ALBERTA SECURITIES COMMISSION

DECISION

Citation: Innovative Energy Solutions, Inc., Re, 2008 ABASC 136 Date: 20080312

Innovative Energy Solutions, Inc. and Patrick Cochrane

Panel:	Stephen R. Murison Dennis A. Anderson, FCA Roderick J. McKay, CA
Appearing:	Laura Burt Tom McCartney for Commission Staff
	Patrick Cochrane on his own behalf
Date of Hearing:	4 and 5 February 2008
Date of Decision:	12 March 2008

I. INTRODUCTION

[1] This was a hearing into allegations by staff ("Staff") of the Alberta Securities Commission (the "Commission") against the Respondents, Innovative Energy Solutions, Inc., a Nevada company ("IES") and Patrick Cochrane ("Cochrane"), concerning what Staff claimed was an illegal distribution of securities of IES. Staff's allegations were set out in a notice of hearing dated 2 May 2007, in which Staff indicated that they would be seeking a number of sanctions against IES and Cochrane.

[2] This matter was scheduled to be heard in October 2007 but was adjourned, in response to submissions made by counsel for Cochrane, to January and then to February 2008. By letter dated 31 January 2008 – the Thursday preceding the Monday commencement of the hearing – the panel was notified by Cochrane's counsel that he was withdrawing from his representation of Cochrane. Cochrane, in consequence, represented himself at the hearing.

[3] The next day – on the Friday preceding the Monday commencement of the hearing – Cochrane and Staff executed a "Statement of Admissions". The Statement of Admissions acknowledged Cochrane's receipt of the notice of hearing and awareness of the hearing date, and stated that "he has sought independent legal advice and . . . has voluntarily made the admissions contained herein". In this document Cochrane admitted certain facts, contraventions of Alberta securities laws and conduct contrary to the public interest, as alleged by Staff in the notice of hearing. Cochrane did not, however, admit all of the allegations. Moreover, the Statement of Admissions did not set out any position on the issue of whether orders concerning sanctions or costs would be appropriate. Cochrane also did not purport to make any admissions on behalf of IES.

[4] At the hearing on 4 and 5 February 2008, Staff and Cochrane tendered evidence in the form of documentation and witness testimony, and made submissions. IES, although given notice of Staff's allegations and of the hearing, is apparently the subject of bankruptcy proceedings in the United States and was not represented at the hearing. We were, however, satisfied that IES was aware of the hearing and given an opportunity to be heard, and that it was appropriate to go forward with the hearing in respect of both Respondents.

[5] Staff proposed and Cochrane agreed (IES, as noted, did not attend the hearing) that the parties address at one time both the merits of Staff's allegations and the issues of appropriate sanction and costs orders. The panel agreed in the circumstances but emphasized that its hearing of submissions on the latter topics would, of course, neither imply any conclusion having been reached by the panel on the merits of the allegations nor affect the panel's analysis of the merits.

II. BACKGROUND

A. The Respondents

1. Cochrane

[6] Cochrane, an Alberta resident, was a director and the chief executive officer of IES throughout the period relevant to this proceeding, the years 2004 and 2005 (the "Relevant Period"). Cochrane has a technical background and certifications. Cochrane has never been registered under the *Securities Act*, R.S.A. 2000, c. S-4 (the "Act").

2. IES

[7] IES was registered in the United States under the laws of Nevada in December 2003. Its incorporating shareholder and officer was apparently a Nevada resident, Ronald Foster ("Foster"). Foster joined the board of directors, as did Cochrane, Terry Dingwall ("Dingwall") and others. Cochrane was at one time identified as president of IES. As noted, Cochrane was a director and the chief executive officer of IES. Dingwall was president throughout much of the Relevant Period. The evidence, however, persuaded us that Cochrane was clearly IES's guiding mind.

[8] IES developed heat recovery technology for industrial facilities designed, as we understand it, to save energy. It was not disputed that the product or technology was real, that it was marketed to potential industrial users and that it had been installed to the apparent satisfaction of at least one customer.

[9] IES had another line of business – apparently only at an early stage – involving so-called "cold fusion" technology which, if successful, might offer a new source of energy. IES was apparently going to rely in this venture on some patents or other intellectual property. There seems to be have been some uncertainty as to the scope of IES's intellectual property rights in this area and there was no evidence that IES had been able to move this technology to the stage of practical application.

B. Allegations

1. Illegal Distributions of IES Securities

(a) Breaches of Sections 75 and 110 of the Act

[10] Staff alleged that IES raised approximately US$1.1 million from 89 Alberta residents through the distribution of securities to them during the Relevant Period. The alleged securities took the form, initially, of loans, under which investors would advance money in return for promissory notes and, in some cases, pledge agreements. The loans were to be repaid in shares and warrants or options (to purchase additional shares, presumably) of IES. This step in the arrangement was to occur once IES had obtained a listing or quotation on a United States exchange or quotation and trade reporting system.

[11] Staff alleged that: this activity involved trading and distributing securities; the Respondents were not registered to trade in securities; no prospectus had been filed or receipted under the Act for the sale of IES securities; and no prospectus exemption was

available. Staff alleged that this activity contravened sections 75 and 110 of the Act – the registration and prospectus requirements. Staff did not pursue the allegation in the notice of hearing concerning non-filing of reports of exempt distribution and we discuss it no further.

(b) Breach of Section 92 of the Act (Prohibited Representations)

[12] Staff also alleged that, with the intention of effecting a trade in IES securities, Cochrane and IES made prohibited representations. Specifically, Staff alleged that Cochrane represented to an Alberta investor ("NC"), without the written approval of the Commission's Executive Director, that IES was "going public" in three to six months, would have securities listed "OTC" (over-the-counter) and thereafter on the NASDAQ, and would "open at [US]$5.25 . . . on the OTC". Staff contended that, in so doing, Cochrane contravened sections 92(3)(a) and (b) of the Act. Staff also alleged in the notice of hearing that the Respondents made misrepresentations to investors but this was neither particularized nor argued and we discuss it no further.

