ALBERTA SECURITIES COMMISSION

DECISION

Citation: Atlas Communications Inc., Re, 2007 ABASC 749 **Date: 20071010**

Atlas Communications Inc., GCS Holdings Inc., George Oscar Amyotte and Ernest Georges Lefebvre

Panel:	Stephen R. Murison Beverley A. Brennan, FCA Karl M. Ewoniak, CA
Appearing:	Samir Sabharwal for Commission Staff
	George O. Amyotte for himself and Atlas Communications Inc.
Date of Hearing:	30 August 2007
Date of Decision:	10 October 2007

I. INTRODUCTION

[1] The following decision concludes a two-part hearing into a distribution of securities. As discussed below, we are ordering sanctions against two of the respondents – George Oscar Amyotte ("Amyotte") and Atlas Communications Inc. ("Atlas") (together, the "Respondents"). We found earlier that the Respondents contravened Alberta securities laws and acted contrary to the public interest in connection with the distribution and associated misrepresentations and prohibited representations.

[2] In brief, we are ordering that Amyotte:

- must cease trading in or purchasing securities for 20 years, and is denied the use of exemptions under Alberta securities laws, permanently, subject to the exception set out in our orders below;
- must resign any position he holds as a director or officer, and he is prohibited for 20 years from acting as a director or officer (or both), of any issuer securities of which are owned by or offered for sale to any person or company other than one or more of Amyotte and members of his immediate family; and
- must pay an administrative penalty of $125 000.

[3] We are also ordering that Atlas must cease trading in or purchasing securities, permanently.

[4] In addition to the foregoing sanctions, we are ordering that Amyotte and Atlas are jointly and severally responsible for paying a total of $28 000 toward the costs of the investigation and hearing.

II. BACKGROUND

[5] This proceeding originated in a notice of hearing issued on 28 July 2006 by staff ("Staff") of the Alberta Securities Commission (the "Commission") against four respondents: Atlas, GCS Holdings Inc. ("GCS"), Amyotte and Ernest Georges Lefebvre ("Lefebvre"). A hearing into the merits of Staff's allegations was held in January 2007 (the "Merits Hearing"). We issued our decision and reasons on the merits of the allegations on 9 May 2007 (the "Merits Decision"), cited as *Re Atlas Communications Inc.*, 2007 ABASC 289. Lefebvre entered into a settlement agreement and undertaking with Staff (*Re Lefebvre*, 2007 ABASC 24) prior to the Merits Hearing. Staff therefore did not pursue their allegations against him in the Merits Hearing. We dismissed the allegations against GCS for the reasons set out in the Merits Decision.

[6] The facts are discussed in the Merits Decision and we provide only a brief summary here. This decision should be read in conjunction with the Merits Decision.

[7] Atlas and Amyotte solicited money from investors. We found that investors outside the inner circle of Amyotte and others in the Atlas "Management Group" invested or committed approximately $2 million to buy shares of Atlas by March 2002.

[8] Amyotte, an Edmonton-area businessman, was throughout the period relevant to this proceeding a director and the largest voting shareholder of Atlas and, in his description, its "president and CEO". Atlas was incorporated in Alberta in 1996 and struck from the Alberta corporate registration system in November 2004. Atlas launched what Amyotte hoped would become a cross-Canada customer loyalty programme called "Air Time".

[9] Investors were enticed by information – conveyed in part via a supposedly confidential "Business Plan" or in comments made orally by Amyotte at meetings with investors – including the identity of businesses that had signed or were apparently about to sign Air Time participation contracts and the quantum of sales and fee revenues anticipated from the Air Time programme. Amyotte also told investors that they could have their subscriptions refunded.

[10] As discussed in the Merits Decision, we found that the fund-raising efforts for Atlas involved trades and the distribution of Atlas securities made without registration, without a prospectus, and without an available registration and prospectus exemption. Although Atlas and Amyotte retained lawyers who began preparing an offering memorandum in the spring of 2002, it was not used properly.

