BRITISH COLUMBIA SECURITIES COMMISSION
Securities Act, RSBC 1996, c. 418

Citation: Re Hamilton, 2018 BCSECCOM 290 Date: 20181009

Matthew John Hamilton and
Braeden William Sinclair Lichti (aka Braeden Sinclair)

Panel	Nigel P. Cave	Vice Chair
	Judith Downes	Commissioner
	Gordon L. Holloway	Commissioner
Hearing Dates	February 19, 20, 21, 22, 23 and 26, 2018 March 6 and July 6, 2018	
Submissions Completed	July 6, 2018	
Date of Findings	October 9 2018	

Appearing

Jennifer Whately	For the Executive Director
Patrick J. Sullivan	For Matthew John Hamilton
H. Roderick Anderson	For Braeden William Sinclair Lichti (aka Braeden Sinclair)

Findings

I. Introduction

[1] This is the liability portion of a hearing under sections 161(1) of the *Securities Act*, RSBC 1996, c. 418.

[2] On April 18, 2017, the executive director issued a notice of hearing against the respondents (2017 BCSECCOM 134).

[3] On November 6, 2017, the executive director amended the original notice of hearing (2017 BCSECCOM 339), such that the executive director alleged that:

a) Matthew John Hamilton, working together with Braeden William Sinclair Lichti, created a publicly trading shell company ideal for use in a securities manipulation by deceiving foreign regulators and the public;

b) Hamilton, together with Lichti:

i) created a company which Hamilton controlled by installing and impersonating nominee directors and officers;

ii) concealed Hamilton's control over all the company's shares by pretending to have independent shareholders;

iii) made false filings with US securities regulators to secure the company's registration and public quotation of the shares; and

iv) sold secret control over all the shares in the publicly trading company; and

c) as a consequence of the forgoing, it is in the public interest that orders be made against the respondents.

[4] During the hearing, the executive director called six witnesses, tendered documentary evidence and provided written and oral submissions. Counsel for Hamilton and Lichti attended the hearing, tendered documentary evidence on behalf of their clients and provided written and oral submissions.

[5] The events that are described in the notice of hearing were originally investigated by both the Commission and the Alberta Securities Commission (ASC). References throughout to "Commission investigators", unless it is material to distinguish between the two entities, generally refer to investigators from one or both of the commissions.

[6] Neither Hamilton nor Lichti testified during the hearing. However, transcripts of interviews of both of the respondents by Commission investigators were entered as exhibits in this proceeding. Descriptions below of Hamilton's or Lichti's evidence are references to their answers to questions from Commission investigators during those interviews.

II. Background

General

[7] Hamilton and Lichti are residents of Vancouver, British Columbia.

[8] Hamilton and Lichti met in 2007 when they both worked together at an investor relations firm and became close friends. They subsequently formed a company (Avail Capital) to carry out consulting work in the capital markets and to act as finders for mineral exploration projects for public companies. Avail Capital ceased to carry on business sometime in 2009 or 2010.

[9] Neither of the respondents have ever been registered in any capacity under the Act.

[10] Hamilton had experience acting as both a director and officer of public and private companies during the period 2008 through 2013.

[11] Hamilton described Lichti as being experienced in the US equity markets. The exact nature of this experience was not clear from the evidence during the hearing other than

Lichti acknowledged acting as a "finder" and, as will be described below, had contacts at a variety of service providers (e.g. lawyers, EDGAR filers, etc.) to US public companies.

[12] Hamilton has a close friend (VG) whom he has known since high school. VG was living for a time in Vancouver but moved to Calgary in January of 2010. VG is a pharmaceutical sales representative with a university degree. VG described Lichti as an acquaintance whom she met through social events connected to Hamilton.

[13] VG testified during the hearing. Transcripts of two interviews of VG by Commission investigators were also entered as exhibits during the hearing. We have generally relied only upon VG's oral testimony during the hearing but have referred to the transcripts of those interviews where directed by one or more of the parties.

[14] The respondents challenged VG's credibility. We will address those submissions below.

Creation of Guru Health Inc.

[15] Hamilton said that in late 2009 and early 2010 he had the idea to form a public company whose shares would be listed or traded in the US. He said that he discussed the idea with VG and asked her to help him with the project.

