ALBERTA SECURITIES COMMISSION

DECISION

Citation: Re Stewart, 2019 ABASC 47 **Date: 20190305**

Robert Carl Stewart and Tamarisk Energy Corp.

Panel:	Tom Cotter Kate Chisholm, QC Karen Kim, CA, CFA
Representation:	Heather Currie for Commission Staff Andrea Sam for the Respondents
Hearing:	August 23, 2018
Decision:	March 5, 2019

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I. INTRODUCTION

[1] In a notice of hearing dated November 29, 2017 (**NOH**), Alberta Securities Commission (**ASC**) staff (**Staff**) alleged that Robert Carl Stewart (**Stewart**) and Tamarisk Energy Corp. (**Tamarisk**) (collectively, the **Respondents**) contravened the *Securities Act* (Alberta) (**Act**) in connection with the sale of Tamarisk common shares and warrants to residents of Alberta and British Columbia (**B.C.**) since November 29, 2011.

[2] Staff and the Respondents entered into an Agreed Statement of Facts and Admissions and Joint Recommendation as to Sanctions dated June 28, 2018 (the **Statement**). The Statement set out admissions by the Respondents, including admissions to some of the contraventions of the Act alleged by Staff in the NOH. As a result of this misconduct and the "Additional Circumstances Relevant to Sanctions" set out in the Statement, Staff and the Respondents jointly proposed that we make certain orders.

[3] At the hearing on August 23, 2018 (**Hearing**), the Statement was entered into evidence and we heard the oral submissions of Staff and counsel for Stewart, who also responded to our questions. No one appeared on behalf of Tamarisk, although it is a party to the Statement.

[4] Our decision and reasons follow. In summary, we find that the Respondents contravened the Act as admitted in the Statement. We therefore consider it to be in the public interest to order sanctions against Stewart which generally correspond to those jointly proposed in the Statement: market-access bans, plus an administrative penalty of $20,000. We also make an $8,000 cost-recovery order against Stewart, as jointly proposed.

[5] In addition, while the parties jointly proposed that no sanctions be issued against Tamarisk, we are imposing a cease-trade order against that entity.

II. FACTUAL BACKGROUND

[6] Relevant facts were set out in the Statement, and summarized by Staff at the Hearing. We accept them as accurate and summarize them here.

[7] Stewart is a resident of Edmonton. He was 75 years old as of the date of the Statement. At all times material to the allegations in the NOH, he was both a director and an officer of Tamarisk, as well as its sole guiding mind.

[8] Tamarisk was a start-up oil and gas company with interests in the United States (**US**). It was incorporated in Alberta on August 12, 2010, and had its head office in Edmonton.

[9] From 2010 through 2013, Stewart raised capital for Tamarisk through the issuance of class "A" common shares (sold at an average price of $0.05 per share) (the **Shares**) and warrants which entitled the holder to purchase Shares (the **Warrants**). During the period relevant to the Statement, $750,000 was raised from sales of Tamarisk Shares and Warrants to approximately 60 investors resident in Alberta and B.C. $300,000 of that sum was paid to Stewart as compensation. The balance was used for the purchase of an oil and gas working interest from a party located in the US, pursuant to a purchase and sale agreement Tamarisk entered into in 2013 (the **Agreement**). Tamarisk failed to pay the balance of the purchase price when due and thus forfeited its initial

payment. As a result, Tamarisk was "rendered effectively insolvent with no further business prospects".

[10] In 2015, Tamarisk was struck from the Alberta corporate registry for failure to file its annual returns. Shortly afterwards, Stewart sent a letter to Tamarisk's investors to advise them that the company had been struck, and that it had been inactive since 2013. He also advised that he was resigning his position as Tamarisk's president.

[11] While Tamarisk has not been legally wound-up or dissolved, Stewart advised it has no operations and no assets, and liabilities of $50,000. The Statement indicated that as of its date, investors in Tamarisk had not received any dividends on their investments.

III. ALLEGATIONS AND BREACHES ADMITTED

[12] In the NOH, Staff alleged that the Respondents breached: (i) s. 110(1) of the Act by illegally distributing the Shares and Warrants; (ii) s. 221.1(2) by providing misleading information to the ASC in Tamarisk's filed reports of exempt distribution; and (iii) s. 92(3)(b)(i) by making prohibited representations.