[11] We concluded "that Amyotte closely supervised and controlled Atlas' business affairs, its dealings with existing and prospective investors, and its communications with them" (Merits Decision at para. 74). He clearly solicited investors. We found that he ignored and disregarded securities laws and that he and Atlas shared responsibility for the illegal trades and distributions.

[12] We also found that Amyotte was responsible for representations – prohibited under the *Securities Act*, R.S.A. 2000, c. S-4 (the "Act") – that investors would acquire exchange-listed securities. Further, we found him responsible for misrepresentations concerning the progress and prospects for signing up businesses for the Air Time programme, the sales and earnings that the programme would generate, and the availability of refunds of investor subscriptions.

[13] Given our findings against Atlas and Amyotte, it remains to be determined whether it is in the public interest to make any orders against them. For that purpose, this hearing was convened on 30 August 2007. We received written submissions on this issue from Staff. Amyotte relied on his written submissions on the merits, which had been tendered and considered for purposes of the Merits Decision. We also heard oral

submissions from Staff and from Amyotte at the August sanctioning hearing. Our decision and reasons on the issue of sanction follow.

III. POSITIONS OF THE PARTIES

A. Staff Position

[14] Staff contended that the misconduct in this case was "serious and . . . inherently contrary to the underlying concepts that define the capital markets", not excusable on the grounds of inexperience or ignorance, and that Amyotte "has never admitted his misconduct . . . and refuses to accept responsibility". Staff submitted that it was in the public interest for us to issue permanent cease-trade and denial-of-exemptions orders against Atlas under section 198 of the Act and, under sections 198 and 199, to remove Amyotte from the capital market through cease-trade and denial-of-exemptions orders and a director-or-officer ban for 25 years and to impose on him a $300 000 administrative penalty.

B. Amyotte's Position

[15] Amyotte, on behalf of himself and Atlas, essentially contended that no sanctioning orders were in the public interest in this case. His position, as we understood it, was that our findings on the merits of the allegations against him were incorrect – either there were no illegal trades and distributions or relatively few. Further, he appeared to portray any deficiencies in the fund-raising for Atlas, and any prohibited representations and misrepresentations, as cured by the completion and issuance of the Atlas offering memorandum, specifically its enumeration of "risk factors" associated with an investment in the offered securities.

IV. ANALYSIS

A. Sanctioning Principles

[16] The purpose of the sanctioning portion of this proceeding is, as noted, to determine whether it is in the public interest to order under sections 198 and 199 of the Act any sanctions against Atlas or Amyotte and, if so, what orders are appropriate. This was not a reconsideration of the facts, and our findings, from the Merits Decision.

[17] This Commission has often commented on the purpose of sanctioning orders under sections 198 and 199 of the Act, and factors that may be considered in determining whether or what sanctions are appropriate in a particular case. For example, in *Re 526053 B.C. Ltd.*, 2006 ABASC 1795, the Commission stated (at paras. 17-18):

> Orders under sections 198 and 199 of the Act are prospective and protective, not punitive or retrospective. The objective is to protect investors and the capital market from future harm. Achieving this objective may require deterrence from future market misconduct, whether by respondents themselves (specific deterrence) or by others (general deterrence). See *Re Cartaway Resources Corp.*, [2004] 1 S.C.R. 672 at para. 55; *Re Dobler*, 2004 ABASC 1178 at para. 14; and *Re Podorieszach*, 2004 ABASC 567 at para. 17.

> The Commission in *Re Lamoureux*, [[2002] A.S.C.D. No. 125] (at para. 11) (appeal dismissed [on other grounds] – *Lamoureux v. Alberta (Securities Commission)*, 2002 ABCA 253) enumerated a number of factors potentially relevant to assessing whether or what sanctions are appropriate in a particular case. Such factors may include:
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> - a respondent's capital market background and experience;
> - whether a respondent recognizes the seriousness of the contraventions;
> - the harm suffered by particular investors or the capital market;
> - the extent to which a respondent benefited from misconduct;
> - risks that might accompany a respondent's continued participation in the capital market; and
> - previous decisions based on similar circumstances.

