 18". That submission finds no support in the evidence or in logic. There is no established proposition, of which I am aware, that a person who intends to tip another person must do so at the first opportunity. The fact that Finkelstein could have tipped Azeff earlier, does not mean that he did not tip Azeff on April 18, nor does the earlier opportunity preclude a later tip.

[61] The difference between this situation and Masonite is that this time there are actual records of the contact between Finkelstein and Azeff. Interestingly, Finkelstein's response to these records is to suggest that there is nothing noteworthy about multiple calls between Azeff

and him on a given day. Rather, that was a common occurrence. Indeed, Finkelstein points to the fact that, in his seven busiest months in 2007, there were are least twelve other days on which three or more phone calls took place between Azeff and him. This, of course, is the polar opposite submission to the one that was made regarding the likely volume of calls between Finkelstein and Azeff in 2004, when the Masonite transaction was at issue. What this latter submission does do, though, is demonstrate the reasonableness of the inference that was drawn by the Panel with respect to the likelihood of calls between Finkelstein and Azeff in November 2004.

[62] Finkelstein says that there was an innocent explanation for him accessing these Dynatec documents and complains that the Panel did not make reference to the evidence underlying that innocent explanation. The Panel is not obliged to refer to every piece of evidence that it hears. In any event, the Panel did deal with the proffered innocent explanation. And further, the fact that Finkelstein might have had an innocent reason for accessing the documents, does not preclude a finding that he also gained material non-public information as a result of that access, and then passed it along to others. A person can have more than one purpose for doing something.

[63] The fact that Finkelstein possessed material non-public information on April 18, the fact that he spoke multiple times with Azeff on April 18, the same day that he accessed documents that contained that material non-public information, the fact that Azeff told others the material non-public information, and the fact that those others made significant purchases of Dynatec shares, renders the Panel's conclusion, that Finkelstein tipped Azeff about the Dynatec transaction, not only probable, it is almost irresistible.

[64] Once again, there is no basis for questioning the reasonableness of the Panel's conclusion that Finkelstein "tipped" Azeff.

AAA. Finkelstein - Legacy

[65] Legacy was a Canadian Real Estate Investment Trust that owned landmark hotels. It was a reporting issuer in Ontario during the period from June 1, 2007 to August 31, 2007. Between

November 2006 and January 2007, the expected sale of Legacy had been prominently reported in the press. On March 1, 2007, Legacy issued a press release announcing that it was exploring strategic alternatives that analysts reported meant a sale or restructuring, but there were no further announcements.

[66] On April 12, 2007, Davies was retained by a joint venture of Cadbridge Investors LP & Innvest REIT, who wanted to purchase Legacy. Finkelstein was the primary lawyer assigned to handle the transaction. He was the one who carried the process through to its public announcement on July 12, 2007.

[67] As the Legacy deal firmed up, there were many calls between Finkelstein and Azeff on July 4 and 5, 2007. On July 4, there were six calls between the two – three from Azeff's work and three from Azeff's home. On July 5, there were five calls between the two – one from Azeff's home, three from Azeff's work and one from Finkelstein's work. Not all of these calls can be seen to have led to actual contact given the short duration of the calls. However, the length of the three work calls on July 4, and the single home call and one of the work calls on July 5, all suggest actual contact. Finkelstein said that he did not answer any work calls on July 4 or 5 because he was too busy. The Panel was not obliged to accept that explanation for the telephone calls just because Finkelstein said so. Finkelstein said that the calls must have been taken by his secretary. His secretary did not give evidence. Further, the Panel was justified in considering Finkelstein's evidence, in this respect, to be self-serving. Finkelstein's evidence on this point is further called into question by the fact, that Finkelstein acknowledges, that there were at least 112 telephone calls between Azeff and him in the period between January 21, 2007 and July 12, 2007. Contrary to Finkelstein's assertion that this fact "weakens the import of any telephone calls between July 4 and 12, 2007", this evidence is capable of demonstrating the exact opposite, that is, the degree of communication that routinely occurred between the two.

[68] On July 5, 2007, Azeff, whose family had not held units in Legacy for the previous six months, began buying 8,300 units on behalf of his family members for $100,395. His colleague Bobrow bought 6,500 Legacy units for $78,910 on behalf of his mother (even though he had earlier sold her Legacy holdings on May 22 and 24, 2007).

[69] On the same day at 8:29 a.m., Azeff called one of his clients for more than three minutes, following which the client bought 5,000 Legacy units at the opening of the markets. The same client bought another 5,000 units on July 6, 2007.

[70] On July 10, 2007, Finkelstein called Azeff at 7:47 a.m. for two minutes. Just over an hour later, Azeff called this same client and that client bought another 5,000 units of Legacy, and then a further 15,000 units, for a combined investment of $240,420 on that day.

[71] Meanwhile, the same assistant who had purchased Dynatec shares also bought, with her family, 17,000 units of Legacy on July 5, 6 and 10-12, 2007 for $205,221. They had previously sold their 4,000 units of Legacy on May 25, 2007.

[72] In addition, L.K. (and his wife) also bought 6,500 units in Legacy on July 9, 10 and 12, 2007, for $78,120, representing a sizeable amount of his portfolio. Yet again, L.K. said that he did so based on information provided to him by Azeff. These were not the only purchases of units in Legacy, but they provide a sufficient context for the purposes of considering the Panel's conclusions.

[73] Finkelstein contends that he did not possess material non-public information as of July 4. He says that the fact Legacy was for sale, and a possible purchase, was all public information. The latter contention about the public information ignores the fact that, as of July 4, any purchase of Legacy was contingent and the market was skeptical that it would, in fact, proceed. The price of the units had declined as a consequence. The former contention, that Finkelstein did not possess material non-public information, is belied by the email exchanges between Finkelstein and counsel for Legacy which show that, by July 4, Finkelstein expected his client to be the successful purchaser. Indeed, an announcement date for the transaction had been agreed to.

[74] It was clear on the evidence that Azeff had material non-public information regarding the Legacy transaction that he shared with his clients, and others, who, in turn, made significant purchases of Legacy units. Finkelstein possessed that same material non-public information, at least some of the details of which made their way to Azeff and his clients. Based on the nature of the information, and the demonstrated contacts between Finkelstein and Azeff at the relevant

time, it was open to the Panel to conclude that it was more probable than not that Finkelstein was the source of Azeff's information.

[75] As with the other two instances, there is no basis for questioning the reasonableness of the Panel's conclusion that Finkelstein "tipped" Azeff.

B. Azeff and Bobrow - Masonite

[76] As will be obvious, much of what I discussed regarding the Masonite transaction, when I dealt with Finkelstein's appeal, applies to the appeal by Azeff and Bobrow. Some additional facts should be pointed out, however.