[16] Hamilton created an email address (guruhealthinc@gmail.com) (Guru email). Hamilton said that VG and, at a later date (around the time of the sale of the company, discussed below), Lichti had access to this email address. However, he also told Commission investigators that it was he who used the Guru email address and that he was not aware of either VG or Lichti having actually used that email address for any purpose.

[17] In late January and early February 2010, the Guru email address was used to correspond with a Nevada agent to incorporate a Nevada corporation called Guru Health Inc. (the company subsequently changed its name to Global Stevia Corp., but to avoid confusion in these findings we will refer to this company throughout as Guru Health).

[18] It is clear from these communications that the Nevada agent believed that they were dealing with VG in incorporating the company. The agent sent emails to the Guru email addressed to VG with respect to payment and other arrangements. The relevance of this will be addressed below. VG was also listed on the agent's form as the individual to bill their services to and to send documents to.

[19] VG acknowledged that Hamilton asked to use her credit card and her mailing address for this incorporation and that he subsequently reimbursed her for these expenditures. VG testified that she did this in order to help Hamilton as he was her longtime friend.

[20] Hamilton admitted that it was he who corresponded with the Nevada agent through the Guru email and provided them the instructions to incorporate the company.

[21] The Nevada agent prepared board resolutions that appointed VG and her cousin (JB) as the corporation's directors and officers.

[22] Hamilton also admitted that he obtained an electronic version of VG's signature that he used to sign various documents relating to Guru Health on her behalf, and that he had a stamp of her signature made for a similar purpose.

[23] JB did not testify during the hearing. However, she did speak with Commission investigators on several occasions during the investigation of this matter. In those conversations, JB indicated that she moved to Sweden in early 2010. She said that she was not aware that she had been made either a director or officer of Guru Health and learned of this only from the investigators.

Guru Health bank account

[24] A bank account was opened for Guru Health at a large Canadian bank in February of 2010.

[25] The banking documents entered as exhibits during the hearing are confusing in that one batch of bank opening documents appear to have been signed in February and March of 2010 and others in November of 2011. VG's signature card, provided by the bank, was dated November of 2011.

[26] The bank account opening documents listed VG, Hamilton and Lichti as signing officers for the company.

[27] VG testified that she wrote the following note to the bank, the contents of which were dictated to her by Hamilton: "To whom it may concern, I, (VG), director of Guru Health, do not intend to do any business in the province of British Columbia…."

[28] A representative of the bank (EC) testified during hearing. EC said that he knew both of the respondents as they had a number of accounts with the bank for US incorporated companies. He testified that he did not remember Guru Health specifically nor any specific transactions related to the company.

[29] EC also testified that he did not remember meeting VG or otherwise dealing with her. However, he confirmed that the bank's standard account opening procedures would have required VG to attend a branch of the bank (even it if was in Calgary) in order to provide the required identification to act as a signing officer on the account.

[30] VG denied that she had ever done so but indicated that she might have signed the bank documents if Hamilton had sent them to her and that she would have signed them without asking what they were for or knowing anything more about them.

[31] Hamilton acknowledged that it was he who was primarily responsible for all of Guru Health's banking transactions. He stated that he was not aware of VG ever having carried out any transactions with respect to the Guru Health bank account. He also

indicated that he used an electronic signature for VG and a stamp of VG's signature on Guru Health banking documents.

[32] Lichti admitted to depositing certain bank drafts (discussed below) into the Guru Health bank account.

[33] The Guru Health bank account was originally opened with VG's Calgary address as its mailing address. In June of 2010, the company's mailing address with the bank was changed to Hamilton's home address in Vancouver.

Guru Health registration statement

[34] Hamilton also drafted, with some input from US counsel, a registration statement (for filing with the U.S. Securities and Exchange Commission) with respect to the business and affairs of Guru Health. The registration statement listed VG and JB as the directors and officers of the company and stated that its principal business was health food/supplements. VG's address in Calgary was listed as the company's head office. There was no mention of either of the respondents in the document nor, as will be discussed below, of either of them owning or controlling (directly or indirectly) any of the securities of the company. The registration statement stated that VG and JB were the controlling shareholders.

[35] Hamilton indicated that it was Lichti who provided him with referrals to the US counsel, the EDGAR filing agent and a US transfer agent.

[36] Hamilton also admitted that he retained and principally dealt with the US counsel.

