IN THE MATTER OF THE *SECURITIES ACT*,
R.S.O. 1990, c. S.5, AS AMENDED

AND

IN THE MATTER OF
ANDREW STUART NETHERWOOD RANKIN

REASONS FOR DECISION ON SETTLEMENT

Hearing and Decision:	February 21, 2008	
Reasons:	March 17, 2008	
Panel:	James E.A. Turner	- Vice-Chair and Chair of the Panel
	David L. Knight, FCA	- Commissioner
Counsel:	Kelley McKinnon	- For Staff of the Ontario Securities Commission
	Douglas C. Hunt Glen Jennings	- Counsel to Staff of the Ontario Securities Commission
	David Humphrey Jill Makepeace	- For Andrew Stuart Netherwood Rankin

REASONS FOR DECISION

I. BACKGROUND

[1] On February 21, 2008, a hearing was convened before the Ontario Securities Commission (the "Commission") to consider the terms of a settlement agreement (the "Settlement Agreement") entered into between Staff of the Commission ("Staff") and Andrew Stuart Netherwood Rankin ("Rankin") on February 19, 2008 relating to matters arising from a Notice of Hearing and Statement of Allegations dated December 20, 2005. This was a hearing under section 127 of the *Securities Act*, R.S.O. 1990, c. S.5, as amended (the "Act"), to consider whether it is in the public interest to approve the Settlement Agreement and the sanctions contained therein.

[2] The hearing to consider the settlement was held *in camera* at the request of Staff and Rankin in order to avoid any potential prejudice to Rankin if we did not approve the settlement. The *in camera* hearing was held pursuant to paragraph 9(1)(b) of the *Statutory Powers Procedure Act*, R.S.O. 1990, c. S.22 and the Commission's *Practice Guidelines – Settlement Procedures*, contained in the Commission's *Rules of Practice* (1997), 20 O.S.C.B. 1947.

[3] At the *in camera* hearing, Staff submitted a Supplementary Settlement Hearing Brief (the "Staff Supplementary Hearing Brief") that contained detailed confidential information with respect to Rankin's current employment, income, assets and financial position. The Staff Supplementary Hearing Brief also contained a transcript of the examination by Staff of Rankin on the information set forth in the brief. We were satisfied that such information was sufficient to permit us to assess Rankin's ability to make the financial payment contemplated by the Settlement Agreement, or any larger payment. At the conclusion of the *in camera* hearing, we ordered that the Staff Supplementary Hearing Brief remain confidential under permanent seal. We did so on the basis that the Staff Supplementary Hearing Brief contains intimate financial and personal information of Rankin that, having regard to all the circumstances, should remain confidential.

[4] After considering the materials filed and the submissions made to us at the *in camera* hearing, we concluded that it was in the public interest to approve the Settlement Agreement. At that time, the public hearing resumed and the Chair of the Panel gave an oral summary of our reasons and indicated that written reasons would be provided in due course. These are the written reasons for our decision.

II. RELEVANT FACTS SET OUT IN THE SETTLEMENT AGREEMENT

[5] The facts and circumstances agreed to by Staff and Rankin for purposes of this settlement are set out in the Settlement Agreement. We will summarize in these reasons certain of the facts that we considered important in coming to our decision. We emphasize that the facts set out in the Settlement Agreement are not findings of fact by this Panel. Rather, they are facts agreed to by Staff and Rankin for purposes of this settlement. In approving the Settlement Agreement, we relied solely on the facts set out in that agreement and those facts represented to us at the

hearing. Except as otherwise indicated, the following statements of fact are based on or contained in the Settlement Agreement.

[6] The Settlement Agreement states that the events that gave rise to this matter occurred from early 2000 to April, 2001, while Rankin was employed as a Managing Director in the Mergers and Acquisitions Department of RBC Dominion Securities ("RBC DS"). Through his work at RBC DS, Rankin was privy to and possessed confidential material information about potential corporate transactions involving RBC DS clients. Pursuant to subsection 76(5)(b) of the Act, Rankin was a person in a special relationship with the reporting issuers involved with the ten corporate transactions listed in the Settlement Agreement (the "Corporate Transactions"). Rankin was a registrant under the Act and a member of the Investment Dealers Association.