[77] Given both their personal relationship and their work relationship, there was a reasonable basis for the Panel to conclude that information possessed by either Azeff or Bobrow would have been shared with the other. In addition to the relationship basis for that conclusion, the conduct of Azeff and Bobrow, in these transactions, is capable of confirming that fact.

[78] I have already set out the volume of share purchases that Azeff and Bobrow made at the relevant times. However, that buying continued. On November 22, 2004, Azeff and Bobrow acquired 31,235 more shares of Masonite for another $1,064,069. That buying represented 19% of all the Masonite shares traded on the TSX. Indeed, their buying continued until the public announcement on December 22, 2004. By then, Azeff and Bobrow had, together, acquired 293,360 Masonite shares for a value (before the announcement of the KKR deal) of $9,950,520 in more than one hundred accounts belonging to them, their families, friends and clients. It was reasonable for the Panel to conclude that those share purchases were made on the basis of inside information.

[79] In addition, L.K. admitted that he received information from Azeff about Masonite and made share purchases as a result. L.K.'s purchase represented the largest position that he had taken in any company up to 2004.

[80] Further, L.K. also admitted that, after he received the information from Azeff about Masonite, he communicated that information to Miller. Minutes after L.K.'s purchases of Masonite shares, Miller began to buy Masonite. Further, on November 24, 2004, Miller emailed a client about Masonite. He said that he had "a tip" that there would be a cash takeover of $40, and that the takeover would come before Christmas. That information, of course, accords directly with the material non-public information that Finkelstein passed to Azeff.

[81] Azeff and Bobrow attempt to undermine the Panel's conclusions by submitting that the Panel reasoned in reverse from the content of Miller's email to conclude that Finkelstein knew the details of the material non-public information. As I have already dealt with above, Miller's email is not the foundation upon which the Panel came to that conclusion. The conclusion that Finkelstein knew the material non-public information is based on other facts.

[82] As I have also reviewed above, the Panel's conclusion that Finkelstein tipped Azeff is a reasonable one. Among the reasons in support of that conclusion are the significant purchases of Masonite shares by Azeff and Bobrow. The Panel did not accept their contention that these purchases were routine or usual – a finding that was open to the Panel on the evidence. In a similar vein, the Panel did not accept the contention by Azeff and Bobrow that the purchases were based on prior research, that they had undertaken on Masonite, because that contention failed to explain the sudden and significant purchases.

[83] The further contention by Azeff and Bobrow, that the Panel's conclusion that Azeff tipped L.K. is flawed, is advanced by ignoring material facts, the most obvious of which is that L.K. says that Azeff gave him the information about Masonite. It also ignores that L.K. says that he told Miller about Masonite, and it ignores the fact that the details that Miller had about Masonite, mirror the details of the material non-public information that Finkelstein had.

[84] Azeff and Bobrow say that Azeff had no motive to tip L.K. That submission ignores the fact that motive is not a requirement for a finding of tipping under s. 76 of the *Act*. In any event, to the degree that the presence or absence of motive is relevant, motive can take many forms. For example, an individual could tip for the purpose of gaining the trust of a client, or for the purpose of building his reputation so that other potential clients would be attracted. There is no requirement that motive must involve a direct personal financial gain.

[85] In terms of Bobrow separately, the Panel's conclusion that Bobrow tipped clients, including in particular, H.F., was an entirely reasonable one for the Panel to reach. Azeff and Bobrow together bought Masonite stock in more than one hundred client accounts, beginning on November 19, 2004, which included the account of H.F. As I have already mentioned, the Panel found that these purchases were the result of Finkelstein tipping Azeff.

[86] Contrary to Bobrow's claim that there was neither evidence presented, nor a finding made, that he had the "opportunity" to tip H.F., the Panel heard evidence from Bobrow himself that H.F. was an important client, with whom Bobrow frequently spoke, often multiple times a day.

[87] Of some consequence, on this point, is the email exchange between H.F. and Bobrow on November 29, 2004 regarding H.F.'s purchase of Masonite shares. In that email exchange, Bobrow inquires whether H.F. has told another person about Masonite. H.F. responds that he has not and then adds: "We don't want this info in the public domain".

[88] Having concluded that Finkelstein tipped Azeff, it would not have been a difficult next step for the Panel to draw the inference that Azeff told Bobrow. When one couples that reality with the evidence of L.K., the volume of shares purchased, and the email from H.F., the Panel's conclusion that it was more probable than not that Azeff and Bobrow were tipped, and correspondingly tipped others, is certainly a conclusion that was reasonably open to the Panel on the evidence.

BB. Azeff and Bobrow – Dynatec

[89] I have already dealt with the issue of whether Finkelstein tipped Azeff about Dynatec. I need not repeat that analysis here. I have also dealt with the issue whether, if Azeff was tipped, he would, in turn, have passed the information to Bobrow.

[90] Azeff and Bobrow's main challenge to the Panel's findings that they were tipped regarding Dynatec, and then used that information to tip others, involves the purchase of a large number of Dynatec shares by the C Family. Azeff and Bobrow contend that the purchase of Dynatec by the C Family was unrelated to any information that Azeff and Bobrow might have possessed. They move from that contention to further contend that purchases of Dynatec by other clients of Azeff and Bobrow were simply the result of those clients "piggy backing" on the purchases by the C Family. Since Azeff and Bobrow say that the C Family purchase was "innocent", the subsequent purchases by other clients must be equally "innocent".

[91] Certain salient facts have to be noted regarding the issue about the C Family purchase. One is that the Panel did not make any finding that the C Family's purchases of Masonite were the result of being tipped. Rather, the Panel simply concluded that the evidence could not establish that fact one way or the other. As the Panel noted: "The evidence regarding timing of the orders and the lunch time presence or absence of Azeff and Bobrow was contradictory and unclear".

[92] The fact that the Panel did not conclude that the C Family purchase was the result of tipping did not, as the Panel found, negate a finding that other purchases were the result of tipping. In that regard, the Panel looked at the long list of communications between Finkelstein, Azeff, Bobrow, and others, on April 18 and 19, forty-eight hours before the public announcement, and the number of purchases of Dynatec shares by various person associated with Azeff and Bobrow, none of whom had bought any Dynatec shares in the previous six months.

[93] Of course, there is the further salient fact that L.K. admitted receiving a recommendation to buy Dynatec from Azeff, and acting on it.

[94] Again, the Panel's conclusion that Azeff and Bobrow used material non-public information, to recommend that their clients purchase Dynatec shares, is a reasonable one that was open to the Panel on the evidence that they heard, and the factual findings that they made.

BBB. Azeff and Bobrow - Legacy

[95] I will deal with this aspect of the appeals briefly because the submissions made by Azeff and Bobrow largely mirror the submissions made by Finkelstein on the subject of Legacy, and I have already dealt with those submissions above.