[13] In the Statement, the Respondents admitted to breaching s. 110(1) and s. 92(3)(b)(i). The s. 221.1(2) allegation was not mentioned in the Statement, but Staff advised us at the Hearing that they were no longer pursuing that allegation.

IV. ANALYSIS

A. Illegal Distributions

[14] Section 110(1) of the Act prohibits the distribution of securities unless a preliminary prospectus and a prospectus have been filed and receipted by the Executive Director of the ASC (**Prospectus Requirement** and **Executive Director**, respectively). In circumstances where certain investment risks are reduced (usually due to the nature of the security or the sophistication or relationship of the investor to the securities issuer), an exemption from the Prospectus Requirement is available. Such exemptions are set out in National Instrument 45-106 *Prospectus Exemptions* (**NI 45-106**) and its predecessors. A person or company engaging in a distribution of securities in reliance on an exemption must be able to prove that the exemption was available and applicable in the circumstances, and that there was strict compliance with the terms of the exemption.

[15] In this case, the Respondents admitted – and we find – that the Shares and Warrants were both "securities" as defined in the Act at s. 1(ggg). Shares are specifically included within the definition of "security" at s. 1(ggg)(v) and, as admitted by the Respondents, each Share fell within the definition at s. 1(ggg)(i) as a "document, instrument or writing commonly known as a security". Each Warrant fell within the definition at s. 1(ggg)(iv) as a "document constituting evidence of an option, subscription or other interest in or to a security".

[16] In addition, the Respondents admitted – and we find – that: (a) each sale of a Share or a Warrant was a "trade" as defined in the Act at s. 1(jjj) (a "sale or disposition of a security for valuable consideration", i.e., cash), and (b) each trade of a Share or a Warrant was a "distribution" as defined at s. 1(p)(i) (a "trade in securities of an issuer that have not been previously issued").

[17] According to the Statement, no preliminary or final prospectus for the issuance of the Shares and Warrants was filed with or receipted by the Executive Director during the relevant period. Even though the Statement indicates that the Respondents purported to rely on exemptions set out in NI 45-106 – in particular, the "accredited investor" exemption under s. 2.3 of that instrument and the "close connection" exemption under s. 2.5 – the Respondents admitted that they failed to qualify purchasers for the exemptions claimed, and no exemption was available for purchases of Shares and Warrants in the approximate amount of $450,000. As noted by the ASC in *Re Cloutier*, 2014 ABASC 2 (at para. 308), every trade within a distribution must qualify for an exemption – that some may have qualified does not cure a deficiency affecting the rest.

[18] We are therefore satisfied that, consistent with the admissions in the Statement, the Respondents contravened s. 110(1) of the Act.

B. Prohibited Representations

[19] Section 92(3)(b)(i) of the Act states:

> (3) Subject to the regulations, no person or company, in relation to a trade in a security or derivative, shall
>
> . . .
>
> (b) except with the written permission of the Executive Director, make any representation
>
> (i) that the security will be listed on any exchange or quoted on any quotation and trade reporting system, unless the exchange or quotation and trade reporting system has granted approval to the listing or quoting of the security, conditional or otherwise, or has consented to, or indicated that it does not object to, the representation . . .

[20] In its decision in *Re Limelight Entertainment Inc.*, 2007 ABASC 710 (at para. 128), an ASC panel explained that, "[t]his prohibition is directed at unauthorized representations that might induce investment in securities based on the prospect, frequently baseless, of a liquid market in which to trade them and possibly an increased value"; see also *Re Smylski*, 2010 ABASC 320 (at para. 84).

[21] In the Statement, the Respondents admitted that they told investors in both written and verbal communications that Tamarisk would "go public" – specifically, that Stewart said the company would soon be listed on the "Toronto Stock Exchange Venture" (the **Listing Representations**). The Respondents also admitted that during the relevant period:

(a) they did not have the Executive Director's written permission to make the Listing Representations;

(b) they did not have approval – conditional or otherwise – from any exchange to list Tamarisk's securities;

(c) they did not have consent from any exchange to make the Listing Representations; and

(d) they did not have an indication from any exchange that it did not object to the making of the Listing Representations.