[7] The Settlement Agreement states that Rankin was aware of the legal requirement not to disclose confidential material information and that he owed a duty of confidentiality to RBC DS and to the clients of RBC DS.

[8] Daniel Duic ("Duic") was a long time close friend of Rankin and had frequent contact with him during the relevant period. Rankin and Duic spoke on the telephone or emailed each other on a daily basis, and met for coffee, meals, social events and trips. Duic also had unsupervised access to Rankin's homes where Rankin often worked and kept confidential information in connection with RBC DS business activities. On occasion, Duic had access to confidential information pertaining to the Corporate Transactions when unsupervised in Rankin's home, as a result of Rankin's negligence.

[9] Duic also engaged Rankin in conversation seeking confidential information or seeking to confirm confidential information he had already acquired. It was acknowledged by counsel for Rankin at the hearing that Rankin informed Duic in certain conversations of confidential material information that had not been generally disclosed.

[10] The Settlement Agreement states that, through Rankin's conduct as described in the Settlement Agreement, Rankin informed Duic of confidential material facts relating to each of the potential Corporate Transactions that had not been generally disclosed.

[11] According to the Settlement Agreement, Rankin did not know and did not advert to Duic's use of the confidential material information.

[12] The Settlement Agreement states that over a 14-month period, on the basis of confidential material information, Duic earned profits of approximately $4.5 million by illegal insider trading, contrary to subsection 76(1) of the Act.

[13] The Settlement Agreement states that, by engaging in the conduct described above, Rankin breached Ontario securities law by acting contrary to subsection 76(2) of the Act.

[14] Accordingly, Rankin has admitted that he breached subsection 76(2) of the Act by informing Duic of material facts with respect to the Corporate Transactions before those material

facts had been generally disclosed. Subsection 76(2) is commonly referred to as the "tipping" prohibition.

III. APPLICABLE LAW

[15] There was no disagreement as to the legal principles we are to apply in considering the Settlement Agreement. We summarize them below.

A. The Purposes of the Act

[16] The purposes of the Act are set out in section 1.1, as follows:

> (a) to provide protection to investors from unfair, improper or fraudulent practices; and
>
> (b) to foster fair and efficient capital markets and confidence in capital markets.

[17] In pursuing the purposes of the Act, section 2.1 provides that the Commission shall have regard to certain fundamental principles. Relevant to this case, paragraph 2 states that the primary means for achieving the purposes of the Act are:

> i. requirements for timely, accurate and efficient disclosure of information,
>
> ii. restrictions on fraudulent and unfair market practices and procedures, and
>
> iii. requirements for the maintenance of high standards of fitness and business conduct to ensure honest and responsible conduct by market participants.

B. The Role of the Commission in Reviewing Settlement Agreements

[18] The role of the Commission in considering a proposed settlement agreement has been articulated in several cases. In *Re Koonar et al.* (2002), 25 O.S.C.B. 2691, the Commission stated:

> The role of the panel in reviewing a settlement agreement is not to substitute the sanctions it would impose in a contested hearing for what is proposed in the settlement agreement, but rather to make sure the agreed sanctions are within acceptable parameters. (*Re Koonar et al.*, *supra* at 2692. See also *Re Melnyk* (2007), 30 O.S.C.B. 5253; *Re Pollitt* (2004), 27 O.S.C.B. 9643 at para. 33; and *Nortel Networks Corp.*, transcript of oral reasons of the Commission, May 22, 2007, p. 52.)

[19] In making that assessment in this case, we gave significant weight to the terms of the Settlement Agreement because those terms were reached as a result of negotiations between adversarial parties (Staff and the Respondent) and because a balancing of factors and interests has already taken place in reaching the agreement. The language of the Settlement Agreement was obviously very carefully negotiated by the parties. Our role in considering the settlement is

not to renegotiate the terms of the Settlement Agreement or to suggest changes to the agreed facts, statements and sanctions set forth in the Settlement Agreement. Our role is simply to decide whether the Settlement Agreement as a whole, on the terms presented and agreed to, should be approved as being in the public interest (*Re Melnyk*, *supra* at para. 15).