[96] Azeff and Bobrow also say that there was significant information regarding Legacy already in the public domain. They also point to rumours and an existing non-binding offer for Legacy. There is, of course, a wide gap between rumours and non-binding offers on the one hand and certain knowledge and a firm offer on the other. The public had the former; Finkelstein had the latter.

[97] There is also a reasonable inference that can be drawn from the magnitude of the purchases. It is one thing to take a small position based on rumour, speculation, or guess work. It is another matter to commit a significant amount of money based on that tenuous information. The United States Court of Appeals for the Eleventh Circuit put the proposition well in its decision in *U.S. S.E.C. v. Ginsburg*, 362 F.3d 1292, at 1299 (2004):

> The larger and more profitable the trades, and the closer in time the trader's exposure to the insider, the stronger the inference that the trader was acting on the basis of inside information.

[98] In the case of Legacy, in the five trading days between July 5 and 12, 2007, family and clients of Azeff and Bobrow invested $3,058,387 to buy 254,200 units of Legacy.

[99] Finally, some additional evidence that these purchases were the result of tipping can be found in the email that one of Azeff's clients, who the Panel found Azeff had tipped about Legacy, sent to Azeff about three hours before the Legacy transaction was to be publicly announced. The email said simply "2 hours!".

[100] The Panel's conclusion that Azeff and Bobrow received material non-public information, and used that information to tip others, is a reasonable one that was open to the Panel based on the evidence.

C. Miller - Masonite

[101] The only transaction with respect to which Miller was found liable is the Masonite transaction. The Panel found that Finkelstein passed material non-public information to Azeff who, in turn, passed it to L.K. who, in turn, passed it to Miller.

[102] I have already dealt with the allegations regarding Masonite as they relate to Finkelstein and Azeff. In the course of that analysis, I mentioned that L.K. admitted that Azeff provided the Masonite information to him. L.K. also admitted that, after he spoke with Azeff, he called Miller. L.K. recalled that he told Miller that Masonite was "in play" and that Miller and he talked about a 20% premium. The difference between the trading price of $34 and the actual purchase price of $40 is about 20%.

[103] Miller did not give evidence before the Panel. Rather, portions of his compelled interview with the respondent were placed into evidence. There was no objection to the Panel receiving the evidence of Miller (or Cheng) in this fashion. However, at the time that the matter was discussed before the Panel, counsel for Azeff and Bobrow raised an issue. The brief exchange with the Panel was as follows:

> Mr. Hodgson: Commissioner, just before we leave the issue of the read-in of the transcripts, I don't think this is controversial. I think the law is settled in this, Commissioner, that when Staff seeks to introduce a compelled statement from a declarant or a respondent, that's admissible only against that person.
>
> Chair: Oh, for sure.

[104] It is not clear to me what authority was being relied upon for placing these portions of the interview of Miller (and the whole of the transcript of the interview of Cheng) before the Panel. That said, the parties can always agree to adopt a particular procedure for the purpose of putting evidence before a tribunal. When that happens, however, the parameters regarding the use of that evidence should be clearly stated and agreed to. If any objection is going to be taken, or issues raised, as to its use, the time to raise those matters is then, not later before this court.

[105] In this case, it appears that the parties were treating these transcripts much like parties would treat reading-in admissions from an examination for discovery in a civil proceeding. This was not the only way in which the evidence could have been received. The evidence could also have been received pursuant to s. 15 of the *Statutory Powers Procedure Act*, R.S.O. 1990, c. S.22, in which case the evidence would have been admissible in the proceeding generally.[2] One of the significant differences, between the two methods of receiving evidence, is that under the *SPPA*, the evidence can be used for any purpose for which it could be used if the witness had given evidence in person, including for the purpose of making credibility determinations. Given the exchange I have referred to above, though, it appears that this court must treat the evidence only for the narrow purpose that the parties appear to have agreed upon at the time.

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[2] In *Fiorillo v. Ontario Securities Commission*, 2016 ONSC 6559 (Div. Ct.), s. 15 was relied upon to provide the authority for the admission into evidence of compelled interviews at an OSC hearing.

[106] Returning then to Miller's evidence, he admitted getting information from L.K. about Masonite. After receiving that information, Miller began to buy Masonite shares. He bought shares for himself, and then for his clients. His purchases, over the next few days, for his own account represented his largest equity position at the time.

[107] Two days later, on November 24, 2004, Miller emailed one of his clients, D.W., with what Miller referred to as a "tip" about Masonite shares. The email exchange was as follows:

> Miller: Call me I have a tip
>
> DW: i'll take your tip. you've steered me right in the past. Just let me know what you are buying/selling/shorting so I can clear it hear [*sic*] first.
>
> Miller: Stock trades on TSX at around $34 - cash takeover of $40[.] Timing should be before xmas but you never know with lawyers[.] I'm long[.]
>
> DW: what's the name of the issuer?
>
> Miller: Masonite - MHM

[108] Miller admitted that the source of the email information was L.K. and, specifically, that knowledge of the timing of the takeover came from L.K. Miller also admitted passing the information on to Cheng – a subject that I will come to below.

[109] The critical issue as it relates to Miller is the proper interpretation of s. 76(5)(e) of the *Act*. That subsection, which was added to the *Act* in 1986, brings certain individuals into the ambit of the section's prohibition on insider trading and tipping. The subsection reads:

> a person or company that learns of a material fact or material change with respect to the issuer from any other person or company described in this subsection, including a person or company described in this clause, and knows or ought reasonably to have known that the other person or company is a person or company in such a relationship.

[110] The Panel concluded that Miller ought to have known that L.K. was in the type of special relationship that s. 76(5)(e) contemplates. Miller submits that the Panel erred in so concluding. Indeed, Miller goes further and submits that the Panel failed to make an express finding that L.K. was in that special relationship.

[111] As will be seen from the plain wording of s. 76(5)(e), there are two routes that can be followed to arrive at the conclusion that a person is caught by the subsection. There is the subjective route, that is, where the person knows that s/he is receiving material non-public information from a person who is in a special relationship, and there is the objective route, that is, where the person reasonably ought to know that that is the case.

[112] In this case, of course, it is the objective route that is at issue. In Miller's submission, that objective route can only be taken if the respondent can show that the individual in question ought to have known:

> (i) that the information originated from an inside source, pursuant to clauses 76(5)(a)-(d) (i.e., the first person in the chain); and (ii) something about the pedigree of the information, i.e. the path that the information took to arrive at his or her immediate source (one person up the chain).[3]

[113] Miller's submission reads language into the subsection that is simply not there. There is no requirement in the statute that one must trace the information back to the originator. There is also nothing in the statute that requires the identification of all of the individuals, who may have transferred the non-public information, prior to the conveyance of that information to Miller.

[114] Rather, all that the subsection requires is that the information must be a material fact or material change with respect to an issuer, and that the recipient knew or ought reasonably to have known that the person, who was providing the information to him/her, is him or herself caught by the section. Contrary to Miller's submission, that includes a person who is caught by s. 76(5)(e).