B. Principles Applied to the Facts

[18] Our findings against Amyotte and Atlas as set out in the Merits Decision involved serious misconduct. The Respondents engaged in illegal trades and distributions. Amyotte was responsible for prohibited representations and misrepresentations to investors and prospective investors. Both acted contrary to the public interest. Neither the fact that some of the trades and distributions might have qualified for exemptions under the Act, nor the fact that some investors (approximately half, according to Amyotte's oral submissions at the sanctioning hearing) received the Atlas offering memorandum which included an enumeration of risk factors, disproved these findings nor diminished their seriousness. Amyotte's position notwithstanding, this was most definitely a case in which it is appropriate for us to consider sanctions.

[19] We consider the sanctioning factors quoted above from *526053*.

Capital Market Background and Experience

[20] Amyotte did not appear to have had any significant experience or background in the capital market – specifically in raising money from investors – before his Atlas venture. Without more, this would tend to argue against significant sanction. However, offsetting this lack of experience was the fact that Amyotte clearly came to understand (while this fund-raising activity was under way if not before) some of the important legal principles and restrictions on such activity. He retained lawyers to draft the offering memorandum. We disbelieved Amyotte's claim that he was "praised" by his lawyers for raising money from investors before the offering memorandum was ready. We found in the Merits Decision that he knowingly disregarded securities laws by continuing to trade and distribute Atlas securities before the offering memorandum was completed and distributed to prospective investors. In so doing, he defeated the purpose of the document and deprived investors of their right to mandated disclosure.

[21] It is therefore evident that, notwithstanding his lack of prior experience, Amyotte in fact came to know that what he was doing was contrary to Alberta securities laws. He carried on nonetheless. We conclude that this argues in favour of significant sanction.

Recognition of Seriousness

[22] Amyotte's own submissions persuaded us that he did not recognize that the misconduct we found in the Merits Decision was serious. Further, he accepted no responsibility for having acted contrary to both the law and the public interest. He demonstrated a complete absence of contrition and seemed, indeed, to be taken aback by efforts on the part of the Commission or its Staff to enforce Alberta securities laws in his case.

[23] This factor argues strongly in favour of significant sanction.

Harm Suffered by Investors and the Capital Market

[24] Atlas appears to be, at best, dormant. The money invested in the company has apparently been lost. Alberta investors were in this way directly harmed.

[25] This case also involves a more generalized harm to the Alberta capital market and investor confidence in the fairness and integrity of that market. The Alberta capital market is a vibrant one. It has been a venue in which issuers and investors alike have benefited from capital raising exemptions enabling legitimate issuers to raise money for viable, legitimate enterprises either through prospectus offerings or in reliance on available registration and prospectus exemptions tailored to the informational and other needs of various classes of investor or categories of investment. Alberta securities laws apply in these circumstances to give information to investors who need it, along with the assistance of a registrant, to help investors make appropriate, informed investment decisions. This system naturally does not eliminate risk, but it is designed to bring together, in a fair and efficient manner, those with money to invest and those who seek investment capital. This system, however, depends on market participants acting with integrity and within the law. Where that does not occur, confidence can be lost, to the potential detriment of all market participants who do act with integrity.

[26] By his conduct, Amyotte (and, through him, Atlas) deprived Alberta investors of the protections they are meant to have under Alberta securities laws. Investors were induced to invest on the basis of misrepresentations and prohibited representations. The integrity of the Alberta capital market, particularly the system for raising capital through exemptions, was abused and misused. This amounted to an assault on the integrity of the capital market and confidence therein.

[27] The harm to which Amyotte's and Atlas' misconduct exposed particular investors and the capital market generally was serious and caused serious harm. This militates in favour of significant sanction.

Extent of Amyotte's and Atlas' Benefit

[28] Atlas received the approximately $2 million raised from non-"Management Group" investors. It clearly benefited.

[29] Amyotte also benefited. He ran Atlas and was in a position to take money from the company by way of salary and to benefit from Atlas' business, had it succeeded.

[30] This factor argues for significant sanction.