[37] In connection with the preparation, filing and responding to comments from the SEC on the registration statement, there were various emails between the US counsel and the Guru email. Based on those communications (as he addressed them to VG), we find that the US lawyer believed he was dealing with and receiving instructions from VG.

[38] Several of the emails between the US counsel and the Guru email were copied to Lichti's email address. At least one of the emails from the Guru email (purportedly written by VG, but by Hamilton's admission as the only person using the Guru email, actually written by Hamilton) directed the US counsel to contact either Hamilton or Lichti with any questions related to the Guru Health registration statement.

[39] The US lawyer also sent several emails to the Guru email to indicate that he was concerned that he had not spoken or otherwise dealt personally with VG and that he wished to speak with her. VG testified that she was told by Hamilton to call the lawyer outside of business hours and that she was given a script by Hamilton to read onto the lawyer's voicemail. That script purportedly authorized the lawyer to continue to deal with Hamilton. Subsequent emails between the parties corroborate that a voicemail to that effect was left with the lawyer.

Guru Health shareholders

[40] VG testified that, prior to her move to Calgary, she discussed with Hamilton and Lichti the idea of her finding Alberta residents to sign documents in a show of support for the company and to provide picture identification in connection with that idea. VG testified that the respondents may have told her that these Alberta residents were signing documents to become shareholders but she also testified that she did not really understand what a shareholder was and that she believed it akin to people providing a show of support for the corporation and its business.

[41] VG testified that the respondents offered her US$30,000 to obtain these signatures and that she did it to help her friend Hamilton build his company.

[42] VG did find 25 Alberta residents (in addition to herself and JB) to sign subscription agreements with both the number of shares and dollar amounts blank, and blank stock powers of attorney. They also provided picture identification, purportedly in connection with the individuals acquiring shares of Guru Health. VG testified that she told the 25 individuals that in signing the documents they were really just showing support for her friend's company and that she did not provide any information on the company or its business.

[43] There was no evidence that any of the 27 individuals (including VG and JB) paid for any of these shares. VG testified that she did not seek or collect any funds from any of the individuals when she obtained the signatures and the identification.

[44] Investigators from the ASC contacted a number of these purported shareholders. Notes of those communications generally confirmed that these individuals did not:

- provide any money in connection with their purported purchase of these shares;
- receive any share certificates in connection with their purported purchases; and
- receive any money when the shares were subsequently sold (as discussed below).

Some of the individuals (but not all of them) also confirmed that they:

- understood that they were signing documents to become shareholders of the company;
- understood the company to be in the health foods/supplements business; and
- remembered receiving informational documents about the company (over and above the subscription related documents that they signed).

[45] Hamilton confirmed that none of these individuals paid any money for their shares. He further confirmed that he purchased (or caused to be purchased) separate bank drafts and

money orders in the exact amount of each of the purported subscription amounts and deposited them (or had them deposited) into the Guru Health bank account.

Guru Health transfer agent

[46] The Guru email was also used to communicate with a US transfer agent. In particular, there were emails sent in connection with:

- having share certificates printed up in the names of the 27 purported Alberta shareholders; and

- having some of those same share certificates cancelled and the shares transferred (at the time of the subsequent sale of the company) into the names of a complex web of offshore entities.

[47] The transfer agent was retained by Hamilton. Similar to the communications with the US lawyer, and the agent in Nevada used to incorporate Guru Health, the email communications by the transfer agent to the Guru email support a finding that the transfer agent believed that they were communicating with VG.

[48] In his submissions, Hamilton disputed that the evidence established that it was he who was communicating with the US transfer agent via the Guru email. As noted above, he pointed to both Lichti and VG as having access to that account.

[49] We do not agree with these submissions. While Hamilton did not expressly admit to Commission investigators that it was he who communicated with the US transfer agent via the Guru email, we find that he was. Hamilton confirmed that he was not aware of VG or Lichti having used the Guru email. That he wrote those emails is also logically consistent with all of the other evidence in the hearing, in which it was clear that it was Hamilton who was carrying on the affairs of the company. We have no difficulty in finding, based upon the totality of all of the evidence during the hearing, that it was Hamilton who was corresponding with the US transfer agent through the Guru email.

Guru Health ticker symbol on the OTCBB

[50] In September 2011, Guru Health sought and obtained sponsorship from a FINRA registered firm (SS) in order to obtain a ticker symbol to have its shares quoted for trading on the OTC Bulletin Board (OTCBB).