[115] In considering this issue, it is important to keep in mind the intent behind adding s. 76(5)(e) to the *Act*. The Minister of Financial Institutions referred to this purpose when he spoke in the Legislature at the time that the legislation was introduced. The Minister said that the purpose was to "strengthen provisions governing illegal trading on insider information". The Minister stated the reason behind that purpose:

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[3] Miller Factum at para. 73.

> Obviously, the principle we have in mind is that everyone trading in the securities market should have equal access to information.[4]

[116] In considering the issue of "ought reasonably to have known", as it related to Miller, the Panel set out a series of factors to be taken into account, at para. 64:

> (a) What is the relationship between the tipper and tippee? Are they close friends? Do they also have a professional relationship? Does the tippee know of the trading patterns of the tipper, successes and failures?
>
> (b) What is the professional qualification and standing of the tipper? Is he a lawyer, businessman, accountant, banker, investment adviser? Does the tipper have a position which puts him in a milieu where transactions are discussed?
>
> (c) What is the professional qualification of the tippee? Is he an investment adviser, investment banker, lawyer, businessman, accountant, etc.? Does his profession or position put him in a position to know he cannot take advantage of confidential information and therefore a higher standard of alertness is expected of him than from a member of the general public?
>
> (d) How detailed and specific is the MNPI [material non-public information]? Is it general such as X Co. is "in play"? Or is it more detailed in that the MNPI includes information that a takeover is occurring and/or information about price, structure and timing?
>
> (e) How long after he receives the MNPI does he trade? Does a very short period of time give rise to the inference that the MNPI is more likely to have originated from a knowledgeable person?
>
> (f) What intermediate steps before trading does the tippee take, if any, to verify the information received? Does the absence of any independent verification suggest a belief on the part of the tippee that the MNPI originated with a knowledgeable person?
>
> (g) Has the tippee ever owned the particular stock before?
>
> (h) Was the trade a significant one given the size of his portfolio?

[117] Miller submits that these factors are "irrelevant" to the proper determination of the subsection. I do not agree. These factors are all relevant considerations in making an objective determination whether a person, who receives material non-public information, ought to know

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[4] Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, 33rd Parl, 2nd Sess, No 79 (11 December 1986) at 4152.

that the source of that information was likely an insider. As the Panel pointed out, these are not the only factors that might be considered. Nor would all of the factors be relevant in every case. Further, the weight to be given to the individual factors may vary from case to case. What the factors do provide is a series of tests that can be applied to the facts, as one proceeds along the road to the ultimate determination.

[118] Miller essentially asserts that, in order for him to be caught by s. 76(5)(e), he must know of the original source of the information and that that source is an insider. Miller moves from this central assertion to place great emphasis on the fact that L.K. said that he did not know, that the information that he received from Azeff, came from an insider. Miller's central assertion is fundamentally flawed. It does not find support in the wording of the section, nor in the prevailing case law. It is simply not the test. The test is whether L.K. ought to have known that the material non-public information emanated from an insider. If so, L.K. is caught by s. 76(5)(e) and that puts Miller squarely in the sights of the same subsection when L.K. passes the information on to him. If that were not the proper interpretation of s. 76(5)(e), then any person could avoid being captured by the subsection simply by not making reasonable, or obvious, inquiries. In other words, it would set up a wilful blindness exemption. One of the purposes of having an objective test, in addition to a subjective test, is, of course, to avoid that very result.

[119] Courts in the United States have addressed this issue. They have also rejected the notion that a person can avoid liability simply by submitting that s/he did not know that the original source of the material non-public information was an insider. Those courts have held that consciously avoiding any inquiry as to the source of the information does not remove liability. By way of example, the United States District Court for the Southern District of New York said in *SEC v. Musella* 678 F. Supp. 1060 at 1062 (1988)::

> Scienter in insider trading cases is not, and as a matter of public policy should not, be limited to those in direct contact with the primary tipper. Rather, the issue is whether a tippee, wherever he stood in a chain of tippees, "either knew or should have known that he was trading on improperly obtained non-public information." […] Both O'Neill and Martin made a conscious and deliberate choice not to ask John Musella any questions about the confidential source whose existence they suspected.

To hold otherwise "would effectively insulate remote tippers from liability": *SEC v. Thrasher* 152 F. Supp. 2d 291 at 304 (2011).

[120] The factual findings relating to Miller can be stated simply. Miller acknowledged that his knowledge of Masonite came only from L.K. Miller had not previously owned the stock. Miller had not followed Masonite, and Miller did not do any research on Masonite before buying the stock. Nevertheless, Miller purchased Masonite shares to the extent that his holding of Masonite shares became the largest position in his portfolio.

[121] Contrary to Miller's submission, the Panel did undertake an analysis of whether L.K. was in a special relationship, and also whether Miller ought to have known of that special relationship. While admittedly there is no express finding by the Panel that L.K. was in a special relationship, that finding is implicit in their reasons. The Panel reviewed a number of factors relating to L.K. including:

(a) L.K. and Miller knew each other well in 2004.

(b) L.K. was a partner in a prominent Montreal accounting and auditing firm, a fact known to Miller. Miller would understand that LK had clients, business relationships, and friends involved in transactional activities in Montreal.

(c) Miller was a senior investment adviser, with a big book of business at TD. He knew, or would be deemed to know, the provisions of the *Act* and the prohibition on trading on material non-public information. As the Panel said, a higher standard of vigilance and inquiry must be expected from a registrant.

(d) The information that Miller received from LK was detailed and very specific. L.K. told Miller that the takeover was for $40, in cash, and by Christmas.

(e) Miller clearly considered this information to be reliable as is evidenced by his email to D.W. where he specifically refers to the information as a "tip".

(f) Within a very short time of receiving the information, Miller bought, for himself, a significant number of shares of Masonite. Miller also bought Masonite shares for his family and for twenty-two clients.

(g) Miller did not conduct any research into Masonite before making these purchases.

(h) Miller was sufficiently comfortable with the reliability of the information that he passed it along to his colleague, Cheng, who also purchased Masonite shares.

[122] That constellation of facts is sufficient to reach a conclusion that Miller ought reasonably to have known that the material non-public information that Miller received from L.K. originated from an insider. As the Panel concluded, at para. 204:

> From these established facts, we conclude that Miller ought to have known that the MNPI [material non-public information] LK gave him derived from a knowledgeable person. The relationship between the tipper and tippee, the essential details of the MHM [Masonite] takeover bid, the precipitous, anomalous, significant trading by Miller, the registrant, make it more probable than not that he ought reasonably to have known that LK was in a special relationship with MHM and the MHM Material Facts originated from a person in a special relationship.

