NOVA SCOTIA COURT OF APPEAL

Citation: ***Electronic Benefits Inc. v. Nova Scotia (Securities Commission)***, 2009 NSCA 6

Date: 20090122
Docket: CA 294529
Registry: Halifax

Between:

Electronic Benefits Inc., Advantage Financial Group Inc., and Everett R. Stuckless

Appellants

v.

Nova Scotia Securities Commission

Respondent

Judge(s):	Bateman, Hamilton, JJ.A. & Murphy, J. (*ad hoc*)
Appeal Heard:	November 13 and December 3, 2008, in Halifax, Nova Scotia
Held:	Appeal dismissed per reasons for judgment of Hamilton, J.A.; Bateman, J.A. and Murphy, J. concurring
Counsel:	Everett (Roger) Stuckless, self-represented Appellant Duane A.C. Eddy, for the Nova Scotia Securities Commission Heidi Schedler & Peter Forgeron, Articled Clerk, for the Staff of the Nova Scotia Securities Commission

IN THE NOVA SCOTIA
COURT OF APPEAL
I hereby certify that the foregoing document, identified by the Seal of the Court, is a true copy of the original document on file herein.
Dated the 22 day of January A.D., 2009.
Jean C. Ross
Deputy Registrar

Reasons for judgment:

[1] Electronic Benefits Inc. ("EBI"), Advantage Financial Group Inc. ("Advantage"), and Everett R. Stuckless appealed the March 12, 2008 decision of the Nova Scotia Securities Commission ("Commission") written by its Vice-Chair, R. Daren Baxter, pursuant to s. 26 of the **Securities Act**, R.S.N.S. 1989, c. 418. The decision may be found at: (http://www.gov.ns.ca/nssc/compliancenforce/enforproceedings.asp). The Vice-Chair accepted EBI's admission that it participated in the furtherance of a trade of securities without having met the registration (s.31(1)(a)) and prospectus (s.58(1)) requirements of the **Act** and found Advantage had done the same. He found Mr. Stuckless' role in these contraventions as director, president and CEO of EBI and Advantage fell below the required standard of care. He ordered a permanent cease trade order against EBI and imposed a $10,000 administrative penalty on it. While he also ordered a twenty-four month cease trade order against Advantage and Mr. Stuckless, the effect of the order was to continue an interim cease trade order and the last day of the twenty-four month period coincided with the date his decision was rendered. He ordered the appellants to jointly and severally pay $7,500 costs. The proceedings were under the administrative public interest section of the **Act**, s.134, as opposed to the quasi criminal section, s.129.

[2] Despite there being three appellants, Mr. Stuckless made it clear at the beginning of the hearing before us that it was only the issues involving himself personally that he was concerned with as EBI and Advantage were no longer carrying on business. Mr. Stuckless' role was the focus before the Vice-Chair as well.

[3] Mr. Stuckless represented himself and the other appellants on appeal.

Facts

[4] EBI and Advantage were small closely held companies. In the fall and winter of 2005/2006 Advantage conducted claims adjudication for health and dental insurance plans and brokered life insurance. EBI was trying to develop and market in-house claims adjudication software and was seeking funding for this purpose from several sources. Mr. Stuckless managed the day to day operations of both EBI and Advantage as president, a director and CEO.

[5] None of the appellants were registered under the **Act** and no prospectus was filed by EBI, although prior to December 2005 Mr. Stuckless had made inquiries of Commission staff ("Staff") about the process to be followed to solicit public investment in a company.

[6] In December 2005 the following unsigned letter on EBI's letterhead was sent to persons in Nova Scotia and other provinces:

> *Please let us introduce ourselves...*
>
> *Welcome to EBI, Electronic Benefits Incorporated. We are a brand new company offering a brand new and innovative In-House Claims Adjudication Software. There is only one other software for in-house claims management in all of Canada. EBI Staff and Management think our software is more detailed and advanced than our competition.*
>
> *The expected revenue in the first year of operation is $2.9 million with an expected revenue after five years of over $5 million. There is an (sic) guaranteed return on investment of 8.5% with a minimum investment of $2000 over 90 days which is, backed by EBI, Everett R. Stuckless and EBI's parent company Advantage Financial Group Inc.*
>
> *A Business Plan is available upon request. So please, take advantage of this incredible opportunity and call us today at the numbers listed above or return your cheque with the enclosed form.*
>
> *Sincerely,*
>
> *Everett R. Stuckless, BA, Bed, MBA*
>
> *President/CEO*

[7] Mary Lianne Bradshaw, a Commission investigator, commenced an investigation in December, 2005 upon becoming aware of the letter. During the investigation she also became aware of the following email being sent in February 2006:

> *Hi There:*

EBI is raising $100,000 for a short term commitment (Electronic Benefits Incorporated). www.ebisoftware.com. The interest EBI will pay on this short term loan is 7%.

I will personally guarantee your loan 100% and Advantage Financial Group Inc. the parent company will also. www.afgclaims.com

We are not offering any shares in EBI at this time however if someone is interested we can open discussions and when EBI goes public in the near future, we will forward the information needed straight away.

We only require these funds for 90 days, (a short term) while a lenders funds are being forwarded to us.

Please feel free to call me or ask for details by return e-mail.

Everett R. Stuckless, BA, Bed, MBA

President/CEO

[8] No one accepted this solicitation to loan money to EBI so no members of the public were harmed as a result of the sending of the letter and email.

[9] On March 8, 2006 the Commission issued a temporary cease trade order against each of the appellants and Staff prepared a Statement of Allegations seeking the imposition of permanent cease trade orders pursuant to s.134(1)(b), an administrative penalty and costs. The Commission's hearing into the allegations commenced March 13, 2006 with Mr. Stuckless representing all of the appellants. Part way through the hearing it was adjourned at Mr. Stuckless' request to allow him to engage counsel. Mr. Stuckless agreed that the temporary cease trade order would remain in effect until the hearing resumed. He indicated such an order made no difference to him or the other appellants because they had not traded and did not want to:

> The Chair Well, Mr. Stuckless, . . . In the interim, there is an interim cease trade order ordering you not to trade in all classes of securities in the province of Nova Scotia and that order was granted on . . . the 8th day of March, and it was for a period of 15 days, of course the period of 15 days to give sufficient time to have a hearing.

> Can I assume from your comments that you have no objection to this cease trade order being extended pending the hearing?
>
> Mr. Stuckless None whatsoever because we don't trade in securities, Mr. Commissioner, that's what I'm saying, we don't - we have - there's no liability to us, you know, because we don't trade in securities, never have.
>
> The Chair: Thank you. . . .