[51] An application to FINRA to have Guru Health's shares quoted for trading was filed by SS in October of 2011. Hamilton supplied the information (including copies of the Guru Health share certificates and documentation evidencing the purported payments by the 27 Alberta shareholders for their Guru Health shares) to SS for filing with FINRA.

[52] The evidence clearly established that the proof of payment documents provided to FINRA included copies of several bank drafts and money orders which were originally purchased by Lichti's brother and then altered to substitute the name of one of the 27 purported Alberta shareholders as the purchaser of the bank draft or money order so as to

give the appearance that they were payments made to Guru Health by one of those individuals.

[53] Lichti told Commission investigators that he had asked his brother to go to his apartment and collect thousands of dollars of cash (which Lichti suggested were the proceeds of gambling) and then purchase the various bank drafts and money orders. The purchases of the bank drafts and money orders were executed through a variety of different financial institutions. Lichti also indicated that it was he who then subsequently deposited those bank drafts and money orders into the Guru Health bank account.

[54] Hamilton admitted that none of the 27 purported Alberta shareholders paid any money for their Guru Health shares. He also confirmed that he used his own money and made deposits into the Guru Health bank account in amounts equal to some of the purported subscription amounts for the Guru Health shares. Hamilton confirmed that all of this was done to create the appearance that the purported Alberta shareholders had paid for their shares. He also confirmed that neither SS nor FINRA was made aware that it was actually he and Lichti who had provided the funds for the shares.

[55] On October 27, 2011, the Guru Health shares obtained a ticker symbol to become eligible for quotation on the OTCBB.

Sale of Guru Health

[56] In early 2012, Hamilton asked Lichti to see if he could find a buyer for Guru Health.

[57] Lichti said that he contacted an individual (S) that he had met in Las Vegas whom he knew only by his first name. Lichti said the S was also a finder on behalf of undisclosed purchasers.

[58] Lichti and S met at a restaurant in Bellingham, Washington. Lichti said that he took to this meeting the Guru Health share certificates (and related stock powers of attorney) registered in the names of the 27 purported Alberta shareholders. Hamilton had previously received (via VG) these share certificates from the transfer agent. Lichti says that S looked at those documents and that he (Lichti) did not provide any further information to S, nor did S ask anything further, about the company.

[59] Lichti said that he and S agreed on a price of US$230,000 for the company, of which US$30,000 was to be wired to Lichti, as his finder's fee, and the remainder to Hamilton as the purchase price for the company.

[60] US$190,000 and US$30,000 was subsequently wired to Hamilton and Lichti, respectively, from an entity in Monrovia, Liberia. The evidence did not clarify why the aggregate amount wired to Hamilton and Lichti differed from the agreed upon purchase price for the company. Lichti told Commission investigators that he then mailed the share certificates and powers of attorney to an undisclosed address that he was provided by S.

[61] In order to complete the transfer of the Guru Health shares to the purchaser(s), the Guru email account communicated with the transfer agent to facilitate the transfer and reissuance of the Guru Health share certificates from the names of the 27 Alberta shareholders to a complex web of offshore entities. Again, it is clear from the correspondence that the transfer agent believed that it was dealing with VG in these communications.

[62] Following receipt of the funds from the purchasers, Hamilton wired US$30,000 to VG.

[63] After the sale of the company, the shares of Guru Health commenced trading on the OTCBB in a suspicious manner that suggested the possibility that persons were engaged in manipulative trading in connection with the shares of the company. There was no evidence to suggest that either of the respondents was connected to this suspicious trading activity or that they had prior knowledge of this activity.

[64] Guru Health's shares were subsequently cease traded in both British Columbia and in the United States.

Events after the commencement of the Commission investigations

[65] At the beginning of their investigation into this matter, investigators for the ASC approached VG and asked to speak with her about Guru Health and her involvement with the company.

[66] The ASC subsequently obtained phone records of VG's phone calls in the immediate aftermath of their initial conversation with VG. Those phone records indicated that, after being approached by the ASC, VG spoke multiple times with JB, Hamilton and an unlisted number. The phone records indicate that the owner of the unlisted number was a third party unrelated to these proceedings. However, in one of her interviews with Commission investigators, VG showed the investigators that her phone had cached the unlisted number as belonging to "Braeden".