[20] In considering the sanctions to be imposed, the Commission has emphasized the following guiding principle:

> . . . the role of this Commission is to protect the public interest by removing from the capital markets – wholly or partially, permanently or temporarily, as the circumstances may warrant – those whose conduct in the past leads us to conclude that their conduct in the future may well be detrimental to the integrity of those capital markets. We are not here to punish past conduct; that is the role of the courts, particularly under section 118 [now 122] of the Act. We are here to restrain, as best we can, future conduct that is likely to be prejudicial to the public interest in having capital markets that are both fair and efficient. In so doing, we must, of necessity, look to past conduct as a guide to what we believe a person's future conduct might reasonably be expected to be. . . . (*Re Mithras Management Ltd.* (1990), 13 O.S.C.B. 1600 at 1610 and 1611.)

[21] Further, the Commission must have regard to the specific circumstances of each case when determining the appropriate sanctions to be imposed on a respondent:

> We have a duty to consider what is in the public interest. To do that, we have to take into account what sanctions are appropriate to protect the integrity of the marketplace where illegal insider trading has been admitted.
>
> In doing this, we have to take into account circumstances that are appropriate to the particular respondents. This requires us to be satisfied that proposed sanctions are proportionately appropriate with respect to the circumstances facing the particular respondents. We should not just look at absolute values, e.g., what has been paid voluntarily in other settlements, or what has been found to be appropriate sanctions by way of cease trade order in other cases. (*Re M.C.J.C. Holdings and Michael Cowpland* (2002), O.S.C.B. 1133 at 1134.)

[22] On the question of whether proposed sanctions are appropriate in the circumstances, the Commission has identified factors such as the following to be relevant:

- the seriousness of the allegations proved;
- the respondent's experience in the marketplace;
- the level of a respondent's activity in the marketplace;
- whether or not there has been a recognition of the seriousness of the improprieties;

- whether or not sanctions may deter not only those involved in the case being considered, but any like-minded people from engaging in similar conduct in the capital markets;
- any mitigating factors;
- the size of any profit (or loss avoided) from the illegal conduct;
- the size of any financial sanction or voluntary payment when considered with other factors;
- the effect any sanction might have on the livelihood of the respondent;
- the restraint any sanction might have on the ability of the respondent to participate without check in the capital markets;
- the reputation and prestige of the respondent;
- the financial consequences to a respondent of any sanction; and
- the remorse of the respondent.

(*Re Belteco Holdings* (1998), 21 O.S.C.B. 7743, at pp. 7746-7; *Re M.C.J.C. Holdings*, *supra* at 1136.)

[23] We must weigh all of the relevant factors in determining whether the Settlement Agreement is in the public interest.

C. The Seriousness of Tipping

[24] Subsection 76(2) of the Act provides as follows:

> No reporting issuer and no person or company in a special relationship with a reporting issuer shall inform, other than in the necessary course of business, another person or company of a material fact or material change with respect to the reporting issuer before the material fact or material change has been generally disclosed.

[25] Rankin has admitted that he breached subsection 76(2). He was in a special relationship with each of the reporting issuers involved in the Corporate Transactions and he informed another person (Duic) of material facts before they were generally disclosed. There was no suggestion that such tipping by Rankin was in the necessary course of business.

[26] The Commission has recognized that insider tipping is as serious an offence as illegal insider trading. As with illegal insider trading, tipping is conduct that undermines confidence in the marketplace by giving a tippee an unfair advantage (*Re Pollitt*, *supra* at para. 22).

[27] As far back as 1965, the Kimber Committee expressed the following views with respect to tipping:

> Persons not connected with the company, but connected in some manner with an insider, such as spouses, relatives, friends and business associates who receive confidential information from the insider have also concerned the Committee. These persons have been described by some writers as "tippees". **If it is wrong for the insider to use confidential corporate information for his own benefit, it is also wrong for him to give the information to "tippees" so that they may benefit.** [Emphasis added] (*Report of the Attorney General's Committee on Securities Legislation in Ontario*, March 1965, Brief of Studies/Reports, Tab 1, p. 12-13, para. 2.12.)

