THE COURT OF APPEAL FOR SASKATCHEWAN

Citation: 2008 SKCA 22 Date: 20080214

Between: Docket: 1276

Euston Capital Corp. and George Schwartz

Appellants

- and -

The Saskatchewan Financial Services Commission

Respondent

Coram:
Jackson, Richards & Hunter JJ.A.

Counsel:
Peter R. Jervis for the Appellant
Patti Pacholek for the Respondent

Appeal:

From:	Saskatchewan Financial Services Commission
Heard:	December 6, 2007
Disposition:	Allowed in part
Written Reasons:	February 14, 2008
By:	The Honourable Mr. Justice Richards
In Concurrence:	The Honourable Madam Justice Jackson
	The Honourable Madam Justice Hunter

Richards J.A.

I. Introduction

[1] The appellants, Euston Capital Corp. ("Euston") and George Schwartz, sold shares of Euston to Saskatchewan residents. In so doing, they purported to rely on exemptions from the registration and prospectus requirements imposed by *The Securities Act, 1988*, S.S. 1988-89, c. S-42.2 (the "*Act*"). The respondent, Saskatchewan Financial Services Commission, found that neither exemption was available. It ordered the appellants to cease trading securities and imposed significant financial penalties.

[2] The appellants contend the Commission made a number of errors in arriving at its decision. Most significantly, they say it misinterpreted or misapplied a particular "companion policy" relating to exemptions from the registration and prospectus requirements. They also argue, in the alternative, that the sanctions imposed on them were improper.

[3] I conclude, for the reasons which follow, that the Commission did not make a reviewable error in finding the appellants had improperly relied on the exemptions. However, in the circumstances of this case, I find that the Commission did err by failing to provide reasons for its decision to impose sanctions on the appellants. As a result, the sanctions aspect of its decision must be quashed and remitted for reconsideration.

II. Background

[4] The issues at stake in this appeal are grounded in the legislative regime which regulates the sale and distribution of securities in Saskatchewan. Sections 27 and 58 of the *Act* are particularly important in this regard.

[5] Section 27(1) provides that no person or company may trade in a security unless registered as a dealer or salesperson. It reads as follows:

> **27**(1) Subject to the regulations, no person or company shall:
>
> (a) trade in a security or exchange contract unless the person or company is:
>
> (i) registered as a dealer; or
>
> (ii) registered as a salesperson, a partner or an officer of a registered dealer and is acting on behalf of the dealer;
>
> (b) **Repealed**. 2001, c.7, s.7.
>
> (c) act as an adviser unless the person or company is:
>
> (i) registered as an adviser; or
>
> (ii) registered as an employee, as a partner or as an officer of a registered adviser and is acting on behalf of the adviser;
>
> and, where the registration is subject to terms and conditions, the person or company complies with those terms and conditions.

[6] Section 58 requires that no person or company may trade in a security unless a prospectus relating to the distribution of that security has been filed. Section 58(1) is reproduced below:

> **58**(1) No person or company shall trade in a security on the person's or the company's own account or on behalf of any other person or company where the trade would be a distribution of the security unless:
>
> (a) a preliminary prospectus relating to the distribution of that security has been filed and the Director has issued a receipt for it; and
>
> (b) a prospectus relating to the distribution of that security has been filed and the Director has issued a receipt for it.

[7] Section 154(2) of *The Securities Act, 1988* empowers the Commission to make various regulations. Pursuant to that authority, the Commission adopted Multilateral Instrument 45-103. It provides an exemption from the registration and prospectus requirements of the *Act* when securities are traded to accredited investors. See: *The Securities Commission (Adoption of National Instruments) Amendment Regulations*, 2003 (No. 2).

[8] "Accredited investor" is defined in s. 1.1 of Multilateral Instrument 45-103. For purposes relevant to this appeal, that definition extends to include the following individuals:

> (k) an individual who, either alone or with a spouse, beneficially owns, directly or indirectly, financial assets having an aggregate realizable value that before taxes, but net of any related liabilities, exceeds $1,000,000,
>
> (l) an individual whose net before taxes exceeded $200,000 in each of the two most recent years or whose net income before taxes combined with that of a spouse exceeded $300,000 in each of the two most recent years and who, in either case, reasonably expects to exceed that net income level in the current year,
>
> (m) a person or company, other than a mutual fund or non-redeemable investment fund, that, either alone or with a spouse, has net assets of at least $5,000,000 and unless the person or company is an individual, that amount is shown on its most recently prepared financial statements,

[9] Euston is incorporated under the laws of Ontario. It is a venture capital corporation. Mr. Schwartz is the president of Euston. In 2002, Euston was interested in the prospect of cross-border pharmaceutical marketing between Canada and the United States.

[10] Between September 2003 and November of 2004, Euston sold its common shares to residents of Saskatchewan using a telemarketing campaign. Approximately 53 provincial residents purchased 73,480 shares for a total of $220,440. Euston purported to rely on the exemptions from the registration and prospectus requirements available by virtue of Multilateral Instrument 145-103. No prospectus was filed and the appellants were not registered with the Commission as dealers or salespersons.

[11] The sales approach used by Euston involved a number of steps. They are summarized below:

(a) Individuals retained by Euston searched a publicly available database called InfoCANADA for the purpose of identifying possible investors. InfoCANADA lists owners/managers of businesses and includes very basic information about those enterprises concerning matters such as number of years in operation, number of employees, revenues generated and credit rating;

(b) Mr. Schwartz reviewed the information copied from InfoCANADA for the purpose of generating a roster of potential investors. He has a background in tax auditing which is said to assist in drawing conclusions about net worth and income levels from the kinds of source data available from InfoCANADA;

(c) Cards with the name, address, telephone and fax numbers of possible investors were distributed to Euston sales representatives;

(d) Sales representatives, working on commission, then made "cold calls" by telephone to prospective purchasers. The representatives did not inquire about the income or net worth of the potential investors or otherwise determine if the investors were, in fact, "accredited investors" within the meaning of Multilateral Instrument 45-103;

(e) Euston's staff faxed or couriered a "confirmation" to those individuals who agreed to purchase shares. An example of a confirmation, with the name and address of the purchaser deleted, is set out below:

Confirmation

Priority Number:	CC7783041404007
Description:	Euston Capital Corp.
Share Price:	$3.00
Number of Shares:	1000
Total Amount Due:	$3,000.00
Terms:	
Purchase Price of the Common Shares	
At $3.00 per Common Share	$3,000.00

Name: _____

Address: _____

_____

Signed: _____

(f) Within a day or two of sending out the confirmation, Euston dispatched a courier to the residence of the investor. The courier

collected the signed confirmation, if it had not already been returned, and a cheque for the purchase price;

(g) The investor subsequently received a package by registered mail. It included a letter from Mr. Schwartz "welcoming" the investor as a Euston shareholder and a share certificate. The letter also asked the investors to sign the five page "purchase agreement" included with the package and return it to Euston. The words at the top of the first page of the purchase agreement indicated, in the following terms, that the securities were being offered to accredited investors:

> THE SECURITIES HEREBY OFFERED ARE BEING PRIVATELY OFFERED TO ACCREDITED INVESTORS, AS DEFINED AT PARAGRAPHS 1(g) IN ATTACHED SCHEDULE "B", PURSUANT TO EXEMPTIONS FROM THE PROSPECTUS AND REGISTRATION REQUIREMENTS UNDER RULE 45-501 [REVISED] IMPLEMENTED BY THE ONTARIO SECURITIES COMMISSION AND UNDER REVISED MULTILATERAL INSTRUMENT 45-103 IMPLEMENTED BY THE SECURITIES REGULATORY AUTHORITIES IN ALBERTA, BRITISH COLUMBIA, MANITOBA, NEWFOUNDLAND & LABRADOR, NORTHWEST TERRITORIES, NOVA SCOTIA, NUNAVUT, PRINCE EDWARD ISLAND AND SASKATCHEWAN.

(h) The agreement included a detailed schedule of buyer warranties and representations, one of which read as follows:

> (g) Prospectus Exemptions. The Purchaser (or, if applicable, others for whom it is contracting hereunder) represents and warrants that he or she is an accredited investor as the term is defined in Ontario Securities Commission's Rule 45-501 ("Rule 45-501") or in Multilateral Instrument 45-103 ("MI 45-103"), as applicable. The Purchaser (or, if applicable, others for whom it is contracting hereunder) acknowledges and agrees that he or she is purchasing the common shares pursuant to the exemption under sec. 2.3 of Rule 45-501 or section 5.1 of MI 45-103 exempting the requirements under applicable securities laws requiring the filing of a prospectus in connection with the distribution of the Common Shares or upon the issuance of such rulings, orders, consents and approvals as may be

> required to permit such sale without the requirement of filing a prospectus. An individual meets these exemptions if his (and his spouse's) financial assets, net of related liabilities, exceeds one million dollars, or his net income before taxes exceeded two hundred thousand dollars (three hundred thousand dollars if combined with his spouse's net income before taxes) in each of the last two years and is expected to exceed that amount in the current year.

[12] A number of investors signed purchase agreements without reading them or properly understanding their content.

[13] Some of the Saskatchewan residents who purchased Euston's shares were not accredited investors.

III. The Commission Decision

[14] Euston's activities were investigated by the Commission. This resulted in the Director providing a notice of hearing to the appellants and four other men involved with Euston. Those four individuals are not parties to this appeal and, as a result, they need not be referred to again.