[123] That is a reasonable conclusion for the Panel to have drawn from the available facts. It is also consistent with the approach taken in the United States where courts have held that knowledge that the likely source of the information is an insider can be inferred from the nature of the information itself. As the United States District Court for the Southern District of New York said *SEC v. Cassano* 61 F. Supp. 2d 31 at 34 (1999):

> In all the circumstances, the facts alleged are more than sufficient to give rise to a strong inference that these defendants each had reason to know that the information on which they traded came from IBM.

D. Cheng - Masonite

[124] The Panel found that Finkelstein passed material non-public information regarding the Masonite transaction to Azeff who, in turn, passed it to L.K. who, in turn, passed it to Miller, who in turn passed it to Cheng. The Panel found that Cheng ought to have known that the information originated from an insider.

[125] Like Miller, the only transaction with respect to which Cheng was found liable is the Masonite transaction. Also like Miller, Cheng did not give evidence before the Panel. Unlike Miller, the entire transcript of Cheng's compelled interview was entered before the Panel.

[126] Cheng does not dispute that Miller told him about Masonite. What Cheng asserts is that the facts do not support a finding that he ought reasonably to have known that the information that Miller gave him about Masonite originated from an insider.

[127] There are factual differences between Cheng's situation and that of the other appellants. For one, Miller and Cheng were not friends. They did not socialize or otherwise generally have contact outside of the workplace. While Miller and Cheng did eventually become "partners" in their work at TD Securities, that did not occur until 2007, long after the Masonite transaction.

[128] By the time of the events surrounding Masonite in 2004, Cheng had been engaged in the securities industry for nine or ten years. He started with a small securities firm (the name of which he could not recall). He moved from that firm to CIBC Securities, and then to HSBC Securities. It was at HSBC Securities that Cheng became registered as an investment advisor. He left HSBC Securities to join what was then known as TD Evergreen. According to Cheng, it was sometime between 2001 and 2003 that he met Miller. At that time, Miller was one of a number of Vice-Presidents at TD.

[129] While Miller and Cheng worked together at TD Securities, Cheng says that Miller was not his "mentor or anything like that" in 2004. Cheng says that Miller told him "about Masonite being a takeover target some time back in 2004. …. I don't recall the exact wording or the detail or the conversations, but he was telling me that he heard rumours that Masonite might be in play". The emails show that Cheng learned that the deal would be before Christmas and that a 20% return could be expected. Cheng said he never asked Miller "where he learned the information from or the rumours."

[130] Cheng advances the same challenge to the factors, that I have set out above, that the Panel identified as being relevant to the inquiry into whether a person ought reasonably to have known that another person was in a special relationship for the purposes of s. 76(5)(e). Cheng

says that the factors are "flawed, illogical and at odds with an objective assessment". For the reasons I have already articulated above, it is Cheng's challenge to the factors that is flawed, not the factors set out by the Panel.

[131] The Panel found that Cheng ought to have reasonably known that Miller was in a special relationship with Masonite based on the following four factors:

(a) Miller was Cheng's mentor and supervisor.

(b) Cheng sent an email to a client that the Panel found demonstrated Cheng's belief in the reliability of the material non-public information.

(c) Cheng made no inquiries as to the source of Miller's information about Masonite.

(d) Cheng's purchases of Masonite shares.

[132] The Panel made a number of factual errors in its analysis of the evidence against Cheng. These errors undermine the foundation upon which the Panel concluded that Cheng ought to have known that he was receiving inside information.

[133] First, the evidence did not establish that Miller was Cheng's mentor and supervisor at the material times in 2004. In fact, the opposite appears to be the case. The only evidence on this point came from Cheng. His evidence was as follows:

Q. At any point at 70 University, did you work directly for Mr. Miller?

A. No.

Q. Okay. Did you have interaction with Miller in respect to your work?

A. Yes.

Q. And what was that interaction?

A. We talk about investment ideas. We talk about running the business.

Q. But you didn't work for him. Everyone works by – they are all independent, if you will, even though they are TD employees.

> A. Yes, yes. He wasn't a mentor or anything like that, that got assigned to me. No we just – we just talk as colleagues, but he was more – he was more senior, experienced, more successful, and funny guy.

[134] Second, the Panel appeared to place significant reliance on the fact that, because Cheng emailed a client, with whom he already had a troubled relationship, about the Masonite transaction, he must have been confident in the reliability of the information. Indeed, the Panel said "He would not have risked passing speculative information, which may prove wrong, to an already complaining client". It is not clear to me why that conclusion must flow from that email. While that is one inference that could be drawn, it is not the only inference available. It may equally be the case that Cheng thought that this was one last chance to salvage the relationship. If the information proved out, the client would be happy. If the information did not prove out, it would not materially add to what was an already bad relationship. In pointing this out, I do not say that the Panel was not entitled to draw the inference that it did. I just suggest that the inference that the Panel chose is not a strong one and, thus, does not provide a particularly solid foundation for the final conclusion.

[135] Third, although Cheng acknowledged that he did not inquire as to the source of Miller's information, he explained why he did not do so. Cheng said:

> I don't recall specifics regarding Masonite to conversation with him after his initial telling me about him hearing these rumours, but I've never ever in any occasions I've asked him if he ever tells me, hey, I've heard this rumour, I never – not just him, but anybody else, I never would go and say where did you learn it from.

[136] I reiterate what I said above: the failure to inquire does not necessarily avoid the effect of s. 76(5)(e). The question will always be whether, in the particular circumstances, an inquiry as to the source of the information was called for. The Panel was obliged to consider all of the facts relating to Cheng, including his explanation, before concluding that he ought reasonably to have known that the source of the material non-public information was an insider. The Panel did not conduct that analysis.

[137] Fourth, there is no doubt that Cheng made purchases of Masonite shares after Miller told him the information about Masonite. However, it is of importance to know what Cheng did

before he made those purchases. Cheng said that it would be his practice, after hearing a rumour like this, to "check the Newswire for a few months or a few weeks, depending on the case, I'll pull the chart". Cheng said he would also talk to other people to see if any of them had heard the same rumour. He concluded on this point by saying:

> But in that – in regards to Masonite, I don't recall exactly what I did after but that would be my normal practice before purchasing or selling a stock.

[138] Contrary to the finding by the Panel, Cheng did not purchase any shares for himself, although he did purchase Masonite shares for various family members. Cheng said that, when making a purchase for his mother or father he would not normally go into specifics of the proposed purchase but would just tell them that he thought it was a good thing to do. However, Cheng treated his younger brother differently. In particular, he said:

> I could have told him – again, I don't recall any specifics, but I could have – he would be the one that I could have told him, hey, I've heard rumours that Masonite is in play. I looked at the chart, I did this and that, I think there's not much downside risk here. So weighing all the pros and cons, I think it is a good investment.