[10] The hearing was adjourned a second time on July 28, 2006 at the request of appellants' counsel because Mr. Stuckless was ill. Without seeking the consent of appellants' counsel the Vice-Chair ordered:

> There is a temporary cease trade order in effect, which continues to be in effect until a full hearing is held and a final decision is rendered by the Commission. And . . . that order will continue.

[11] The hearing resumed October 26, 2006. Final submissions from counsel were received by the Vice-Chair on November 16, 2006. He rendered his decision 16 months later, on March 12, 2008.

[12] There were several admissions by appellants' counsel at the Commission hearing. He admitted that what was offered in the letter and email was a security for purposes of the **Act**, that sending them was an act in furtherance of a trade in a security and that the letter and email were sent to some people. He indicated he had no difficulty with EBI being held accountable. He indicated that EBI was out of business and that Advantage was going out of business:

> **Mr. Melanson:** . . . The essential basis of our case, Mr. Chair, is that the letters that were received by certain individuals, and we're not quite sure how many, were never authorized to be sent out by Mr. Stuckless with respect to this matter, and therefore, that Mr. Stuckless and Advantage Financial should not in any way be held liable for the contents of the letter, or the fact that it was sent.
>
> We have no difficulty with EBI taking responsibility for letters that went out...but even without instruction, the letters went out . . . but . . . our basic case is that they went out without instruction and without authorization, and by mistake. And therefore, should not (be held accountable?)
>
> . . .

The Chair: Are you suggesting that EBI Electronics Benefits should be held accountable for but not Mr. Stuckless directly?

Mr. Melanson: Because of the fact that he did not authorize letters to be sent out. The letters did go out, and we have no difficulty with that finding . . . if that finding were made, but from a point of view of . . .

The Chair: Right. So you draw a distinction between the corporate entity and Mr. Stuckless himself.

The Chair: Are you acting for the two corporate entities, EBI Electronic Benefits Inc. and Advantage Financial Group Inc.?

Mr. Melanson: I am.

. . .

The Chair: There doesn't seem to be any issue as to whether or not what was offered in that letter was a security.

Mr. Melanson: I concur that what was offered in the letter was a security.

The Chair: And also there doesn't seem to be any issue that what was offered in the letter or suggested by the letter itself would be an act of furtherance of a trade in the security.

Mr. Melanson: That is correct.

. . .

Mr. Melanson: With respect, just to go back to these cease trading orders, EBI obviously . . . the fact is that EBI is no longer in business, and so instructions were not to take any real steps to defend EBI. And the fact is those letters did go out, and so as a corporate situation, I mean, somebody can be held liable for that. And so we're not contesting any part of the EBI situation.

Advantage Financial . . . the only real involvement of Advantage Financial is that that's where the client lists came from. And obviously Advantage Financial is not involved in the business of trading securities. And as Mr. Stuckless has indicated,

> the book of business is being sold so that it will become a shell company in any event. So again, we were instructed not to make any real submissions on that.
>
> But for Mr. Stuckless, personally, this is . . . this is an important issue.

Decision

[13] With those admissions and with it being clear that none of the appellants were registered under the **Act** and no prospectus had been filed, the issue before the Vice-Chair was whether it was in the public interest to make permanent the temporary cease trade orders against Advantage and Mr. Stuckless and whether penalties or costs should be imposed.

[14] The Vice-Chair reviewed the evidence in detail. He found Advantage participated in furtherance of a trade of securities contrary to the **Act** by providing its client list and using its employees to prepare the letter:

> I find that EBI contravened or failed to comply with the provisions of the Act by sending the Letter and E-Mail, and that Advantage also contravened or failed to comply with the provisions of the Act by participating in the sending of the Letter and E-mail. The answer to the second issue noted above (whether corporate respondent, Advantage, is to be held responsible for the solicitation of investments by the letters and e-mails) is yes.

[15] He then considered Mr. Stuckless' role. He referred to Mr. Stuckless' testimony:

> Mr. Stuckless's testimony is that it did not dawn on him that sending a letter to clients of Advantage seeking a loan was a matter regulated by the Commission. He admits that EBI could use the money and that his intentions were to send a letter to the clients of Advantage seeking loans to EBI. He just did not authorize the actual sending of the letter because he was not yet comfortable with the wording of the letter. He believes he told his staff that changes are required and the letter is not to be sent.
>
> . . .
>
> Mr. Stuckless' evidence is that he did not sign the Letter, he did not personally send any Letters, and that he did not give instructions for either the Letter or E-mail to be sent. He said that [he] instructed the letter not to be sent. He further

> states that any Letters or E-mails sent [were] done by his staff without his express approval. . . .

[16] He referred to the evidence of Shelly Diana Hunt, the office manager for Advantage until January 6, 2006:

> Ms. Hunt said that Mr. Stuckless dictated a letter to another employee, Ms. Shannon Helm, in early December, 2005, and Ms. Helm provided the letter to Mr. Stuckless who made changes. Ms. Helm went home sick before the letter was finalized, and did not return to the office. Apparently she accepted employment elsewhere.
>
> Ms. Hunt was not in the office the day the letter was dictated, but became aware of the letter the following day from Ms. Helm, who advised that Mr. Stuckless dictated it. The letter was addressed to persons in Advantage's client database. After Ms. Helm went home sick, Ms. Hunt started folding the printed letters in preparation for mailing when Mr. Stuckless discovered a mistake. Mr. Stuckless asked Ms. Hunt to make certain changes to the draft letter. In particular, the letter read "There is a return on investment with 8.5% percent minimum investment of $2,000 for 90 days which is guaranteed by EBI." Ms. Hunt said Mr. Stuckless instructed her to change "guaranteed" to "backed" and to remove "guaranteed" to earlier in the sentence. Ms Hunt made the requested changes and reprinted the revised letter.
>
> . . .
>
> Ms. Hunt mailed two boxes of the Letters on her way home from work in the second week of December, 2005, and she saw the mail lady pick up other Letters from the office for mailing.
>
> . . .
>
> About ten Letters were returned due to incorrect address, and five people called to complain about the Letter.
>
> In her statement, Ms. Hunt said that mailing of the Letters was a priority in the office under Mr. Stuckless's direction.