[22] In light of these admissions, we are satisfied that all of the elements which constitute a breach of s. 92(3)(b)(i) of the Act have been proved. Accordingly, we find that, as admitted, the Respondents contravened s. 92(3)(b)(i).

C. Summary of Conclusion on the Merits of the Allegations

[23] Staff's allegations that the Respondents contravened ss. 110(1) and 92(3)(b)(i) of the Act were admitted by the Respondents. We have found both admitted allegations to have been proved.

V. APPROPRIATE ORDERS

A. Sanction Orders

1. General Principles and Factors

[24] We now turn to the issue of what, if any, sanctions should be ordered in the public interest against the Respondents under sections 198 and 199 of the Act. All sanction orders are aimed toward the objectives of protecting investors, protecting the Alberta capital market, and prevention of future harm; they are not meant to be punitive or remedial: *Committee for the Equal Treatment of Asbestos Minority Shareholders v. Ontario (Securities Commission)*, 2001 SCC 37 (at paras. 41-43, 45). Their primary goal is deterrence, both specific and general – specific deterrence from future misconduct by the respondents being sanctioned, and general deterrence from similar future misconduct which may be contemplated by others: *Re Cartaway Resources Corp.*, 2004 SCC 26 (at paras. 52-53, 55-56, 60-61).

[25] We are mindful of the Alberta Court of Appeal's (**Court of Appeal**) caution that the two must be balanced to ensure that the sanctions ordered are "proportionate and reasonable" in the circumstances, as "general deterrence does not warrant imposing a crushing or unfit sanction on any individual": *Walton v. Alberta (Securities Commission)*, 2014 ABCA 273 (at paras. 154, 156). Monetary sanctions in particular must be "proportionate to the offence, and fit and proper for the individual offender" (*Walton* at para. 156).

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

[27] To arrive at a sanction order which is "proportionate and reasonable" in the circumstances, ASC hearing panels typically consider the results in comparable prior decisions and settlements: *Re Homerun International Inc.*, 2016 ABASC 95 (at para. 16). Since the facts of each case differ, however, appropriate orders vary from case to case. We therefore carefully consider the specific facts and the Respondents' characteristics in deciding on the measures that will best achieve deterrence and limit future risk.

[28] In this regard, we are guided by a non-exhaustive set of factors which are intended to assist us in determining the sanctions that are appropriate given the circumstances and the capital market misconduct at issue. Those factors were set out in *Homerun* (at para. 20):

- the seriousness of the respondent's misconduct;
- the respondent's pertinent characteristics and history;
- any benefit sought or obtained by the respondent; and
- any mitigating or aggravating considerations.

[29] The scope and application of each factor were discussed at length in *Homerun* (at paras. 22-46), and we adopt the panel's reasoning therein.

2. Joint Submission on Sanction

[30] As mentioned, Staff and the Respondents have submitted a joint proposal on sanction in the Statement. The proposed orders would direct that:

- Stewart pay an administrative penalty of $20,000;
- Stewart "resign from all positions he holds as a director or officer (or both) of any issuer, registrant, investment fund manager, recognized exchange, recognized self-regulatory organization, recognized clearing agency, recognized trade repository or recognized quotation and trade reporting system";
- for a period of eight years from the date of the sanction order:
  - "Stewart must cease trading in or purchasing securities or derivatives in respect of all securities in Tamarisk";
  - "Stewart is prohibited from engaging in investor relations activities, from advising in securities or derivatives, from becoming or acting as a registrant, investment fund manager or promoter, and from acting in a management or consultative capacity in connection with activities in the securities market"; and
  - "Stewart is prohibited from becoming or acting as a director or officer (or both) of any issuer (or other person or company that is authorized to issue securities), registrant, investment fund manager, recognized exchange, recognized self-regulatory organization, recognized clearing agency, recognized trade repository or recognized quotation and trade reporting system".

[31] In submissions at the Hearing, Staff argued that the proposed sanctions are "appropriate" and "reasonable", as they take Stewart's individual circumstances into account but still "achieve the purpose of general deterrence". They advised that no sanctions were proposed with respect to Tamarisk, because it is "defunct and has no assets".