(c) Conduct Contrary to the Public Interest

[13] Staff further contended that the above alleged activity constituted conduct by both Respondents that was contrary to the public interest.

2. Cochrane's Admissions

[14] In his Statement of Admissions, Cochrane admitted to many of the facts and contraventions alleged by Staff. Among these:

- During the Relevant Period, [IES], with Cochrane as its CEO, raised approximately [US]$1.1 million . . . from 89 Alberta residents (the Funds).
- Cochrane participated in promotional activities during the Relevant Period and participated in the raising of the Funds by entering into loan agreements on behalf of [IES] with the investors. The investors loaned the Funds to [IES] and executed promissory notes, pledge agreements, options to purchase and powers of attorney issued by [IES] in relation to the Funds invested. The loans were to be converted automatically to [IES] securities when [IES] became a publicly traded company in the USA.
- [IES] did not become a publicly traded company in the USA. Nonetheless, investors who loaned the Funds to [IES] were issued [IES] securities and received share certificates as evidence of these securities.
- Cochrane admits that:
  - . . . the [IES] loan agreements were securities . . . ;
  - . . . the sale of these securities to [IES] investors represented trades [and] . . . were also distributions . . . ;
  - [there was no receipted prospectus and] there were no exemptions . . . applicable to the trades . . . .

[15] Cochrane admitted that, as a result, "he acted contrary to the public interest" and contravened sections 75(1) and 110(1) of the Act.

[16] Cochrane did not admit having made the prohibited representations alleged by Staff or acting contrary to the public interest in that way.

III. ISSUES

[17] The issues for determination can therefore be summarized:

1. Did Cochrane and IES contravene sections 75(1) and 110(1) of the Act and in so doing act contrary to the public interest?

2. Did Cochrane, or Cochrane and IES, make representations that were prohibited by sections 92(3)(a) and (b) of the Act and contrary to the public interest?

IV. ANALYSIS

A. Status of Statement of Admissions

[18] The Statement of Admissions was not a settlement agreement. It was, rather, merely one piece of evidence entered at the hearing.

[19] It was, of course, important evidence. Noting that it was executed by Cochrane with the benefit of legal advice, we accorded the Statement of Admissions great weight. However, before reaching definitive conclusions, we also considered the other evidence and Alberta securities laws. We found Cochrane's admissions compelling.

B. Cochrane

1. "Security", "Trade" and "Distribution"

[20] First, and despite a lack of clarity in portions of the Statement of Admissions, the documentation in evidence and the expansive meaning of the term "security" as defined in section 1(ggg) of the Act make it clear that what Alberta investors were offered, and bought, fell squarely within the definition of "security". We so find.

[21] Second, Cochrane's role in participating and raising funds from investors (seemingly, what the Statement of Admissions described as "promotional activities") involved either, or both, the sale of IES securities for valuable consideration or an act, solicitation, conduct or negotiation made in furtherance of such a sale. Given the broad meaning of "trade" under section 1(jjj) of the Act, these actions constituted trading in securities.

[22] Third, because the securities in question had not previously been issued, Cochrane's trading also involved "distribution" as that term is defined in section 1(p) of the Act.

2. Illegal Trades and Distributions

[23] Section 75(1) of the Act prohibits trading in securities without registration. Section 110(1) of the Act prohibits a distribution unless a preliminary and final prospectus have been filed and the Commission's Executive Director has issued receipts for them. Cochrane was unregistered and no prospectus had been filed and receipted. There was no evidence of any registration or prospectus exemption having been available or relied upon in a filing or otherwise; Cochrane admitted that none was available. It follows, as he also admitted, that Cochrane contravened sections 75(1) and 110(1) of the Act. We so find.

3. Conduct Contrary to the Public Interest

[24] This Commission has commented frequently on the importance of adherence to the registration and prospectus requirements of the Act. The prospectus requirement is designed to help investors make informed investment decisions by providing them with material information about an issuer and the securities it is offering. The registration requirement is meant to ensure the involvement in the investment process of a knowledgeable intermediary who understands a prospective investor's financial circumstances, risk tolerances and investment objectives. Cochrane's contravention of these requirements deprived Alberta investors in IES of the fundamental protections they are meant to be afforded. Cochrane's activity in this regard was clearly contrary to the public interest, and we so find.

C. Conduct of IES

[25] In the distributions here in issue, securities of IES were offered and sold through the agency of individuals including Cochrane. The money so raised was paid to IES, apparently to further its business objectives. It follows, and we find, that IES was itself trading and distributing securities.

[26] IES was not registered and, as noted, no prospectus had been filed and receipted for these distributions. There was no evidence that IES had available, or purported in any filing or otherwise to rely upon, any exemption from the registration and prospectus requirements of the Act.

[27] It follows, and we find, that IES contravened sections 75(1) and 110(1) of the Act. For the reasons given in respect of Cochrane, we also find that, in so doing, IES acted contrary to the public interest.

D. Prohibited Representations

1. Parties' Positions

[28] Staff, as noted, alleged that the Respondents contravened Alberta securities laws and acted contrary to the public interest by making prohibited representations. Specifically, Staff contended that Cochrane had breached sections 92(3)(a) and (b) of the Act by representing to investor NC that IES shares would be quoted on the United States

OTC marketplace, opening at a price of US$5.25 per share, and that the shares would later be listed on the NASDAQ. However, section 1 of the notice of hearing did not limit the allegation to Cochrane or to dealings with only one named investor.