[17] The Vice-Chair found that Mr. Stuckless was the directing mind of the corporate appellants. He did not find that Mr. Stuckless' specifically told Ms. Hunt not to send the letter but concluded as follows concerning Mr. Stuckless'

knowledge, intention and carelessness with respect to the letter and email being sent:

> . . . I accept [Mr. Stuckless'] evidence that although he caused the letters to be prepared he did not intentionally take any overt act to send the Letters or the E-Mail. I accept that he intended for the letters not to be sent until he was more comfortable with the wording and that he intended to sign the letters before they were sent.
>
> . . .
>
> Upon analysing the evidence . . . I accept that Mr. Stuckless did not send the E-mail nor know that it was being sent.
>
> . . .
>
> Unfortunately Mr. Stuckless set in motion the process that led to his staff sending the Letters and E-mails in question. His staff were under the impression that the Letter was a priority and that Mr. Stuckless wanted it sent out to all of Advantage's client list. I find that Mr. Stuckless was careless in this regard and did not take adequate steps to clearly communicate with his staff nor to ensure that the Letter was not sent without his express approval. There is no evidence on how the E-mail was sent, but I conclude this was also a result of Mr. Stuckless's poor communication with his staff.
>
> I find that Mr. Stuckless further failed to inform himself of the laws regulating the seeking of investments from the public of the type he contemplated. It is fortunate that Ms. Bradshaw contacted Mr. Stuckless before he found the time to revise the letter to his satisfaction and send it to Advantage's full client list.

[18] He found that Mr. Stuckless' actions as a director, president and CEO of EBI and Advantage did not meet the required standard of care:

> As the sole officer and director of EBI and Advantage Mr. Stuckless was the operating mind of each entity. He is educated in business and has a Masters in Business Administration. His earlier enquiry with the Commission and his registration with the Superintendent of Insurance demonstrates that he is aware that financial business is regulated in the province. I find that Mr. Stuckless failed to meet the standard expected of him in these circumstances.

> I conclude from the evidence that the fall of [2005] was a busy time for Mr. Stuckless, he was under financial pressure and was stressed. I conclude that Mr. Stuckless was careless in the conduct of the business of EBI and Advantage. In particular, he did not take the proper time to consider the implications of seeking financing from the clients of Advantage. Simply put, Mr. Stuckless was ignorant of the restrictions in the Act in this regard, and did not make any inquiries. As a director of EBI and Advantage it was his duty to inform himself of the laws of this Province with respect to offering investments to the public of the type contemplated. He failed to do so.
>
> Mr. Stuckless also had a duty to adequately supervise the staff of EBI and Advantage. I find he failed to do so. Although I accept that Mr. Stuckless did not intend for the Letters to be sent until he was satisfied with the wording and that he did not knowingly give instructions to send the Letters, his staff thought otherwise. His staff were under the impression that sending the Letter was a priority. This impression was the result of Mr. Stuckless' own actions and words, or lack thereof. He was the only person directing . . . Advantage's staff. Notwithstanding that Mr. Stuckless did not turn his mind to the applicable laws, it would have been obvious to him that sending such a letter to all of the clients of Advantage would have an impact upon the reputation of Advantage. This should have been an important matter and he should have taken more active steps to be clear with his instructions and to ensure that his instructions were followed.
>
> Mr. Stuckless did not act carefully and on an informed basis nor did he exhibit the diligence and skill that a reasonably prudent person would exercise in comparable circumstances. As a result the Letters and E-mail in question were sent to members of the public. Mr. Stuckless's carelessness resulted in the Act being violated, albeit unintentionally.

[19] The Vice-Chair then considered whether it was in the public interest to make permanent cease trade orders, impose administrative penalties or costs and made the orders referred to in paragraph 1 above.

Law

[20] The relevant provisions of the **Act** during the Fall 2005/ Winter 2006 were:

> 134 (1) Where the Commission considers it to be in the public interest, the Commission, after a hearing, may order
>
> . . .

(b) that

(i) all persons or companies,

(ii) the person or company or persons or companies named or described in the order, or

(iii) one or more classes of persons or companies,

cease trading in a specified security or in a class of security;

. . .

(2) Where the Commission considers that the length of time required to hold a hearing pursuant to subsection (1), other than pursuant to subclause (ii) or (iii) of clause (e) of subsection (1), could be prejudicial to the public interest, the Commission may make a temporary order without a hearing, to have effect for not longer than fifteen days after the date the temporary order is made.

(3) Where the Commission considers it necessary and in the public interest, the Commission may, without a hearing, make an order extending a temporary order until a hearing is held and a decision is rendered.

. . .

135 Where the Commission, after a hearing,

(a) determines that a person or company has contravened

(i) a provision of this Act or of the regulations, or

(ii) a decision, whether or not the decision has been made a rule or order of the Supreme Court of Nova Scotia; and

(b) considers it to be in the public interest to make the order,

the Commission may order the person to pay the Commission an administrative penalty of not more than one hundred thousand dollars.

> 135A The Commission may, after a hearing, order a person or company convicted of an offence or against whom an order has been made pursuant to Section 133, 134 or 135 to pay costs in connection with the investigation and prosecution of the offence or the investigation and conduct of the proceeding in respect of which the order was made pursuant to Section 133, 134 or 135, such costs not to exceed the costs prescribed in the regulations.

[21] The costs prescribed at the relevant time were $50 per hour for time spent by the Director, Deputy Director, lawyers, investigators or accountants employed by the Commission and engaged in the investigation, preparation and attendance at a hearing.

Issues

[22] Restated the issues to be determined on this appeal are:

1. Did the Vice-Chair err by ignoring, mischaracterizing or misunderstanding the evidence?

2. Did the Vice-Chair err in making the cease trade order he did against Mr. Stuckless?

3. Did the Vice-Chair err in ordering Mr. Stuckless to pay costs?

4. Was there a breach of natural justice because of bias giving rise to a remedy?

5. Did the sixteen month delay in rendering the Commission's decision amount to an abuse of process justifying a remedy?

Standard of Review

[23] I will first deal with the standard of review we are to apply with respect to issues 2 and 3.