[32] Joint sanction proposals submitted by Staff and respondents to an enforcement proceeding "generally carry considerable weight". However, they are not binding on the hearing panel, as we are required to make our own determination with respect to what sanction orders – if any – are in the public interest and appropriate in the circumstances (*Re Bradbury*, 2016 ABASC 272 at para. 58).

[33] We agree with the panel in *Re McKenzie*, 2014 ABASC 506 (at para. 18):

> Hearing panels generally give a large measure of deference to jointly-recommended sanctions, subject always to the public interest. Thus, although not bound to do so, we will generally order jointly-recommended sanctions if we are satisfied that they fall within a range that we consider reasonable in all the circumstances and in keeping with our public interest mandate.

3. Sanctioning Principles and Factors Applied

[34] We now consider the *Homerun* factors in relation to the facts of this case. We will then consider the outcomes in prior decisions and settlements involving comparable circumstances.

(a) Seriousness of Misconduct

[35] *Homerun* suggested that the seriousness of a respondent's misconduct has three aspects: the nature of the misconduct; whether the misconduct was deliberate, reckless or inadvertent; and the harm the misconduct caused or may have caused to the specific investors involved and the Alberta capital market in general (at para. 22). Typically, more serious misconduct will imply that there is a greater risk of future misconduct, and thus a need for greater deterrent measures (at para. 26).

[36] Staff submitted that while Stewart's misconduct "was wrong, it was not egregious", as a sizeable portion of the funds raised were raised from investors who qualified for an exemption from the Prospectus Requirement. Similarly, Staff submitted that the Listing Representations were "not the most grave of prohibited representations or misrepresentations", and pointed out that Tamarisk had carried on a legitimate business before it failed to complete the Agreement and became insolvent.

[37] Neither the parties at the Hearing nor the Statement addressed whether the Respondents' misconduct was deliberate, reckless or inadvertent.

[38] We agree that in relative terms, the nature of the Respondents' misconduct in this case was not as serious or as harmful as the misconduct in some cases, such as those involving, for example, deliberate fraud or market manipulation perpetrated over an extended period, causing tens of millions of dollars in financial losses to hundreds of investors. That said, the Prospectus Requirement and the prohibition against unfounded statements like the Listing Representations are intended to ensure investors are given sufficient and accurate information upon which to assess risk and make investment decisions. This is a fundamental tenet of Alberta securities laws, aimed at the primary goals of protecting investors and fostering a fair and efficient capital market. Those goals are undermined by conduct like that of the Respondents.

[39] We are also of the view that the impact of the Respondents' misconduct goes beyond the investors who were directly affected. Public confidence in Alberta's capital market is eroded when misconduct of this nature occurs, which in turn affects the ability of law-abiding issuers to raise capital.

[40] The seriousness of the Respondents' misconduct therefore calls for significant protective orders sufficient to deter them and others from engaging in similar misconduct.

(b) Respondents' Characteristics and History

[41] In the context of determining appropriate sanction orders, relevant characteristics of an individual may include his or her work experience, education, experience in the capital market, past disciplinary record and financial circumstances (*Homerun* at para. 28). Such characteristics "may be important indicators of the degree of risk posed and, in turn, the extent of deterrence required", as well as "the proportionality of [the] sanctions under consideration" (*Homerun* at para. 27). Where an individual is a guiding mind of a corporate respondent, "it may be appropriate to attribute to a corporate respondent pertinent characteristics of its guiding individuals" (*Homerun* at para. 33).

[42] In addition to the background facts concerning the Respondents mentioned earlier in these reasons, the Statement indicates that:

- During the period relevant to the allegations in the NOH, Stewart was not registered in either Alberta or B.C. to deal in securities.
- Neither of the Respondents has been previously sanctioned by the ASC.
- Stewart "filed for bankruptcy" in February 2018, and had not been discharged as of the date of the Statement.