[15] The hearing was held and the Commission issued a decision in February of 2006. It found that the appellants had not done enough to ensure individual purchasers were accredited investors and that, in relation to the representations and warranties included in the purchase agreement, the appellants' efforts were "too late" because they occurred after the sale of shares had taken place. The key paragraphs of the Commission's decision are set out below:

> Euston, Schwartz, Saks and MacLeod (as the case may be) had to, but did not, establish before a sale was made that the investor had the necessary net worth or

> income under (k) or (l) to qualify as an Accredited Investor. The sale was complete when the Confirmation was signed and the purchase cheque was delivered, notwithstanding anything confirming or contrary in the Purchase Agreement.
>
> The only attempt to satisfy the Accredited Investor requirement was in the Purchase Agreement which, as we hold, was submitted to the Purchaser after the fact of the purchase having been made and therefore too late to satisfy the exemption requirements. In addition to this attempt being too late, it was also too little. To put it on an investor to ferret out information from a Purchase Agreement (some 5 pages long), when there is no inclination by an investor to do so, (since he was then already a shareholder as many of the witnesses said) and then attempt to put on him that he represents, warrants and covenants that he is an Accredited Investor, is insufficient to satisfy the Accredited Investor test.

[16] The Commission ordered, pursuant to s. 134(1) of the *Act*, that the appellants cease trading in all securities for a period of 10 years and provided that the exemptions in Saskatchewan securities law be inapplicable to them for 10 years. It also required, pursuant to s. 135.1 of the *Act*, that each of the appellants pay an administrative penalty of $50,000. In addition, Mr. Schwartz was ordered to pay costs related to the hearing in the amount of $14,622.40.

IV. Analysis

[17] The appellants appeal, as of right, pursuant to s. 11(1) of the *Act*.

[18] As noted above, they take issue with the Commission's decision that the exemptions from the regulation and prospectus requirements were not available to them. They also take issue, in the alternative, with the sanctions imposed by the Commission. I will deal with each matter in turn.

A. The Registration and Prospectus Requirements

[19] The Commission imposed sanctions under ss. 134 and 135.1 of the *Act* on the basis that it was in the public interest to do so. The relevant parts of those two provisions are set out below:

> **134**(1) Where, in the opinion of the Commission, it is in the public interest, the Commission may order, subject to any terms and conditions that it may impose, one or more of the following:
>
> > (a) that any or all of the exemptions in Saskatchewan securities laws do not apply to the person or company named in the order, either generally or concerning those trades, securities, exchange contracts or bids specified in the order;
> >
> > (b) that trading shall cease respecting any securities or exchange contracts for a period that is specified in the order;
> >
> > …
>
> **135.1**(1) The Commission may make an order pursuant to subsection (2) where the Commission, after a hearing:
>
> > (a) is satisfied that a person or company has contravened or failed to comply with:
> >
> > > (i) Saskatchewan securities laws; or
> > >
> > > (ii) a written undertaking made by that person or company to the Commission or the Director; and
> >
> > (b) considers it to be in the public interest to make the order.
>
> (2) In the circumstances described in subsection (1), the Commission may order all or any of the following:
>
> > (a) that the person or company pay an administrative penalty of up to $100,000;
> >
> > …

[20] On the facts of this appeal, s. 135.1(1)(a)(ii) has no application. Therefore, a penalty may be imposed pursuant to s. 135.1 only if there has been a failure to comply with Saskatchewan securities laws. On the other hand, there is some authority for the proposition that an order in the public interest under s. 134 can be made in the absence of a breach of such laws. See, for example: *Re: C.T.C. Dealer Holdings Ltd. et al. v. Ontario Securities*

Commission et al. (1987), 59 O.R. (2d) 79 (Ont. Div. Ct.). However, it is not necessary to deal with that issue in order to resolve this appeal. As I understood their submissions, both the appellants and the Commission advanced their positions on the basis that a breach of securities laws was a precondition to the valid imposition of sanctions pursuant to both s. 134 and s. 135.1. Accordingly, I too will proceed on that assumption for purposes of resolving this appeal.

[21] In relation to the question of what must be shown to establish a breach of the *Act*, the appellants contend they were required only to take reasonable steps to ensure that the purchasers of Euston shares were accredited investors and that they acted properly if they had no reasonable basis to believe a purchaser made false statements about his or her financial status. For its part, the Commission takes the position that, regardless of how elaborate or complete the steps a seller of securities might take to ensure a purchaser is an accredited investor, the seller will be exposed to the possibility of sanctions if the purchaser ultimately proves not to have been an accredited investor.

[22] These competing views were not fully argued or developed by counsel and, as a result, I am reluctant to formally decide this issue. Rather, I propose to proceed in the manner most favourable to the appellants, *i.e.* by assuming, solely for the sake of the analysis which follows, that the appellants cannot be sanctioned by the Commission under either s. 134 or s. 135.1 if they acted with reasonable diligence to ensure the Saskatchewan purchasers of Euston shares were accredited investors and had no reasonable basis to disbelieve the representations of purchasers to the effect that they were accredited investors.

If the appellants fail to succeed on this basis, they obviously cannot succeed on the basis of the Commission's theory that the mere fact some purchasers were not accredited investors is in and of itself enough to open the door to sanctions.

[23] With that background established, I turn to the particulars of the appellants' arguments. The central point of their position with respect to the registration and prospectus requirements is that they acted to ensure purchasers of Euston shares were accredited investors. Their submissions in this regard are grounded in Companion Policy 45-103. This document is made available to the public by the Commission. By its own terms, it provides "guidance on the use of the exemptions in MI 45-103". The appellants refer, in particular, to s. 1.3 of the Companion Policy. It reads as follows:

> **1.3 Responsibility for compliance**
>
> The issuer or selling security holder trading securities under an exemption is responsible for determining whether the exemption is available. In doing so, the seller may rely on factual representations by the purchaser, provided that the seller has no reasonable grounds to believe that those representations are false. However, the seller must still determine whether, given those facts, the exemption is available.
>
> For example, an issuer distributing securities to a close personal friend of a director could require that the purchaser provide a signed statement describing the purchaser's relationship with the director. On the basis of that factual information, the issuer could determine whether the purchaser is a close personal friend of the director for the purposes of the exemption. The issuer should not rely merely on the representation: "I am a close personal friend of the director".
>
> In another example, an issuer distributing securities to an individual under the accredited investor exemption can rely on a representation that the purchaser had net income before taxes in excess of $200,000 in each of the two most recent years and expects to have net income before taxes in excess of $200,000 in the current year. However, the issuer should not rely on the representation: "I am an accredited investor".

> The person or company trading securities under an exemption is also responsible for retaining the documents necessary to show that the person or company properly relied upon the exemption.

[24] The appellants say the Euston sales campaign was carefully structured so as to align with s. 1.3. In their view, the Commission failed to consider or appreciate the significance of the "pre-screening process" involving the InfoCANADA data that Euston undertook for the purpose of identifying likely investors. Most significantly, they say the Commission erred by failing to see the sale of Euston's shares as a multi-stage transaction which was not complete until Euston was in receipt of a signed purchase agreement confirming that the investor was accredited. The appellants submit they were fully entitled to rely on the representations of investors made by way of the agreements. In a nutshell, their first line of argument is that the Commission erred both in the interpretation and in the application of Companion Policy 45-103.

[25] It is useful to begin consideration of these submissions by focusing on the question of when Euston shares were sold to Saskatchewan investors. This issue is the linchpin of the appellants' arguments. As noted, they say securities were traded, *i.e.* shares sold, only when an investor executed a purchase agreement and thereby warranted that he or she was an accredited investor. This allows them to take the position that, prior to completing any sale, they discharged their obligation to ascertain the applicability of the exemptions by obtaining an express written certification as to the buyer's financial status.

[26] Before addressing the specifics of when the sale of Euston shares took place, it is necessary to say a word about the applicable standard of review. *Dr. Q v. College of Physicians and Surgeons of British Columbia*, 2003 SCC 19, [2003] 1 S.C.R. 226, mandates that four factors must be considered to determine whether the Commission's decision should be reviewed on a standard of correctness, reasonableness *simpliciter* or patent unreasonableness. Those factors are (a) the presence or absence of a privative clause or a statutory right of appeal; (b) the expertise of the tribunal relative to the court on the issue in question; (c) the purposes of the legislation; and (d) the nature of the issue.

[27] Taking these matters into account, it seems apparent that the Commission's decision with respect to when Euston shares were sold should be reviewed on a standard of reasonableness. See: *Committee for the Equal Treatment of Asbestos Minority Shareholders v. Ontario (Securities Commission)*, 2001 SCC 37, [2001] 2 S.C.R. 132; *Re Cartaway Resources Corp.*, 2004 SCC 26, [2004] 1 S.C.R. 672. I do not understand the appellants to have suggested anything different. However, even if the correctness standard is applied to this aspect of the Commission's decision, the result is the same. As explained below, the Commission's view that the sale took place before investors were presented with the purchase agreement is not only reasonable, it is also correct. As a result, I find it unnecessary to embark on a detailed assessment of the applicable standard of review in relation to this issue and, therefore, return to the main line of analysis concerning when the sale of Euston shares took place.

[28] In my view, the appellants' characterization of the timing of the sales is not supported by the evidence presented to the Commission. Euston's representatives, by way of telephone call, first obtained a verbal commitment from a potential investor. A confirmation form was then faxed or couriered to the investor. The investor signed the confirmation, indicating the number of shares involved in the transaction and their price, and provided a cheque covering the value of the shares to a waiting courier. There was no reference to a purchase agreement or to "accredited investor" status at this point and the investor could not have understood the transaction to be conditional on such status. The confirmation and cheque were returned to Euston. Significantly, Euston then issued a share certificate. In the package subsequently returned to the investor, Mr. Schwartz delivered the certificate along with a letter welcoming the purchaser as a shareholder of Euston. On the basis of these facts, it is clear that the sale of securities was complete before the investor ever learned about the purchase agreement or about the requirement that he or she be an accredited investor.