[29] Cochrane did not deny discussions with NC generally along the lines alleged, but he denied having made promises. According to Cochrane, what he conveyed were plans or hopes, not guarantees. He suggested that NC should not have concluded otherwise.

2. The Law

[30] The relevant provisions of section 92 of the Act, as it read until 7 June 2005, stated as follows:

> (3) Subject to the regulations, no person or company, with the intention of effecting a trade in a security or exchange contract, shall
>
> (a) give any undertaking relating to the future value or price of the security or exchange contract,
> (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, or
> (ii) that application has been or will be made to list the security on any exchange or quote the security on any quotation and trade reporting system,
>
> (A) unless
>
> (I) the securities being traded, and
> (II) securities of the same issuer,
>
> are currently listed on an exchange or quoted on a quotation and trade reporting system, or
>
> (B) unless the exchange or quotation and trade reporting system has granted approval to the listing or quoting of the securities, conditional or otherwise, or has consented to, or indicated that it does not object to, the representation,

[31] A representation may, of course, take the form of a direct, positive statement, but that is not invariably required. As the Commission stated in *Re 526053 B.C. Ltd.*, 2006 ABASC 1408 at para. 170:

> . . . we do not believe that the term 'representation' demands evidence of a positive statement. In our view, depending on the circumstances, a representation can also be made by indirection, including by silence in the face of statements by others, or by a

> failure to correct a misapprehension demonstrated by another. All of the circumstances need to be assessed.

[32] Staff's allegation concerning representations as to the opening price of Innovative shares presumably related specifically to section 92(3)(a) of the Act. That provision, quoted above, referred to an "undertaking". This Commission commented on the meaning of that term, as used in this context, in *Re InstaDial Technologies Corp.*, 2005 ABASC 965 at para. 155:

> . . . The Act does not define 'undertaking'. However, in this context we believe that 'undertaking' connotes rather more than an 'impression', however persistently conveyed. For the purpose of paragraph 92(3)(a), we would look for something stronger than an impression and more clearly indicative of intention and commitment such as a promise, guarantee or contractual covenant . . . .

3. Investor Testimony and Documentation

[33] Staff called NC as a witness. NC described how he came to invest in IES. Cochrane and IES were, at that time, developing a proposal to install heat recovery technology at a manufacturing plant operated by NC's employer. NC held a managerial position at that plant and had met on several occasions with Cochrane. NC was favourably impressed with the IES technology. It was in the course of this process that NC inquired of Cochrane as to the possibilities of NC investing in IES. What followed, therefore, represented a response by Cochrane and IES to an approach by NC, not the converse. That fact, though, does not take their dealings outside the expansive definition of "trade" under the Act.

[34] As an investor, NC was neither inexperienced nor, in our view, naïve. He indicated that he treated his investment (which was apparently converted into IES shares) as a relatively long-term one; he was not intending to "flip" it as soon as IES went public and it was possible to sell the shares over an exchange or quotation system. That said, it was clear to us that NC considered the prospect of obtaining IES shares and being able to sell them in a public market at some time to be an important factor in his investment decision. We also think it obvious that his assessment of whether he could profit from his investment was an important factor. It was, however, less obvious that he relied on – or received from Cochrane – "representations" or an "undertaking" on those points.

[35] NC invested on two occasions. He invested US$5000 on 6 February 2004 and a further US$8000 in March 2005. His first investment was evidenced by a promissory note that included the following clause:

> At any time prior to the payment of this note in full [which was to occur on or before 30 June 2004], the Holder may convert all of the outstanding principal amount of this Note into shares of [IES's] common stock . . . , as follows:

> For each [US$2.50] in principal amount of the Note being converted, the Holder shall receive one shares [sic] of [IES's] common stock.
>
> If the Holder converts his or her Note prior to [IES's] shares being registered with the Securities and Exchange Commission, Holders [sic] shares will be registered and become free-trading at the time [IES] commences trading on the stock market. . . .

[36] Cochrane signed this promissory note for IES.

[37] Investor NC also obtained an option to purchase "future shares" in IES at US$2.50 per share under an agreement bearing a date in June 2004 (the precise date was unclear from the copy in evidence).

[38] NC's second investment – US$8000, apparently paid for by a bank draft dated 21 March 2005 – was evidenced by a promissory note dated 23 February 2005. Rather inexplicably, two such promissory notes were in evidence. One appeared to bear the signature of IES's "CEO", Cochrane, although he denied that the handwriting on the document was his. The second copy of the promissory note of that date bore the signature of IES's president, Dingwall. Also in evidence was a "Pledge Agreement" under which IES purported to pledge security in favour of NC, apparently in support of its obligation under the $8000 promissory note. This pledge agreement made reference to "2000 Future Class A Preferred Shares", and included as a recital that both IES and NC "agree that the value of a single current share as at [23 February 2005] is [US$4.00] per share. Under an "Option to Purchase" of the same date, NC also had an option to purchase 2000 "future" common shares in IES at US$4.00 per share.

[39] Two undated letter agreements in evidence, each on IES letterhead and entitled "Shares For Note Agreement", were signed for IES by Foster and by NC as "Note Holder". They show NC agreeing to convert IES's indebtedness to him under the promissory notes into IES shares. IES issued two share certificates to NC, each for 2000 common shares, the first dated 6 February 2004 and the second dated 24 March 2005.

[40] NC's recollections of specific conversations with Cochrane were imprecise – unsurprising given the lapse of time. He recalled Cochrane talking, "I think", about "going to do" an initial public offering of IES shares "at about $5.20" and about "going to try to get those listed six months after . . . we talked". NC testified later that the time given by Cochrane may have been three to six months. NC stated that "there was no guarantee of a specific date". NC did not recall whether others were present during the conversation or conversations but stated that Cochrane "typically had an entourage with" him. NC did not recollect whether Cochrane was present when NC's first promissory note was signed or given to him; he did not believe that Cochrane was present when NC's second promissory note was signed.