[43] With respect to Stewart's financial circumstances, we asked Staff at the Hearing whether or not any administrative penalty we imposed would survive Stewart's bankruptcy. Staff indicated that while they were unsure, they (and Stewart's counsel) understood that it would not. However, Staff reiterated that through the Statement, Stewart "agreed that a [$]20,000 administrative penalty is appropriate and reasonable in the circumstances", and that he had "indicated a bona fide intent to pay this amount by receiving financial assistance from his family members". Stewart's counsel similarly submitted that while Stewart is essentially without assets and living off a small pension at this time, he still intends to pay any administrative penalty and costs "if he is able to in the near future", and that he has solicited help in that regard from his family and friends.

[44] Apart from the foregoing and Stewart's age, we were not given any additional information about his background. We do not know, for example, whether he has any capital market education or experience prior to Tamarisk. While these and other background facts may have provided additional helpful context, the evidence before us is sufficient to guide our assessment of the degree to which Stewart poses a future risk. He was not a registrant at the relevant time, and has no prior sanctioning history. In addition, he is approximately 75 years of age, without assets, and living on a pension. Likewise, Tamarisk has no prior sanctioning history, no assets and no business prospects.

[45] We are mindful of the panel's observation in *Re Currey*, 2018 ABASC 34, that "[r]educed financial circumstances may suggest that reduced financial penalties are appropriate in certain cases" (at para. 64, citing *Re Holtby*, 2015 ABASC 891 at para. 55). While we thus take Stewart's financial condition into account in assessing the appropriateness of any monetary sanction, we are of the view that Stewart's "agreement to the sanctions jointly recommended in the Statement alleviates concerns that the financial penalties contemplated would be unreasonable, disproportionate or 'crushing'" (*Currey* at para. 65), despite his bankruptcy.

[46] The Respondents' characteristics and history therefore suggest a low risk of future misconduct, and thus an attenuated need for deterrent sanctions.

(c) Benefit to the Respondents

[47] The benefit from misconduct sought or actually obtained by a respondent in situations of capital market misconduct is typically (but not always) financial. As stated in *Homerun*, "[t]he extent to which a respondent sought to benefit, or did in fact benefit, from misconduct can be a compelling indicator of risk" (at para. 35) – the greater the benefit, the greater the risk that the respondent or others will repeat or emulate the misconduct. The greater the risk, the greater the need for deterrent measures (*Homerun* at para. 38).

[48] At the Hearing, Staff submitted that apart from the $300,000 Stewart was paid in compensation and expenses over the three years Tamarisk was in active business, he received no "enduring benefit" from his contraventions of Alberta securities laws. The benefit realized by Tamarisk was not addressed, but we note that it received $450,000 for use toward completing the Agreement, even though that transaction was not concluded. Given its current financial circumstances, it appears not to have realized an "enduring benefit" from the market misconduct in issue, either.

[49] That said, $300,000 over a period of less than three years is not an insignificant amount of compensation, particularly as that amount represents 40% of the total $750,000 raised from investors over the same period. Whether Stewart has since spent or otherwise lost those funds, he had the benefit of them for a time.

[50] We are of the view that the monetary benefits realized by the Respondents indicate that a monetary sanction is necessary for both specific and general deterrence. However, the appropriate amount of that sanction is at the lower end of the spectrum given the amounts involved and the fact that this matter does not involve allegations of fraud or misappropriation of funds.

(d) Mitigating or Aggravating Considerations

[51] Mitigating or aggravating circumstances are suggestive of the level of risk of future misconduct, and may take "a variety of forms" (*Homerun* at para. 40). Again, the greater the risk, the greater the need for deterrent measures.

[52] Mitigating circumstances may include such things as a respondent's efforts to repay investors, and expressions of remorse and understanding that the misconduct was serious and caused harm to others (*Homerun* at para. 40-41). Aggravating circumstances may include indications of a respondent's contempt for the victims of the misconduct or the law itself (*Homerun* at para. 46).

[53] However, just as "[a]n absence of mitigation is not the same as an aggravating consideration" (*Homerun* at para. 45), "neither is an absence of aggravation the same as a mitigating consideration" (*Currey* at para. 70).

[54] At the Hearing, Staff did not mention any aggravating considerations, but submitted that Stewart's cooperation during the investigation and in reaching an agreed resolution by way of the Statement is a mitigating consideration. Counsel for Stewart similarly emphasized the fact that

Stewart was "very cooperative" throughout the process, "understood the mistakes that he made", and "is more than willing to and motivated to make amends for what he's done and take responsibility for his actions".