[28] In dismissing an appeal from an insider trading conviction in *R. v. Plastic Engine Technology Corp.*, [1994] 3 C.C.L.S. 1, Mr. Justice Farley held that insider trading undermines the capital markets even where the insider did not personally profit from the trades at issue, but sold shares for the benefit of a friend. The court recognized that section 76 is aimed at ensuring that investors have an equal opportunity to consider material information in reaching their investment decisions (at 24). Both the insider trading prohibition and the tipping prohibition protect equal opportunity by restricting people who have access to material information before it is generally disclosed from trading or assisting others in trading with knowledge of that information, to the disadvantage of investors generally.

[29] Subsection 76(2) of the Act in effect imposes an obligation on those persons with access to confidential material information to preserve the confidentiality of that information and not to illegally communicate it to third parties. Doing so not only constitutes a clear breach of the Act but also puts a tippee in a position to both illegally trade on the basis of that information and to illegally communicate it to others. Tipping is the likely cause of many run-ups in the price of a stock in advance of the public announcement of a merger or acquisition transaction. Such conduct and the resulting market impact significantly undermine confidence in our capital markets and are manifestly unfair to investors.

IV. DISCUSSION AND ANALYSIS

A. Rankin's Conduct

[30] We have based our decision on the agreed facts as set out in the Settlement Agreement and the submissions made to us during the hearing. We recognize that it is not appropriate for us to speculate beyond those facts. The Settlement Agreement reflects a good faith negotiation between Staff and Rankin. Staff, knowing all of the facts and circumstances of this matter, recommends that we approve the settlement. We must give substantial weight to that recommendation. At the same time, however, we must be satisfied that the agreed sanctions are within an appropriate range given the facts agreed to.

[31] This case involved very serious market misconduct that constituted tipping of confidential material information by a senior investment banker. Rankin's duties frequently put him in possession of confidential merger and acquisition information. In our view, it is significant that Rankin's tipping of this information occurred over a period of 14 months and related to ten very high-profile transactions. He was a senior investment banker and knew he had an obligation to

maintain the confidentiality of all sensitive non-public information. Rankin's behaviour was both illegal and unacceptable for an individual of his seniority and in his position of trust. For these reasons, this is an egregious case that warrants significant sanctions.

[32] The Settlement Agreement states that Rankin did not know and did not advert to Duic's use of the confidential material information. We take that to mean that Rankin did not consciously consider the possibility that Duic would use the confidential information to trade illegally. We note that subsection 76(2) of the Act does not require that the tipper know or intend that the tippee would use the confidential material information to trade. The mere fact of informing another person of confidential material information constitutes an offence. Counsel for Rankin submitted that there is a range of conduct in relation to tipping, from the most serious to the least serious, and suggested that it is less serious if the tipper does not know or advert to the fact that the tippee would trade on the information. In our view, tipping is itself a very serious breach of securities law. Though Rankin did not advert to the fact that his friend might misuse the confidential information imparted by him, he should have. We acknowledge, however, that this is not a case, based on the facts presented to us, where Rankin knew and intended that Duic trade on the confidential material information communicated to him. We also recognize, based on the Settlement Agreement, that this is not a case in which Rankin himself traded with knowledge of material undisclosed information.

B. Sanctions

[33] The sanctions agreed to are fully set out in the Settlement Agreement and include (i) permanently prohibiting Rankin from registration under Ontario securities law; (ii) permanently prohibiting Rankin from becoming a director or officer of any registrant; (iii) permanently prohibiting Rankin from becoming a director or officer of any reporting issuer; (iv) requiring Rankin to resign all positions he holds as director or officer of a reporting issuer; (v) requiring Rankin to cease trading in any securities and prohibiting him from acquiring any securities for a period of 10 years, with two limited exceptions (for two specific retirement and education funds held through registered dealers); and (vi) requiring Rankin to pay costs of the investigation in the amount of $250,000.