[24] This Court in **Nova Scotia (Securities Commission) v. Schriver**, [2006] N.S.J. No. 1 considered the appropriate standard of review for an appeal from a decision of the Commission where the issue was whether the Commission had

jurisdiction to deal with an alleged breach of the rules of the Mutual Fund Dealer Association, and found the appropriate standard was reasonableness:

> [25] While the existence of a statutory right of appeal and the absence of privative protection suggest less deference, the specialized functions of the Commission and its extensive expertise strongly suggest that deference is due to the Commission's determination of the issue on appeal. In my view, these words of LeBel, J. in **Cartaway** are equally applicable here:
>
> > 45. . . . Decisions of the Commission are ... not protected by a privative clause. This militates against deference. Nevertheless, this Court has held that deference is due to matters falling squarely within the expertise of the Commission even where there is a right of appeal: *Pezim, supra*, at p. 591. This Court recognized in *Pezim*, at pp. 593-94, that the Commission has special expertise regarding securities matters. **The core of this expertise lies in interpreting and applying the provisions of the Act, and in determining what orders are in the public interest with respect to capital markets**. ...
>
> [26] In my view, the conclusion reached by Iacobucci, J. in **CETAMS** concerning standard of review also applies to this case:
>
> > 49 In this case, as in Pezim, it cannot be contested that the [Commission] is a specialized tribunal with a wide discretion to intervene in the public interest and that the protection of the public interest is a matter falling within the core of the [Commission's] expertise. Therefore, although there is no privative clause shielding the decisions of the [Commission] from review by the courts, that body's relative expertise in the regulation of the capital markets, the purpose of the Act as a whole and [the provision in issue] in particular, and the nature of the problem before the [Commission], all militate in favour of a high degree of curial deference. However, as there is a statutory right of appeal from the decision of the [Commission] to the courts, when this factor is considered with all the other factors, an intermediate standard of review is indicated. Accordingly, the standard of review in this case is one of reasonableness.
>
> [27] I conclude that the appropriate standard of review is reasonableness . . .
> (Emphasis added)

[25] The analysis in **Schriver**, supra, satisfies me that the applicable standard of review for issues 2 and 3 is reasonableness. Issue 2 involves our review of the Vice-Chair's decision under the public interest section of the **Act** wherein he determined that Mr. Stuckless's actions failed to meet the required standard of care for an officer and director in these circumstances. The Commission has a very broad discretion when it comes to making public interest orders; **Committee for the Equal Treatment of Asbestos Minority Shareholders v. Ontario (Securities Commission)**, [2001] 2 S.C.R. 132, ¶ 39 to 45. In addition, securities commissions are frequently called upon to consider the obligations of directors and officers in the securities law context; **Baldwin (Re)**, [1999] 18 B.C.S.C.W.S. 12, ¶ 10. The obligations of directors and officers are often required to be determined in other contexts as well, such as general corporate and tax. While this may at first suggest correctness as the applicable standard of review when reviewing a determination of the standard of care for directors and officers, the cases indicate the standard required for directors and officers is different in the securities law context; **Cartaway Resources Corp. (Re)**, (2000) 9 ASCS 3092, #9/32 at p. 29 (this point not reversed on appeal [2002] BCCA 461; [2004] 1 S.C.R. 672); **Standard Trustco Ltd. (Re)**, (1992), 15 OSCB 4322 at p. 26. I am satisfied the Commission has greater expertise in determining this issue in the securities law context, suggesting the standard of review is reasonableness. The third issue of costs is squarely within the Commission's expertise; **Pezim v. British Columbia (Superintendent of Brokers)**, [1994] S.C.J. No. 58 at ¶ 78.

[26] When we are considering whether the Vice-Chair's decision is reasonable, the Supreme Court of Canada in **Dunsmuir v. New Brunswick**, [2008] 1 S.C.R. 190 directs us to consider both his process of articulating the reasons for his decision and whether the outcome he reached is within a range of possible, acceptable outcomes which are defensible in respect of the facts and law:

> 47 . . . A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

Issue 1: Did the Vice-Chair err by ignoring, mischaracterizing or misunderstanding the evidence?

[27] The standard of review for alleged factual errors is as addressed in **Miller v. Royal Bank of Canada**, 2008 NSCA 118:

> [6] Before addressing each of these arguments it is important to recall this court's limited jurisdiction on appeal. Whether the members of this panel might have decided the case differently had they heard it in first instance, is not the test. Neither does an appeal provide an opportunity for a second trial. Great deference is paid to a trial judge's findings of fact, or inferences drawn from those facts. Such conclusions are immutable unless it can be shown that they are the result of palpable and overriding error. Assessing testimony, evaluating the evidence, making factual findings, and drawing inferences are all functions well within the jurisdiction of the trial judge who enjoys a significant advantage in seeing and hearing the witnesses first hand. Not every misapprehension of the evidence or every error of fact by the trial judge will justify appellate intervention. The error must not only be plainly seen, but be overriding and determinative. See for example **Housen v. Nikolaisen**, [2002] 2 S.C.R. 235; **Delgamuukw v. British Columbia**, [1997] 3 S.C.R. 1010; and **2703203 Manitoba Inc. V. Parks** (2007), 253 N.S.R. (2d) 85 (C.A.). . . .

[28] Mr. Stuckless argued that the Vice-Chair erred by ignoring, mischaracterizing or misunderstanding the evidence. As an example of this he suggested the Vice-Chair ignored his evidence that he did not intend for that particular draft of the letter to be sent. The decision indicates that the Vice-Chair did not ignore this evidence and in fact accepted it:

> . . . I accept that [Mr. Stuckless] intended for the letters not to be sent until he was more comfortable with the wording and that he intended to sign the letters before they were sent.

[29] Mr. Stuckless argued that the Vice-Chair ignored, mischaracterized or misunderstood the evidence of himself and Greg Lavern to the effect that Mr. Stuckless specifically instructed Ms. Hunt not to send the letters until he reviewed them and had an opportunity to sign them. The Vice-Chair accurately referred to this evidence and to the testimony of Ms. Hunt that the sending of the letters was a priority in the office under Mr. Stuckless' direction in the portion of his decision previously quoted in ¶ 17 and 18 above. He also referred to the testimony of Mr. Lavern in his decision:

> . . . Mr. Lavern heard Mr. Stuckless inform Ms. Hunt not to send the letters as he wanted to look at them and have an opportunity to revise if need be.

[30] The absence of a finding by the Vice-Chair that Mr. Stuckless specifically told Ms. Hunt not to send the letter does not indicate he ignored, mischaracterized or misunderstood the evidence. Rather it suggests he did not accept this evidence. The Vice-Chair's obligation as the trier of fact is to determine credibility, to hear all of the evidence and decide what parts he accepts and what parts he does not accept. He may accept some, none or part of any witness' testimony.

[31] There is nothing in the record that suggests the Vice-Chair made a palpable and overriding error in not accepting this evidence.

[32] Mr. Stuckless also argued that Ms. Hunt's evidence as to the number of letters that were sent and about the priority of their being sent should not have been accepted by the Vice-Chair. The Vice-Chair did not accept the testimony that 800 letters were sent, finding instead that a "handful" were sent. He did accept Ms. Hunt's testimony that she understood from Mr. Stuckless that it was a priority in the office that the letters be sent. Again this is an issue of credibility for the Vice-Chair to decide. We defer to his decision absent a palpable and overriding error of which there is none here.