[55] Staff referred to the ASC's Policy 15-601 *Credit for Exemplary Cooperation in Enforcement Matters* (the **Policy**). They argued that Stewart's cooperation fell within that Policy, since s. 12 thereof gives "examples . . . of when cooperation has been exemplary" and one of those examples is "proceeding to a hearing on an agreed statement of facts and joint recommendation as to sanction". They noted that the parties had reached their agreement "early in June", which saved the time and expense of preparing for and conducting a contested hearing on the merits. Each of these matters was also mentioned in the Statement.

[56] Section 12 of the Policy sets out the steps Staff may or may not agree to take in recognition of exemplary cooperation rather than the actions a respondent might take to earn credit for exemplary cooperation. The latter appear to be enumerated in s. 6 of the Policy. Based on the Statement and the representations of both Staff and counsel for Stewart at the Hearing, we are satisfied that Stewart was cooperative. Although cooperation of this nature is more relevant to costs (as acknowledged by Staff), we nonetheless consider it indicative of Stewart's recognition that his conduct was wrong, serious, caused harm and is deserving of sanction. Moreover, we accept his counsel's representations with respect to his remorse. This recognition and acceptance of responsibility – which we also impute to Tamarisk – is a mitigating consideration which suggests a reduced risk of future harm and a diminished need for specific deterrence.

[57] We do not discern any other mitigating or aggravating considerations.

(e) Outcomes in Other Cases

[58] As mentioned, it was observed in *Homerun* (at para. 16) that "[e]nsuring that sanctions are proportionate involves appropriate consideration of other decisions and settlement outcomes". In their submissions at the Hearing, Staff cited only one decision in this context: *Re Bennett*, 2017 ABASC 177. The 70-year-old respondent in that case had raised a total of $3.8 million, a portion of which was raised illegally in contravention of s. 110 of the Act. In addition, he was found liable for making misrepresentations and prohibited representations similar to the Listing Representations. Like Stewart, the respondent was cooperative during the investigation, and entered into an agreed statement of facts and admissions with Staff. He was not a registrant at the relevant time, and had no prior sanctioning history. He was also impecunious – again like Stewart, he was involved in bankruptcy proceedings at the time of the decision. The sanctions ordered against the respondent included a $50,000 administrative penalty and permanent market-access bans.

[59] To assist us in assessing the proportionality and appropriateness of the sanctions recommended by the parties in this matter, we had reference to other ASC decisions and settlement agreements. They are summarized as follows:

- *Re 2 Wongs Make It Right Enterprises Ltd.*, 2014 ABASC 475: While there were a total of five respondents in this matter – two individuals and three corporations – one of the individual respondents admitted to multiple breaches of the Act, including fraud. Accordingly, we referred to this decision only for guidance with

respect to the remaining individual respondent and the corporate respondents. In a statement of admissions, those respondents admitted to illegally dealing and distributing approximately $4.97 million in securities, nearly $4 million of which remained owing to investors at the time of the decision. The individual respondent had no prior capital-market experience or disciplinary history. She also cited impecuniosity. Permanent market-access bans were ordered for the three corporate respondents, and 10-year bans (with a limited carve-out) were ordered for the individual respondent. In addition, she was ordered to pay a $15,000 administrative penalty.

- *McKenzie*: The two individual respondents entered into a statement of admissions and joint recommendation as to sanction with Staff, pursuant to which they admitted to having engaged in illegal trading and distribution of $2 million in securities, and to making misrepresentations to investors with respect to the intended use of their funds. While neither respondent was registered with the ASC at the relevant time and neither had a prior sanctioning history, both had past capital-market experience. The panel accepted the parties' joint recommendation, and ordered four-year director-and-officer bans and an administrative penalty of $60,000 against each respondent.

- *Re Alexander*, 2016 ABASC 56: The respondent was the co-guiding mind of a number of companies which were involved in the real estate development business. Approximately $1,935,000 was raised from 17 investors over a one-year period. The respondent admitted to contravening ss. 75 and 110 of the Act by illegally dealing in and distributing securities. The settlement agreement noted that the respondent had no prior sanctioning history, cooperated with Staff's investigation, and initiated the settlement discussions in order to resolve the matter without a hearing. It also noted that the business was a legitimate one, and that many of the investors were not only repaid their capital, but also received a return on their investments. The respondent agreed to sanctions including 18-month market-access bans (with limited carve-outs) and a $30,000 settlement payment.