[29] The appellants respond to this difficulty in their position by emphasizing Mr. Schwartz's evidence to the effect that, on three or perhaps four occasions, Euston cancelled issued shares when, after reviewing the purchase agreement, an investor indicated that he or she did not qualify as an accredited investor. This is said to carry the implication that there was no sale until a purchase agreement was executed. However, this submission is unconvincing. As noted, at the point when confirmations were signed, money paid, and share certificates issued, there had been no suggestion by Euston or its representatives that the share transactions were contingent on buyers being

accredited investors and there is nothing in the evidence to suggest buyers understood the transactions to be in any way conditional. In other words, the fact Euston cancelled some share certificates on its own initiative is not inconsistent with the notion that a trade had occurred prior to the cancellations. While I find it unnecessary to rely directly on the expanded definition of "trade" found in s. 2(1)(vv) of the *Act* in order to resolve this aspect of the appeal, I do note that the appellants' position is particularly challenging in light of that definition. Section 2(1)(vv) reads as follows:

> **2**(1)…
>
> (vv) "trade" includes:
>
> > (i) any transfer, sale or disposition of a security for valuable consideration, whether the terms of payment be on margin, instalment or otherwise, but does not include a purchase of a security or, except as provided in subclause (iv), a transfer, pledge, mortgage or encumbrance of securities for the purpose of giving collateral for a bona fide debt;
> >
> > (i.1) any entering into of an exchange contract;
> >
> > (ii) any participation as a floor trader in any transaction in a security or an exchange contract on the floor of any exchange;
> >
> > (iii) any receipt by a registrant of an order to buy or sell a security or an exchange contract;
> >
> > (iv) any transfer, pledge, mortgage or encumbrancing of a security from the holdings of a control person for the purpose of giving collateral for a bona fide debt; and
> >
> > (v) any act, advertisement, solicitation, conduct or negotiation directly or indirectly in furtherance of anything mentioned in subclauses (i) to (iv).

[30] There is also a second reason why the appellants' reliance on the cancellation of some issued shares is not persuasive. The evidence reveals that, on a number of occasions, Euston did *not* cancel share certificates when an investor failed to return an executed purchase agreement. Mr. Schwartz attempted to explain this by saying such individuals had "acquiesced to the

fact that they are accredited investors" but this is very difficult to reconcile with the idea of the sale of shares being contingent on an individual confirming, through a purchase agreement, that he or she was an accredited investor. In my view, Euston's actions dramatically undercut its argument that no sale occurred until the investor executed a purchase agreement.

[31] In the end, therefore, it is clear the appellants sold shares to Saskatchewan purchasers prior to presenting them with a purchase agreement or obtaining a confirmation of any sort that they were accredited investors. The Commission's conclusion on this issue was not only reasonable, it was correct.

[32] In addition to the purchase agreements, the appellants' "pre-screening" efforts were the only other step they took in the direction of ascertaining whether the purchasers of Euston shares were accredited investors within the meaning of Multilateral Instrument 45-103. However, the pre-screening was of limited significance. Mr. Schwartz's consideration of the information drawn from the InfoCANADA publication perhaps served to identify individuals somewhat likely to be accredited investors but it is apparent from the evidence that, at best, his review took him no further than that. Mr. Schwartz himself described the exercise as providing "reasonable grounds to believe that this person *might* qualify [my emphasis]" as an accredited investor. More to the point, the appellants quite properly do not suggest that the pre-screening, in and of itself, was sufficiently reliable, rigorous or informative to satisfy their obligation not to sell securities to buyers other than accredited investors.

[33] The conclusion that flows from all of this is unavoidable. The appellants did not take reasonable steps in advance of the sale of Euston shares to ensure Saskatchewan purchasers were accredited investors and, at the time of sale, the appellants had no reasonable basis for believing those purchasers were, in fact, accredited investors. No inquiries were made about the purchasers' financial status in advance of the sales and the purchasers made no representations of any sort to Euston or its salespeople to the effect they were accredited investors until after the sales were completed.

[34] This result means it is unnecessary to consider the full detail of the appellants' arguments about whether the Commission properly interpreted and applied Companion Policy 45-103. The ultimate effectiveness of their submissions on those points is entirely dependent on the notion that the sales of Euston shares did not occur until investors signed the purchase agreements. If, as I have found, the sales occurred prior to the execution of those agreements, their arguments must fail.

[35] The appellants second main submission with respect to the registration and prospectus exemptions is that, in substance, the Commission applied Companion Policy 45-106, the successor policy to 45-103, and did so retroactively in violation of common law rules of fairness. Companion Policy 45-106 is said to involve a new notion to the effect that a seller should discuss with a purchaser the criteria for qualifying as an accredited investor and not rely solely on written representations. The appellants say this is the standard that, in fact, the Commission imposed. For its part, the Commission denies there is any difference in substance between the Companion Policies and says

that, in any event, the appellants place far more importance on the Policies than is warranted. They say the Policies do not have the force of law.

[36] As I understand it, the appellants object to the following paragraph from p. 2 of the Commission's decision:

> It is apparent from the evidence that at no time, during discussions over the telephone with the possible investor, did the salesman endeavour to determine whether the possible investor could meet the test to qualify as an Accredited Investor. Additionally there is no evidence that he was required to do so, or for that matter whether he (except perhaps salesman Robinson) even knew who would qualify as a Accredited Investor. There is no evidence that Euston or Schwartz gave the salespeople any instructions or advice as to who could so qualify.

[37] I do not read this passage as meaning the Commission believed the appellants were under a positive duty to obtain *verbal* assurances from purchasers of Euston shares that they were accredited investors. Rather, these comments do no more than recount background facts noting, as was the case, that Euston's salespeople did not determine in their telephone conversations with purchasers whether the purchasers fell within the definition of accredited investor. Thus, even if the appellants' submissions about the legal significance of the Companion Policies and about the difference between Policies 45-103 and 45-106 were to be accepted, their argument could not succeed. The Commission did not impose a requirement to obtain verbal assurances from investors about their financial status and it did not reject the idea that a seller of securities could rely on a properly worded written representation from a purchaser as to his or her financial situation. It simply made the point that the appellants in this case received no representations of

any sort prior to the sale of shares being completed. As a consequence, I see little merit in the appellants' arguments in relation to this matter.

[38] In the end, therefore, there is no basis for taking issue with the Commission's conclusions with respect to the propriety of the appellants' sales activity. It correctly found that the appellants were not entitled to rely on the registration and prospectus exemptions found in Multilateral Instrument 45-103. The appellants acted contrary to Saskatchewan securities laws and, on the theory of the case as presented by the appellants and the Commission, the Commission was therefore entitled to impose sanctions in the public interest under both ss. 134 and 135.1 of the *Act*.

B. Sanctions

[39] In the combination of their written and oral submissions, the appellants advance three alternative arguments with respect to the sanctions imposed by the Commission. First, they say the Commission offered no explanation for its decision with respect to sanctions and thereby erred in law. Second, they contend the sanctions fall outside the Commission's authority to act in the public interest. Third, they argue that the sanctions imposed are unreasonable. As the discussion below reveals, I find it necessary to resolve only the first of these arguments.

[40] As indicated, the appellants say the Commission erred by failing to provide adequate reasons for its decision concerning sanctions. In this regard, they emphasize that it did not explain the rationale for the sanctions imposed under either s. 134 or 135.1. It simply said summarily that the sanctions were

in the public interest. The part of the Commission's decision dealing with sanctions is set out below in its entirety:

> The Securities Act was enacted for the protection of the public. Breaches of the provisions thereof, as is the case in this matter, merit the levying of penalties.
>
> The Act gives the Commission the authority to do so, if it is in the public interest. It is our opinion that it is in the public interest that the Commission does hereby order that:
>
> 1. pursuant to section 134(1)(d) of the Act that trading in all securities by and of Euston Capital Corp., George Schwartz, Charles Saks and Norman MacLeod do cease for the period up to and including:
>
>   (i) 10 years from the date hereof by each of Euston Capital Corp. and George Schwartz, and
>
>   (ii) 5 years from the date hereof by each of Charles Saks and Norman MacLeod; and
>
> 2. the exemptions described and provided for in section 134(1)(a) of the Act do not apply to each of Euston Capital Corp., George Schwartz, Charles Saks and George MacLeod for the period up to and including:
>
>   (i) 10 years from the date hereof as to each of Euston Capital Corp. and George Schwartz, and
>
>   (ii) 5 years from the date hereof as to each of Charles Saks and Norman MacLeod.
>
> Pursuant to section 135.1(1) and (2) of the Act the Commission considers it to be in the public interest, and does hereby order, that each of Euston Capital Corp. and George Schwartz pay an administrative penalty of $50,000 and each of Charles Saks and Norman MacLeod pay an administrative penalty of $25,000.
>
> Pursuant to section 161(1) and (2) of the Act, the Commission does order that George Schwartz do pay the costs of or related to this hearing in the amount of $14,622.40.

[41] As is well known, the general historical position at common law was that a statutory tribunal had no obligation to give reasons for decision and a failure to give reasons was not considered to be a breach of the duty of procedural fairness. However, this changed with the Supreme Court of Canada's decision in *Baker v. Canada*, [1999] 2 S.C.R. 817.

[42] In *Baker*, the Court canvassed the various advantages of written reasons and concluded the time had come to acknowledge that the duty of fairness would sometimes require that reasons be provided. L'Heureux-Dube J. said this at para. 43:

> In my opinion, it is now appropriate to recognize that, in certain circumstances, the duty of procedural fairness will require the provision of a written explanation for a decision. The strong arguments demonstrating the advantages of written reasons suggest that, in cases such as this where the decision has important significance for the individual, when there is a statutory right of appeal, or in other circumstances, some form of reasons should be required. This requirement has been developing in the common law elsewhere….