[67] VG testified that, in the aftermath of her first meeting with the ASC investigators and having spoken with both of the respondents, she was contacted by a Vancouver law firm whom she did not know but that she believed the respondents were working with in connection with the Commission investigations. After this initial contact from the Vancouver law firm, VG was sent an email, originally drafted by a lawyer in that firm with a document attached. The email had originally been sent by that lawyer to Lichti and then Lichti sent it to Hamilton. Hamilton asked VG to sign the document. The contents of the attached document stated that VG had been paid the US$30,000 (i.e. the money sent to VG by Hamilton) by the purchasers of Guru Health as consideration for the sale of her shares in the company. VG refused to sign this document.

[68] As noted above, JB was contacted by Commission investigators early in their investigation and she advised that she:

- was VG's cousin;

- had moved to Sweden in early 2010;

- was not involved in any manner with anything to do with Guru Health;

- did not sign any documents related to the company; and

- to her knowledge, was never a director, officer or shareholder of Guru Health.

Expert evidence

[69] The executive director engaged William Park, a Senior Director in FINRA's Enforcement Department to prepare an independent expert report and to give expert opinion evidence during the hearing. Park was qualified as an expert witness in matters pertaining to US securities laws and FINRA approval processes for small cap issuers.

[70] The following is a summary of the material aspects of that evidence:

- that there is nothing inherently wrong in the creation of a microcap shell company for listing on the OTCBB;

- certain of these shell companies have been used to carry out manipulative trading schemes of one type or another;

- a critical feature of certain manipulative trading schemes is that there is undisclosed control of the shares of the listed company;

- a review of the evidence presented to him by the Commission for his report indicated multiple red flags that indicated undisclosed control and influence of Guru Health and its shares; and

- he highlighted, as significant, the lack of transparency provided to key gatekeepers (transfer agent and sponsoring brokerage firm) in the process used to obtain Guru Health's ticker symbol.

[71] In cross examination, Park also set out that:

- Hamilton's conduct was consistent with someone seeking to profit from the sale of the shell while keeping his involvement hidden; and

- US securities regulatory authorities have a number of enforcement tools at their disposal to deal with manipulative trading schemes and undisclosed control and direction of public companies whose shares become registered in the US.

III. VG's Credibility

[72] One of the central issues in this case is the credibility of VG.

[73] The following is a summary of her material evidence during the hearing (in addition to the specific matters that VG testified about and that are described above):

- she was asked *by both* Hamilton and Lichti to find Alberta residents and to obtain signatures (and identification) from those individuals on the Guru Health share subscription documents;

- she was told to leave the subscription agreements blank with respect to the number of shares acquired and the cost of those shares;

- when she asked the Alberta residents to sign the Guru Health subscription agreements, she told the individuals that if the company were ever sold that they might receive "a couple of hundred dollars";

- none of the Alberta residents ever paid her any money for their Guru Health shares and, to her knowledge, none of these individuals were ever paid any amount by either of the respondents when the company was sold and that she did not pay them any amounts out of the US$30,000 that she received;

- that Hamilton and Lichti were partners in the Guru Health project and in similar projects to create shell companies;

- that she was paid US$30,000 for obtaining the signatures from the Alberta residents;

- that she allowed Hamilton to use her credit card from time to time on matters related to Guru Health (e.g. with the Nevada agent for incorporating the company) and that she was reimbursed by Hamilton for those amounts;

- that she occasionally signed documents related to Guru Health at Hamilton's request;

- that she received documents from the US transfer agent relating to Guru Health and simply forwarded them to Hamilton without opening them or knowing what they were;

- that she did not know that she was a signing officer for the Guru Health bank account;

- that she did not know what a director of a company was;

- she understood that she had been made the president of the company but she was not involved in the day to day operations or decision making with respect to the business and affairs of Guru Health;

- she did not know that her name appeared as a director and officer of the company in Guru Health's registration statement filed with the securities regulatory authorities nor that JB's name similarly appeared in that document;

- that, although she may have had access to the Guru email account, she did not use the account;

- that, following her initial conversation with an investigator from the ASC, she immediately contacted and spoke on multiple occasions to each of JB, Hamilton and Lichti;

- that, in those conversations immediately after being contacted by the ASC, Lichti told her to tell the securities regulatory authorities that she and JB were really the directors and officers of Guru Health.