4. Dingwall's Evidence

[41] We heard the testimony of Dingwall, president of IES during much of the Relevant Period, concerning telephone conversations that he participated in or overheard while in Cochrane's home office. In these conversations, with both prospective and then-current IES investors, Dingwall testified that Cochrane routinely spoke about a US listing or quotation for IES shares as relatively imminent – to occur within months.

[42] Despite Cochrane's suggestions to the contrary, we found Dingwall to be a credible witness, on this point in particular.

5. Analysis Concerning Listing Representation Allegation

[43] None of NC's investment documentation sets out a written representation that IES shares would be listed on an exchange or quotation system, or trade at any particular price. The quoted clause from NC's first promissory note does suggest that IES or its shares might, at some time before the promissory note was repaid, be registered with the Securities and Exchange Commission in the US, and that IES shares might trade on "the stock market". We consider that a reasonable investor reading this document would draw the conclusion that a US listing, somewhere, could be foreseen. Without more, however, we would be reluctant to conclude that this amounted to a "representation" that IES shares "will be listed", in the wording of section 92(3)(b) of the Act.

[44] No other documentation before us evidenced such a representation. Even the January 2004 IES "Business Plan", a somewhat optimistic document, did not state that IES shares "will be listed". It did, however, include the following statement: [Ex 11]

> . . . Once the first stage of funding is completed, [IES] will seek to become a full-trading public entity through the acquisition of a full-trading shell company on the American NASDAQ Stock Exchange.

[45] The quoted statement, if presented to a prospective investor with the intention of effecting a trade in a security and depending on all the circumstances, might amount to a representation of the sort contemplated in section 92(3)(b)(i) of the Act ("that the security will be listed . . . or quoted") or, perhaps, section 92(3)(b)(ii) ("that application has been or will be made to list . . . or quote the security").

[46] However, there was no evidence that this Business Plan, or the quoted statement therefrom, was presented to NC with a view to prompting him to invest (or invest further) in IES.

[47] Considering all the evidence, we believe that Cochrane intended and sincerely hoped that IES shares would be listed or quoted on a US marketplace (OTC or NASDAQ). We do not doubt that he conveyed his hope, in this regard, to NC and other prospective and existing investors because he believed – correctly – that it would be

important to them. Prospective investors would use the information in assessing whether an investment (or further investment) in IES would be a good decision; those who had already invested in IES would find the information reassuring. We accept from NC's testimony that the prospect of being able, at some point, to sell IES shares over a United States marketplace was an important factor in his investment decision. This, in our view, is a natural perspective for any reasonably knowledgeable or experienced investor.

[48] We accepted Dingwall's testimony that Cochrane routinely gave assurances to prospective and existing investors that a listing or quotation would be expected imminently. We are persuaded that Cochrane was fully aware that investors – including those contemplating making an initial or additional investment in IES – were expecting a future quotation or listing, and also expecting that the necessary steps (which might include an application) had been or would shortly be initiated.

[49] However, the notice of hearing stated that Staff's allegation concerning listing representations related to Cochrane's dealings with one investor, NC. NC's own testimony did not seem inconsistent with Cochrane's contention that references he made to the listing or quotation of IES shares conveyed a plan or hope, not a guarantee or assurance. It was not clear that NC was given, or thought he had been given, a "representation" on this point.

[50] In short, the evidence does not suffice to persuade us that Cochrane represented to NC, with a view to effecting a trade, that IES securities "will be listed . . . or quoted" or that an application for listing or quotation "has been or will be made".

[51] We conclude, therefore, that this allegation against Cochrane has not been sustained. There was no other evidence or argument about IES's role in respect of this allegation. Therefore, if Staff intended the allegation to extend to IES, that allegation was also not sustained.

6. Future Value or Price Allegation

(a) Discussion

[52] In his testimony before us, NC recalled somewhat uncertainly (as mentioned) Cochrane having spoken about an initial public offering of IES shares "at about $5.20". The context of the conversation or conversations was unclear. However, NC's testimony indicated that he did not seem to attribute any particular weight, in deciding to invest, to the price mentioned – he indicated that he planned to retain his shares, not sell immediately – and he acknowledged his understanding that market forces would drive the price of IES shares once listed or quoted.

[53] There was no other evidence on this topic. However, Cochrane suggested that NC's recollections on this point were mistaken and might have been tied in some way to the exercise price of his IES options.

(b) Conclusion on Price or Value Undertaking

[54] The evidence was insufficient for us to determine precisely what NC was told about a future trading price or value of IES shares, in what context or with what degree of certainty. Given the meaning of "undertaking" in section 92(3)(a) of the Act (discussed above) and this paucity of evidence, we are unable to conclude that Cochrane made a prohibited "undertaking relating to the future value or price" of IES shares.

[55] It follows that this allegation against Cochrane has not been sustained. Again, if Staff intended that the allegation extend to IES, such allegation is also not sustained for the same reasons.

7. Conclusion on Section 92 Allegations

[56] For the reasons given, Staff's allegations that the Respondents contravened section 92 of the Act are dismissed.