[43] Justice L'Heureux-Dube's reference to some form of reasons being necessary where there is a statutory right of appeal reflected the decisions of various courts in cases such as *Re R.D.R. Construction Ltd. and Rent Review Commission* (1982), 139 D.L.R. (3d) 168 (N.S.C.A.) and *Boyle v. Workplace Health, Safety and Compensation Commission (N.B.)*(1996), 179 N.B.R. (2d) 43 (C.A.). Since *Baker*, courts have continued to find a duty to provide reasons by the reference to the existence of statutory rights of appeal. See, for example: *Casavant v. S.T.F.*, 2005 SKCA 52, [2005] 6 W.W.R. 31 at para 28; *Creager v. Provincial Dental Board of Nova Scotia*, 2005 NSCA 9, (2005), 230 N.S.R. (2d) 48; *Gardner v. Canada (Attorney General)*, 2005 FCA 284, (2005), 339 N.R. 91. It should perhaps be noted as well that, following *Baker*, the Supreme Court of Canada has framed the obligation to provide reasons in criminal cases around the need to make rights of appeal meaningful. See: *R. v. Sheppard*, 2002 SCC 26, [2002] 1 S.C.R. 869.

[44] In the present case, s. 11(5) of the *Act* provides an open-ended right of appeal from the Commission to this Court. Typically, that right of appeal will be meaningful only if the Commission offers reasons for its decisions. This is so because a decision which does no more than declare a bottom-line conclusion can easily obscure such things as an error of law or legal reasoning, a mishandling of the evidence or the consideration of improper or irrelevant factors. In short, and speaking in general terms, the failure to provide reasons for decision hollows out and defeats the right of appeal provided by s. 11(5).

[45] I do note that s. 9(11) of the *Act* imposes an obligation on the Commission to provide written reasons for its decisions when they are requested. This provision, in my view, should be read only as supplementary to the obligation to provide reasons which is rooted more generally in the common law and the right of appeal provided by the *Act*. Section 9(11) does not exhaustively prescribe the Commission's duty to explain the basis for its rulings.

[46] None of this is to say the obligation to give reasons means the Commission must always provide detailed and elaborate explanations for its decisions. Requirements in this regard will depend on context. The necessary content of any particular set of reasons will be dictated by factors such as the significance of the issues under consideration, the complexity of those issues, the arguments advanced by the parties, the nature of the evidence, the significance of the decision to the parties and so forth. The business of providing reasons for decision is not a one size fits all operation. See: *Casavant v. S.T.F., supra*, at paras. 43-48; *VIA Rail Canada Inc. v. Canada*

(National Transportation Agency) (2000), 193 D.L.R. (4th) 357 (Fed. C.A.) at paras. 21-22.

[47] In this case, significant sanctions were imposed on the appellants and they are entitled to ask the Court to review the Commission's decision with respect to those sanctions. They seek to argue two points. The first is that the sanctions were not imposed in the public interest as required by ss. 134 and 135.1. The second is that the sanctions were not reasonable.

[48] On the "public interest" issue, the appellants' submissions are grounded on the Supreme Court of Canada's decision in *Asbestos Minority Shareholders*, *supra*. In that case, the Court considered the nature and scope of the Ontario Securities Commission's jurisdiction to intervene in the public interest pursuant to s. 127 of the *Securities Act*, R.S.O. 1990, c. S. 5. Section 127 is the Ontario equivalent of s. 134 of the Saskatchewan *Act*, the provision under which the Commission purported to act here in imposing the cease trading orders on the appellants and making exemptions from securities laws unavailable to them.

[49] The Supreme Court held that sanctions imposed under s. 127(1) must be preventive and prospective in character. It said s. 127 could not be used merely to remedy misconduct alleged to have caused harm or damages. Iacobucci J., on behalf of the Court, summarized his analysis as follows at para. 45:

> In summary, pursuant to s. 127(1), the OSC has the jurisdiction and a broad discretion to intervene in Ontario capital markets if it is in the public interest to do so. However, the discretion to act in the public interest is not unlimited. In

> exercising its discretion, the OSC should consider the protection of investors and the efficiency of, and public confidence in, capital markets generally. In addition, s. 127(1) is a regulatory provision. The sanctions under the section are preventive in nature and prospective in orientation. Therefore, s. 127 cannot be used merely to remedy *Securities Act* misconduct alleged to have caused harm or damages to private parties or individuals.

[50] On their face, the sanctions imposed by the Commission under s. 134 appear to be "preventive in nature and prospective in orientation", to use the Supreme Court's phraseology. Nonetheless, in the absence of any meaningful explanation as to why these particular sanctions were selected, it is obviously difficult for the appellants to engage on this point.

[51] A similar problem arises with respect to the $50,000 administrative penalties imposed by the Commission pursuant to s. 135.1 of the *Act*. The extent to which the public interest factor restricts the penalties of this sort was considered by the Supreme Court in *Re Cartaway Resources Corp., supra*. In that case, the British Columbia Commission levied major financial penalties under the B.C. counterpart of s. 135.1 of the Saskatchewan *Act*. The Court upheld the penalties and said there was nothing inherent in the Commission's public interest jurisdiction, as conferred by that provision, which prevented it from considering general deterrence when imposing administrative penalties. That said, in context of this appeal it is not readily apparent what consideration or considerations underpinned the Commission's decision to impose administrative penalties. Again, the appellants are left at a major disadvantage in attempting to question or assess the validity of the order imposed on them.

[52] With respect to the appellants' "reasonableness" argument, the parties agree that the Commission's decision should be reviewed on the basis of the standard of reasonableness *simpliciter*. Therefore, the issue before the Court on this aspect of the appeal is quite straightforward: Are the sanctions imposed by the Committee reasonable? Unfortunately, the nature of the Commission's reasons for decision makes it extremely difficult for the appellants to come to grips with that question.

[53] We know nothing, for example, of what the Commission made, or did not make, of the various factors identified by the appellants and claimed by them to be mitigating in nature. These include the lack of any history of wrongdoing on their part, their cooperation in the Commission's investigation, what they say are ongoing efforts to assist the purchasers of Euston shares to realize some benefit from their investments and the small financial returns Mr. Schwartz derived from Euston's operations. At the same time, we understand very little of what led the Commission to choose the specific sanctions it imposed. For example, we know nothing of how the Commission assessed the seriousness of the appellants' actions or of the significance it placed on factors such as the need to deter future activity of this kind and the urgency of protecting the public. We do not know why it chose a 10 year term for the cease trade order, rather than a 5 year term or a 20 year term or why it chose $50,000 as an administrative penalty as opposed to an amount either greater or smaller. Neither do we know why it did not allow Mr. Schwartz to continue trading in or purchasing securities using his own funds for his own account. In short, while the appellants are entitled to argue that the sanctions imposed by the Commission are unreasonable, they are severely hamstrung in

this regard by the Commission's failure to explain the basis for its conclusions.

[54] Looking at the matter from a different perspective, the Court, which has an obligation to adjudicate this appeal, has been left in a position where it is largely impossible to make an assessment of the Commission's ruling. In this regard it is useful to note that "reasonableness" is typically determined by way of reference to the reasons for decision under review. This is apparent from *Law Society of New Brunswick v. Ryan*, 2003 SCC 20, [2003] 1 S.C.R. 247 where at para. 56, Iacobucci J. said:

> … The question is rather whether the reasons, taken as a whole, are tenable as support for the decision. At all times, a court applying a standard of reasonableness must assess the basic adequacy of a reasoned decision….

The same point was repeated in *Dr. Q*, *supra*, at para. 39 where Chief Justice McLachlin said that, in considering reasonableness, a reviewing court must ask whether the conclusions of a tribunal are "supported by any reasons that can bear somewhat probing examination." Seen from this angle, it is apparent that a failure of the Commission to provide reasons has the effect of frustrating the ability of the Court to undertake a meaningful appellate review.

[55] I conclude, therefore, that in the particular circumstances of this case, the Commission had an obligation to provide reasons explaining the basis for its choice of sanctions and that it erred in law by failing to do so.

[56] In light of that conclusion, three alternative remedial options present themselves. The Court might (a) quash the decision as it relates to sanctions

and remit that issue to the Commission for reconsideration; (b) leave the decision concerning sanctions in place but direct the Commission to provide reasons; or (c) substitute its own view of what sanctions are appropriate in the circumstances.

[57] In my respectful opinion, the lack of reasons on the part of the Commission leaves room for concern there might have been something less than full deliberation on the issues concerning sanctions. As a result, I am not inclined to simply ask the Commission to provide reasons explaining its existing decision. At the same time, at least in relation to the matters at hand, the Commission has relevant expert knowledge with respect to the practices, dynamics and history of capital market regulation and it would not be advisable for the Court to impose sanctions without the benefit of the Commission's assessment of the pertinent considerations. As a result, the best course of action is to quash the sanctions aspect of the Commission's decision and remit it for reconsideration. I do not, however, by way of such an order, intend to suggest one way or the other what sanctions might be appropriate in this case. The Commission must take its own view of the matter.

[58] I appreciate that this result will mean some measure of delay and perhaps some increased costs for the parties. I am not pleased by that reality but believe it is unavoidable in the circumstances.

V. Conclusion

[59] The Commission made no error in finding that the registration and prospectus exemptions found in Multilateral Instrument 45-103 were not available to the appellants. Their appeal in that regard is dismissed.

[60] However, the Commission did err by failing to provide reasons explaining its decision with respect to the sanctions imposed pursuant to ss. 134 and 135.1 of the *Act*. The appeal is allowed to that extent. The sanctions aspect of the Commission's decision is quashed and remitted to it for reconsideration. The Commission's order with respect to the costs of the hearing remains in effect.

[61] In light of the mixed outcome of this appeal, there will be no order as to costs in this Court.

DATED at the City of Regina, in the Province of Saskatchewan, this 14th day of February, A.D. 2008.

"RICHARDS J.A."_____
RICHARDS J.A.

I concur "JACKSON J.A."_____
JACKSON J.A.

I concur "HUNTER J.A."_____
HUNTER J.A.