[74] Counsel for both respondents submitted that we should place little or no reliance on her testimony at the hearing. They submitted that:

- there were significant inconsistencies between her evidence given during her interviews with Commission investigators and her evidence during the hearing;

- in general, her evidence downplayed her role in Guru Health; and

- in some respects her evidence was simply not believable or was contradicted by other evidence in the hearing.

[75] Counsel for Lichti further submitted that VG demonstrated, during her testimony, an animosity to Lichti and in so doing she significantly expanded (from her evidence given during earlier interviews with Commission investigators) on the purported role that Lichti had with respect to Guru Health.

[76] We generally agree with the submissions of the respondents with respect to VG. We did not find her to be a credible witness.

[77] It was clear during her testimony that VG was intent on minimizing her role and culpability with respect to matters relevant to the notice of hearing.

[78] Her testimony was also contradicted in certain respects by other evidence in the hearing. Specifically:

- in her original interview with Commission investigators VG said that she was not even aware that Guru Health had opened a bank account and that she has not signed any banking documents related to it. That evidence was contradicted by the representative of the bank who testified that the account would not have been opened without VG attending at a branch of the bank and providing personal identification. VG's testimony during the hearing about the Guru Health bank

account also differed from her original answers to Commission investigators on this subject;

- her evidence that she did not:

    - provide any documents to the Alberta residents about Guru Health (other than the share subscription documents);

    - otherwise describe the company's business to them; or

    - tell the Alberta residents that they were signing documents to become a shareholder of the company,

  was contradicted by the notes of the ASC investigators' interviews (not under oath) of certain of these individuals who knew that Guru Health was in the health foods/supplements business and that they were signing documents to become a shareholder in the company. Several of these individuals also said that they received a disclosure document of some type about the company.

[79] The portions of VG's testimony in which she indicated that she did not know what a director or shareholder was or what a particular document's purpose was with respect to Guru Health were simply not believable. VG admitted that she provided a note to the bank in which she described herself as a director of Guru Health.

[80] The documentary evidence established that Hamilton sent VG a number of emails over the relevant period that contained strings of emails purportedly from VG at Guru Health to third parties. During her interview with Commission staff, she was asked about a number of these emails and she denied writing them. When she was asked about what she thought of these emails when she originally received them, she said that she either did not notice that she was the purported author or never asked about these emails. Those answers were not credible. VG must have known at that time that Hamilton was sending emails through the Guru email using VG's name to conceal his involvement.

[81] Similarly, VG told Commission investigators that she never asked why Hamilton had to use her credit card (and then reimburse her) to incorporate Guru Health, even though she also admitted that he had never asked to use her credit card before. That answer was simply not credible.

[82] Although VG's testimony was, in a very broad sense, similar during the hearing with her earlier interviews with Commission staff, it did differ, to some extent, with respect to her evidence as to the level of involvement of Lichti in the relevant matters and with respect to which documents she did or did not sign. In particular, during her first interview with Commission staff she denied speaking with Lichti in the immediate aftermath of her first contact with the ASC investigators. Yet she testified to speaking with him on multiple occasions in the immediate aftermath of her first being approached by ASC investigators. During her interviews she said that she signed very few documents on behalf of the

company, yet during her testimony at the hearing she admitted to signing a relatively large number of documents (although not all of the documents that appear to have her signature attached to them).

[83] As a consequence of the above, we did not find VG to be a credible witness. We have placed little weight or reliance on her evidence.

IV. Analysis and Findings

A. Applicable law

Standard of Proof

[84] The standard of proof is proof on a balance of probabilities. In *F.H. v. McDougall*, 2008 SCC 53, the Supreme Court of Canada held (at para. 49):

> In the result, I would reaffirm that in civil cases there is only one standard of proof and that is proof on a balance of probabilities. In all civil cases, the trial judge must scrutinize the relevant evidence with care to determine whether it is more likely than not that an alleged event occurred.

[85] The Court also held (at paragraph 46) that the evidence must be "sufficiently clear, convincing and cogent" to satisfy the balance of probabilities test.

[86] This is the standard that the Commission applies to allegations: see *David Michael Michaels and 509802 BC Ltd. doing business as Michaels Wealth Management Group*, 2014 BCSECCOM 327, para. 35.