[33] Mr. Stuckless has not satisfied me that the Vice-Chair ignored, mischaracterized or misunderstood the evidence.

Issue 2: Did the Vice-Chair err in making the cease trade order he did against Mr. Stuckless?

[34] In considering this issue it is important to remember that the Vice-Chair found Mr. Stuckless did not intend to send the letter until it was revised and that he did not take any overt steps to send it, but that he did not find that Mr. Stuckless specifically told Ms. Hunt not to send the letter until he reviewed it, concluding instead:

> Unfortunately Mr. Stuckless set in motion the process that led to his staff sending the Letters and E-mails in question. His staff were under the impression that the

> Letter was a priority and that Mr. Stuckless wanted it sent out to all of Advantage's client list. . . .

[35] It was admitted at the hearing before the Vice-Chair that Mr. Stuckless intended to send the letter when he was taking steps to put the letter together:

> **The Chair:** All right, so there's no issue with what Mr. Stuckless's intention might be when we'll say contemplating the letter and taking steps to putting the letter together.
>
> **Mr. Melanson:** Right.
>
> **The Chair:** Your submission is that what's important is not what he was intending to do . . . which he may have been doing and I accept, you know, without knowledge of the securities law.
>
> **Mr. Melanson:** Yes.
>
> **The Chair:** You're saying the question is, What did he do?
>
> **Mr. Melanson:** That's correct.

[36] It is also important to remember that we are only concerned here with the administrative public interest provisions of the **Act** which do not include the possibility of incarceration, not with the quasi-criminal section. Under the public interest section the Commission is given a broad mandate to determine and act in accordance with the public interest; **Schriver**, supra, ¶17.

[37] The Supreme Court of Canada commented on the breadth of the Ontario Securities Commission's mandate when considering its public interest jurisdiction under a similar section of the **Ontario Securities Act** in **Asbestos Minority Shareholders**, supra:

> 1. What s the nature and scope of s. 127 jurisdiction to intervene in the public interest?
>
> 39 Section 127(1) of the Act provides the OSC with the jurisdiction to intervene in activities related to the Ontario capital markets when it is in the public interest to do so. The legislature clearly intended that the OSC have a very wide discretion in such matters. The permissive language of s. 127(1) expresses

an intent to leave it for the OSC to determine whether and how to intervene in a particular case:

127. (1) The Commission may make one or more of the following orders if in its opinion it is in the public interest to make the order or orders . . . [Emphasis added]

40 The breadth of the OSC's discretion to act in the public interest is also evident in the range and potential seriousness of the sanctions it can impose under s. 127(1). Furthermore, pursuant to s. 127(2), the OSC has an unrestricted discretion to attach terms and conditions to any order made under s. 127(1):

(2) An order under this section may be subject to such terms and conditions as the Commission may impose.

41 However, the public interest jurisdiction of the OSC is not unlimited. Its precise nature and scope should be assessed by considering s. 127 in context. Two aspects of the public interest jurisdiction are of particular importance in this regard. First, it is important to keep in mind that the OSC's public interest jurisdiction is animated in part by both of the purposes of the Act described in s. 1.1, namely "to provide protection to investors from unfair, improper or fraudulent practices" and "to foster fair and efficient capital markets and confidence in capital markets". Therefore, in considering an order in the public interest, it is an error to focus only on the fair treatment of investors. The effect of an intervention in the public interest on capital market efficiencies and public confidence in the capital markets should also be considered.

42 Second, it is important to recognize that s. 127 is a regulatory provision. In this regard, I agree with Laskin J.A. that "[t]he purpose of the Commission's public interest jurisdiction is neither remedial nor punitive; it is protective and preventive, intended to be exercised to prevent likely future harm to Ontario's capital markets" (p. 272). This interpretation of s. 127 powers is consistent with the previous jurisprudence of the OSC in cases such as *Canadian Tire, supra*, aff'd (1987), 59 O.R. (2d) 79 (Div. Ct.); leave to appeal to C.A. denied (1987), 35 B.L.R. xx, in which it was held that no breach of the Act is required to trigger s. 127. It is also consistent with the objective of regulatory legislation in general. The focus of regulatory law is on the protection of societal interests, not punishment of an individual's moral faults: see *R. v. Wholesale Travel Group Inc.*, [1991] 3 S.C.R. 154, at p. 219.

43 Furthermore, the above interpretation is consistent with the scheme of enforcement in the Act. The enforcement techniques in the Act span a broad spectrum from purely regulatory or administrative sanctions to serious criminal

> penalties. The administrative sanctions are the most frequently used sanctions and are grouped together in s. 127 as "Orders in the public interest". Such orders are not punitive: *Re Albino* (1991), 14 O.S.C.B. 365. Rather, the purpose of an order under s. 127 is to restrain future conduct that is likely to be prejudicial to the public interest in fair and efficient capital markets. The role of the OSC under s. 127 is to protect the public interest by removing from the capital markets those whose past conduct is so abusive as to warrant apprehension of future conduct detrimental to the integrity of the capital markets: *Re Mithras Management Ltd.* (1990), 13 O.S.C.B. 1600. In contradistinction, it is for the courts to punish or remedy past conduct under ss. 122 and 128 of the Act respectively: see [page151] D. Johnston and K. Doyle Rockwell, *Canadian Securities Regulation* (2nd ed. 1998), at pp. 209-11.
>
> 44 More specifically, s. 122 makes it an offence to contravene the Act and, though the OSC's consent is required before a proceeding under s. 122 can commence, the provision authorizes the courts to impose fines and terms of imprisonment. Under s. 128, the OSC may apply to the Ontario Court (General Division) for a declaratory order. In making such an order, the courts may resort to a wide range of remedial powers detailed in that section, including an order for compensation or restitution which would be aimed at providing a remedy for harm suffered by private parties or individuals. In addition, further remedial powers are available under Part XXIII of the Act which deals with civil liability for misrepresentation and tipping and creates rights of action for rescission and damages.
>
> 45 In summary, pursuant to s. 127(1), the OSC has the jurisdiction and a broad discretion to intervene in Ontario capital markets if it is in the public interest to do so. However, the discretion to act in the public interest is not unlimited. In exercising its discretion, the OSC should consider the protection of investors and the efficiency of, and public confidence in, capital markets generally. In addition, s. 127(1) is a regulatory provision. The sanctions under the section are preventive in nature and prospective in orientation. Therefore, s. 127 cannot be used merely to remedy *Securities Act* misconduct alleged to have caused harm or damages to private parties or individuals.