- *Re Yawrenko*, 2018 ABASC 134: The respondents (a corporation and its sole guiding mind) admitted illegally distributing over $2.1 million in securities to approximately 33 investors, in breach of s. 110 of the Act. Neither had been previously sanctioned by the ASC, and their contribution to an efficient resolution by entering into a settlement agreement with Staff was noted. They jointly agreed to pay $55,000 "in settlement of all allegations against them". The individual respondent agreed to five-year market-access bans, and the corporate respondent agreed to refrain from relying on any exemptions available under Alberta securities laws for the same five-year period.

[60] The foregoing decisions and settlements are sufficiently comparable to provide guidance on the nature and extent of the sanctions considered appropriate in circumstances similar to those in this instance. The spectrum of sanctions included market-access bans ranging from 18 months in duration to bans of permanent duration, and administrative penalties or settlement payments ranging from $15,000 to $60,000.

[61] The sanctions proposed in the Statement fall within these ranges, albeit at the lower end of the range for monetary orders and settlement payments.

(f) Conclusion on Sanctions

[62] Consistent with the Respondents' admissions in the Statement, we have found them both liable for serious misconduct in breach of Alberta securities laws. This misconduct harmed not only the investors directly affected, but also the integrity of our capital market. While this argues for significant sanction orders, we recognize that the seriousness of the misconduct in this case is not of the kind that attracts the most severe penalties available.

[63] In addition, we have considered the specific circumstances of these Respondents. Stewart was not a registrant, neither Respondent has a prior sanctioning history, and neither Respondent appears to have realized an enduring benefit. We have also taken into account Stewart's age, his bankruptcy, and his acceptance of responsibility and expression of remorse conveyed through his counsel and through his cooperation with Staff. These considerations suggest that the future risk posed by these Respondents is relatively low, with a reduced need for specific deterrence.

[64] Having thus: (i) applied the sanctioning principles outlined herein; (ii) considered the facts and circumstances of this case; (iii) considered the outcomes in prior decisions and settlements; and (iv) taken into account the Respondents' agreement, we are of the view that, with two modifications discussed below, the sanction orders jointly proposed by Staff and the Respondents in the Statement are appropriate, proportionate and in the public interest. As stated by the panel in *McKenzie* (at para. 27):

> Ultimately, we are satisfied that the sanctions jointly recommended by the parties are in the public interest, being within a range of sanctions that we consider appropriate and proportionate in all the circumstances, albeit near the lower end of that range.

[65] The nature of the bans sought is rationally connected to the specific misconduct at issue and Stewart's position as Tamarisk's sole guiding mind. Further, we are satisfied that market-access bans alone are not sufficient deterrent and protective measures. A monetary order is also required. In accordance with the agreement of the parties, we make that order against Stewart alone in light of his role with Tamarisk and Tamarisk's current inactive status.

[66] Though we agree that a combination of market-access bans and an administrative penalty with respect to Stewart are in the public interest, we conclude that the twin goals of specific and general deterrence will be better served by tying the length of the market-access bans to Stewart's payment of the administrative penalty. Noting that past ASC panels have often taken this approach when a respondent is insolvent or on the verge insolvency, we asked Staff for their views about it at the Hearing. Staff indicated no objection, and pointed out that Stewart would be at liberty to apply to vary or revoke the order depending on how the administrative penalty was treated in his bankruptcy proceedings. Counsel for Stewart did not express any particular view, as she did not have Stewart's instructions on the point.

[67] In the result, we determined that the $20,000 administrative penalty proposed is at the lower end of the range, and it is reasonable in the circumstances to connect it to the market-access

bans in order to improve the chance that it will be paid and have the intended deterrent effect. This is the first modification to the sanctioning proposal in the Statement.

[68] The second modification concerns the corporate Respondent. At the Hearing, we asked Staff why no orders were sought against Tamarisk, and Staff indicated that that decision was made in the interest of current Tamarisk security-holders, who may want to trade their securities if new management were to enter the scene and take over the company. However, Staff also acknowledged that new management would be at liberty to apply to vary or revoke any such order. They thus conceded that a cease-trade order against Tamarisk "would be the most ideal approach" to protect its current security-holders and the rest of the investing public. Counsel for Stewart indicated that she did not have submissions to make on the point, as she did not represent Tamarisk.

[69] As it is unknown whether Tamarisk will be revived and in a position to resume business, we conclude that it is in the public interest for the company to be subject to a cease-trade order. Tamarisk was the vehicle used to raise capital illegally, so the protective action of halting all trading in and purchasing of its securities is appropriate in the circumstances. Both Respondents abused the privilege of access to the Alberta capital market, and both should be removed from it for at least the period recommended by the parties in the Statement.

B. Cost-Recovery Orders

1. General Principles

[70] Under s. 202(1) of the Act, we are authorized to order a respondent to pay the "costs of or related to the hearing or the investigation that led to the hearing, or both", if we are satisfied that the respondent "has contravened Alberta securities law or acted contrary to the public interest".

[71] Such an order is not a sanction. As explained in *Re Marcotte*, 2011 ABASC 287 (at para. 20):

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

[72] As mentioned, the parties jointly proposed that we make an $8,000 cost-recovery order against Stewart, and no order against Tamarisk.

2. Appropriate Cost Recovery

[73] Staff advised us at the Hearing that they had applied the Policy in arriving at the costs figure proposed, which represents the costs of the investigation. Costs of the Hearing were not included, in recognition of the Respondents' "exemplary cooperation". Although we were not told what proportion of Staff's actual costs the recommended amount represents, we are satisfied that Stewart's timely cooperation made a meaningful contribution to the efficiency of the investigation, the Hearing, and its resolution as contemplated in *Marcotte*.

[74] We were not told why the parties recommended that Stewart alone be made responsible for the proposed costs order when there was a second Respondent that was also investigated and

ultimately admitted to breaching Alberta securities laws. However, we are satisfied that where, as here, a single individual was guiding the corporate Respondent, it is not unreasonable to ascribe full responsibility for any ordered costs to that individual.

[75] Accordingly, we are satisfied that the $8,000 costs amount jointly recommended by the parties, to be paid by Stewart, is appropriate in the circumstances and provides Stewart significant credit for and recognition of his contribution to the efficient resolution of this proceeding.

VI. CONCLUSION

[76] In view of all of the foregoing, we make the following orders:

Market-Access Bans

- under s. 198(1)(d) of the Act, Stewart must immediately resign all positions he holds as a director or officer of any issuer, registrant, investment fund manager, recognized exchange, recognized self-regulatory organization, recognized clearing agency, recognized trade repository or recognized quotation and trade reporting system;

- for a period of eight (8) years from the date of this decision or until the administrative penalty set out below is paid in full, whichever is the later:

    - under s. 198(1)(b), Stewart must cease trading in or purchasing all securities or derivatives of Tamarisk;

    - under s. 198(1)(c.1), Stewart is prohibited from engaging in investor relations activities;

    - under s. 198(1)(e), Stewart is prohibited from becoming or acting as a director or officer (or both) of any issuer (or other person or company that is authorized to issue securities), registrant, investment fund manager, recognized exchange, recognized self-regulatory organization, recognized clearing agency, recognized trade repository or recognized quotation and trade reporting system;

    - under s. 198(1)(e.1), Stewart is prohibited from advising in securities or derivatives;

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

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

- for a period of eight (8) years from the date of this decision or until the administrative penalty set out below is paid in full, whichever is the later:

- under s. 198(1)(a), all trading in or purchasing of securities or derivatives of Tamarisk must cease;

Administrative Penalty

- under s. 199(1), Stewart must pay an administrative penalty of $20,000; and

Cost Recovery

- under s. 202(1), Stewart must pay $8,000 of the costs of the investigation.

[77] This proceeding is concluded.

March 5, 2019

For the Commission:

"original signed by"
Tom Cotter

"original signed by"
Kate Chisholm, QC

"original signed by"
Karen Kim, CA, CFA