8. Section 92 of the Act and the Public Interest

[57] In addition to their allegations about contravention of section 92, Staff alleged that the Respondents acted contrary to the public interest by making prohibited representations to Alberta investors with the intention of trading. While such a finding might follow from a finding of contravention of section 92, that is not an automatic result. Similarly, our dismissal of the allegations concerning contravention of section 92 does not dispose of the related – but not identical – allegation concerning conduct contrary to the public interest. A panel may make a finding that a respondent acted contrary to the public interest even without concluding that a provision of the Act was contravened; see *Re Canadian Tire Corp.* (1987), 10 O.S.C.B. 857; affirmed *sub nom. C.T.C. Dealer Holdings Ltd. v. Ontario (Securities Commission)* (1987), 37 D.L.R. (4th) 94 (Div. Ct.); affirmed and leave denied (1987), 35 B.L.R. xx (note) (Ont. C.A.).

[58] In this case, we are concerned that Cochrane told prospective or then-current IES investors that IES would, through one mechanism or another, have its shares listed or quoted on a US marketplace and that this could be expected to occur quite soon. The evidence did not persuade us that investor NC was misled on this point. It appeared that he understood that a listing or quotation was hoped for, not guaranteed – that is, he and Cochrane understood one another and it was unnecessary for Cochrane to correct a misapprehension on the part of NC.

[59] However, the evidence was that Cochrane routinely conveyed to other existing and prospective investors, in telephone conversations, a strong expectation of imminent listing or quotation. In addition, both the Business Plan – which may or may not have been circulated to existing or prospective investors – and a version of the IES promissory note (such as was issued to NC in February 2004) strongly hinted, to say the least, at a listing or quotation.

[60] The evidence persuades us that IES and Cochrane proceeded in a way that could reasonably be expected – and was intended – to give both existing and prospective investors the impression that their investment in IES would, quite soon, provide them with IES shares that could be resold over a public US exchange or quotation system.

[61] Missing from the information conveyed in this way were important cautions or caveats, including the fact that an exchange or quotation system might decline a listing or quotation application, or that the preparatory step of clearing a registration application with the SEC was not assured of success. This was material and, therefore, necessary information. It should have been disclosed.

[62] We consider that the Respondents' actions in this regard – even if motivated by genuine hopes and intentions – could reasonably have affected the investment decisions of Albertans, and exposed them to unanticipated illiquidity and financial loss. Those risks might not have been incurred had Cochrane refrained from broaching the topic of a future listing or included more complete information about the associated uncertainties and risks.

[63] We therefore conclude that, in discussions with investors about the listing or quotation of IES shares, Cochrane (and IES, through Cochrane) acted contrary to the public interest.

V. SANCTION

A. Position of Staff

[64] Staff sought orders that would prohibit trading in securities of IES indefinitely, until such time (if ever) as it were to clear a prospectus and obtain a receipt therefor from the Commission's Executive Director. Staff also sought orders against Cochrane that would, for 12 years, bar him from trading in securities, relying on any exemptions under Alberta securities laws, and acting as an officer or director of any issuer, and an order that he pay an administrative penalty of $100 000.

[65] In support of their position, Staff pointed to the nature of the contraventions and conduct contrary to the public interest alleged against Cochrane (some admitted by him); sanctions imposed in other cases including, in particular, the decision of this Commission in *Re Euston Capital Corp.*, 2007 ABASC 338; and the circumstance (as Staff alleged) that Cochrane acted as he did in the IES distributions while knowing of the existence of, and the importance attached by Staff to, the prospectus and registration requirements. In respect of the latter point, Staff pointed to an unrelated proceeding against Cochrane and others in respect of such requirements (the "Genoray Proceeding", relating to a notice of hearing cited as *Re Genoray Advanced Technologies Ltd.*, 2005 ABASC 64), which led,

eventually, to Cochrane entering into a settlement agreement with Staff (*Re Genoray Advanced Tech. Ltd.*, 2005 ABASC 866).

B. Position of the Respondents

[66] IES, as noted, took no part in the hearing and thus took no position on the sanctions sought by Staff. The evidence was, however, that the trustee and counsel acting for IES in its bankruptcy proceeding had been informed of Staff's allegations and intention to seek orders against IES.

[67] Cochrane did not take a clear position on sanction. He appeared to accept that sanctions of some sort were likely to follow from his admitted contraventions and conduct contrary to the public interest. However, it was evident that he considered Staff's proposed orders too harsh. He indicated that he had already suffered financial and other harm from his involvement with IES and from his involvement in the other proceeding mentioned by Staff. He took great exception to Staff having raised the existence of the Genoray Proceeding. He devoted a considerable portion of his submissions to describing his involvement in the activities that gave rise to the Genoray Proceeding and the circumstances that led him to enter into a settlement agreement which he now seemed to regret.

[68] Cochrane expressed in his submissions both frustration and regret as to the difficulties he and IES encountered during and after the Relevant Period; anger at some of his former IES colleagues and others for behaviour that, in his view, harmed IES (and, indirectly, its investors); contrition for his own admitted contraventions and conduct contrary to the public interest; and a wish to make recompense at some point to affected Alberta investors.

C. Sanctioning Principles

[69] The principles on which we consider and impose sanctions are clear, as noted in *Re Atlas Communications Inc.*, 2007 ABASC 749 at para. 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:
>
> - 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.

D. Application of Sanctioning Principles to the Facts

[70] We summarize here our analysis on the issue of sanction, applying the more pertinent sanctioning factors to the facts, in light of the positions of Cochrane and Staff.

1. Sanctioning Factors

(a) Past Conduct and Experience

[71] Neither Cochrane nor IES had apparently been sanctioned for capital market misconduct before the activities here in issue occurred. Specifically, Cochrane's settlement agreement in the Genoray Proceeding was signed in October 2005. Although there was in evidence one IES investor's subscription payment subsequent to that time, that appears to have been an isolated occurrence. Therefore, for the purposes of the sanctioning principles, we consider that Cochrane's settlement of the Genoray Proceeding and the associated consequences of his conduct there would not have informed, in any substantial degree if at all, his actions in the IES distributions. For the same reason, his conduct with IES did not contravene the restrictions on him following the Genoray Proceeding.