[139] Cheng's evidence that he might have told his younger brother "there's not much downside risk here" is consistent with an email that he sent on December 8, 2004 to a person he had recently met in Chicago. In that email, advising about the Masonite information, he said "I don't see much downside from here even if the deal ended up falling through". That statement hardly constitutes a ringing endorsement of the reliability of the information.

[140] The Panel found that Cheng did not engage in due diligence and undertook no research with respect to the Masonite transaction. That is not correct. I have set out above the steps that Cheng said it would have been his practice to take, including looking at the Newswire and speaking to others about the "rumours".

[141] The Panel also found that, based solely on the Masonite information, Cheng "precipitously bought a large position for himself and family members". It is not clear on what basis the Panel concluded that the purchases were precipitous. Further, as I earlier noted, Cheng did not buy any Masonite shares for himself. In terms of the family members, while it is true

that large positions were taken in some of those accounts, it is also true that the dollar value of those positions was small.

[142] Moreover, Sherry Brown, the respondent's lead investigator, acknowledged that this was not unusual behaviour, upon looking at the history of these accounts. With respect to one account, Ms. Brown said:

> Q. So, again, in this account, the concentrated position of Masonite is not uncharacteristic of the trading pattern in this account.
>
> A. It happens on other occasions, yes.

With respect to the account for Cheng's aunt, Ms. Brown said:

> Q. Again, to close off, the trading of Masonite in this account is not uncharacteristic of the overall trading pattern in this account?
>
> A. Concentration of it, yes, that's correct.

[143] In reaching their conclusions, the Panel was entitled to take into account the large position taken, in Masonite, in these accounts. However, before drawing a negative inference from the fact that a large position was taken in Masonite, the Panel was obliged to consider the history of the accounts. The Panel was also obliged to consider the relative dollar value of those positions. That was a necessary step in evaluating the reasonableness of drawing the inference that the purchases were the result of inside information. The Panel did that when they considered the purchases made by Azeff and Bobrow of Masonite, Dynatec and Legacy. They also did it when they considered Miller's purchases of Masonite. However, the Panel did not do that analysis in the case of Cheng.

[144] In the end result, the Panel's reasons state the following evidence incorrectly:

(i) that Miller was Cheng's mentor/supervisor when in fact there was no such close relationship at the material times.

(ii) that Cheng bought stock for himself when he did not.

[145] In addition, unlike the approach taken by the Panel when they reached their conclusions regarding the other appellants, the Panel appears not to have taken into account the following evidence with respect to Cheng:

(i) that Miller told Cheng the information was a "rumour".

(ii) Cheng said he would have made inquiries of others about the stock.

(iii) the dollar value of the purchases made by Cheng was small.

(iv) the history of trading in the Cheng family accounts.

[146] The cumulative effect of these errors renders the Panel's conclusion regarding Cheng both an unsafe, and an unreasonable, one. It cannot be said, with any degree of confidence, that the decision is "justified, transparent and intelligible".[5] Consequently, the finding that Cheng ought reasonably to have known the information he received, and passed on, originated from an insider must be set aside, as must be the sanctions imposed.

V: Procedural unfairness

[147] In addition to their challenge to the conclusions of the Panel regarding insider trading and tipping, some of the appellants also contend that the hearing before the Panel was tainted by various instances of procedural unfairness. I will deal with each of those contentions in turn.

(a) Lack of particulars

[148] Finkelstein complains that the findings of the Panel fall outside the Statement of Allegations made by the respondent against him. For example, in respect of the Dynatec allegations, Finkelstein says that the respondent knew what the material non-public information was, but did not include it in the Statement of Allegations. Finkelstein contends that this type of conduct constitutes a procedural unfairness to him.

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[5] *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190 at para. 47

[149] I do not accept that contention. The Statement of Allegations contained sufficient particularity that it allowed Finkelstein to respond to the allegations. In each of the three instances where insider trading/tipping occurred, the Statement of Allegations was clear that it was the fact of the Masonite transaction, or the Dynatec transaction, or the Legacy transaction, that was material non-public information. Finkelstein could not have been confused or uncertain as to what the respondent was alleging against him.

[150] I would also note that, while there was some skirmishing in advance of the actual hearing regarding the alleged lack of particulars, the hearing proceeded without any real issue being raised on that point.

[151] In any event, assuming for the moment that Finkelstein was uncertain of what he was alleged to have passed along in terms of material non-public information, and that, as a consequence, he was being hampered in his ability to respond, Finkelstein was entitled to seek an order, from the Panel, that particulars be provided. Specifically, rule 4.2 of the Rules of Procedure of the Ontario Securities Commission reads:

> At any stage in a proceeding, the Panel may order that a party:
>
> (a) provide to another party and to the Panel any particulars that the Panel considers necessary for a full and satisfactory understanding of the subject of the proceeding; and
> (b) make any other disclosure required by this Rule, within the time limits and on any conditions that the Panel may specify.

[152] No such request was made of the Panel by Finkelstein. Nor is there anything in the record of the hearing that establishes that Finkelstein ever identified any witness, or other evidence, that he did not call, but would have called, but for some uncertainty, or confusion, or lack of awareness, arising from the content of the Statement of Allegations, or of the proceeding generally.

[153] I cannot find any basis that would sustain a conclusion that Finkelstein was not provided with procedural fairness, or was not fully apprised of the case that he had to meet, or was subject to any denial of natural justice.

(b) Denial of adjournment

[154] Azeff and Bobrow say that they were unfairly hampered in their ability to respond to the allegations because the Panel refused to give them an adjournment of the hearing when their expert's work product was lost. This is, in effect, a renewal of the argument that underlay the fresh evidence application.

[155] I earlier set out the background facts to this issue. I will not repeat them here. The central contention of Azeff and Bobrow is that their expert lacked sufficient time to recreate her lost work product and, as a consequence, they were not properly prepared as the hearing continued along. Azeff and Bobrow say that they continually complained to the Panel about the negative ramifications to their positions because of this issue.

[156] The decision to permit or deny an adjournment is a quintessential example of the exercise of a discretion.[6] It will not be interfered with unless the decision is clearly unreasonable or based on a faulty principle.

[157] The Panel gave detailed reasons for denying the request for an adjournment. In doing so, the Panel had to balance the potential impact on Azeff and Bobrow, with the desire to proceed with the hearing as scheduled. On that latter point, the Panel observed that it had already taken four years to get the matter to the current hearing date, and that the events in issue dated back to 2004 and 2007. Delay was therefore a natural concern.

[158] In refusing the request for an adjournment, the Panel noted the following pertinent facts:

> (i) Azeff and Bobrow's expert was not going to be a witness at the hearing. Her role was strictly an advisory one to assist counsel in his preparation of the case and with his cross-examination of witnesses;
>
> (ii) The majority of the evidence to be called at the hearing was to be fact evidence and it would be for the panel to determine what inferences may be drawn from the evidence presented by the parties;

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[6] *Senjule v. Law Society of Upper Canada*, [2013] O.J. No. 2347 (Div. Ct.) at para. 21.