BC Notice 2007/24

[87] In 2007, the Commission published for comment a notice entitled "BCSC Response to Abusive Practices in British Columbia Involving US Over-the-Counter Markets" (OTCBB Notice).

[88] The OTCBB Notice led to the adoption of BC Instrument 51-509 *Issuers Quoted in the US Over-the-Counter Markets* (the OTC Rule) which was then repealed in 2012 and replaced by a largely similar instrument, Multilateral Instrument 51-105 *Issuers Quoted in the U.S. Over-the-Counter Markets*.

[89] The OTC Rule (and it successor) deemed an issuer that had a class of securities that was OTC quoted (and not also listed or quoted on a North American exchange) a reporting issuer in BC if one or more of the following applied:

a) the issuer's business was directed or administered from the province;

b) promotional activities with respect to the issuer had been carried out in or from the province;

c) on or before the issuer obtained its ticker symbol on an OTC market, the issuer had distributed a security (of the class quoted on the OTC market) to a person resident in the province.

[90] Once an issuer was deemed to be a reporting issuer in BC, then all of the continuous disclosure obligations that apply to reporting issuers would apply to that issuer. In addition, the issuer would be required to file its most recent registration statement filed with the SEC with the Commission.

[91] The OTC Rule included additional filing requirements for persons carrying on promotional activities with respect to the reporting issuer and the requirement to file with the Commission personal information forms with respect to each director and officer of the issuer.

[92] The OTC Rule also included certain restrictions on the resale of privately placed securities, a restriction from using certain exemptions from the take-over bid rules in the Act and a restriction from using an exemption from the insider reporting requirements under the Act.

Orders for Conduct Contrary to the Public Interest

[93] The Supreme Court of Canada has made it clear that the Commission has the authority to make an order in the public interest without finding a contravention of the Act: *Committee for Equal Treatment of Asbestos Minority Shareholders v Ontario (Securities Commission)*, 2001 SCC 37.

[94] In discussing the use and breadth of that authority, this Commission, in *Re Carnes*. 2015 BCSECCOM 187, set out the following (paragraphs 128-132):

> 128. As can be seen, the OSC cases diverge on whether to take a narrower or a broader basis for exercising the public interest jurisdiction. The narrower basis requires a finding that the conduct was abusive of capital markets, or that a particular financial structure was used with the intent of avoiding contravening a specific provision of the Act. The broader basis, represented by the *Biovail* decision, is founded upon the concept that a range of factors should be considered but that an order may be made without a finding of abuse where the conduct is inconsistent with the animating principles of the Act.
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> 129. We recognize that when a panel issues an order in exercise of its public interest jurisdiction, the order has the effect of restraining or prohibiting conduct that is not prohibited specifically by legislation. Market participants should be able to structure their affairs within the context of the specific provisions of the Act, without fear of enforcement actions alleging wrongdoing that is not encoded in the Act, regulation or rules of the Commission.
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> 130. This is not to say that the Commission's public interest jurisdiction should never be used in the enforcement context. In fact, the authority to issue orders in the public interest is a necessary and important enforcement tool to assist the Commission's mandate of protecting investors and the integrity of British Columbia's capital markets.
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> 131. In the enforcement context, where the Act prohibits specific conduct, and an allegation involving that type of conduct is found not to contravene the Act,

then only in very rare circumstances would it be in the public interest to issue an order based on that same conduct. Generally, the conduct would need to be abusive of the capital markets in order to make such an order. A finding that a respondent had artificially structured their affairs with the intent of placing their conduct outside of the wording of the Act would also be relevant but not a necessary element of such an order.

132. Where the Act is generally silent with respect to a type of conduct alleged as the basis for a public interest order, as was the case with the respondent Speckert in *McCabe*, then the above may or may not be the applicable test. As discussed below, we do not need to decide that in this case because those are not the circumstances before us.

B. Analysis

Positions of the Parties

[95] The executive director submitted that the evidence established that the respondents engaged in the "unscrupulous practice of manufacturing shell companies that are ideal for use in securities manipulation schemes." In particular, the executive director alleges that the respondents:

- created a company that Hamilton controlled by installing and impersonating nominee directors;
- concealed Hamilton's control over all of the company's shares;
- made false filings with US securities regulators; and
- secretly sold control over all the shares of the publicly traded company.