[72] Cochrane appeared to suggest that his understanding of the laws governing the distribution of securities in Alberta had been limited and that his admitted contraventions were inadvertent. There was, indeed, no suggestion that Cochrane had securities law expertise. On the other hand, the evidence is quite compelling that he (and IES) should have known and, in fact, did know some important principles that, if acted upon, might have averted or reduced the harm done.

[73] First, IES developed formal legal-looking documents for its capital-raising activities. Someone, somewhere came up with the initial form of promissory note. Whether it was directly drafted by a lawyer or patterned after documents used by someone else in a different transaction, there was clearly an understanding within IES that the taking of money from investors had important legal implications. Cochrane

himself signed some of these documents – including the February 2004 promissory note to NC – and therefore could not have been unaware of this.

[74] Second, IES was aware that there was in the US a system of securities laws which, at the very least, prompted it to retain lawyers and prepare an application for registration with the SEC. Foster suggested in his testimony that there had been at one point "a question" as to whether a US company would be subject to Canadian requirements. It defies belief, however, to imagine that the awareness by IES and its management of US securities laws would not alert them to the need to resolve that "question" and inquire into the laws of Canada, where they were actively raising money.

[75] Third, IES contacted and engaged in discussions with GM, whom they understood to be a British Columbia lawyer. Whatever GM's professional standing at the time (this came into doubt later), he clearly alerted IES to the existence of provincial securities laws in Canada and indicated that some work might have to be done to bring IES into compliance with those laws. A 27 August 2004 e-mail from GM to Foster stated:

> As discussed, exemptions must be available under provincial securities legislation in the provinces where the holders of the notes are resident. It is possible that in cases where an exemption is not available, the monies loaned to IES will have to be repaid. Availing yourself of the applicable exemptions will likely involve the preparation of a Canadian form of offering memorandum, which can be cribbed from [a document apparently related to IES's SEC application] currently being prepared . . . .

[76] In our view, this e-mail was damning. It gave IES – including IES's CEO, Cochrane, who did not claim to have been unaware of the discussions with GM – a clear warning, if still needed, that there could be some serious legal problems with the fund-raising in Canada, including Alberta. Despite this warning, the distribution of securities in Alberta continued: the evidence included investor NC's second investment, in March 2005, as well as sales to other investors for which the documentation bore dates in December 2004, January 2005, March 2005 and a subscription payment as late as December 2005.

[77] Cochrane's awareness of Alberta securities laws was also apparent from the Genoray Proceeding. As mentioned, Cochrane took strong exception to the introduction of evidence relating to that proceeding, particularly his settlement of the Genoray Proceeding. He suggested that the contraventions of securities laws to which he admitted in the Genoray Proceeding were inadvertent and arose in circumstances dissimilar to those in the present case.

[78] Cochrane appeared to misunderstand the purpose for which Staff raised the Genoray Proceeding in this proceeding. In any event, we assigned no importance to the rights or wrongs of what Cochrane did or did not do in the transactions that were the

subject of the Genoray Proceeding. We did not even consider his settlement agreement in that matter.

[79] The only relevance of the Genoray Proceeding that we discerned for present purposes lay in the fact that it brought to Cochrane's attention the existence and importance of the registration and prospectus requirements under the Act. First, Staff interviewed Cochrane in July 2004 in connection with an investigation that ultimately led to the Genoray Proceeding. Second, Staff issued a notice of hearing in the Genoray Proceeding on 31 January 2005 in which they set out a number of allegations against several respondents, Cochrane among them. That notice of hearing was served on Cochrane on 14 February 2005. The allegations against Cochrane in the Genoray Proceeding included making prohibited representations and engaging in trades without registration or exemptions.

[80] The point we drew from Cochrane's receipt of the Genoray Proceeding notice of hearing was, simply, that he could have been left in no doubt, after reading the document, that there are Alberta securities laws that require registration for securities trading, require a prospectus for securities distributions (breach of that requirement was alleged against others in the Genoray Proceeding notice of hearing), and prohibit certain types of representations. With that knowledge, Cochrane had every reason to obtain legal advice in respect of the IES distributions to satisfy himself that he was at no risk of contravening Alberta securities laws in that process. There is no evidence that he ever obtained such legal comfort. As noted, the IES distributions to Alberta investors continued even after Cochrane's 14 February 2005 receipt of the Genoray Proceeding notice of hearing. There was, in our view, no basis for Cochrane to suggest that, by that date, he lacked an appreciation of the existence – and potential relevance to his activities – of Alberta securities laws.

[81] Foster's testimony indicated that Cochrane made no secret of the Genoray Proceeding to his colleagues at IES. Thus, both through him as CEO and more generally among its principals, IES, too, knew quite specific details about Alberta securities laws that were relevant to the IES distributions.

[82] In short, we find that IES and Cochrane engaged in the illegal trades and distributions of IES securities with knowledge that there were laws governing that sort of activity. More specifically, they knew not later than 27 August 2004 that it would be necessary to fit within exemptions under the securities laws of each province in which money was being raised from investors. They further knew, not later than Cochrane's receipt of the Genoray Proceeding notice of hearing on 14 February 2005, some specific aspects of those securities laws, the seriousness with which they are taken in Alberta, and the possible consequences of contravention.

[83] IES's and Cochrane's persistence in raising money from Alberta investors in the face of this knowledge is, in our view, a highly aggravating circumstance warranting significant sanction.

(b) Recognition of Seriousness

[84] Cochrane suggested in his oral submissions that others at IES bore substantial responsibility for the illegal distributions. It was unclear whether this was directed to the merits of Staff's allegations or to the issue of sanction. Either way, the suggestion might be viewed as an effort to shift or minimize his own responsibility.