[38] The breadth of the Commission's discretion in making public interest orders was also considered by the Supreme Court of Canada in **Pezim**, supra:

> 70 The breadth of the Commission's expertise and specialisation is reflected in the provisions of the Act. Section 4 of the Act identifies the Commission as being responsible for the administration of the Act. The Commission also has broad powers with respect to investigations, audits, hearings and orders. Section 144.2 provides that any decision of the Commission filed in the Registry of the Supreme

> Court of British Columbia has the force and effect of a decision of that court. Finally, pursuant to s. 153 of the Act, the Commission has the power to revoke or vary any of its decisions. Sections 14 and 144 are of particular importance as they reveal the breadth of the Commission's public interest mandate: (Sections quoted)
>
> . . .
>
> 71 In reading these powerful provisions, it is clear that it was the legislature's intention to give the Commission a very broad discretion to determine what is in the public's interest. To me, this is an additional basis for judicial deference.

[39] The Commission's discretion is so broad that public interest orders may be made without proof the **Act** has been breached, **CTC Dealer Holdings and Ontario Securities Commission** (1987), 59 O.R. (2d) 79, p. 95/96; **Standard Trustco**, supra, p. 24, **Re Mithras Management Ltd. et al** (1990), 13 OSCB 1600 (OSC) p. 1611, **Banks (Re)** (2003), 26 OSCB 3377, ¶ 89, (this point not changed on appeal 204 OAC 290). In making decisions under the public interest section the Commission may take into consideration the consequences of its decision on the individuals involved but its paramount concern is what is in the public interest. The honesty of a director or officer does not prevent public interest orders being made, **Soper v. Canada**, [1998] 1 F.C. 124 (CA), ¶ 41.

[40] As discussed in **Schriver**, supra, the Commission has more expertise than the court in determining what is in the public interest:

> 22 The Supreme Court of Canada has consistently recognized the considerable expertise of securities commissions: see, for example, **Pezim, supra**, paras. 60 and 70; **Committee for the Equal Treatment of Asbestos Minority Shareholders v. Ontario (Securities Commission) ("CETAMS")**, [2001] 2 S.C.R. 132 at para. 49; **Cartaway Resources Corp. (Re)**, [2004] 1 S.C.R. 672 at paras. 46-47. Given the broad policy context within which securities commissions operate, courts have been held to have less expertise relative to the commissions in determining what is in the public interest in the regulation of financial markets and in interpreting their constituent statutes: **Cartaway** at para. 46.

[41] Mr. Stuckless' argument was that the Vice-Chair's decision was unreasonable because of its outcome. He argued it was unreasonable for the Vice-Chair to find his actions did not meet the required standard of care when he did not intend to send either the letter as it was or the email and according to his evidence, specifically told Ms. Hunt not to send the letter. He argued he should

not be responsible if his employees acted contrary to his instructions. He argued perfection is not required.

[42] As indicated in ¶ 19 and 41 above, while the Vice-Chair recited the testimony of Mr. Stuckless and Mr. Lavern to the effect Mr. Stuckless specifically told Ms. Hunt not to send the letter, the Vice-Chair did not find this was contrary to his instructions.

[43] On the other hand, as Mr. Stuckless indicated, the Vice-Chair did accept that Mr. Stuckless did not intend to send the letter until it was revised and did not intend to send the emails. These findings did not preclude the Vice-Chair from concluding that Mr. Stuckless failed to meet the required standard. Even in quasi-criminal proceedings, a director or officer can be found guilty without intent or knowledge if s/he falls below the required standard of care; **R. v. Wholesale Travel Group Limited**, [1991] S.C.J. No. 79.

[44] This is equally so when the public interest jurisdiction of the Commission is engaged as here. In **Erikson v. Ontario (Securities Commission)**, 26 O.S.C.B. 1622, 169 OAC 80, the Ontario Superior Court of Justice (Divisional Court) states:

> 10 None of these ultimate conclusions require criminal knowledge or intent. The tribunal, to exercise its public interest jurisdiction after a hearing under s. 128, was not obliged to find criminal intent or knowledge. As the Commission pointed out in *Standard Trustco Ltd., Re* (1992), 15 O.S.C.B. 4322 (Ont. Securities Comm.), at 4359-60:
>
> > **State of Mind of the Respondents**
> >
> > While the Commission should consider the state of mind of the Respondents in deciding whether to exercise its public interest jurisdiction, it is not determinative. It is not necessary for us to find that the Respondents acted wilfully or deceitfully in order to exercise our public interest jurisdiction. In the case of Gordon Capital Corporation and Ontario Securities Commission (1990), 13 O.S.C.B. 2035, affirmed (1991), 14 O.S.C.B. 2713 (Ont. Div. Ct.) at p. 14, Craig J. stated:
> >
> > > The fact that Gordon may have acted without malevolent motive and inadvertently is not determinative of the right of the OSC to exercise its

> regulatory and discretionary powers to impose a sanction upon Gordon.
>
> Although that case involved a hearing into whether it was in the public interest to suspend, cancel, restrict or impose conditions on the registration of a registrant and not a section 128 hearing, we believe the same principle applies in the case at hand.
>
> . . .
>
> 14 So far as knowledge is concerned there comes a point where the unexplained participation of individuals in a vital capacity in a scheme which abuses the market supports an inference that some sanction is required to prevent them from doing so again, whatever their precise degree of knowledge.

[45] See also **Banks (Re)**, supra; **In the Matter of Donald A. Lyons**, [1988] 57 B.C.S.C. Weekly Summary, referred to in **Baldwin (Re)**, supra, at page 9.

[46] The Vice-Chair found that Mr. Stuckless' carelessly set in motion the process that led to the letters and emails being sent. He failed to adequately communicate with his staff to ensure that they understood his intention not to send the unrevised letter. This carelessness together with Mr. Stuckless' failure to inform himself of the relevant securities law with respect to soliciting public investment in EBI, in light of his earlier inquiries of Staff, was found by the Vice-Chair to fail to meet the required standard.