[34] In assessing whether the sanctions are in an appropriate range, we note that Rankin's conduct has had a devastating effect on his career and financial circumstances. The sanctions to be imposed will permanently bar him from his chosen profession and livelihood in the Ontario securities industry and will have very serious adverse consequences for his future career prospects, not only in Ontario, but elsewhere.

[35] Based on the evidence submitted to us in the Staff Supplementary Hearing Brief regarding Rankin's current employment and financial circumstances, we accept that the payment by Rankin of $250,000 on account of costs of the investigation is a significant sanction and will effectively exhaust his resources. We understand that the $250,000 is substantially less than the Commission's actual costs in this matter. We accept, however, based on the Supplementary Hearing Brief, that Rankin is not able to pay more. We have accepted in this case as a matter of principle that, where a respondent cannot afford to make a larger financial payment, that should

not bar the respondent from being able to enter into a settlement with the Commission that is otherwise on acceptable terms. That is a matter of fairness to a respondent. We do not mean to suggest by that statement, however, any limitation on the discretion of Staff to enter into only those settlements that are on terms Staff considers appropriate.

[36] In our view, the regulatory sanctions in this case reflect the seriousness with which the Commission regards tipping. It is important that these sanctions reflect our strong view that Rankin's conduct fell far below what we expect of a person in his circumstances. The permanent prohibitions agreed to in the Settlement Agreement will bar Rankin for life from participation in the Ontario securities industry. He will be barred for life from being a registrant or a director or officer of any registrant or public company. These elements of the settlement ensure the future protection of investors and capital markets by taking away any opportunity Rankin may have to ever again engage in similar conduct.

[37] We believe that these sanctions will serve as a general deterrent to individuals who may be in a position similar to Rankin. We believe the settlement will communicate a clear message that tipping is a very serious offence and that the Commission will pursue administrative and other proceedings aggressively against anyone alleged to have committed such a flagrant breach of securities laws. The consequences to Rankin of the settlement can reasonably be expected to deter others in a similar position from committing similar illegal acts.

[38] Although the regulatory sanctions agreed to in the Settlement Agreement may be below what we might have imposed after a hearing on the merits had we found that Rankin had breached subsection 76(2) of the Act, we note that this was not a hearing on the merits, and there is no certainty as to what the outcome of any such hearing would have been.

[39] Rankin has acknowledged that he breached subsection 76(2) of the Act, and has acknowledged the seriousness of that misconduct, by agreeing to significant sanctions, including a number of permanent prohibitions and an agreement to pay $250,000 towards the Commission's investigation costs. We do not doubt that he regrets his conduct and wishes to put these matters behind him. By entering into the Settlement Agreement, the Commission avoids a lengthy and costly hearing on the merits and the settlement removes any uncertainty as to the outcome of such a proceeding.

[40] Staff advised us that the quasi-criminal proceeding before the court with respect to Rankin's conduct in this matter would be withdrawn if the Settlement Agreement is approved. While that proceeding would have had potentially significant consequences for Rankin, the criminal trial would have been long and complex and the outcome would have been uncertain. We are well aware of the lengthy history of those proceedings both at trial and on appeal. We believe that it is appropriate for us to defer to the judgment of Staff that the criminal proceedings be withdrawn in the circumstances. There are many reasons why that decision may be considered appropriate by Staff. Not the least is that the Settlement Agreement has the effect of ending, on acceptable terms, two legal proceedings that would have involved substantial costs and risks for both parties.

[41] We stress that this hearing is an administrative proceeding and the Commission's primary responsibility as a securities regulator is to protect the public from future improper conduct and to deter others from similar conduct. Having considered all of the terms of the Settlement Agreement and the submissions of the parties, we conclude that the Settlement Agreement accomplishes those objectives and that the agreed sanctions are within acceptable parameters in all the circumstances. We therefore approve the Settlement Agreement as being in the public interest and we grant the order contemplated in the Settlement Agreement.

Dated at Toronto, this 17th day of March, 2008.

"James E.A. Turner"	*"David L. Knight"*
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James E.A. Turner	David L. Knight