THE COURT OF APPEAL FOR SASKATCHEWAN

Citation: 2008 SKCA 22 Date: 20080214

Between: Docket: 1276

Euston Capital Corp. and George Schwartz

Appellants

- and -

The Saskatchewan Financial Services Commission

Respondent

Coram:
Jackson, Richards & Hunter JJ.A.

Counsel:
Peter R. Jervis for the Appellant
Patti Pacholek for the Respondent

Appeal:

From:	Saskatchewan Financial Services Commission
Heard:	December 6, 2007
Disposition:	Allowed in part
Written Reasons:	February 14, 2008
By:	The Honourable Mr. Justice Richards
In Concurrence:	The Honourable Madam Justice Jackson
	The Honourable Madam Justice Hunter

Richards J.A.

I. Introduction

[1] The appellants, Euston Capital Corp. ("Euston") and George Schwartz, sold shares of Euston to Saskatchewan residents. In so doing, they purported to rely on exemptions from the registration and prospectus requirements imposed by *The Securities Act, 1988*, S.S. 1988-89, c. S-42.2 (the "*Act*"). The respondent, Saskatchewan Financial Services Commission, found that neither exemption was available. It ordered the appellants to cease trading securities and imposed significant financial penalties.

[2] The appellants contend the Commission made a number of errors in arriving at its decision. Most significantly, they say it misinterpreted or misapplied a particular "companion policy" relating to exemptions from the registration and prospectus requirements. They also argue, in the alternative, that the sanctions imposed on them were improper.

[3] I conclude, for the reasons which follow, that the Commission did not make a reviewable error in finding the appellants had improperly relied on the exemptions. However, in the circumstances of this case, I find that the Commission did err by failing to provide reasons for its decision to impose sanctions on the appellants. As a result, the sanctions aspect of its decision must be quashed and remitted for reconsideration.

II. Background

[4] The issues at stake in this appeal are grounded in the legislative regime which regulates the sale and distribution of securities in Saskatchewan. Sections 27 and 58 of the *Act* are particularly important in this regard.

[5] Section 27(1) provides that no person or company may trade in a security unless registered as a dealer or salesperson. It reads as follows:

> **27**(1) Subject to the regulations, no person or company shall:
>
> (a) trade in a security or exchange contract unless the person or company is:
>
> (i) registered as a dealer; or
>
> (ii) registered as a salesperson, a partner or an officer of a registered dealer and is acting on behalf of the dealer;
>
> (b) **Repealed**. 2001, c.7, s.7.
>
> (c) act as an adviser unless the person or company is:
>
> (i) registered as an adviser; or
>
> (ii) registered as an employee, as a partner or as an officer of a registered adviser and is acting on behalf of the adviser;
>
> and, where the registration is subject to terms and conditions, the person or company complies with those terms and conditions.

[6] Section 58 requires that no person or company may trade in a security unless a prospectus relating to the distribution of that security has been filed. Section 58(1) is reproduced below:

> **58**(1) No person or company shall trade in a security on the person's or the company's own account or on behalf of any other person or company where the trade would be a distribution of the security unless:
>
> (a) a preliminary prospectus relating to the distribution of that security has been filed and the Director has issued a receipt for it; and
>
> (b) a prospectus relating to the distribution of that security has been filed and the Director has issued a receipt for it.

[7] Section 154(2) of *The Securities Act, 1988* empowers the Commission to make various regulations. Pursuant to that authority, the Commission adopted Multilateral Instrument 45-103. It provides an exemption from the registration and prospectus requirements of the *Act* when securities are traded to accredited investors. See: *The Securities Commission (Adoption of National Instruments) Amendment Regulations*, 2003 (No. 2).

[8] "Accredited investor" is defined in s. 1.1 of Multilateral Instrument 45-103. For purposes relevant to this appeal, that definition extends to include the following individuals:

> (k) an individual who, either alone or with a spouse, beneficially owns, directly or indirectly, financial assets having an aggregate realizable value that before taxes, but net of any related liabilities, exceeds $1,000,000,
>
> (l) an individual whose net before taxes exceeded $200,000 in each of the two most recent years or whose net income before taxes combined with that of a spouse exceeded $300,000 in each of the two most recent years and who, in either case, reasonably expects to exceed that net income level in the current year,
>
> (m) a person or company, other than a mutual fund or non-redeemable investment fund, that, either alone or with a spouse, has net assets of at least $5,000,000 and unless the person or company is an individual, that amount is shown on its most recently prepared financial statements,

[9] Euston is incorporated under the laws of Ontario. It is a venture capital corporation. Mr. Schwartz is the president of Euston. In 2002, Euston was interested in the prospect of cross-border pharmaceutical marketing between Canada and the United States.

[10] Between September 2003 and November of 2004, Euston sold its common shares to residents of Saskatchewan using a telemarketing campaign. Approximately 53 provincial residents purchased 73,480 shares for a total of $220,440. Euston purported to rely on the exemptions from the registration and prospectus requirements available by virtue of Multilateral Instrument 145-103. No prospectus was filed and the appellants were not registered with the Commission as dealers or salespersons.

[11] The sales approach used by Euston involved a number of steps. They are summarized below:

(a) Individuals retained by Euston searched a publicly available database called InfoCANADA for the purpose of identifying possible investors. InfoCANADA lists owners/managers of businesses and includes very basic information about those enterprises concerning matters such as number of years in operation, number of employees, revenues generated and credit rating;

(b) Mr. Schwartz reviewed the information copied from InfoCANADA for the purpose of generating a roster of potential investors. He has a background in tax auditing which is said to assist in drawing conclusions about net worth and income levels from the kinds of source data available from InfoCANADA;

(c) Cards with the name, address, telephone and fax numbers of possible investors were distributed to Euston sales representatives;

(d) Sales representatives, working on commission, then made "cold calls" by telephone to prospective purchasers. The representatives did not inquire about the income or net worth of the potential investors or otherwise determine if the investors were, in fact, "accredited investors" within the meaning of Multilateral Instrument 45-103;

(e) Euston's staff faxed or couriered a "confirmation" to those individuals who agreed to purchase shares. An example of a confirmation, with the name and address of the purchaser deleted, is set out below:

Confirmation

Priority Number:	CC7783041404007
Description:	Euston Capital Corp.
Share Price:	$3.00
Number of Shares:	1000
Total Amount Due:	$3,000.00
Terms:	
Purchase Price of the Common Shares	
At $3.00 per Common Share	$3,000.00

Name: _____

Address: _____

_____

Signed: _____

(f) Within a day or two of sending out the confirmation, Euston dispatched a courier to the residence of the investor. The courier

collected the signed confirmation, if it had not already been returned, and a cheque for the purchase price;

(g) The investor subsequently received a package by registered mail. It included a letter from Mr. Schwartz "welcoming" the investor as a Euston shareholder and a share certificate. The letter also asked the investors to sign the five page "purchase agreement" included with the package and return it to Euston. The words at the top of the first page of the purchase agreement indicated, in the following terms, that the securities were being offered to accredited investors:

> THE SECURITIES HEREBY OFFERED ARE BEING PRIVATELY OFFERED TO ACCREDITED INVESTORS, AS DEFINED AT PARAGRAPHS 1(g) IN ATTACHED SCHEDULE "B", PURSUANT TO EXEMPTIONS FROM THE PROSPECTUS AND REGISTRATION REQUIREMENTS UNDER RULE 45-501 [REVISED] IMPLEMENTED BY THE ONTARIO SECURITIES COMMISSION AND UNDER REVISED MULTILATERAL INSTRUMENT 45-103 IMPLEMENTED BY THE SECURITIES REGULATORY AUTHORITIES IN ALBERTA, BRITISH COLUMBIA, MANITOBA, NEWFOUNDLAND & LABRADOR, NORTHWEST TERRITORIES, NOVA SCOTIA, NUNAVUT, PRINCE EDWARD ISLAND AND SASKATCHEWAN.

(h) The agreement included a detailed schedule of buyer warranties and representations, one of which read as follows:

> (g) Prospectus Exemptions. The Purchaser (or, if applicable, others for whom it is contracting hereunder) represents and warrants that he or she is an accredited investor as the term is defined in Ontario Securities Commission's Rule 45-501 ("Rule 45-501") or in Multilateral Instrument 45-103 ("MI 45-103"), as applicable. The Purchaser (or, if applicable, others for whom it is contracting hereunder) acknowledges and agrees that he or she is purchasing the common shares pursuant to the exemption under sec. 2.3 of Rule 45-501 or section 5.1 of MI 45-103 exempting the requirements under applicable securities laws requiring the filing of a prospectus in connection with the distribution of the Common Shares or upon the issuance of such rulings, orders, consents and approvals as may be

> required to permit such sale without the requirement of filing a prospectus. An individual meets these exemptions if his (and his spouse's) financial assets, net of related liabilities, exceeds one million dollars, or his net income before taxes exceeded two hundred thousand dollars (three hundred thousand dollars if combined with his spouse's net income before taxes) in each of the last two years and is expected to exceed that amount in the current year.

[12] A number of investors signed purchase agreements without reading them or properly understanding their content.

[13] Some of the Saskatchewan residents who purchased Euston's shares were not accredited investors.

III. The Commission Decision

[14] Euston's activities were investigated by the Commission. This resulted in the Director providing a notice of hearing to the appellants and four other men involved with Euston. Those four individuals are not parties to this appeal and, as a result, they need not be referred to again.