[47] The Vice-Chair reached this conclusion after carefully considering the relevant law:

> Upon my review of the relevant law I conclude that Mr. Stuckless, as a director, has a duty to act carefully and on an informed basis and to exhibit the diligence and skill that a reasonably prudent person would exercise in comparable circumstances. Directors are liable for failing to meet this standard if there is evidence that they were not diligent.
>
> In *Soper v Canada*, [1998] 1 F.C. 124 (C.A.), the court made the following observation regarding duties of directors in connection with the due diligence defence available under section 227.1 of the *Income Tax Act*:

> *It would be silly to pretend that the common law would stand still and permit directors to adhere to a standard of total passivity and irresponsibility...[T]he law today can scarcely be said to embrace the principle that the less a director does or knows or cares, the less likely it is that he or she will be held liable. Further to this point, the statutory standard of care will surely be interpreted and applied in a manner which encourages responsibility.*

In *Re Standard Trust Co. Ltd.* (1992), 15 O.S.C.B. 4322, the Ontario Securities Commission (the "**OSC**") held that officers and directors will be held to a higher standard for purposes of securities law than that found in corporate law generally.

In *Re Slightham*, August 2, 1996, the British Columbia Securities Commission stated as follows about a director's regulatory obligations:

> *In summary, though there may be a dearth of case law in Canada on the issue of the duty of care of directors, there is sufficient law from which we [can] derive certain basic principles. Those principles certainly take us beyond the standards established for English directors in* Re City Equitable Fire Ins. Co. *They impose on directors a duty to put in place adequate systems for management of the company, which would include the flow of information that is necessary to the directors and upon which they will base their decision. Should that information generate concerns or otherwise put the directors on inquiry, they must take the necessary steps to resolve those concerns or initiate the appropriate inquiry. In short, the directors, all of the directors, have a duty to ensure that the affairs and business of the company are being properly managed.*

The OSC also discussed the standard of care applicable to directors and officers in the *Banks* decision, *In the Matter of Jack Banks, a.k.a. Jacques Benquesus*, OSC decision dated April 23, 2003. In *Banks* the OSC referred to Justice Robertson's decision in *Soper* referring to the actual duty of care expected of inside directors, meaning those involved in the day to day management of the company and who influence the conduct of its business affairs:

> *For such individuals, it will be a challenge to argue convincingly that, despite their daily role in corporate management, they lacked business acumen to the extent that that factor should overtake the assumption that they did know, or ought to have known, of both remittance requirements and any problem in this regard. In short, inside directors will face a significant hurdle when arguing that*

> *the subjective element of the standard of care should predominate over its objective aspect.*

The OSC stated in their decision that the statement quoted above is even more applicable in the *Banks* case where the director is also a chairman of the board, the president and (with his wife) the controlling shareholders of the company with few employees.

The OSC also quoted the Alberta Securities Commission decision in *Re Cartaway Resources Corp.* to support the principle that more is required of a senior officer of the company as follows:

> *The CEO will normally be held to a higher standard than the board and the rest of management because the CEO bears direct responsibility for establishing the standards of behaviour and processes of the corporation. The CEO may delegate duties to the rest of management, but the CEO will always remain primarily responsible for overseeing the performance of such duties, especially in junior companies that generally lack documented procedures.*

Accordingly, the *Banks* decision supports the proposition that both an objective and subjective standard should be used in determining the directors or officers liability and whether they met the standard of care expected of them for securities law purposes.

Perhaps the leading case on the subject of directors' duties and liabilities is *Peoples Department Stores Inc.(Trustee of) v. Wise*. Here the Supreme Court of Canada held directors' duty of care should be tested against an objective standard, but provided that the standard is not perfection. The Court stated as follows:

> *Directors and officers will not be held to be in breach of the duty of care ... if they act prudently and on a reasonably informed basis. The decisions they make must be reasonable business decisions in light of all the circumstances about which the directors or officers knew or ought to have known. In determining whether directors have acted in a manner that breached the duty of care, it is worth repeating that perfection is not demanded. Courts are ill-suited and should be reluctant to second-guess the application of business expertise to the considerations that are involved in corporate decision making, but they are capable, on the facts of any case, of determining whether an appropriate degree of prudence and diligence was brought to bear in reaching what is*

> *claimed to be a reasonable business decision at the time it was made.*
>
> Because the standard of care is measured against the objective standard of what a reasonably prudent person would do in comparable circumstances, this requires directors to devote the necessary time and attention to bring their own judgment to bear on the matter and make an informed decision.
>
> Having to be diligent in discharging their duties does not mean that directors will be liable for every error. Rather, they must discharge their duties with the same diligence as a reasonably prudent person would use in comparable circumstances. Failure to meet the standard often stems from passivity and a failure to inquire. Directors have a responsibility to inquire into and oversee corporate activities.
>
> The objective test provides that directors not be allowed to escape responsibility on the grounds that their levels of skill, knowledge and ability fell below the norm, nor may directors escape responsibility on the basis of ignorance of matters of which they are reasonably expected to be informed. The subjective element imposes a higher standard on directors who have a particular education, knowledge, skill or experience relevant to the issues at hand

[48] The cases referred to by the Vice-Chair and others indicate that in the securities law context, directors and officers, especially CEO's, are responsible to ensure the proper management of their company. This includes consideration of their omissions as well as their actions; **Re Kusumoto**, 2007 ABASC 40, ¶ 114.

[49] It is also the responsibility of directors in the securities law context to ensure that the company complies with applicable legislation; **The Matter of Re Slightham**, [1996] 30 B.C.S.C. Weekly Summary 38, p 71; **Re Specialized Surgical Services Inc**, 2002 BCSECCOM 675, ¶ 83.

[50] Mr. Stuckless was the directing mind of both companies as president, inside director and CEO. Ms. Hunt considered him to be her boss. He was responsible to ensure both companies were properly managed and complied with the applicable securities law. The Vice-Chair found this included effective communication with staff to ensure compliance with the securities law, given the nature of the enterprise he had put in motion. He personally arranged for Advantage's staff to prepare the letter to be sent to persons on Advantage's client list. He personally communicated with Ms Hunt about the letter. The letter was to be signed by him. The Vice-Chair accepted Ms. Hunt's testimony that she understood getting the

letter out was a priority. The Vice-Chair found it was his responsibility to make sure his employees understood what was to be done with the letter. The Vice-Chair found that Mr. Stuckless did not exercise all reasonable care, that he did not take appropriate steps to make sure the breach of the **Act** did not occur, the test suggested by Goudge, J.A., in **R. v. Petro Canada** (2003), 63 O.R. (3d) 219 (C.A.).

[51] The test of reasonableness is not whether another person may have reached a different conclusion. I am satisfied that the decision reached by the Vice-Chair fell within the range of acceptable outcomes, defensible on the facts and law.

[52] After finding Mr. Stuckless failed to meet the required standard of care, the Vice-Chair considered whether an order should be issued in the public interest. As indicated previously he has a broad discretion in making this decision which involves a consideration of what will best achieve the purposes of the **Act** in protecting investors, maintaining investor confidence and fostering the process of capital formation. As indicated in ¶ 1 above, a temporary cease trade order remained in effect throughout the proceeding, until the final decision was rendered. While in his final decision the Vice-Chair purported to impose a retroactive twenty-four month cease trade order against Mr. Stuckless, in effect he did no more than confirm the existence of the temporary order. The cease trade order expired on the day his decision was rendered. I am not persuaded that this disposition is unreasonable in the circumstances.

Issue 3: Did the Vice-Chair err in ordering Mr. Stuckless to pay costs?

[53] Section 135A provides that costs may be ordered against a person against whom an order has been made pursuant to s.134, "such costs not to exceed the costs prescribed in the regulations." The prescribed costs at the time of the decision were $50 per hour for time spent by the Director, Deputy Director, lawyers, investigators and accountants involved in investigating, preparing for and attending a hearing. The Vice-Chair confirmed the $7,500 costs requested by Staff and ordered by him complied with this. Mr. Stuckless did not suggest that the costs ordered deviated from the prescribed costs.

[54] While the maximum amount of costs is prescribed, the Commission has discretion as to whether to order them to be paid. The Supreme Court in **Pezim**,

supra, ¶ 78, indicated we are to give considerable deference to a securities commission's decision on costs. Mr. Stuckless has not satisfied me that the Vice-Chair erred in his costs award.

Issue 4: Was there a breach of natural justice because of bias giving rise to a remedy?

[55] Mr. Stuckless argued for the first time on appeal that Ms. Bradshaw's investigation was biased:

> The question of how Ms. Bradshaw knew Perry Marchand was raised by Everett Roger Stuckless under cross examination on March 13, 2006. Ms. Bradshaw did not disclose to the Commission her personal relationship with Mr. Marchand or the fact that Mr. Marchand works for her Family's insurance business. Advantage ceased doing business with Mr. Marchand just weeks before because of customer's complaints. I strongly believe this decision impacted Ms. Bradshaw opinion and decision to proceed against Advantage, Electronic and Everett Roger Stuckless greatly. Ms. Bradshaw made it sound like Mr. Marchand had no relationship with Advantage now or in the past and was not able to comply (sic) the facts related to Mr. Marchand's employment with employment with Advantage Financial Group Inc. . . .

[56] In considering this issue we review the record and apply the relevant law to determine if Mr. Stuckless has established a breach of natural justice due to bias.

[57] Mr. Marchand was described as part of EBI's management team in EBI's Business Plan referred to in the letter (¶ 7). During Ms. Bradshaw's direct examination she indicated she knew Mr. Marchand, saw his name in the Business Plan during her investigation and contacted him. She testified that he told her he was not part of EBI's management team and wanted his name removed. During cross-examination by Mr. Stuckless she indicated that she knew Mr. Marchand because he worked in Antigonish and she was from there. If Mr. Stuckless wished to ask additional questions of Ms. Bradshaw about her relationship with Mr. Marchand he had the opportunity to do so then or later in the hearing when he was represented by counsel. Having failed to do so, it is too late to make unsupported allegations of investigative bias for the first time on appeal.

[58] In addition, there is nothing to suggest that if the allegations now made by Mr. Stuckless were proven to be true, that they would have affected the decision.

There is no suggestion Mr. Marchand was instrumental in the commencement of the investigation. There was no suggestion the Vice-Chair was biased. The Vice-Chair made his decision following a hearing where a number of admissions were made by the appellants, evidence was presented, cross-examination conducted and arguments made by all parties. There was no reference to Mr. Marchand in the decision because his involvement was not relevant to the decision that had to be made, specifically to the decision of whether Mr. Stuckless' actions had met the required standard of care and whether it was in the public interest to make a permanent cease trade order against him.

[59] Mr. Stuckless has not satisfied me that the Vice-Chair exhibited bias in this proceeding.

Issue 5: Did the sixteen month delay in rendering the Commission's decision amount to an abuse of process justifying a remedy?

[60] Mr. Stuckless also argued that he was entitled to a remedy because he waited sixteen months for the Vice-Chair's decision. He suggested this delay added to the detrimental effect the proceedings before the Commission had on him, which he described as having ruined him financially. While he was waiting for the decision, Mr. Stuckless continued to be bound by the temporary cease trade order imposed on him on March 8, 2006. Mr. Stuckless consented to the continuation of this cease trade order when he requested an adjournment on March 13, 2006 but was not consulted on its continuation thereafter.

[61] In considering this issue we review the record and apply the relevant law to determine if Mr. Stuckless has established an abuse of process resulting from undue delay.

[62] For a matter such as this, the decision should have been rendered much sooner. Sixteen months is an inordinately long time to wait for such a decision, especially when an order restricting one's activity is in place pending the decision. Despite Mr. Stuckless' protestations that the proceedings before the Commission including the cease trade order ruined him financially, the fact is his ability to earn an income was not restricted by the cease trade order. As he indicated to the Vice-Chair when he agreed to the continuation of the cease trade order on March 13,

2006, it did not affect his ability to earn an income because he was not registered to trade securities and did not want to.

[63] In light of this admission by Mr. Stuckless, I am satisfied the continuation of the cease trade order did not affect his rights substantively and therefore the long delay before the decision was rendered, while of concern, does not amount to an abuse of process requiring a remedy.

[64] **Civil Procedure Rule** 62.27 provides:

> Unless otherwise ordered by the Court in its discretion, no costs shall be ordered paid by or to any party to a tribunal appeal.

[65] Not having been persuaded that in the circumstances of this case this court should exercise its discretion to award costs, I would dismiss the appeal without costs.

M. J. Hamilton

Hamilton, J.A.

Concurred in:

Bateman, J.A. NB

Murphy, J.

IN THE MATTER OF THE *SECURITIES ACT*
R.S.N.S. 1989, CHAPTER 418, as amended

- and -

IN THE MATTER OF ELECTRONIC BENEFITS INC.,
EVERETT R. STUCKLESS, and
ADVANTAGE FINANCIAL GROUP INC.

(collectively the "**Respondents**")

REASONS FOR DECISION

Commission Panel:	Mr. R. Daren Baxter, Vice-Chairman
Representing the Respondents:	Mr. Richard Melanson
Counsel for Staff of the Commission:	Ms. Heidi Schedler
Date Heard:	March 13, July 28, and October 26, 2006
Place Heard:	Halifax, Nova Scotia
Date of Decision:	March 12, 2008