Risk of Continued Participation in the Capital Market

[31] We have no doubt, given the seriousness of the harm to which Amyotte and Atlas exposed particular investors and the capital market generally, as well as his failure to appreciate the seriousness of his misconduct and accept responsibility for it, that Amyotte (and, were he to revive it, Atlas) pose a significant risk to Alberta investors and the Alberta capital market for the foreseeable future. This argues for significant sanction.

Previous Decisions

[32] Staff pointed us to a number of other decisions. Inevitably, the facts and circumstances differ from case to case, sometimes widely.

[33] Further, capital markets are not static. Their efficiency, and confidence in them, depend significantly on investor perception. Where misconduct is seen to recur, the forcefulness of the administrative response may have to increase to provide the requisite degree of specific and general deterrence of future misconduct. Moreover, the arsenal of sanctions given to the Commission by the legislators also evolves. The array of available orders under section 198 has expanded and the quantum of administrative penalty that can be ordered under section 199 was, in June 2005, increased significantly from a maximum of $100 000 per contravention (for individuals) to $1 million. We infer from this change a recognition of the factor just mentioned and a legislative intention that capital market misconduct be dealt with firmly.

[34] We do not find previous decisions helpful. The considerations discussed above diminish their value as a guide to appropriate sanctioning outcomes here.

Need for Specific and General Deterrence

[35] We have already alluded to the need, in this case, for both specific and general deterrence. Given the risk that we perceive of future harm to Alberta investors and the Alberta capital market were Amyotte and Atlas to be permitted continued access to them, we conclude that it is in the public interest for us to make orders that provide clear, substantial specific deterrence of continued or repeated misconduct on the part of Amyotte and Atlas.

[36] For the reasons mentioned, we also conclude that it is in the public interest for us to order sanctions that provide a clear and substantial message of general deterrence to other market participants who, in the absence of such orders, might be minded to misuse the privilege of access to the Alberta capital market, particularly through the exempt market.

[37] We believe that the appropriate orders should combine direct bans on access to the capital market, for significant periods, and in the case of Amyotte (Atlas being at best dormant, and apparently without assets, we consider this unnecessary in its case) a direct monetary sanction in the form of a substantial administrative penalty.

C. Conclusions on Sanction

1. Nature and Extent of Necessary Sanctions

[38] For the reasons given, we are persuaded that the public interest calls for significant sanctions against both Atlas and Amyotte. We consider that the types of sanction sought by Staff against Amyotte and Atlas are generally appropriate.

[39] We conclude that a permanent cease-trade ban, as suggested for Atlas, is sufficient and consistent with the public interest; no additional sanction against Atlas is necessary.

[40] In the case of Amyotte, we agree with Staff that quite lengthy cease-trade and director-and-officer bans are necessary, but we consider that a duration of 20 years will provide sufficient protection and deterrence. We agree that a prolonged denial of exemptions is also a necessary component of sanctions against him, as is a significant monetary penalty.

[41] Although cease-trade and denial-of-exemption orders are not infrequently combined as part of a package of Commission sanctions, they need not be of identical duration. Here, given Amyotte's knowing misuse of the offering memorandum exemption, we consider that the protection of the public interest requires that Amyotte never again enjoy the privilege of access to public investors' funds through the use of an exemption. Thus, while we consider that a cease-trade order for a substantial, but limited, period would suffice as part of a package of sanctions, we conclude that the public interest demands that Amyotte be permanently denied the use of exemptions. As a result, were he to seek again to raise capital from the investing public following the expiry of the other market-access restrictions ordered against him, he would have to comply with the registration and prospectus requirements of the Act.

[42] We believe that the appropriate quantum of monetary penalty in this case should be substantial. However, in view of the significant bans that we consider appropriate, we are not persuaded that the accompanying administrative penalty need be of the $300 000 magnitude urged by Staff; $125 000 is appropriate.

2. Exceptions to Sanctions

[43] It is not unusual for the Commission to provide exceptions (sometimes termed "carve-outs") or limit the scope of sanctioning orders where we consider that doing so does not put the public interest in jeopardy. In this case, although we conclude that Amyotte's access to the capital market must be significantly restricted for a substantial period, we do not believe it necessary to prohibit him from conducting personal investment activity, within certain constraints. We consider that the public interest would not be jeopardized were he to be permitted to trade in or purchase securities, as principal, through an account maintained with a registrant who has been made aware of our orders against Amyotte. We also consider that, although it is in the public interest to significantly constrain Amyotte's ability to serve in responsible positions as an officer or director of any issuer, the public interest would not be jeopardized were he to be permitted to act as such for a closely-held family company that does not trade in or distribute securities to others.

[44] For these reasons, we make the following orders in the public interest:

Atlas

- Under section 198(1)(b) of the Act, Atlas must cease trading in or purchasing all securities, permanently.

Amyotte

- Under section 198(1)(b) and (c) of the Act:

  (i) Amyotte must cease trading in or purchasing all securities, for 20 years; and

  (ii) he is denied the use of all of the exemptions contained in the Alberta securities laws, permanently;

  except that these orders do not preclude Amyotte from trading in or purchasing securities as principal through a single account maintained with a registrant under the Act who has first been given a copy of this decision.

- Under paragraphs 198(1)(d) and (e) of the Act, Amyotte must resign any position that he holds as a director or officer of any issuer and he is prohibited, for 20 years, from becoming or acting as a director or officer (or both) of any issuer securities of which are owned by or offered for sale to any person or company other than one or more of Amyotte and members of his immediate family.

- Under section 199(1) of the Act, Amyotte must pay an administrative penalty of $125 000.

V. COSTS

[45] In addition to sanctions, Staff sought orders under section 202 of the Act that Amyotte and Atlas pay substantially all of the costs of the investigation and hearing in this matter enumerated in an Amended Bill of Costs tendered for this purpose. That Amended Bill of Costs referred to four broad categories of costs: "Investigative Services"; "Witness Examination Costs, Court Reporter Costs, and Disbursements"; "Legal Services"; and "Disbursements/Incidental Costs for Hearing". The former two categories related to the investigation, the latter two to the hearing. We consider that all four categories of costs fall within the types for which an order can be made under section 202 of the Act. We were not, however, persuaded that the full amount of such costs sought by Staff in oral submissions – $73 000 – should be ordered in this case.

[46] This Commission has commented in other cases on some of the principles relevant to costs orders. We refer again to *526053*, at paras. 82-83:

> Costs are not an element of sanction. That is, an order for payment of costs is not primarily designed to protect investors or the capital market. Nor should an order for payment of costs be seen as coercive; costs orders neither alter the fact that Staff bear the burden of proving their case, nor deprive respondents of the right to contest allegations against them.
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> The purpose of an order for costs is more modest – to shift to a respondent an appropriate portion of the financial burden of enforcing Alberta securities laws. Given this different purpose, the factors relevant to assessing costs orders are not the same as for sanctioning. As this Commission stated in [*Re Podorieszach*, 2004 ABASC 567] (at para. 54):
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> > . . . An order for costs or the quantum of costs awarded is not dictated by the severity of misconduct. Such awards relate more to procedural efficiency. As the Commission said in *Re Del Bianco* (2003) ABSECCOM ENF - #968904 v5 (at para. 24):
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> > > The purpose of awarding costs under section 202 is . . . , among other things, to provide the Commission with the ability to exert some influence over the conduct of proceedings and encourage efficient administration of the Act.

[47] The present case, as noted, initially involved allegations against four respondents – the Respondents here, along with GCS and Lefebvre. We dismissed the allegations against GCS. The allegations against Lefebvre were not pursued in the Merits Hearing because he and Staff concluded a settlement. In the circumstances, it seems to us obvious that some portion of the costs of investigation must have been attributable to investigating GCS and Lefebvre. While it is true that we found Amyotte to have been the guiding mind behind Atlas and the misconduct found in the Merits Decision, that does not (without more) persuade us that he and Atlas alone should be responsible for all of those investigation costs. The same is true of the hearing costs. Staff did pursue their

allegations against GCS in the Merits Hearing but were unsuccessful. While they did not pursue allegations against Lefebvre in the Merits Hearing, it is reasonable to infer (and there was no evidence to the contrary) that at least some of Staff's preparation work for the Merits Hearing was undertaken in anticipation that they would be pursuing allegations against him during that hearing. We conclude, in short, that some adjustment to all categories of the costs incurred must be made in recognition of the failed allegations against GCS and the settled allegations against Lefebvre.

[48] Lefebvre agreed in his settlement to pay $1000 toward costs. Staff suggested during the present hearing that that amount should be subtracted from the total in the Amended Bill of Costs (to arrive at the requested $73 000 total). While a simple approach, we do not believe that this amounts to a sufficient adjustment. The Lefebvre settlement did not, after all, indicate that the $1000 reflected a full allocation of the costs, merely that that was the amount that, between Staff and Lefebvre, they determined was an appropriate contribution towards costs.

[49] One specific item of costs – expenses for Staff to travel to and from Edmonton, where the hearing was held, and for their accommodation in Edmonton – bears specific comment. A hearing panel responsible for a Commission enforcement hearing is the master of its own proceedings and, as such, has discretion to determine when and where a hearing will be held. Among the factors that may be taken into account, the location and convenience of respondents and witnesses may be significant. We are not persuaded that the Respondents ought to bear the costs of Staff's travel and accommodation attributable to the convening of the hearing of this matter in Edmonton.

[50] The Respondents did not challenge the particulars of Staff's Amended Bill of Costs. However, for the reasons given, we deduct $5242.88 in respect of Staff travel and accommodation for the Edmonton hearing from the $73 000 total sought by Staff, producing a remainder of $67 757.12. The allegations against GCS and Lefebvre were not insignificant but they were, on balance, less extensive or fundamental than those against Amyotte and Atlas. Certainly the attention given to the allegations against GCS at the Merits Hearing was comparatively slight and the allegations against Lefebvre formed no part of the Merits Hearing. We conclude that one-sixth of the adjusted total costs (rounded for convenience down to $67 500) can reasonably be considered to have been incurred in respect of allegations that either were not pursued during the Merits Hearing (Lefebvre's) or that were not proved. Accordingly, we consider that the quantum of costs relevant to us is $56 250.

[51] Applying the principles of costs orders described above, we are not persuaded that this is a case in which the full amount of the relevant costs should be paid by Atlas and Amyotte. Focussing on their contribution (or otherwise) to the efficient resolution of this matter, we are certain that they could have done more. A respondent is never precluded from defending against allegations, nor obliged to retain legal counsel. However, by

mounting his case in the manner he did – among other things declining to admit some rather obvious points going to the merits of the allegations – Amyotte made the scope of the proceeding broader than was reasonably necessary.

[52] On the other hand, this was not a case in which there was clear evidence of the Respondents having created inefficiencies or added costs through lies, deception or other bad conduct in the course of the investigation or hearing. To the contrary, we gathered from Staff's submissions that Amyotte (and, through him, Atlas) were, if not particularly forthcoming, reasonably cooperative.

[53] Although their misconduct and the harm to which they exposed Alberta investors and the Alberta capital market were serious, we stress that this is not a determining factor for the purpose of a costs order.

[54] For the reasons given, we conclude that Amyotte and Atlas should each bear responsibility for paying one-quarter of the relevant costs of the investigation and hearing – that is, approximately $14 000 each, or a total of $28 000, of the $56 250 total. Given Amyotte's role as a guiding mind of Atlas, we believe that responsibility for payment of these costs should be joint and several.

[55] Accordingly, we order under section 202 of the Act that Amyotte and Atlas must pay, jointly and severally, $14 000 each ($28 000 in total) toward the costs of the investigation and hearing in this matter.

[56] This proceeding is now concluded.

10 October 2007

For the Commission:

"original signed by"
Stephen R. Murison

"original signed by"
Beverley A. Brennan, FCA

"original signed by"
Karl M. Ewoniak, CA