[15] The hearing was held and the Commission issued a decision in February of 2006. It found that the appellants had not done enough to ensure individual purchasers were accredited investors and that, in relation to the representations and warranties included in the purchase agreement, the appellants' efforts were "too late" because they occurred after the sale of shares had taken place. The key paragraphs of the Commission's decision are set out below:

> Euston, Schwartz, Saks and MacLeod (as the case may be) had to, but did not, establish before a sale was made that the investor had the necessary net worth or

> income under (k) or (l) to qualify as an Accredited Investor. The sale was complete when the Confirmation was signed and the purchase cheque was delivered, notwithstanding anything confirming or contrary in the Purchase Agreement.
>
> The only attempt to satisfy the Accredited Investor requirement was in the Purchase Agreement which, as we hold, was submitted to the Purchaser after the fact of the purchase having been made and therefore too late to satisfy the exemption requirements. In addition to this attempt being too late, it was also too little. To put it on an investor to ferret out information from a Purchase Agreement (some 5 pages long), when there is no inclination by an investor to do so, (since he was then already a shareholder as many of the witnesses said) and then attempt to put on him that he represents, warrants and covenants that he is an Accredited Investor, is insufficient to satisfy the Accredited Investor test.

[16] The Commission ordered, pursuant to s. 134(1) of the *Act*, that the appellants cease trading in all securities for a period of 10 years and provided that the exemptions in Saskatchewan securities law be inapplicable to them for 10 years. It also required, pursuant to s. 135.1 of the *Act*, that each of the appellants pay an administrative penalty of $50,000. In addition, Mr. Schwartz was ordered to pay costs related to the hearing in the amount of $14,622.40.

IV. Analysis

[17] The appellants appeal, as of right, pursuant to s. 11(1) of the *Act*.

[18] As noted above, they take issue with the Commission's decision that the exemptions from the regulation and prospectus requirements were not available to them. They also take issue, in the alternative, with the sanctions imposed by the Commission. I will deal with each matter in turn.

A. The Registration and Prospectus Requirements

[19] The Commission imposed sanctions under ss. 134 and 135.1 of the *Act* on the basis that it was in the public interest to do so. The relevant parts of those two provisions are set out below:

> **134**(1) Where, in the opinion of the Commission, it is in the public interest, the Commission may order, subject to any terms and conditions that it may impose, one or more of the following:
>
> > (a) that any or all of the exemptions in Saskatchewan securities laws do not apply to the person or company named in the order, either generally or concerning those trades, securities, exchange contracts or bids specified in the order;
> >
> > (b) that trading shall cease respecting any securities or exchange contracts for a period that is specified in the order;
> >
> > …
>
> **135.1**(1) The Commission may make an order pursuant to subsection (2) where the Commission, after a hearing:
>
> > (a) is satisfied that a person or company has contravened or failed to comply with:
> >
> > > (i) Saskatchewan securities laws; or
> > >
> > > (ii) a written undertaking made by that person or company to the Commission or the Director; and
> >
> > (b) considers it to be in the public interest to make the order.
>
> (2) In the circumstances described in subsection (1), the Commission may order all or any of the following:
>
> > (a) that the person or company pay an administrative penalty of up to $100,000;
> >
> > …

[20] On the facts of this appeal, s. 135.1(1)(a)(ii) has no application. Therefore, a penalty may be imposed pursuant to s. 135.1 only if there has been a failure to comply with Saskatchewan securities laws. On the other hand, there is some authority for the proposition that an order in the public interest under s. 134 can be made in the absence of a breach of such laws. See, for example: *Re: C.T.C. Dealer Holdings Ltd. et al. v. Ontario Securities*

Commission et al. (1987), 59 O.R. (2d) 79 (Ont. Div. Ct.). However, it is not necessary to deal with that issue in order to resolve this appeal. As I understood their submissions, both the appellants and the Commission advanced their positions on the basis that a breach of securities laws was a precondition to the valid imposition of sanctions pursuant to both s. 134 and s. 135.1. Accordingly, I too will proceed on that assumption for purposes of resolving this appeal.

[21] In relation to the question of what must be shown to establish a breach of the *Act*, the appellants contend they were required only to take reasonable steps to ensure that the purchasers of Euston shares were accredited investors and that they acted properly if they had no reasonable basis to believe a purchaser made false statements about his or her financial status. For its part, the Commission takes the position that, regardless of how elaborate or complete the steps a seller of securities might take to ensure a purchaser is an accredited investor, the seller will be exposed to the possibility of sanctions if the purchaser ultimately proves not to have been an accredited investor.

[22] These competing views were not fully argued or developed by counsel and, as a result, I am reluctant to formally decide this issue. Rather, I propose to proceed in the manner most favourable to the appellants, *i.e.* by assuming, solely for the sake of the analysis which follows, that the appellants cannot be sanctioned by the Commission under either s. 134 or s. 135.1 if they acted with reasonable diligence to ensure the Saskatchewan purchasers of Euston shares were accredited investors and had no reasonable basis to disbelieve the representations of purchasers to the effect that they were accredited investors.

If the appellants fail to succeed on this basis, they obviously cannot succeed on the basis of the Commission's theory that the mere fact some purchasers were not accredited investors is in and of itself enough to open the door to sanctions.

[23] With that background established, I turn to the particulars of the appellants' arguments. The central point of their position with respect to the registration and prospectus requirements is that they acted to ensure purchasers of Euston shares were accredited investors. Their submissions in this regard are grounded in Companion Policy 45-103. This document is made available to the public by the Commission. By its own terms, it provides "guidance on the use of the exemptions in MI 45-103". The appellants refer, in particular, to s. 1.3 of the Companion Policy. It reads as follows:

> **1.3 Responsibility for compliance**
>
> The issuer or selling security holder trading securities under an exemption is responsible for determining whether the exemption is available. In doing so, the seller may rely on factual representations by the purchaser, provided that the seller has no reasonable grounds to believe that those representations are false. However, the seller must still determine whether, given those facts, the exemption is available.
>
> For example, an issuer distributing securities to a close personal friend of a director could require that the purchaser provide a signed statement describing the purchaser's relationship with the director. On the basis of that factual information, the issuer could determine whether the purchaser is a close personal friend of the director for the purposes of the exemption. The issuer should not rely merely on the representation: "I am a close personal friend of the director".
>
> In another example, an issuer distributing securities to an individual under the accredited investor exemption can rely on a representation that the purchaser had net income before taxes in excess of $200,000 in each of the two most recent years and expects to have net income before taxes in excess of $200,000 in the current year. However, the issuer should not rely on the representation: "I am an accredited investor".

> The person or company trading securities under an exemption is also responsible for retaining the documents necessary to show that the person or company properly relied upon the exemption.

[24] The appellants say the Euston sales campaign was carefully structured so as to align with s. 1.3. In their view, the Commission failed to consider or appreciate the significance of the "pre-screening process" involving the InfoCANADA data that Euston undertook for the purpose of identifying likely investors. Most significantly, they say the Commission erred by failing to see the sale of Euston's shares as a multi-stage transaction which was not complete until Euston was in receipt of a signed purchase agreement confirming that the investor was accredited. The appellants submit they were fully entitled to rely on the representations of investors made by way of the agreements. In a nutshell, their first line of argument is that the Commission erred both in the interpretation and in the application of Companion Policy 45-103.

[25] It is useful to begin consideration of these submissions by focusing on the question of when Euston shares were sold to Saskatchewan investors. This issue is the linchpin of the appellants' arguments. As noted, they say securities were traded, *i.e.* shares sold, only when an investor executed a purchase agreement and thereby warranted that he or she was an accredited investor. This allows them to take the position that, prior to completing any sale, they discharged their obligation to ascertain the applicability of the exemptions by obtaining an express written certification as to the buyer's financial status.

[26] Before addressing the specifics of when the sale of Euston shares took place, it is necessary to say a word about the applicable standard of review. *Dr. Q v. College of Physicians and Surgeons of British Columbia*, 2003 SCC 19, [2003] 1 S.C.R. 226, mandates that four factors must be considered to determine whether the Commission's decision should be reviewed on a standard of correctness, reasonableness *simpliciter* or patent unreasonableness. Those factors are (a) the presence or absence of a privative clause or a statutory right of appeal; (b) the expertise of the tribunal relative to the court on the issue in question; (c) the purposes of the legislation; and (d) the nature of the issue.

[27] Taking these matters into account, it seems apparent that the Commission's decision with respect to when Euston shares were sold should be reviewed on a standard of reasonableness. See: *Committee for the Equal Treatment of Asbestos Minority Shareholders v. Ontario (Securities Commission)*, 2001 SCC 37, [2001] 2 S.C.R. 132; *Re Cartaway Resources Corp.*, 2004 SCC 26, [2004] 1 S.C.R. 672. I do not understand the appellants to have suggested anything different. However, even if the correctness standard is applied to this aspect of the Commission's decision, the result is the same. As explained below, the Commission's view that the sale took place before investors were presented with the purchase agreement is not only reasonable, it is also correct. As a result, I find it unnecessary to embark on a detailed assessment of the applicable standard of review in relation to this issue and, therefore, return to the main line of analysis concerning when the sale of Euston shares took place.

[28] In my view, the appellants' characterization of the timing of the sales is not supported by the evidence presented to the Commission. Euston's representatives, by way of telephone call, first obtained a verbal commitment from a potential investor. A confirmation form was then faxed or couriered to the investor. The investor signed the confirmation, indicating the number of shares involved in the transaction and their price, and provided a cheque covering the value of the shares to a waiting courier. There was no reference to a purchase agreement or to "accredited investor" status at this point and the investor could not have understood the transaction to be conditional on such status. The confirmation and cheque were returned to Euston. Significantly, Euston then issued a share certificate. In the package subsequently returned to the investor, Mr. Schwartz delivered the certificate along with a letter welcoming the purchaser as a shareholder of Euston. On the basis of these facts, it is clear that the sale of securities was complete before the investor ever learned about the purchase agreement or about the requirement that he or she be an accredited investor.