(iii) Azeff and Bobrow were not precluded from bringing forward additional documents nor were they precluded from giving their own evidence and/or calling any witnesses;

(iv) A year earlier, Bobrow had been granted an adjournment and the hearing was re-scheduled as a consequence;

(v) If an adjournment was granted, there was no guarantee that the hearing could be re-scheduled before September 2015.

[159] In the end result, the Panel concluded that the expert was "sufficiently prepared" to provide the assistance to counsel that she was retained to provide.

[160] It is also the case that, during the course of the hearing, the Panel was alert to the concerns that Azeff and Bobrow continued to raise regarding this issue. Indeed, the Panel granted their counsel an indulgence when it agreed to postpone for a week the continued cross-examination of the respondent's principal investigator to provide counsel with additional time to prepare.

[161] It is also of some importance in relation to this issue that, notwithstanding the passage of time since the hearing was completed, Azeff and Bobrow are still unable to point to any evidence, that their expert uncovered, that they were precluded from advancing at the hearing. Azeff and Bobrow respond to this point by saying that their expert did not continue working after the hearing ended, because they did not know whether her efforts would be accepted on the appeal.

[162] It seems to me that the argument advanced by Azeff and Bobrow becomes somewhat circular at this point. Azeff and Bobrow had the opportunity to provide concrete examples of documents or witnesses, that might have affected the result of the hearing, but were unavailable to them, because of the refusal to grant an adjournment. They have not produced any such evidence. It does not lie with them, in response, to suggest that they did not have any obligation to pursue that evidence, until they first obtained this court's agreement that they were prejudiced by what occurred.

[163] Finally on this point, the reliance by Azeff and Bobrow on the decision in *Kalin v. Ontario College of Teachers* (2005), 75 O.R. (3d) 523 (Div. Ct.) is misplaced. There is no

comparison between what the tribunal did in *Kalin*, when refusing the request for an adjournment, and what the Panel did in this case. In particular, in this case, the Panel treated the issue seriously; it weighed the pros and cons of the request; and it did not act arbitrarily.

[164] I see no merit in the suggestion by Azeff and Bobrow that they were denied procedural fairness and natural justice arising from the manner in which the Panel dealt with this issue.

VI: Sanctions

[165] I turn now to the submissions of the appellants that the sanctions imposed by the Panel were unprecedented and excessive. I will deal with each of the appellants in turn, although it is unnecessary to deal with Cheng on this issue. Since the decision on the merits respecting Cheng has been set aside, the sanctions decision falls with it.

[166] Before dealing with each of the appellants, however, it will be helpful to set out the general principles that underlie the imposition of sanctions regarding conduct that violates the *Act*. In that regard, the purpose of the *Act* bears repeating. It is set out in s. 1.1 that reads:

> The purposes of this Act are,
>
> (a) to provide protection to investors from unfair, improper or fraudulent practices; and
>
> (b) to foster fair and efficient capital markets and confidence in capital markets.

[167] In pursuing that purpose, the respondent must "consider the protection of investors and the efficiency of, and public confidence in, capital markets generally": *Committee for the Equal Treatment of Asbestos Minority Shareholders v. Ontario (Securities Commission)*, [2001] 2 S.C.R. 132 at para. 45.

(i) Finkelstein

[168] Finkelstein was found to have contravened s. 76 of the *Act* by tipping on three occasions. The Panel levied an administrative penalty of $450,000 (or $150,000 per violation) and ordered Finkelstein to pay $125,000 in costs.

[169] Finkelstein says that the sanctions are excessive. He points to the fact that he did not personally profit from any of the tipping. He also says that a penalty of $150,000 per violation greatly exceeds the penalties in other cases. On this latter point, Finkelstein points to the decision in *Re Agueci*, [2015] 38 OSCB 5995 where a penalty of $25,000 per violation was imposed.

[170] In rendering its decision on sanctions, the Panel noted that both personal deterrence and general deterrence are important objectives in reaching a decision on the appropriate sanction. It also noted that the *Act* provides for administrative penalties of up to $1 million per breach. At the same time, the Panel was cognizant of the fact that punishment is not one of the objectives of imposing sanctions.

[171] In approaching its task, the Panel also observed, at para. 10:

> Sanctions have to be carefully tailored to the particular breaches of the *Act*, the role of the perpetrator and the particular circumstances applicable to each respondent. Prior decisions of this Commission, or of any other regulator, must be considered, as we have done, to gain the wisdom from peers. However, it would not be an appropriate exercise of our discretion to slavishly follow prior sanctions decisions and make adjustments to them based on the amount of profit garnered in these situations, or of the number of breaches.

[172] Unlike the other appellants, Finkelstein was not a registrant. The Panel found, correctly in my view, that registrants, because of their position, bear a higher degree of responsibility for violations of the *Act*, than non-registrants would. At the same time, however, Finkelstein was a lawyer, working at a major law firm, in the very area of law and commercial activity to which the *Act* is directed. Finkelstein would, by the very nature of his position, be privy to precisely the type of material non-public information that the *Act* seeks to prohibit trading on. Finkelstein was, therefore, in a critical position in terms of his access to such information and his ability to pass it along to others. Consequently, the degree of responsibility that he should bear for violations of the *Act* ought not to be appreciably different, in terms of order of magnitude, than that imposed on registrants.

[173] The harm that is associated with the conduct that Finkelstein engaged in is fundamentally at odds with the goal of having a free and equal market, open to all investors. The goal is to

ensure that any investor can have confidence that the market is not "rigged" in favour of some investors, over others. As the Panel said, at para. 13:

> The passing of MNPI to a person not authorized to receive it strikes at the core of fairness to all investors engaged in the market. Tipping of MNPI undercuts one of the foundational pillars of the Act, namely confidence. It provides an informational advantage to some market participants at the expense of others.

[174] The Panel noted that, while Finkelstein may not have personally benefitted from his conduct, the participants in the three instances of insider trading/tipping, earned profits of approximately $2 million. Of course, personal profit is only one of the reasons why an individual might engage in such conduct. Enhancing one's reputation with a view to future benefits may also be a motivating factor. Simple self-aggrandizement may be another.

[175] Given Finkelstein's role and given his position, I agree with the Panel that his conduct must be considered to be at the higher end of the spectrum of severity. That fact alone is sufficient to distinguish this case from *Re Agueci*. The Panel also had to be concerned that any administrative penalty imposed could not be seen as simply the cost of engaging in the conduct, the cost of doing business as it were, or simply as a licencing fee for bad behaviour. The administrative penalty had to be meaningful, and one that would send the appropriate message to achieve deterrence.

