ALBERTA SECURITIES COMMISSION

DECISION

Citation: Genoray Advanced Technologies Ltd., Re, 2008 ABASC 52 Date: 20080125

Genoray Advanced Technologies Ltd., Richard George Kearl, Ross Vincent Bayne, Douglas Andrew Nesbitt and Wyatt Gordon McNabb

Panel:	Glenda A. Campbell, QC Beverley A. Brennan, FCA Karl M. Ewoniak, CA
Appearing:	Diane Volk for Commission Staff Robert C. Burgener for Ross Vincent Bayne Richard George Kearl for himself Douglas Andrew Nesbitt for himself
Dates of Hearing and Argument:	30 August, 21 and 27 September and 30 November 2007
Date of Decision:	25 January 2008

I. INTRODUCTION

[1] This is the conclusion of a hearing (the Hearing) before the Alberta Securities Commission (the Commission) pursuant to sections 198, 199 and 202 of the *Securities Act*, R.S.A. 2000, c. S-4 (the Act) to determine what, if any, sanction and costs the Commission should order against Genoray Advanced Technologies Ltd. (Genoray), Richard George Kearl (Kearl), Ross Vincent Bayne (Bayne), Douglas Andrew Nesbitt (Nesbitt) and Wyatt Gordon McNabb (McNabb) (collectively, the Respondents).

[2] In *Re Genoray Advanced Technologies Ltd.*, 2007 ABASC 551 (the Merits Decision), we determined that Genoray, Kearl, Bayne and McNabb had contravened various provisions of the Act and that all the Respondents had acted contrary to the public interest. We also made findings against Lambert Joseph Lavallee (Lavallee). The Alberta Court of Queen's Bench in September 2007 quashed our findings against Lavallee. Accordingly, we removed Lavallee from the style of cause of this decision and do not consider him here.

II. BACKGROUND

A. General

[3] This decision is to be read in conjunction with the Merits Decision, but it is helpful to review briefly the findings and underlying facts from the Merits Decision.

[4] We found that the Respondents were involved in various ways (outlined below) in activities that contravened Alberta securities laws or were contrary to the public interest, or both, in relation to one or more of Blue Lagoon Ventures, Inc. (Blue Lagoon), American Technology Exploration Corporation (AmTech) and Genoray.

[5] In July and August 2001, AmTech securities were illegally sold to approximately 70 Alberta residents for total proceeds of almost $680 000. Eventually, some of those investors received Blue Lagoon securities in lieu of their unsuccessful investments in AmTech. Between February and August 2002, over 180 Alberta investors purchased Genoray securities, for a total investment of approximately $3 300 000. The AmTech and Genoray securities subject to the allegations were previously issued – they came from Lavallee's and some of the other Respondents' personal holdings (sometimes registered and sometimes beneficial) rather than from AmTech's and Genoray's treasuries, respectively. The Blue Lagoon securities traded to investors were from Lavallee's and Kearl's personal holdings.

B. Kearl

[6] We found that Kearl traded in Blue Lagoon, AmTech and Genoray securities without being registered to do so and without applicable exemptions from the registration requirement of the Act. Those trades were, therefore, contrary to section 75(1)(a) of the Act.

[7] We also found that Kearl breached section 92(3)(c) of the Act by making misrepresentations to investors, with the intention of effecting a trade in the securities, that the subscription funds for AmTech securities and Genoray securities would be held "in trust" until a certain transaction was completed.

[8] Finally, we concluded that Kearl's conduct was contrary to the public interest.

C. Bayne

[9] We found that Bayne traded in Genoray securities without being registered to do so and without applicable exemptions from the registration requirement of the Act. Those trades were, therefore, contrary to section 75(1)(a) of the Act.

[10] We also found that Bayne contravened section 92(3)(b)(i) of the Act by making a prohibited representation, with the intention of effecting a trade in Genoray securities, that those securities would be listed on an exchange, when he had no permission from the Executive Director of the Commission to make such a representation.

[11] We further found that Bayne contravened section 92(3)(c) of the Act by making representations, with the intention of effecting a trade in Genoray securities, relating to the future listing of those securities on an exchange and relating to the funds from Genoray investors being held "in trust".

[12] Finally, we concluded that Bayne's conduct was contrary to the public interest.

D. Nesbitt

[13] Although we did not find that Nesbitt contravened specific provisions of the Act, we did find that his conduct was contrary to the public interest. Nesbitt was the president, the CEO and a director of Genoray, yet did not immediately correct false representations in documents and failed to ensure appropriate due diligence was conducted in valuing the Genoray Korea Imaging Technology in issue. We characterized Nesbitt's "conduct and failures as a serious and unacceptable abdication of responsibility by an officer and director" (Merits Decision at para. 272). We also found that his inattention to his responsibilities "led directly to investors losing their investments and to a loss of investor confidence in those responsible for the ongoing affairs of a public entity" (Merits Decision at para. 273).

E. McNabb

[14] We found that McNabb traded in Genoray securities without being registered to do so and without applicable exemptions from the registration requirement of the Act. Those trades were, therefore, contrary to section 75(1)(a) of the Act.

[15] We also found that McNabb gave a prohibited undertaking relating to the future price of Genoray securities, with the intention of effecting a trade in those securities. Therefore, McNabb breached section 92(3)(a) of the Act.

[16] We further found that McNabb contravened section 92(3)(c) of the Act by making a misrepresentation, with the intention of effecting a trade in Genoray securities, as to the future price of those securities.

[17] Finally, we concluded that McNabb's conduct was contrary to the public interest.

F. Genoray

[18] We found that Genoray contravened section 146 of the Act by failing to issue a news release disclosing a material change and to file a material change report within the required time.

[19] Finally, we concluded that Genoray's conduct was contrary to the public interest.

III. PARTIES' POSITIONS ON SANCTION

[20] Counsel for Staff and Bayne made written and oral submissions on the sanction issue. Bayne himself, Nesbitt and Kearl also made oral submissions. There were no written or oral submissions made on behalf of Genoray or McNabb.

[21] Staff asked that Genoray be denied the use of all Alberta securities laws exemptions for five years and that it be prohibited from trading in or purchasing securities or exchange contracts until all required financial statements are filed with the Commission and a final prospectus is filed and receipted. As noted, Genoray did not present a position.

[22] Staff sought ten-year market access bans against Kearl (bans against: trading in or purchasing securities and exchange contracts; use of all exemptions; and acting as a director or officer or both of any issuer) and a $150 000 administrative penalty. In response, Kearl submitted that $20 000 would be an appropriate administrative penalty. In support of his position, Kearl argued that the Hearing process was unfair to him (for reasons discussed later), that our findings were incorrect or incomplete, that he never intended to "defraud or fool anyone", and that Cochrane and Wolstenholme were required to pay only $10 000 and $20 000, respectively, under the terms of the Cochrane Settlement Agreement and the Wolstenholme Settlement Agreement. Kearl made no comments on Staff's proposed market access bans.

[23] Against Bayne, Staff sought a five-year ban on his trading in or purchasing securities or exchange contracts, along with a $15 000 administrative penalty. Bayne and his counsel stressed Bayne's "minimal" involvement, his own personal investment and loss in Genoray, and claims of unfairness during the Hearing (as with Kearl's similar argument, we discuss this later). Bayne admitted making a mistake, expressed his regret, and did not dispute our findings. Bayne's counsel submitted that, if the Commission decided that a trading ban was necessary, a period of two years (his written submission suggested one year) would be more appropriate, with an exception for Bayne to continue

his director and officer positions with his own company. Neither Bayne nor his counsel addressed the administrative penalty issue in oral submissions, but Bayne's counsel's written submission contended that a maximum of $1000 in administrative penalty and costs would be appropriate.

[24] Staff sought a director-and-officer ban of five years against Nesbitt. Nesbitt did not address the length of the proposed ban but did ask for (and Staff did not contest) an exception to any director-and-officer ban to allow him to remain involved with a private, family company.

[25] Against McNabb, Staff sought cease-trade and director-and-officer bans of five years, along with an administrative penalty of $75 000. As noted, McNabb did not appear and made no submissions on sanction.

[26] We address costs separately, as orders for costs are not sanctions.

IV. ANALYSIS

A. Fairness of Procedure

[27] As noted, both Kearl and Bayne suggested that the Hearing process was unfair to them because, for different reasons, they believed they were denied the opportunity to present as they wished their respective cases before this Panel. Both submitted that our decision might have been different had we received additional information and evidence from them. They consequently implied that their sanctions should be lower than those we would consider in the absence of these submissions.

[28] A hearing panel assesses what, if any, sanctions are in the public interest with a view to the purpose of sanctions – to protect and deter. This assessment is based on the evidence and argument presented to the panel and its findings of fact and law. Such an assessment cannot be made on the basis of merely hypothetical facts or arguments, or notional findings different from those actually made. That is, a panel cannot properly adjust its conclusions as to the public interest merely on the basis that a respondent contends that they might, had the hearing proceeded differently, have presented other evidence or argument. Similarly, arguments about the fairness of the hearing cannot properly form a basis for a panel to alter its findings on the public interest.

1. Kearl

(a) Kearl's Position

[29] Kearl argued during the sanction phase of the Hearing that he had been unable to attend the merits phase of the Hearing because of certain health problems and that he could not afford to have counsel present on his behalf. He stated:

> The very first time that I made this request [for a health-related adjournment], the first day of the initial hearing in Edmonton, it was my understanding that I would have the opportunity to question witnesses at a later date. That was my understanding. That

> was, I believe, expressed by [Staff counsel], when I made that request to have it postponed due to health concerns, and so I would like to point out that I was not given that opportunity.
>
> If I had been able to attend, I'm sure that things would have looked very different, and I would be in a much more favourable position today.

[30] Kearl suggested that we would have rejected more of the allegations had he been able to present his evidence and perspective.

(b) Discussion

[31] First, we do not view Kearl's inability to retain counsel or attend the Hearing as mitigating factors on the issue of sanction. Second, we do not believe that Kearl was denied the opportunity to present his case.

[32] Kearl appeared, without counsel, on 25 April 2006 – the first day of the Hearing. During a short late-morning break that day, Kearl apparently told counsel for Staff that he was feeling unwell and would not be returning that day. He returned on the third day of the Hearing, informing us of supposed heart difficulties and requesting an adjournment. Although Kearl provided us with a copy of X-rays and what we were told was an "ECG" graphic, no other medical information was provided. Staff objected to the requested adjournment, stating:

> . . . we only have another day and probably a day and a half of evidence before we have a break for some months until September. So there doesn't, nothing prevents Mr. Kearl from coming back before the panel in September and saying, I was not there. I didn't get a chance to cross-examine these witnesses, and I would like to do that. I may not agree to it at that time, but he can make those submissions at that time if he wishes.

[33] The Panel decided not to adjourn the Hearing, but made it clear to Kearl what his alternatives were:

> . . . We will proceed with Mr. Gallucci, direct and cross-examination today. . . . If you feel you have other questions that have not been adequately canvassed by other counsel, you can make application in the fall for the return of Mr. Gallucci. So we leave it up to you as to whether or not you wish to stay during the proceedings, if you find it too upsetting. You may not, but you can always get copies of the transcript.

[34] Kearl left and the Hearing continued in his absence.

[35] On 13 September 2006, the Panel heard and rejected Kearl's application for an adjournment of the Hearing, which was scheduled to resume two weeks later. At that time, he described certain medical problems and stated that he was "not in sufficient health . . . to attend the hearing until this pressing medical matter is resolved". He also cited a conflict between one of the Hearing dates and the date of one of his medical tests, as well as the adverse effect he believed the stress of the Hearing had on his condition.

[36] We advised Kearl that, given the lack of medical evidence, we would not grant his adjournment application. However, we did modify the Hearing schedule to enable Kearl to attend his medical test. We also pointed out to Kearl that he could bring another adjournment application before the Hearing resumed. He did not do so.

[37] In the circumstances, we perceive no unfairness in the conduct of the proceeding against Kearl. Kearl had adequate prior notice of Staff's allegations against him and the Hearing dates. He also received full disclosure of Staff's case in advance of the Hearing. Kearl knew the particulars of Staff's case against him and was given the opportunity to make full answer and defence to the allegations against him. In the event that the Panel's conduct of the Hearing could be a mitigating factor for sanction – which we conclude it is not – we see nothing in the conduct of the Hearing that would mitigate the otherwise appropriate public interest sanction we determine against Kearl on the basis of the findings in the Merits Decision.

2. Bayne

[38] Bayne and his counsel made several submissions along a theme that was similar to that presented by Kearl.

[39] First, they claimed that the "length of the hearing and the total volume of material made it impossible for Mr. Bayne to follow the process". Second, Bayne "was unable to afford to retain legal counsel for the duration of the hearing". Third, Bayne claimed that Staff did not tell him which Hearing days "would involve the aspect of his matters", so that he could attend those days, hear the evidence against him and cross-examine witnesses. Fourth, "the hearing did not call Mr. Bayne to put questions to him to clarify any role that he was alleged to have played". Consequently, he contended, all of the evidence on which our decision was based "has gone in without cross examination or rebuttal from Mr. Bayne".

[40] Counsel for Staff countered each of these arguments. Bayne, through his counsel at the time, received disclosure of Staff's case well before the Hearing. Staff also noted that they provided Bayne in advance with an approximate schedule of witnesses. Finally, Staff submitted that neither Staff nor the Panel had an obligation to call Bayne as a witness during the Hearing; he could have chosen to testify or call any witnesses that he wished at the close of Staff's case.

[41] We agree with Staff on each of those points. Further, we note that Bayne and his counsel were present and did participate in early portions of the merits phase of the Hearing. Neither was present for the first day of the merits phase of the Hearing, but Bayne was present on the second day. At that time he declined to ask any questions of Staff's witness Touchings.

[42] The last day that Bayne and his counsel attended the Hearing was on 27 April 2006 (the third of eight days of the merit phase of the Hearing). At that time, the September 2006 continuation dates for the Hearing were set. Further, Bayne's counsel stated after the cross-examination of Staff's investigator (Gallucci) that "there will be no questions from our perspective of Mr. Gallucci". After the Hearing resumed in September, Bayne did not appear and was, apparently, no longer represented by counsel. Staff told the Panel at that time that, because Bayne was apparently no longer represented by counsel, Staff had sent out material to both the former counsel and to Bayne himself to ensure that Bayne received it. At that point (mid-September 2006), Staff also received a "Demand for Particulars" from Bayne. Staff told us they informed Bayne that his counsel had received full disclosure and that Bayne could apply to the Panel for further disclosure if he wished. We did not hear again from Bayne or his counsel until the sanction phase of the Hearing.

[43] We are satisfied that Bayne had full knowledge and awareness of the Hearing and its significance. He (and his counsel) did attend portions of the Hearing. He chose not to attend the duration of the merits phase of the Hearing, chose not to continue to retain counsel, and chose not to give evidence before the Panel. In our view, Bayne's position that his straitened financial circumstances caused him not to present a defence do not justify lower (or no) sanctions.

[44] We conclude that there is no evidence of any unfairness to Bayne in this proceeding. Bayne knew of the allegations against him and the nature of Staff's case. He had the opportunity to receive and did receive a fair hearing. Therefore, in the event that the Panel's conduct of the proceedings could be a mitigating factor for sanction – which we conclude it is not – we see no element of unfairness present to mitigate any sanction against Bayne that is otherwise appropriate in the circumstances of his case.

B. The Law Relating to Sanction

[45] This Commission has stated many times the basic principles and specific factors that we consider when determining what, if any, sanctions are appropriate in particular circumstances.

1. General Principles

[46] The underlying principles we consider in assessing the appropriate sanction are ensuring public confidence in the capital market and protecting the public (see, for example: *Brosseau v. Alberta Securities Commission*, [1989] 1 S.C.R. 301 at para. 32; *British Columbia Securities Commission v. Branch*, [1995] 2 S.C.R. 3 at para. 59; and *Committee for the Equal Treatment of Asbestos Minority Shareholders v. Ontario (Securities Commission)*, 2001 SCC 37 at paras. 41-43, 45 – all as referred to by this Commission in *Re Ironside*, 2007 ABASC 824 at paras. 58-60). This Commission continued in *Ironside* with the following (at para. 61):

> Consistent with these interpretations of the Commission's role in exercising its public interest powers under sections 198 and 199 of the Act, our focus is always the protection of the public and the integrity of the Alberta capital market. In contemplating an appropriate sanction in particular circumstances, the Commission assesses what measures are required to protect investors and the efficiency of our capital market by preventing the recurrence of the misconduct at issue. Thus, the sanction orders we make are not intended to punish respondents for their past conduct, but rather serve to deter the particular respondents (specific deterrence) and others (general deterrence) from repeating the misconduct. The appropriateness of considering these general sanctioning principles is well established in [*Brosseau, Branch* and *Asbestos*]. . . and in, for example, *Re Cartaway Resources Corp.*, 2004 SCC 26 at paras. 52-62; and *Re Podorieszach*, 2004 ABASC 567 at para. 17.

[47] Therefore, the public interest is our animus, with our decisions being preventative and protective, not punitive or remedial. We also consider the factors of deterrence – specific and general – as they further our preventative and protective public interest mandate.

[48] We find it particularly appropriate to invoke deterrence in the form of an administrative penalty in cases of misrepresentations, illegal trades and the abuse of exemptions as an effective means of maintaining investor confidence in our capital market.

2. Specific Factors

[49] This Commission also referred in *Ironside* (and other decisions) to specific factors that may be relevant in particular cases (for example, see *Ironside* at para. 62). These non-exhaustive factors set out in *Re Lamoureux*, [2002] A.S.C.D. No. 125 at para. 11 (affirmed on other grounds 2002 ABCA 253) include (as set out in *Ironside*):

- the respondent's experience and activity in the capital market;
- the seriousness of the misconduct and the respondent's recognition or acknowledgement of that misconduct;
- the harm suffered as a result of the respondent's misconduct – by particular investors and by the capital market in general;
- the benefit received by the respondent;
- the risk to investors and the capital market were the respondent to continue to operate in the capital market;
- the need to deter the respondent and other like-minded market participants in the particular circumstances [specific and general deterrence, respectively];
- any mitigating factors; and
- previous decisions made in similar circumstances.

[50] This Commission also noted in *Ironside* the importance of considering "the extent of the respondent's role in the misconduct, whether the misconduct was a single transgression or a series of recurring acts, and whether the respondent's preferred occupation increases the likelihood of future misconduct" (at para. 63).

C. Application of Sanction Factors to Each Respondent

1. Kearl

(a) Particular Circumstances

[51] Kearl chose not to testify. He therefore did not take the opportunity provided him to explain or contradict the assertions of other witnesses or make any submissions on the evidence presented to the Panel. We accept Kearl's statement during the sanction phase of the Hearing that he is married with three dependent children. We also acknowledge that he complained of ill health during the merits phase of the Hearing.

[52] Kearl did attempt, during the sanction phase of the Hearing, to give evidence. This was in the form of unsworn statements on certain facts going to the substance of our findings on the allegations against him. For example, he claimed that many of his "problems" stemmed from his trying "to make investors whole", such as "by giving away shares in Blue Lagoon". That may well have been so, but does not change our finding that Kearl traded the Blue Lagoon securities – and the related AmTech securities – contrary to section 75 of the Act.

[53] Relating to our finding that he misrepresented to investors that the AmTech and Genoray funds would be held in trust, Kearl said that he never made any statements he did not believe to be true. He claimed that Wolstenholme knew the funds were not – and were not intended to be – held in trust. Kearl stated that the lack of trust conditions found in any of the documents meant that no trust arrangement had been established. He implied that the lack of trust conditions also meant he could not have intended to convey to investors that the funds were being held in trust. Contrary to Kearl's submissions, we heard evidence from investors in AmTech and Genoray who believed that writing "in trust" on their cheques made payable to Kearl meant that he would hold their funds "in trust" and keep them safe. We reiterate our findings in our Merits Decision (at para. 182):

> . . . we find that Kearl's actions (accepting investors' cheques made payable to him in trust and failing to correct investors' misapprehension as to the terms under which they paid their investment funds) allowed investors to make investment decisions based on an untrue understanding of the AmTech [and Genoray (see para. 219)] share purchase transaction. Kearl had ample opportunity to return cheques to investors and advise them that their funds were not held in trust. He also could have told Wolstenholme his payment instructions were incorrect. Kearl did neither. We find his inaction particularly egregious when we consider that Kearl himself benefited personally from investors' misapprehension.

[54] As a general rule we give little, if any, weight to unsworn statements relating to facts in issue because there is no opportunity to test their reliability through cross-examination. Moreover, in this case, we also found that some of the statements made by Kearl in the sanction phase of the Hearing directly related to certain matters in issue. Kearl's statements were contrary to the evidence we accepted during the merits phase of the Hearing. In the result, Kearl's submissions during the sanction phase do not alter our findings nor provide us with any reliable mitigating factors to consider.

(b) Sanctioning Considerations

[55] It is clear that our findings against Kearl were serious. Illegal trading and making misrepresentations are serious threats to the integrity and efficiency of the capital market and, therefore, to specific investors and to the public interest in general. We also found that Kearl did not hold investor funds in trust, even though investor cheques were made payable to him in trust. As we noted in the Merits Decision, we found Kearl's use of investors' funds for his personal expenses to be particularly egregious. Also alarming were Kearl's submissions to us during the sanction phase of the Hearing that indicated to us that Kearl was well aware of the concept of "in trust" used in commercial settings, yet did not hold those funds in trust as was expected by investors. Moreover, Kearl's contraventions involved three separate companies and persisted over a lengthy period.

[56] A respondent's past conduct – including conduct that resulted in sanctions and the fact of those sanctions – is relevant in determining an appropriate sanction here. This Commission sanctioned Kearl in 1982 for participating in an illegal distribution, although the panel there stated that it thought Kearl acted in good faith and believed in the issuer. That panel ordered Kearl to cease trading in securities of the subject company until it had complied with Alberta securities laws and also denied Kearl the use of the exemptions under Alberta securities laws for two months. Regarding Kearl's contention that he did not know his acts were contrary to securities laws, the panel stated:

> . . . we have to take the position that the knowledge of the law is imputed to all people who propose to carry out activities as he did; and would strongly urge Mr. Kearl to avail himself of the services of legal advise [sic] and financial advice or other Professional [sic] advice as required from time to time in carrying out his activities.

[57] It was clear that Kearl was given a warning by the Commission (albeit some 25 years ago). Kearl, to his peril, failed to heed that advice, at least for the matters before us and for activities discussed below.

[58] In 2006, Kearl and this Commission entered a settlement agreement (*Re Kearl*, 2006 ABASC 1755) (the 2006 Kearl Settlement) in which Kearl admitted to illegal trades and distributions in securities of another issuer, misrepresentations and prohibited representations, and conduct contrary to the public interest. Kearl agreed to a cease trade order for five years, along with payments of $15 000 towards settlement and $3000

towards investigation costs. Kearl claimed before us that there were "blatant errors" in that agreement but that he settled anyway. In our view Kearl's argument is specious.

[59] We note that the activities covered under the 2006 Kearl Settlement occurred after the activities for which we are sanctioning here. Therefore, the consequences stemming from the 2006 Kearl Settlement could not have affected Kearl's behaviour in the matters before us (that is, subsequent consequences obviously do not deter past behaviours). However, the facts in the 2006 Kearl Settlement do establish that Kearl was actively raising funds in the capital market without complying with Alberta securities laws. He clearly should have been – and, we find, he was – well aware of securities laws requirements as a result of his prior sanction in 1982. His past conduct, coupled with our recent findings of transgressions, demonstrates a pattern of complete disregard for compliance with Alberta securities laws.

[60] Kearl argued that sanctions comparable to the consequences agreed to by Wolstenholme (market access restrictions for five years and a $20 000 payment) would be equally appropriate for him. We disagree. First, Kearl and Wolstenholme did not have comparable roles in the illegal activities. Second, because settlement agreements are negotiated, they are generally inappropriate comparators for sanctions to be imposed on respondents after a full hearing has been completed – see, for example, *Re Stewart*, 2005 ABASC 91 at para. 25. Therefore the Wolstenholme Settlement Agreement was of little assistance to us in our determination of the sanction to impose on Kearl.

[61] We also considered the authorities provided by Staff but concluded they provided little guidance as the facts in those were not comparable.

[62] We discern no mitigating factors in these circumstances.

[63] Kearl's misconduct was deliberate, not inadvertent. Kearl is a repeat offender who ignored this Commission's advice to seek professional assistance in any future dealings in the capital market. By failing to comply with the registration requirements of the Act, Kearl deprived investors of their fundamental rights under Alberta securities laws to receive the advice of a registrant. Had these investors been given advice from a registrant, they may not have invested funds in these ventures. If they had invested, after receiving such advice, it would have been their fully-informed decision to take the particular risk. Kearl's actions did not allow these investors to make a fully-informed decision. In the result Alberta investors apparently lost their investment funds and our capital market's reputation was sullied. Kearl showed no remorse for the harm his misconduct caused to the AmTech and Genoray investors, but rather appeared self-absorbed in his own predicament.

[64] Given his past history and obviously frequent participation in fund-raising activities in the Alberta capital market, we are of the view that Kearl is unlikely to change

his behaviour. We perceive him to be a danger to Alberta investors and a threat to investor confidence in our capital market if we do not intervene with protective orders.

[65] We believe it is important to send a strong message both of specific deterrence to Kearl and of general deterrence to others who may consider similar behaviour in the future. Therefore the sanction we impose must communicate to all market participants that similar contraventions of Alberta securities laws will be dealt with severely and attract direct personal consequences.

[66] In our view, it is in the public interest to ban Kearl from participating in the capital market (trading in and purchasing securities, using exemptions, and acting as a director or officer of any issuer) for a period of 15 years. We do not believe that there is any public interest reason to prohibit Kearl from trading in or purchasing securities in his own personal account through a registrant, or in accounts for registered retirement savings plans (RRSPs) or registered education savings plans (RESPs) as defined in the Income Tax Act (Canada), for himself, his spouse or dependent children. We also discern no harm to the public from allowing Kearl to act as a director or officer of any issuers that are owned and remain owned by Kearl or his immediate family. We are also of the view that it is in the public interest to order that Kearl pay an administrative penalty of $125 000.

2. Bayne

(a) Particular Circumstances

[67] Our findings against Bayne all related to Genoray. Bayne's counsel stressed that Bayne's involvement was "minimal", that he was not an officer, director or employee of Genoray, and that he "got caught up in the excitement of an investment and a corporation that had all of the earmarks of looking like a good investment" (including investing himself). His counsel also noted that Bayne acknowledged our findings as "correct" and admitted "he made the mistake of talking to third parties" and knows now that "[y]ou can't even talk about the fact that you invested and thought that you had a good deal happening". Finally, Bayne's counsel argued that Bayne received no compensation and the amount of funds he raised was an insignificant part of the total funds raised for Genoray. Therefore, he contended, the harm to the capital market was small (although significant to the particular investor).

[68] Bayne also made submissions during the sanction phase of the Hearing. He told us that he is a married businessman with two young children. He apologized for his non-attendance at portions of the Hearing, asserting that financial constraints prevented him from attending the entire Hearing. After making some statements about the history of his involvement in Genoray and his trades in securities, he acknowledged that he was "deeply sorry" for his participation. He claimed that he acted out of ignorance. He also told us that he received no compensation from Genoray and that he himself believed in Genoray's prospects, having invested his own money in Genoray. Bayne noted that his reputation suffered in addition to his loss of the funds he had invested in Genoray.

(b) Sanctioning Considerations

[69] In selling securities to investor RO, Bayne made misrepresentations that he knew or ought to have known were not true. Illegal trades, misrepresentations and prohibited representations are all serious contraventions of Alberta securities laws and bring into disrepute the reputation of Alberta's capital market.

[70] We take into account that this Commission has not previously sanctioned Bayne. As for his experience in the capital market, we know only that he is a businessman. Neither he nor his counsel elaborated on Bayne's experience. Bayne's own submissions, however, indicated that he was perhaps more involved in Genoray than he or his counsel wished to acknowledge. In attempting to set out a mitigating factor, Bayne stated:

> When I first discovered that there was problems [sic] with the project, I was part of the group that raised additional dollars to send [KL] over to Korea to investigate what was going on. We sent him over there on two different occasions. I funded those trips, to get to the bottom of trying to figure out what was going on, and try to mitigate any possible loss. And at that point, we were still optimistic that there were solutions to be found and that there was some great misunderstandings [sic] that happened between the organization, Genoray, in Canada and the two Genoray companies in South Korea. As soon as I had the opportunity, I did everything that I could to try to solve the problem and then try to do what I could, as well, to cooperate to try to protect the investors from losing their funds in their entirety.

[71] We do accept, to a point, that Bayne's enthusiasm led him to become involved beyond his level of comfort and competence and that he may have tried with others to investigate the status of the Genoray Korea Imaging Technology in the hope of salvaging their investment. However, that does not excuse his illegal acts in selling Genoray securities without registration and in making misrepresentations and prohibited representations in the first instance. We also note that Bayne did not see fit to present us with evidence of his Genoray dealings during the merits phase of the Hearing through his counsel, in a written statement, in an agreed statement of facts or by testifying. Even had he attended only for a brief period to call a witness or to testify on his own behalf, we would have had his evidence before us and been able to conclude what, if any, of such evidence to accept.

[72] In all the circumstances, including Bayne's apparent remorse and understanding of the seriousness of his misconduct, we conclude that a short market access ban and a noticeable administrative penalty would serve the public interest. These sanctions provide the appropriate level of specific and general deterrence by communicating to both Bayne and other market participants that this type of misconduct in the Alberta capital market will attract sanction.

[73] In our view, it is in the public interest to prohibit Bayne from trading in or purchasing securities and using the exemptions under Alberta securities laws for three

years. We do not believe there is any public interest reason to prohibit Bayne from trading in or purchasing securities in his own personal account through a registrant, or in accounts for RRSPs or RESPs for himself, his spouse or dependent children. We are also of the view that it is in the public interest to order that Bayne pay an administrative penalty of $8000.

3. Nesbitt

(a) Particular Circumstances

[74] During the sanction phase of the Hearing, Nesbitt focused on the costs that Staff were seeking against him. Regarding our findings against him, he said only "the findings against me are essentially bad management, and I did not benefit from sales or involvement". Nesbitt did not acknowledge the seriousness of our findings against him or express any remorse for or appreciation of his grave abdication of his responsibilities as president, CEO and a director of Genoray. Nesbitt requested that, if we were to order a director-and-officer ban against him, he be permitted to continue to act as a director and officer of a family company.

(b) Sanctioning Considerations

[75] While Nesbitt's conduct did not contravene any specific provision of Alberta securities laws, we concluded in the Merits Decision that Nesbitt's conduct was completely inappropriate and unacceptable for an officer and director – his conduct was contrary to the public interest. He failed to fulfil his responsibilities to Genoray and to its securityholders. That failure to carry out properly his position as a director and officer burdens him with some of the responsibility for the losses occasioned to investors by Genoray's failure to obtain the Genoray Korea Imaging Technology. Nesbitt also failed to immediately correct false information in the public domain about Genoray Inc.'s rights to the Genoray Korea Imaging Technology, information that we believe would have been an important consideration in investors' decisions to purchase the Genoray shares. He allowed himself to act as a mere figurehead of a director and officer when, as an experienced businessman with an MBA degree, he should have known and fulfilled the requirements and demands of those positions.

[76] Nesbitt confessed to us during the merits phase of the Hearing that he was unaware of "what was going on" at Genoray and asserted during the sanction phase, as noted, that he was only guilty of "bad management". Nesbitt's failure to recognize that he had completely abdicated his responsibilities as a director and senior officer of Genoray, in our view, brings into question his fitness to act as a director or officer of any issuer. His lax attitude suggests to us his future likely approach towards such positions. Therefore, we conclude that Nesbitt presents a serious threat to investors and the Alberta capital market if permitted to act in such capacities without restriction.

[77] In our view, it is essential to craft a sanction that will protect the public from Nesbitt's complete disregard of such duties in the future. We also believe it crucial to communicate the message to the capital market that we expect directors and officers to

take the obligations of their positions seriously and that a failure to do so could well result in a prohibition from acting as a director or officer of an issuer.

[78] We conclude that it is in the public interest to order that Nesbitt be prohibited from acting as a director or officer of any issuer for ten years. We do not believe that there is any public interest reason to prohibit Nesbitt from acting as a director or officer of any issuers which are owned and continue to be owned by Nesbitt or his immediate family.

4. McNabb

(a) Particular Circumstances

[79] McNabb did not appear at either phase of the Hearing. He is a businessman with previous ties to Nesbitt. McNabb was a director and officer of Genoray and was involved in preparing Genoray's financial statements. Apart from his Genoray experience, we have no information as to his experience in the capital market.

(b) Sanctioning Considerations

[80] As we discussed concerning the other Respondents, we regard McNabb's misconduct as seriously contravening of Alberta securities laws. As set out in the Merits Decision, McNabb sold some of his Genoray securities to a number of investors. Those sales were illegal trades and were also made to investors using prohibited undertakings and misrepresentations as to the future price of those securities. McNabb apparently made a profit of $70 000 from the sale of his Genoray securities.

[81] McNabb seemingly neither recognizes the seriousness of his conduct nor expresses remorse for it. His refusal to participate in any way at any stage of this Hearing indicates to us at best indifference and at worst disdain for our proceedings. Although the Commission has not previously sanctioned McNabb, there are also no mitigating factors that would affect the appropriate sanction.

[82] Individual investors suffered financial losses as a consequence of McNabb's conduct. McNabb ignored the rules associated with selling securities in the exempt market. Such abuses by market participants jeopardize our entire exemption system, thus harming both investors and honest market participants. Investor confidence in the integrity of the Alberta capital market is also shaken when individuals sell securities illegally.

[83] We have no reason to believe that McNabb would comply with Alberta securities laws without our intervention. We therefore perceive that McNabb would pose a significant risk to investors and the capital market were he allowed to continue operating in the capital market without some sanction.

[84] Moreover, we want to send the message that those who engage in illegal trades and make misrepresentations in order to effect sales of securities will not be allowed to

profit from their illegal activity. In this way, the sanction we impose will serve as a meaningful deterrent to market participants, including McNabb.

[85] Considering all of the above, we conclude that the appropriate sanction against McNabb requires a considerable measure of specific and general deterrence to protect the public from him and others like him in the future.

[86] In our view, it is in the public interest to prohibit McNabb from trading in or purchasing securities, using the exemptions under Alberta securities laws and acting as a director or officer of any issuer – all for five years. We do not believe that there is any public interest reason to prohibit McNabb from trading in or purchasing securities in his own personal account through a registrant, or in accounts for RRSPs or RESPs for himself, his spouse or dependent children. Nor do we see a need to prohibit McNabb from acting as a director or officer of any issuers that are owned and continue to be owned by McNabb or his immediate family. We are also of the view that it is in the public interest to order that McNabb pay an administrative penalty of $75 000.

5. Genoray

(a) Particular Circumstances

[87] As noted, Genoray was not represented at the sanction phase of this Hearing. It appears that Genoray is without assets and is dormant.

(b) Sanctioning Considerations

[88] In our Merits Decision we found that Genoray contravened section 146 of the Act and engaged in conduct contrary to the public interest by failing to disclose in the required time as a material change in its business that Genoray (through its subsidiary) would not acquire the rights to the Genoray Korea Imaging Technology.

[89] Disclosure is a cornerstone principle of our securities regulatory regime. Timely disclosure, such as disclosure of material changes, provides fairness for all investors by ensuring equal access to the same information on which investment decisions are made. It also enhances investor protection by giving investors access to information necessary for making informed investment decisions. Finally, timely disclosure promotes a fair and efficient capital market by ensuring transparency about securities and their value. Failures by public companies to make timely disclosure of material changes damage investor confidence in the fairness of the market for all investors.

[90] We have no doubt that investors were persuaded to purchase Genoray securities primarily because they were told and believed that Genoray Inc. had acquired the rights to the Genoray Korea Imaging Technology. As became evident in September 2002, such was not the case. Investor funds in Genoray have been lost and Alberta investors have been directly harmed. Genoray's contravention has also damaged the reputation of the Alberta capital market.

[91] We conclude that it is in the public interest for trading in and purchasing of Genoray's securities to cease and to deny Genoray the use of any exemptions under Alberta securities laws. Both sanctions will remain in place until Genoray has received a receipt for a final prospectus. This will ensure that potential investors are able to access full, true and plain disclosure about Genoray and its securities before making any investment decisions. We also considered whether Genoray should be prohibited from trading in or purchasing securities until it has filed all required financial statements with the Commission. In our view that additional sanction is not necessary to protect the public interest as any financial statement deficiency will presumably be addressed during the clearance of a prospectus providing full, true and plain disclosure about Genoray.

D. Orders

[92] We are of the view that it is in the public interest to make the following orders.

1. Kearl

[93] Under sections 198(1)(b) and (c) of the Act, Kearl must cease trading in or purchasing securities, and all of the exemptions contained in Alberta securities laws do not apply to Kearl, for a period of 15 years from the date of this decision, except that this order does not preclude him from trading in or purchasing securities through a registrant (who has first been provided with a copy of this decision) in: (i) Kearl's own personal accounts; or (ii) RRSP or RESP accounts for the benefit of one or more of himself, his spouse or his dependent children.

[94] Under sections 198(1)(d) and (e) of the Act, Kearl must resign all positions he holds as a director or officer of any issuer, and he is prohibited from becoming or acting as a director or officer (or both) of any issuer for a period of 15 years, except that this order shall not preclude him from acting as a director or officer (or both) of any issuer the securities of which are owned by or continue to be owned by only Kearl and members of his immediate family.

[95] Under section 199 of the Act, Kearl must pay an administrative penalty in the amount of $125 000.

2. Bayne

[96] Under sections 198(1)(b) and (c) of the Act, Bayne must cease trading in or purchasing securities, and all of the exemptions contained in Alberta securities laws do not apply to Bayne, for a period of three years from the date of this decision, except that this order does not preclude him from trading in or purchasing securities through a registrant (who has first been provided with a copy of this decision) in: (i) Bayne's own personal accounts; or (ii) RRSP or RESP accounts for the benefit of one or more of himself, his spouse or his dependent children.

[97] Under section 199 of the Act, Bayne must pay an administrative penalty in the amount of $8000.

3. Nesbitt

[98] Under sections 198(1)(d) and (e) of the Act, Nesbitt must resign all positions he holds as a director or officer of any issuer, and he is prohibited from becoming or acting as a director or officer (or both) of any issuer for a period of ten years, except that this order shall not preclude him from acting as a director or officer (or both) of any issuer the securities of which are owned by or continue to be owned by only Nesbitt and members of his immediate family.

4. McNabb

[99] Under sections 198(1)(b) and (c) of the Act, McNabb must cease trading in or purchasing securities, and all of the exemptions contained in Alberta securities laws do not apply to McNabb, for a period of five years from the date of this decision, except that this order does not preclude him from trading in or purchasing securities through a registrant (who has first been provided with a copy of this decision) in: (i) McNabb's own personal accounts; or (ii) RRSP or RESP accounts for the benefit of one or more of himself, his spouse or his dependent children.

[100] Under sections 198(1)(d) and (e) of the Act, McNabb must resign all positions he holds as a director or officer of any issuer, and he is prohibited from becoming or acting as a director or officer (or both) of any issuer for a period of five years, except that this order shall not preclude him from acting as a director or officer (or both) of any issuer the securities of which are owned by or continue to be owned by only McNabb and members of his immediate family.

[101] Under section 199 of the Act, McNabb must pay an administrative penalty in the amount of $75 000.

5. Genoray

[102] Under sections 198(1)(a) and (c) of the Act, all trading in or purchasing cease in respect of any security of Genoray and none of the exemptions contained in Alberta securities laws apply to Genoray. The sanctions under both sections 198(1) (a) and (c) of the Act will remain in effect until such time, if any, as Genoray has filed a prospectus with the Commission and the Executive Director of the Commission has issued a receipt therefor.

V. COSTS

A. Staff's Claimed Costs

[103] Staff claimed approximately $165 000 in costs for the investigation and Hearing of this matter, as shown in a two-page bill of costs dated 27 September 2007 and submitted to the Panel (the Bill of Costs). We have removed approximately $15 500 from Staff's original total in the Bill of Costs as we agree with Staff that the principle from *Re Atlas Communications Inc.*, 2007 ABASC 749 at para. 49 applies here, so that costs to hold the

Hearing in Edmonton should not be included in the Bill of Costs. The new total claimed is, therefore, approximately $149 000.

[104] All of the Respondents had the opportunity to comment on the Bill of Costs. Genoray and McNabb made no such comments as they were not represented and did not appear before us. The Respondents who made submissions raised no concerns with the structure of the Bill of Costs, although they disputed the ultimate amounts sought by Staff against each of them. We reviewed the Bill of Costs and, in our view, not all of the costs sought by Staff are recoverable against the Respondents.

B. Potentially Recoverable Costs

[105] When we consider the total potentially recoverable costs allowable, we take into account that not all of Staff's allegations were sustained (although most were) and that our findings against Lavallee were quashed.

[106] Many investigations and hearings require examination of matters that ultimately have no connection to allegations sustained against one or more respondents. Costs incurred for unrelated or unproved matters are not recoverable against a particular respondent. We do know that some 750 hours were spent by Staff investigators and some 335 hours by legal counsel during the investigation stage and that legal counsel expended 71.5 hours during the Hearing. According to Staff, time and allowable expenses up to the first day of the Hearing were claimed under section 191.1 (*Costs re investigations*) of the Alberta Securities Commission Rules (General) (the ASC Rules). After that point, time and allowable expenses were claimed under section 191.2 (*Costs re hearing*) of the ASC Rules. Overall, we viewed the time and expenses claimed as reasonable and allowable under sections 191.1 and 191.2 of the ASC Rules and had no reason to question the validity of the time spent or expenses claimed by Staff in the Bill of Costs. However, Staff provided no detailed breakdown of the time spent by investigators and legal counsel throughout the progress of this matter. Accordingly, we were unable to determine which claimed investigation and Hearing costs related to which allegations including which, if any, related to allegations not proved. We also do not know how much of the claimed costs related to matters involving parties who had settled prior to the Hearing (Wolstenholme and Cochrane).

[107] Given our uncertainty as to the amount of costs attributable to matters not pursued or sustained, we conclude that it is appropriate to decrease the total potentially recoverable costs. Staff apparently recognized this uncertainty as well and advised that they were seeking to recover approximately 80% of their total claimed costs, or $120 000. To ensure that the Respondents are given the benefit of the uncertainty, we apply a further discount and reduce the total potentially recoverable costs from $149 000 to $100 000.

[108] A greater portion of the investigation and Hearing costs were clearly attributable to Lavallee. For example, Staff investigators presented at the Hearing a number of

detailed and complex charts and diagrams tracing the ownership of certain securities. Those labour-intensive visual aids, which obviously required both investigation and Hearing time, related primarily to Lavallee, although linkages to Kearl, Bayne and McNabb were also included. Staff agreed that the amount of time and expense that would have been attributable to Lavallee ought to be removed from the total potentially recoverable costs against the Respondents. Staff submitted that the appropriate amount to attribute to Lavallee would be 30% of the costs claimed by them.

[109] We had the benefit of hearing the evidence adduced as it related to all the Respondents, as well as Lavallee. With the benefit of that experience, we determine it is fair and reasonable to allocate 45% of the potentially recoverable costs to the investigation and Hearing efforts against Lavallee. Obviously we make no award of costs against Lavallee, but the result is that 55% or $55 000 of costs are recoverable from Genoray, Kearl, Bayne, Nesbitt and McNabb.

C. Allocation of Recoverable Costs ($55 000)

1. Kearl

[110] We conclude that Kearl is responsible for approximately 55% of the recoverable costs in light of his role in this matter. Kearl pointed out that a number of Staff's allegations against him were not sustained. While we recognized that point, we also considered that several allegations were sustained against Kearl. Those involved hearing from a number of witnesses and reviewing many documents, including financial information. Kearl was the only Respondent who was involved in securities law contraventions relating to three issuers – AmTech, Blue Lagoon and Genoray.

[111] Kearl told us that he could not settle the matter because Staff made "very unreasonable demands". However, Kearl did not aid in the efficiency of the Hearing by agreeing to facts or otherwise acting in a way that might have contributed to the efficient resolution of this matter. In our view, Kearl's conduct did not promote the efficiency of the Hearing and did not justify a corresponding discount in the costs otherwise appropriately awarded against him.

[112] We reject Kearl's contention that $5000 is an appropriate amount of costs for him to pay. He appeared to arrive at that amount largely by comparison to the costs allocated in the Cochrane Settlement Agreement ($3000) and the Wolstenholme Settlement Agreement ($5000). As discussed, different considerations are present for settlement agreements and for contested hearings.

[113] Accordingly, we order under section 202 of the Act that Kearl pay $30 000 towards the costs of the investigation and Hearing in this matter.

2. Bayne

[114] We conclude that Bayne is responsible for approximately 5% of the recoverable costs as a result of his role in this matter.

[115] While Bayne's written and oral submissions were not entirely consistent, he contended that the amount should be lower than Staff's claimed $8400 and perhaps as low as $1000 for costs and an administrative penalty combined. Bayne claimed that he did not hinder the efficiency of the Hearing because he did not even attend most of it. As we noted with Kearl, such lack of participation does hamper efficiency. Because Bayne was not there, the Hearing could not proceed as efficiently as if he had been properly involved. Even with the minimal involvement he had, Bayne could have agreed to some facts, made some admissions or participated in narrowing the issues relating to the allegations against him. Instead, he largely ignored the process. In our view, Bayne's conduct did not promote the efficiency of the Hearing and did not justify a corresponding discount in the costs otherwise appropriately awarded against him.

[116] Accordingly, we order under section 202 of the Act that Bayne pay $3000 towards the costs of the investigation and Hearing in this matter.

3. Nesbitt

[117] We conclude that Nesbitt is responsible for approximately 20% of the recoverable costs as a result of his role in this matter.

[118] As Nesbitt emphasized, an appropriate consideration was that we sustained only one allegation against him – acting contrary to the public interest. However, in reaching that finding against Nesbitt, much evidence had to be garnered and adduced to establish responsibility for Genoray's failure to obtain the Genoray Korea Imaging Technology, the lack of corporate governance and management that existed at Genoray and Nesbitt's role.

[119] Nesbitt also argued that he was cooperative, improved the Hearing's efficiency, and was not even part of the investigation or the Hearing of the Blue Lagoon and AmTech allegations. Staff responded that the latter matters were recognized in Staff's proposed $21 600 costs award. We believe we have appropriately accounted for those matters in our additional reduction of costs. As we said in relation to the other Respondents, Nesbitt could have done more to further the efficiency of the process.

[120] Accordingly, we order under section 202 of the Act that Nesbitt pay $10 000 towards the costs of the investigation and Hearing in this matter.

4. McNabb

[121] We conclude that approximately 15% of the recoverable costs is an appropriate amount for McNabb to pay as a result of his role in this matter.

[122] As noted, McNabb did not appear and made no submissions. Staff claimed $18 000 costs against him. As with the other Respondents, McNabb did nothing to further the efficiency of the Hearing and, as with Kearl and Bayne, hampered that

efficiency by his absence and failure to admit or acknowledge even those matters that should have been obvious and non-controversial points.

[123] Accordingly, we order under section 202 of the Act that McNabb pay $8000 towards the costs of the investigation and Hearing in this matter.

5. Genoray

[124] Staff did not ask for costs against Genoray. While we would attribute approximately 5% of the recoverable costs to Genoray, we agree with Staff that an order for costs against Genoray would not be appropriate in the circumstances.

[125] Accordingly, we make no order under section 202 of the Act as against Genoray.

VI. PROCEEDING CONCLUDED

[126] This proceeding is now concluded.

25 January 2008

For the Commission:

"original signed by"
Glenda A. Campbell, QC

"original signed by"
Beverley A. Brennan, FCA

"original signed by"
Karl M. Ewoniak, CA