[29] The appellants respond to this difficulty in their position by emphasizing Mr. Schwartz's evidence to the effect that, on three or perhaps four occasions, Euston cancelled issued shares when, after reviewing the purchase agreement, an investor indicated that he or she did not qualify as an accredited investor. This is said to carry the implication that there was no sale until a purchase agreement was executed. However, this submission is unconvincing. As noted, at the point when confirmations were signed, money paid, and share certificates issued, there had been no suggestion by Euston or its representatives that the share transactions were contingent on buyers being

accredited investors and there is nothing in the evidence to suggest buyers understood the transactions to be in any way conditional. In other words, the fact Euston cancelled some share certificates on its own initiative is not inconsistent with the notion that a trade had occurred prior to the cancellations. While I find it unnecessary to rely directly on the expanded definition of "trade" found in s. 2(1)(vv) of the *Act* in order to resolve this aspect of the appeal, I do note that the appellants' position is particularly challenging in light of that definition. Section 2(1)(vv) reads as follows:

> **2**(1)…
>
> (vv) "trade" includes:
>
> > (i) any transfer, sale or disposition of a security for valuable consideration, whether the terms of payment be on margin, instalment or otherwise, but does not include a purchase of a security or, except as provided in subclause (iv), a transfer, pledge, mortgage or encumbrance of securities for the purpose of giving collateral for a bona fide debt;
> >
> > (i.1) any entering into of an exchange contract;
> >
> > (ii) any participation as a floor trader in any transaction in a security or an exchange contract on the floor of any exchange;
> >
> > (iii) any receipt by a registrant of an order to buy or sell a security or an exchange contract;
> >
> > (iv) any transfer, pledge, mortgage or encumbrancing of a security from the holdings of a control person for the purpose of giving collateral for a bona fide debt; and
> >
> > (v) any act, advertisement, solicitation, conduct or negotiation directly or indirectly in furtherance of anything mentioned in subclauses (i) to (iv).

[30] There is also a second reason why the appellants' reliance on the cancellation of some issued shares is not persuasive. The evidence reveals that, on a number of occasions, Euston did *not* cancel share certificates when an investor failed to return an executed purchase agreement. Mr. Schwartz attempted to explain this by saying such individuals had "acquiesced to the

fact that they are accredited investors" but this is very difficult to reconcile with the idea of the sale of shares being contingent on an individual confirming, through a purchase agreement, that he or she was an accredited investor. In my view, Euston's actions dramatically undercut its argument that no sale occurred until the investor executed a purchase agreement.

[31] In the end, therefore, it is clear the appellants sold shares to Saskatchewan purchasers prior to presenting them with a purchase agreement or obtaining a confirmation of any sort that they were accredited investors. The Commission's conclusion on this issue was not only reasonable, it was correct.

[32] In addition to the purchase agreements, the appellants' "pre-screening" efforts were the only other step they took in the direction of ascertaining whether the purchasers of Euston shares were accredited investors within the meaning of Multilateral Instrument 45-103. However, the pre-screening was of limited significance. Mr. Schwartz's consideration of the information drawn from the InfoCANADA publication perhaps served to identify individuals somewhat likely to be accredited investors but it is apparent from the evidence that, at best, his review took him no further than that. Mr. Schwartz himself described the exercise as providing "reasonable grounds to believe that this person *might* qualify [my emphasis]" as an accredited investor. More to the point, the appellants quite properly do not suggest that the pre-screening, in and of itself, was sufficiently reliable, rigorous or informative to satisfy their obligation not to sell securities to buyers other than accredited investors.

[33] The conclusion that flows from all of this is unavoidable. The appellants did not take reasonable steps in advance of the sale of Euston shares to ensure Saskatchewan purchasers were accredited investors and, at the time of sale, the appellants had no reasonable basis for believing those purchasers were, in fact, accredited investors. No inquiries were made about the purchasers' financial status in advance of the sales and the purchasers made no representations of any sort to Euston or its salespeople to the effect they were accredited investors until after the sales were completed.

[34] This result means it is unnecessary to consider the full detail of the appellants' arguments about whether the Commission properly interpreted and applied Companion Policy 45-103. The ultimate effectiveness of their submissions on those points is entirely dependent on the notion that the sales of Euston shares did not occur until investors signed the purchase agreements. If, as I have found, the sales occurred prior to the execution of those agreements, their arguments must fail.

[35] The appellants second main submission with respect to the registration and prospectus exemptions is that, in substance, the Commission applied Companion Policy 45-106, the successor policy to 45-103, and did so retroactively in violation of common law rules of fairness. Companion Policy 45-106 is said to involve a new notion to the effect that a seller should discuss with a purchaser the criteria for qualifying as an accredited investor and not rely solely on written representations. The appellants say this is the standard that, in fact, the Commission imposed. For its part, the Commission denies there is any difference in substance between the Companion Policies and says

that, in any event, the appellants place far more importance on the Policies than is warranted. They say the Policies do not have the force of law.

[36] As I understand it, the appellants object to the following paragraph from p. 2 of the Commission's decision:

> It is apparent from the evidence that at no time, during discussions over the telephone with the possible investor, did the salesman endeavour to determine whether the possible investor could meet the test to qualify as an Accredited Investor. Additionally there is no evidence that he was required to do so, or for that matter whether he (except perhaps salesman Robinson) even knew who would qualify as a Accredited Investor. There is no evidence that Euston or Schwartz gave the salespeople any instructions or advice as to who could so qualify.

[37] I do not read this passage as meaning the Commission believed the appellants were under a positive duty to obtain *verbal* assurances from purchasers of Euston shares that they were accredited investors. Rather, these comments do no more than recount background facts noting, as was the case, that Euston's salespeople did not determine in their telephone conversations with purchasers whether the purchasers fell within the definition of accredited investor. Thus, even if the appellants' submissions about the legal significance of the Companion Policies and about the difference between Policies 45-103 and 45-106 were to be accepted, their argument could not succeed. The Commission did not impose a requirement to obtain verbal assurances from investors about their financial status and it did not reject the idea that a seller of securities could rely on a properly worded written representation from a purchaser as to his or her financial situation. It simply made the point that the appellants in this case received no representations of

any sort prior to the sale of shares being completed. As a consequence, I see little merit in the appellants' arguments in relation to this matter.

[38] In the end, therefore, there is no basis for taking issue with the Commission's conclusions with respect to the propriety of the appellants' sales activity. It correctly found that the appellants were not entitled to rely on the registration and prospectus exemptions found in Multilateral Instrument 45-103. The appellants acted contrary to Saskatchewan securities laws and, on the theory of the case as presented by the appellants and the Commission, the Commission was therefore entitled to impose sanctions in the public interest under both ss. 134 and 135.1 of the *Act*.

B. Sanctions

[39] In the combination of their written and oral submissions, the appellants advance three alternative arguments with respect to the sanctions imposed by the Commission. First, they say the Commission offered no explanation for its decision with respect to sanctions and thereby erred in law. Second, they contend the sanctions fall outside the Commission's authority to act in the public interest. Third, they argue that the sanctions imposed are unreasonable. As the discussion below reveals, I find it necessary to resolve only the first of these arguments.

[40] As indicated, the appellants say the Commission erred by failing to provide adequate reasons for its decision concerning sanctions. In this regard, they emphasize that it did not explain the rationale for the sanctions imposed under either s. 134 or 135.1. It simply said summarily that the sanctions were

in the public interest. The part of the Commission's decision dealing with sanctions is set out below in its entirety:

> The Securities Act was enacted for the protection of the public. Breaches of the provisions thereof, as is the case in this matter, merit the levying of penalties.
>
> The Act gives the Commission the authority to do so, if it is in the public interest. It is our opinion that it is in the public interest that the Commission does hereby order that:
>
> 1. pursuant to section 134(1)(d) of the Act that trading in all securities by and of Euston Capital Corp., George Schwartz, Charles Saks and Norman MacLeod do cease for the period up to and including:
>
>   (i) 10 years from the date hereof by each of Euston Capital Corp. and George Schwartz, and
>
>   (ii) 5 years from the date hereof by each of Charles Saks and Norman MacLeod; and
>
> 2. the exemptions described and provided for in section 134(1)(a) of the Act do not apply to each of Euston Capital Corp., George Schwartz, Charles Saks and George MacLeod for the period up to and including:
>
>   (i) 10 years from the date hereof as to each of Euston Capital Corp. and George Schwartz, and
>
>   (ii) 5 years from the date hereof as to each of Charles Saks and Norman MacLeod.
>
> Pursuant to section 135.1(1) and (2) of the Act the Commission considers it to be in the public interest, and does hereby order, that each of Euston Capital Corp. and George Schwartz pay an administrative penalty of $50,000 and each of Charles Saks and Norman MacLeod pay an administrative penalty of $25,000.
>
> Pursuant to section 161(1) and (2) of the Act, the Commission does order that George Schwartz do pay the costs of or related to this hearing in the amount of $14,622.40.

[41] As is well known, the general historical position at common law was that a statutory tribunal had no obligation to give reasons for decision and a failure to give reasons was not considered to be a breach of the duty of procedural fairness. However, this changed with the Supreme Court of Canada's decision in *Baker v. Canada*, [1999] 2 S.C.R. 817.

[42] In *Baker*, the Court canvassed the various advantages of written reasons and concluded the time had come to acknowledge that the duty of fairness would sometimes require that reasons be provided. L'Heureux-Dube J. said this at para. 43:

> In my opinion, it is now appropriate to recognize that, in certain circumstances, the duty of procedural fairness will require the provision of a written explanation for a decision. The strong arguments demonstrating the advantages of written reasons suggest that, in cases such as this where the decision has important significance for the individual, when there is a statutory right of appeal, or in other circumstances, some form of reasons should be required. This requirement has been developing in the common law elsewhere….

[43] Justice L'Heureux-Dube's reference to some form of reasons being necessary where there is a statutory right of appeal reflected the decisions of various courts in cases such as *Re R.D.R. Construction Ltd. and Rent Review Commission* (1982), 139 D.L.R. (3d) 168 (N.S.C.A.) and *Boyle v. Workplace Health, Safety and Compensation Commission (N.B.)*(1996), 179 N.B.R. (2d) 43 (C.A.). Since *Baker*, courts have continued to find a duty to provide reasons by the reference to the existence of statutory rights of appeal. See, for example: *Casavant v. S.T.F.*, 2005 SKCA 52, [2005] 6 W.W.R. 31 at para 28; *Creager v. Provincial Dental Board of Nova Scotia*, 2005 NSCA 9, (2005), 230 N.S.R. (2d) 48; *Gardner v. Canada (Attorney General)*, 2005 FCA 284, (2005), 339 N.R. 91. It should perhaps be noted as well that, following *Baker*, the Supreme Court of Canada has framed the obligation to provide reasons in criminal cases around the need to make rights of appeal meaningful. See: *R. v. Sheppard*, 2002 SCC 26, [2002] 1 S.C.R. 869.

[44] In the present case, s. 11(5) of the *Act* provides an open-ended right of appeal from the Commission to this Court. Typically, that right of appeal will be meaningful only if the Commission offers reasons for its decisions. This is so because a decision which does no more than declare a bottom-line conclusion can easily obscure such things as an error of law or legal reasoning, a mishandling of the evidence or the consideration of improper or irrelevant factors. In short, and speaking in general terms, the failure to provide reasons for decision hollows out and defeats the right of appeal provided by s. 11(5).

[45] I do note that s. 9(11) of the *Act* imposes an obligation on the Commission to provide written reasons for its decisions when they are requested. This provision, in my view, should be read only as supplementary to the obligation to provide reasons which is rooted more generally in the common law and the right of appeal provided by the *Act*. Section 9(11) does not exhaustively prescribe the Commission's duty to explain the basis for its rulings.

[46] None of this is to say the obligation to give reasons means the Commission must always provide detailed and elaborate explanations for its decisions. Requirements in this regard will depend on context. The necessary content of any particular set of reasons will be dictated by factors such as the significance of the issues under consideration, the complexity of those issues, the arguments advanced by the parties, the nature of the evidence, the significance of the decision to the parties and so forth. The business of providing reasons for decision is not a one size fits all operation. See: *Casavant v. S.T.F., supra*, at paras. 43-48; *VIA Rail Canada Inc. v. Canada*

(National Transportation Agency) (2000), 193 D.L.R. (4th) 357 (Fed. C.A.) at paras. 21-22.

[47] In this case, significant sanctions were imposed on the appellants and they are entitled to ask the Court to review the Commission's decision with respect to those sanctions. They seek to argue two points. The first is that the sanctions were not imposed in the public interest as required by ss. 134 and 135.1. The second is that the sanctions were not reasonable.

[48] On the "public interest" issue, the appellants' submissions are grounded on the Supreme Court of Canada's decision in *Asbestos Minority Shareholders*, *supra*. In that case, the Court considered the nature and scope of the Ontario Securities Commission's jurisdiction to intervene in the public interest pursuant to s. 127 of the *Securities Act*, R.S.O. 1990, c. S. 5. Section 127 is the Ontario equivalent of s. 134 of the Saskatchewan *Act*, the provision under which the Commission purported to act here in imposing the cease trading orders on the appellants and making exemptions from securities laws unavailable to them.

[49] The Supreme Court held that sanctions imposed under s. 127(1) must be preventive and prospective in character. It said s. 127 could not be used merely to remedy misconduct alleged to have caused harm or damages. Iacobucci J., on behalf of the Court, summarized his analysis as follows at para. 45:

> In summary, pursuant to s. 127(1), the OSC has the jurisdiction and a broad discretion to intervene in Ontario capital markets if it is in the public interest to do so. However, the discretion to act in the public interest is not unlimited. In

> exercising its discretion, the OSC should consider the protection of investors and the efficiency of, and public confidence in, capital markets generally. In addition, s. 127(1) is a regulatory provision. The sanctions under the section are preventive in nature and prospective in orientation. Therefore, s. 127 cannot be used merely to remedy *Securities Act* misconduct alleged to have caused harm or damages to private parties or individuals.

[50] On their face, the sanctions imposed by the Commission under s. 134 appear to be "preventive in nature and prospective in orientation", to use the Supreme Court's phraseology. Nonetheless, in the absence of any meaningful explanation as to why these particular sanctions were selected, it is obviously difficult for the appellants to engage on this point.

[51] A similar problem arises with respect to the $50,000 administrative penalties imposed by the Commission pursuant to s. 135.1 of the *Act*. The extent to which the public interest factor restricts the penalties of this sort was considered by the Supreme Court in *Re Cartaway Resources Corp., supra*. In that case, the British Columbia Commission levied major financial penalties under the B.C. counterpart of s. 135.1 of the Saskatchewan *Act*. The Court upheld the penalties and said there was nothing inherent in the Commission's public interest jurisdiction, as conferred by that provision, which prevented it from considering general deterrence when imposing administrative penalties. That said, in context of this appeal it is not readily apparent what consideration or considerations underpinned the Commission's decision to impose administrative penalties. Again, the appellants are left at a major disadvantage in attempting to question or assess the validity of the order imposed on them.

[52] With respect to the appellants' "reasonableness" argument, the parties agree that the Commission's decision should be reviewed on the basis of the standard of reasonableness *simpliciter*. Therefore, the issue before the Court on this aspect of the appeal is quite straightforward: Are the sanctions imposed by the Committee reasonable? Unfortunately, the nature of the Commission's reasons for decision makes it extremely difficult for the appellants to come to grips with that question.

[53] We know nothing, for example, of what the Commission made, or did not make, of the various factors identified by the appellants and claimed by them to be mitigating in nature. These include the lack of any history of wrongdoing on their part, their cooperation in the Commission's investigation, what they say are ongoing efforts to assist the purchasers of Euston shares to realize some benefit from their investments and the small financial returns Mr. Schwartz derived from Euston's operations. At the same time, we understand very little of what led the Commission to choose the specific sanctions it imposed. For example, we know nothing of how the Commission assessed the seriousness of the appellants' actions or of the significance it placed on factors such as the need to deter future activity of this kind and the urgency of protecting the public. We do not know why it chose a 10 year term for the cease trade order, rather than a 5 year term or a 20 year term or why it chose $50,000 as an administrative penalty as opposed to an amount either greater or smaller. Neither do we know why it did not allow Mr. Schwartz to continue trading in or purchasing securities using his own funds for his own account. In short, while the appellants are entitled to argue that the sanctions imposed by the Commission are unreasonable, they are severely hamstrung in

this regard by the Commission's failure to explain the basis for its conclusions.

[54] Looking at the matter from a different perspective, the Court, which has an obligation to adjudicate this appeal, has been left in a position where it is largely impossible to make an assessment of the Commission's ruling. In this regard it is useful to note that "reasonableness" is typically determined by way of reference to the reasons for decision under review. This is apparent from *Law Society of New Brunswick v. Ryan*, 2003 SCC 20, [2003] 1 S.C.R. 247 where at para. 56, Iacobucci J. said:

> … The question is rather whether the reasons, taken as a whole, are tenable as support for the decision. At all times, a court applying a standard of reasonableness must assess the basic adequacy of a reasoned decision….

The same point was repeated in *Dr. Q*, *supra*, at para. 39 where Chief Justice McLachlin said that, in considering reasonableness, a reviewing court must ask whether the conclusions of a tribunal are "supported by any reasons that can bear somewhat probing examination." Seen from this angle, it is apparent that a failure of the Commission to provide reasons has the effect of frustrating the ability of the Court to undertake a meaningful appellate review.

[55] I conclude, therefore, that in the particular circumstances of this case, the Commission had an obligation to provide reasons explaining the basis for its choice of sanctions and that it erred in law by failing to do so.

[56] In light of that conclusion, three alternative remedial options present themselves. The Court might (a) quash the decision as it relates to sanctions

and remit that issue to the Commission for reconsideration; (b) leave the decision concerning sanctions in place but direct the Commission to provide reasons; or (c) substitute its own view of what sanctions are appropriate in the circumstances.

[57] In my respectful opinion, the lack of reasons on the part of the Commission leaves room for concern there might have been something less than full deliberation on the issues concerning sanctions. As a result, I am not inclined to simply ask the Commission to provide reasons explaining its existing decision. At the same time, at least in relation to the matters at hand, the Commission has relevant expert knowledge with respect to the practices, dynamics and history of capital market regulation and it would not be advisable for the Court to impose sanctions without the benefit of the Commission's assessment of the pertinent considerations. As a result, the best course of action is to quash the sanctions aspect of the Commission's decision and remit it for reconsideration. I do not, however, by way of such an order, intend to suggest one way or the other what sanctions might be appropriate in this case. The Commission must take its own view of the matter.

[58] I appreciate that this result will mean some measure of delay and perhaps some increased costs for the parties. I am not pleased by that reality but believe it is unavoidable in the circumstances.

V. Conclusion

[59] The Commission made no error in finding that the registration and prospectus exemptions found in Multilateral Instrument 45-103 were not available to the appellants. Their appeal in that regard is dismissed.

[60] However, the Commission did err by failing to provide reasons explaining its decision with respect to the sanctions imposed pursuant to ss. 134 and 135.1 of the *Act*. The appeal is allowed to that extent. The sanctions aspect of the Commission's decision is quashed and remitted to it for reconsideration. The Commission's order with respect to the costs of the hearing remains in effect.

[61] In light of the mixed outcome of this appeal, there will be no order as to costs in this Court.

DATED at the City of Regina, in the Province of Saskatchewan, this 14th day of February, A.D. 2008.

"RICHARDS J.A."_____
RICHARDS J.A.

I concur "RICHARDS J.A. for JACKSON J.A."
JACKSON J.A.

I concur "HUNTER J.A."_____
HUNTER J.A.