[176] The imposition of a sanction, like the imposition of a sentence in a criminal prosecution, is a matter of discretion. It is entitled to a high degree of deference by an appellate court. As the Supreme Court of Canada said, on this point, in *R. v. Shropshire*, [1995] 4 S.C.R. 227, an appellate court does not have "free rein" to change a sentence just because it would have imposed a different one. Rather, an appellate court should only interfere with a sentence when the following test is met, at para. 46 (QL):

> A variation in the sentence should only be made if the court of appeal is convinced it is not fit. That is to say, that it has found the sentence to be clearly unreasonable.

[177] The decision to impose a penalty equivalent to $150,000 per violation places the administrative penalty at 15% of the maximum provided for in the *Act*. Given the severity of the

conduct found by the Panel, the imposition of a penalty at such a level gives full allowance to all of the mitigating factors in this case, that were outlined by the Panel, including the impact of the allegations on Finkelstein's career. It is also not out of line with the administrative penalties upheld in, for example, *Rowan v. Ontario (Securities Commission)* (2012), 110 O.R. (3d) 492 (C.A.) or in *Fiorillo v. Ontario (Securities Commission)*, [2016] O.J. No. 5520 (Div. Ct.).

[178] In terms of the costs awarded, I cannot find any basis to conclude that the allotment of $125,000 was unreasonable, or failed to take into account the fact that some of the allegations were not proven. The Panel noted that the respondent had already discounted the actual costs of the proceedings by 70% in terms of the amounts that it sought from the appellants. The Panel reduced the amount of costs sought by the respondent by a further 50%.

[179] The quantum of costs to be awarded by a tribunal is also a matter of discretion. As Sharpe J. A. said in *Rowan*, at para. 92:

> Costs orders are entitled to deference on appeal. Where the tribunal making the order has expressly taken into account the very point advanced on appeal, an appellate court will rarely interfere.

[180] There is simply no basis for this court to interfere with the costs award.

(ii) Azeff and Bobrow

[181] Azeff was found to have violated the *Act* five times. Bobrow was found to have violated the *Act* twice. Azeff was assessed an administrative penalty of $750,000 and Bobrow an administrative penalty of $300,000. Again these penalties would reflect an amount of $150,000 per violation. Both Azeff and Bobrow were ordered to disgorge the profits that they personally made. Azeff was ordered to pay costs in the amount of $175,000 and Bobrow was ordered to pay costs in the amount of $125,000.

[182] Azeff and Bobrow repeat the arguments made by Finkelstein regarding the administrative penalties. I make the same response to those arguments that I have made above.

[183] Azeff and Bobrow also complain that the administrative penalties represent multiples of the profits that they earned that are out of line with other cases. Applying a multiplier to the

profit earned is only one of the ways in which an administrative penalty can be tested as to its appropriateness. As the Panel noted, applying a multiplier to the profit earned does not account for the situation, such as Finkelstein's, where no profit is earned. Further, the fact that a violator of the insider trading/tipping section of the *Act* does not earn a profit, or a large profit, does not diminish the seriousness of the conduct. It also does not account for the fact, as was the case here, that friends, family, and clients, of the violators may earn substantial profits. On that latter point, the administrative penalty levied against Azeff represents 37½% of the $2 million in profit said to have been gained by others. In the case of Bobrow, it represents only 15%.

[184] For these reasons, the application of a multiplier to profits is, in my view, one of the weaker mechanisms by which to determine the appropriate administrative penalty. It may provide a useful cross-check, but it ought not to be the starting point, or the determining factor. The severity of the conduct, the number of violations, the personal circumstances of the violator, the position that the violator held, and other like factors, are much more important considerations.

[185] Azeff and Bobrow also complain about the ten year registration ban that was imposed upon them. While they acknowledge that such bans "are generally found to be appropriate in insider trading/tipping cases", they submit that they were not appropriate in this case. The principal reason advanced for this submission is that, in the years since the allegations arose, Azeff and Bobrow had continued to participate in the market, albeit under strict supervision, without any further violations.

[186] The Panel considered that submission and rejected it. The Panel found that permitting Azeff and Bobrow to continue working in the market would fail to provide sufficient protection to all other market participants. Specifically, the Panel said, at para. 28:

> Continued registration for Azeff and Bobrow, even under strict supervision, does not provide a sufficient shield to the market. It would leave Azeff and Bobrow, as registrants, in the milieu where financings and takeover bids are regularly discussed. We have no confidence that Azeff and Bobrow would resist temptation any more in the future than they did in the past. Supervision, while laudable, does not cover the whole day. Tipping can occur by various, difficult-to-detect, means and may not always occur at the workplace.

[187] That was an entirely reasonable conclusion for the Panel to reach in the circumstances. It is not for this court to second guess that conclusion, or to substitute our opinion for that of the Panel.

[188] Azeff and Bobrow do not directly challenge the costs awards made against them. However, insofar as they may indirectly challenge those costs awards, my observations and conclusion, regarding the issue of costs as they relate to Finkelstein, apply equally to Azeff and Bobrow.

(iii) Miller

[189] Miller was found to have violated the *Act* on three occasions. He was ordered to pay an administrative penalty of $450,000 and costs of $50,000. He was also ordered to disgorge the profits that he made.

[190] Miller's sole submission regarding the sanctions imposed on him is to repeat the arguments made by Azeff and Bobrow regarding the multiplier of profits approach to setting administrative penalties. I will not repeat what I have just said in rejecting that approach as being determinative of the appropriate penalty.

[191] Once again, there is no principled basis upon which this court could properly interfere with the sanctions imposed by the Panel.

VII: Conclusion

[192] For these reasons, the appeals of Finkelstein, Azeff, Bobrow, and Miller are dismissed. The appeal of Cheng is allowed and the findings respecting him are set aside, as are the sanctions imposed.

[193] If the parties cannot agree on the disposition of the costs of the appeal, they may make written submissions. The respondent and Cheng shall each file their written submissions within fifteen days of the date of these reasons. The appellants, and the respondent with respect to Cheng, shall file their written submissions within fifteen days thereafter. No reply submissions

are to be filed without leave of the court. No party's submissions shall exceed ten pages in length.

NORDHEIMER J.

I agree

MARROCCO A.C.J.

I agree

THORBURN J.

Date of Release: December 2, 2016

CITATION: Finkelstein v. Ontario (Securities Commission), 2016 ONSC 7508
DIVISIONAL COURT FILE NO's.: 478/15, 479/15, 480/15 & 497/15

ONTARIO

SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT

MARROCCO A.C.J., NORDHEIMER & THORBURN JJ.

BETWEEN:

MITCHELL FINKELSTEIN, PAUL AZEFF, KORIN BOBROW, HOWARD JEFFREY MILLER and MAN KIN (FRANCIS) CHENG

Appellants

– and –

ONTARIO SECURITIES COMMISSION

Respondent

REASONS FOR JUDGMENT

NORDHEIMER J.

Date of Release: