

## Corporate Securities

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### Ontario Court Significantly Reduces Donnini's Suspension for Insider Trading

The Ontario Superior Court of Justice (Divisional Court) has reduced the 15-year suspension for insider trading imposed by the Ontario Securities Commission (OSC) on Piergiorgio Donnini, the former head liability and institutional trader at Yorkton Securities Inc., to four years. (For further background, please refer to our Update of September 30, 2002.)

Although the Court did not overturn the OSC's conclusion that Donnini had breached insider trading laws, and showed deference to the OSC's expertise in reaching that decision, the Court's tone was critical of the sanction imposed by the OSC, stating that the penalty "does not stand up to a somewhat probing analysis." The Court also disapproved of statements by the OSC panel indicating that the severity of the penalty was in part due to Donnini's failure to acknowledge the impropriety of his conduct (having failed to settle the matter with the Commission), emphasizing that "Donnini was entitled to defend himself." The ruling may begin to address concerns in the marketplace following the OSC Donnini decision about the severity of penalties imposed and the particularly severe consequences of choosing to contest (rather than settle) OSC charges.

### The Court Ruling

#### Insider Trading

The Court dismissed Donnini's appeal of the OSC's determination that he had breached insider trading laws, noting that "there was clear and cogent evidence" to support the OSC's findings that Donnini was guilty of insider trading, notwithstanding that he may not have profited from these trades. The Court made several references to the expertise of the OSC panel, and cited a number of examples where the Court considered such expertise to have been manifested in the panel's decision, indicating a high degree of deference to the OSC's factual and legal conclusions.

#### Penalties

The Court indicated that the penalties imposed on Donnini warranted careful examination for a number of reasons:

First, one member of the OSC panel disagreed with the finding of insider trading, finding instead that Donnini had acted contrary to the public interest (suggesting to the Court that the panel member considered Donnini's conduct to be "less reprehensible" than those guilty of insider trading).

Second, the Court focused on a comment made by the Chairman of the OSC panel following the liability hearing but before the penalty hearing, in which the Chairman stated (speaking about Donnini): "He has been unrepentant and unwilling to acknowledge that his conduct was not becoming a registrant and contrary to the public interest." The Court emphasized, in notably strong words, that "Any person charged with a crime in the criminal courts or an offence before a tribunal, which has the power to impose penalties, is entitled to deny his guilt and call upon the prosecution to establish it. ... An accused not pleading guilty is not and should not be subject to increased penalties simply because he has chosen to defend himself."

Third, the Court considered the disparity with the penalty imposed by the OSC (a two year suspension and a voluntary payment of \$1,000,000) in its earlier settlement with Scott Paterson, the former Chairman and CEO of

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Yorkton and, the Court noted, a person who played a very significant (and, with respect to Donnini, supervisory) role in the entire matter. The Court declared, based on its assessment that the disparity between the sanctions was “unreasonable”, that the OSC “has generated a message, through its actions, that the OSC will agree to lesser sanctions when an accused person has the ‘good sense’ to admit liability and make a substantial ‘voluntary payment’.” The Court noted that while the OSC is not strictly required to follow its own precedents, the penalties imposed “should generally adhere to some recognizable pattern”.

The Court concluded that the 15-year suspension for Donnini imposed by the OSC would have had the effect of a lifetime ban. Taking the foregoing factors into consideration (and reviewing precedents), the Court reduced the suspension to four years.

## Costs

The Court accepted Donnini’s objections that he was denied the opportunity to review any meaningful back-up material and cross-examine the participants in respect of the OSC’s requirement that he pay approximately \$186,000 in costs. The Court concluded that the OSC had erred in denying Donnini the opportunity to review and challenge the basis for the cost assessment, stating, “An order for costs is simply a fine by another name, unless it is a true reflection of the actual and reasonable costs” recoverable under the *Securities Act* (Ontario). The matter of costs was referred back to the OSC to conduct a hearing to review the extent and amount of the costs imposed. The Court also directed that Donnini’s counsel have access to all dockets, journal and diary entries and other back-up materials in support of the Commission’s claim for costs and to make available for cross-examination all of the individuals whose time is reflected in the Commission’s costs.

## Conclusion

The decision, especially since it comes in an era of increased public scrutiny of capital market participants, expanding regulatory enforcement powers and growing regulatory budgets and enforcement objectives, is significant in that:

- it indicates that parties contesting charges made against them should not be exposed to additional penalties because they have chosen to defend themselves;

- sanctions imposed will be reviewed in the context of precedents to ensure that they are consistent with sentencing patterns; and
- while there is generally a high degree of deference to the OSC, courts may have greater willingness to intervene on questions of sanction, specifically to impose their own view of a “punishment that fits the crime”.

Please contact any member of the Goodmans Securities team to discuss the Donnini ruling and its implications.

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