[85] On the other hand, in his Statement of Admissions – clearly a serious document – Cochrane stated, without reservation, that he had, as Staff alleged, breached key provisions of the Act and acted contrary to the public interest. His oral submissions made clear his understanding that Alberta investors have suffered from the IES distribution; he clearly expressed appreciation of the gravity of the situation.

[86] On balance, we are persuaded that Cochrane today recognizes the seriousness of his misconduct. This factor argues in favour of moderation in sanction.

(c) Seriousness of the Misconduct and Harm Suffered

[87] We found above that, in distributing IES securities, Cochrane and IES contravened the registration and prospectus requirements of the Act – fundamental investor protections – and that Cochrane (and IES, through Cochrane) conveyed an inappropriate – because incomplete – impression as to the prospect of IES securities being listed or quoted on a US marketplace. Thus, Alberta investors were induced to make investment decisions, and to hand over money to IES, with neither adequate information nor the involvement of a registrant. IES is in the midst of bankruptcy proceedings in the United States. It is clear that Alberta investors did not get what they expected from their investment and face the prospect of financial loss.

[88] Illegal distributions also pose broader risks to the capital market as a whole. They can undermine public confidence in the fairness and integrity of the capital market. Impaired confidence among investors can impede capital-raising, even by businesses seeking to raise money in accordance with securities laws.

[89] Misconduct of the nature found here thus exposes both identifiable investors and, more generally, other participants in the capital market to the risk of harm. As noted, those Albertans who did invest in IES also face the real prospect of losing their money.

(d) Benefit to Respondents

[90] IES clearly benefited from the illegal distributions, since the money raised went to it.

[91] Cochrane, too, was a relatively direct beneficiary. He was a director, the chief executive officer and the guiding mind of IES. The money was raised to help IES succeed, and IES's success would benefit Cochrane. He, therefore, intended to and did benefit from his misconduct. Subsequent disputes among IES principals, disappointment with certain of its technology, and what Cochrane indicated was a profusion of expensive and distressing litigation do not alter the fact that both IES and Cochrane intended to benefit, and did benefit, from the distributions while they were under way.

(e) Risk of Continued Participation in the Capital Market

[92] Cochrane and IES not only contravened fundamental provisions of Alberta securities laws, exposing identifiable investors in the capital market generally to the risk of harm, but they did so in the face of information that we found had alerted them to the existence of the relevant parts of Alberta securities laws. We have found that Cochrane does now appreciate the seriousness of this misconduct, but are not convinced that this alone will protect the capital market. We consider that, in the absence of significant sanction, were either IES or Cochrane to participate again in the Alberta capital market (Cochrane told us he had no such present intention), they would pose a risk to Alberta investors.

(f) Other Decisions

[93] Staff suggested that we ought to be guided by the sanctions ordered by this Commission in *Euston* against one of the respondents in that proceeding, George Schwartz. Among the factual similarities, Staff noted that a similar amount had been raised from Alberta investors in both situations, and that Schwartz (like Cochrane) was a director and officer and the guiding mind of the issuer of the securities. As is often the case, we find decisions in other proceedings to be of limited assistance in assessing the sanctions appropriate to the case before us. The differences between the facts in *Euston* and the facts before us are at least as numerous as the similarities.

[94] We did not find *Euston* or any other prior decision to be of great assistance to us. We arrived at our sanctioning decision based on the circumstances here, the particular respondents, our assessments of future risk, and the other factors discussed.

(g) Mitigation and Other Factors

[95] Cochrane submitted that he had invested, and lost, heavily in IES. He also declared his wish, at some point, to compensate Alberta investors who also lost by investing in IES securities. These were declarations of belief or intent, not facts or evidence. We do, however, believe that they were sincerely meant.

[96] Cochrane also submitted that the publicity attendant on Commission proceedings has been distressing, if not devastating, to his finances, reputation and even family relationships. While, again, none of this was put forward as evidence, we are inclined to believe that there is truth in what Cochrane said.

[97] While these points are of no tangible assistance to the investors who were harmed, we are prepared to treat these as factors favouring some moderation in sanction against Cochrane.

[98] We note that IES seemed to have a real business – its heat recovery technology, at least, was real and apparently viable – and we accept that Cochrane believed in the company. This was not an instance of fraudulent promotion of a sham company with no business prospects. We took this into account in assessing appropriate sanction.

2. Specific and General Deterrence

(a) Specific Deterrence

[99] We conclude from the foregoing that both IES and Cochrane must be deterred, by sanctioning orders, from a repetition of misconduct in the Alberta capital market.

[100] The ease with which Cochrane was able to raise money from Alberta investors in breach of Alberta securities laws, and his persistence in so doing despite having been alerted to those laws, convinces us that specific deterrence is required and that it must be significant. However, his recognition of the seriousness of his misconduct moderates the extent of specific deterrence required. To have the required effect, our orders must consist – as Staff contended – of a combination of market-access restrictions (cease-trade and denial-of-exemption orders and restrictions on his acting as a director or officer) and a direct monetary sanction in the form of an administrative penalty.

[101] IES's current bankruptcy proceedings suggest that its prospects for re-entering the Alberta capital market may be limited. Its re-emergence cannot, however, be ruled out. We believe that specific deterrence of IES must take the form of a sanction that effectively removes it from access to Alberta investors until it is suitable to re-enter the Alberta capital market, on the basis of full prospectus disclosure. In the circumstances, we do not believe that an additional direct monetary sanction is necessary for the purpose of specific deterrence. Such a sanction could, in fact, aggravate the harm already done, by diminishing whatever prospect currently exists of financial recovery for the Alberta investors who were the victims of the illegal distributions.

(b) General Deterrence

[102] This case also, in our view, demands a significant and effective measure of general deterrence. We must send a message, to others who might otherwise be tempted to follow in Cochrane's and IES's footsteps, that a repetition of the misconduct associated with the IES distributions would be unacceptable and would be met with serious consequences.

(c) Conclusion on Deterrence

[103] In short, we consider that significant specific and general deterrence are called for by significant sanctions against Cochrane. The market-access sanction described above in respect of IES would also have a general deterrent effect and, for the reasons mentioned, we do not believe that an additional direct monetary sanction against IES would be necessary in the circumstances.

3. Sanctions Ordered

[104] For the reasons given, we conclude that it is in the public interest to order significant sanctions against both Cochrane and IES.

(a) IES

[105] We therefore order, under section 198(1)(a) of the Act, that trading cease in the securities of IES until such time, if ever, as it files a preliminary and a final prospectus for which the Executive Director issues receipts.

(b) Cochrane

[106] In respect of Cochrane, we concur with Staff's contention that appropriate sanctions against Cochrane should include the three types of market-access bans already mentioned. However, despite Staff's contentions to the contrary, we do not believe that protection of the public interest demands that Cochrane be wholly excluded from the capital market, so long as any limited participation on his behalf is subject to constraints designed to ensure that he is not, directly or indirectly, raising money from investors without essential protections for those investors.

[107] Therefore, for the reasons given, we make the following orders in the public interest against Cochrane:

- under sections 198(1)(b) and (c) of the Act, Cochrane must cease trading in or purchasing securities, and all of the exemptions contained in the Alberta securities laws do not apply to him, for 10 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 given a copy of this decision) in: (i) Cochrane's own personal accounts; or (ii) registered retirement savings plans or registered education savings plans (as defined in the *Income Tax Act* (Canada)) for the benefit of one or more of Cochrane, his spouse and his dependent children;

- under sections 198(1)(d) and (e) of the Act, Cochrane must resign all positions he holds as a director or officer of any issuer that distributes securities and he is prohibited for 10 years from the date of this decision from becoming or acting as a director or officer (or both) of any issuer that distributes securities, except that this order will not preclude Cochrane from serving as a director or officer (or

both) of an issuer all the securities of which are owned by one or more of Cochrane and members of his immediate family; and

- under section 199 of the Act, Cochrane must pay an administrative penalty of $60 000.

VI. COSTS

[108] Staff tendered a Bill of Costs indicating that the investigation and hearing into this matter involved costs totalling over $79 000, calculated in accordance with the *Alberta Securities Commission Rules (General)* (the "Rules"). Although the Bill of Costs lacked detail, there was no evidence of errors or inappropriate calculations.

[109] Staff sought an order under section 202 of the Act that Cochrane pay costs. In oral submissions Staff sought such an order in respect of the full amount of the itemized costs but, in a later written communication to Cochrane and the panel, Staff acknowledged an earlier pre-hearing commitment to the then-counsel for Cochrane to seek no more than $50 000 in costs; Staff therefore reduced their request to $50 000. Staff sought no costs from IES.

[110] Staff submitted that Cochrane not only did not contribute significantly to the efficient resolution of the matters in issue in this proceeding, but actually caused inefficiency and delay. Staff contended that Cochrane should therefore bear a significant portion of the resulting costs.

[111] In respect of the investigation, we are persuaded that Cochrane was less than cooperative. Repeated Staff efforts to arrange an investigative interview were thwarted by postponement or simple lack of communication from Cochrane or his then-counsel. Cochrane indicated at the time that some of this was attributable to his being overseas working on business deals. Even assuming that to have been true, and assuming that the deals (if successful) might ultimately have benefited the then-existing IES investors – for which there was no solid evidence – it did not justify persistent avoidance of communication. In addition, Staff suggested that the adjournment of this hearing until February 2008 was but a further example of continued delay.

[112] The background to this hearing does lead us to think that Cochrane was not pursuing a timely and efficient conclusion of this proceeding.

[113] Cochrane did make important admissions in the Statement of Admissions. We accept that this shortened the amount of time required for the hearing. This, however, was done very late in the day and Staff contended that this greatly diminished Cochrane's apparent contribution to efficiency. Staff were led to assume that they had to prepare for a full, contested hearing. They therefore made arrangements for, among other things, the attendance of a considerable number of witnesses. The last-minute Statement of

Admissions obviated the need for those witnesses to attend the hearing, but we do not doubt that they had already been inconvenienced by planning to attend.

[114] During the course of the hearing, Cochrane tendered documentary evidence of which Staff were unaware. Compelling Staff to respond to unanticipated new information at that late stage did not shorten or enhance the efficiency of the hearing.

[115] In brief, while the Statement of Admissions did indeed shorten the actual hearing, its timing, and Cochrane's conduct before he signed the Statement of Admissions, contributed to inefficiency and delay, not efficiency and timely resolution of matters in dispute. All of this, in our view, warrants imposing on Cochrane responsibility for a substantial portion of the costs of the investigation and hearing.

[116] We do note that, while Staff proved the illegality of the IES distributions – the primary allegations in this case – they did not prove their allegations of prohibited representations (although we did find some of the Respondents' conduct in that area to be contrary to the public interest). We do not make costs orders in respect of allegations not proved. It follows, therefore, that we would not in this case order Cochrane to pay all of the costs submitted by Staff.

[117] In all the circumstances, we consider the order sought by Staff to be appropriate. We order under section 202 of the Act that Cochrane pay $50 000 of the costs of the investigation and hearing.

[118] This proceeding is concluded.

12 March 2008

For the Commission:

"original signed by"
Stephen R. Murison

"original signed by"
Dennis A. Anderson, FCA

"original signed by"
Roderick J. McKay, CA