[96] The executive director submitted that the respondents' conduct, as a whole, did not squarely engage a specific provision of the Act and that the respondents' misconduct was abusive and therefore meets the standard for us to exercise our public interest jurisdiction to issue orders against them.

[97] Hamilton submitted that because:

a) the executive director could have alleged specific contraventions of the Act (e.g. sections 61, 50, 57, and 168.1) with respect to specific aspects of his alleged misconduct as described in the notice of hearing (and the executive director did not); and

b) that the SEC had enforcement powers (and the ability to bring actions against Canadian residents using those powers) to deal with specific aspects of his alleged misconduct,

to use the Commission's public interest jurisdiction (instead of the executive director making specific allegations against him or leaving enforcement of the conduct to the SEC) was both unnecessary and inappropriate.

[98] Hamilton also submitted that if the panel used its public interest jurisdiction in these circumstances, the effect of such orders would be to essentially establish a new contravention in the province's securities regulation of "deceptive shell manufacturing". He submitted that to do so would be inappropriate given that the Commission and the legislature had already turned their mind to the appropriate legislative and regulatory response to deceptive shell manufacturing in the OTC Rule and codified an appropriate regulatory regime within it. Hamilton noted that his alleged misconduct, as described in the notice of hearing, did not contravene any provisions of the OTC Rule.

[99] Finally, Hamilton submitted that the evidence of his conduct that preceded the date that Guru Health obtained an OTC ticker symbol should not be considered by the panel with respect to making orders using the Commission's public interest jurisdiction.

[100] In totality, Hamilton submitted that the public has a reasonable expectation that the boundaries of prohibited conduct, as it relates to manufacturing OTC shell companies, have been set by the legislature through the combination of the existing provisions set out in the OTC Rule and the existing statutory misconduct provisions. He submitted that when the OTC Rule was adopted (which required the legislature to amend the Act in certain respects) it did not make it an offense to manufacture an OTC shell company in the manner carried out by Hamilton. Given this, Hamilton submitted that we do not have the jurisdiction to create such an offense through the use of our public interest jurisdiction.

[101] Lichti agreed with and adopted all of Hamilton's submissions as set out above.

[102] In addition, Lichti submitted that the evidence of his involvement with respect to Guru Health was limited to:

- acting as a signatory on the Guru Health bank account;
- providing cash to his brother for deposit into the Guru Health bank account;
- providing Hamilton with referrals to US service providers; and
- acting as a finder with respect to the sale of the company.

[103] Lichti submitted that none of these actions raised public interest concerns and that the evidence of his involvement in the alleged misconduct was insufficient for the panel to use its public interest jurisdiction to make orders against him.

[104] Lastly, during the hearing, both respondents submitted that the evidence of the suspicious trading activity in the securities of Guru Health after the sale of the company was not

relevant to these proceedings as there was no evidence that either of the respondents was in any way involved in this activity or had any prior knowledge of that conduct.

Application of facts to the law

a) <u>Summary of material findings</u>

[105] In order to analyze the parties' submissions on the issues raised by this case, it is important to set out our findings with respect to what each of the respondents did in relation to Guru Health.

[106] The evidence established that Hamilton:

- was responsible for incorporating Guru Health and did so in a manner that concealed his involvement from the US agent;

- installed VG and JB as nominee directors and officers of Guru Health and that at all times until the sale of the company was acting as the undisclosed *de facto* director and officer of the company;

- became a signing officer for the Guru Health bank account and was responsible for Guru Health banking transactions;

- at all times maintained undisclosed control of all of the issued and outstanding shares of Guru Health; that none of the 27 Alberta shareholders ever paid for their shares in the company, and that Hamilton (along with Lichti, as described below) supplied the consideration for the share subscriptions;

- was responsible for the preparation and filing with the SEC of a registration statement that:

    - failed to disclose his role as the *de facto* director and officer of the company,

    - failed to disclose his control of all of the issued and outstanding **s**hares of the company, and

    - misrepresented the nature of the prior share subscriptions in the company;

- provided false records (e.g. altered bank drafts and money orders) and other misleading information to the US broker, for subsequent filing with FINRA, in order to obtain Guru Health's ticker symbol;

- dealt with various gate keepers in the capital markets through the Guru email by authoring correspondence in VG's name in a manner that concealed his involvement with Guru Health;

- sold control of a public company without public disclosure; and

- received US$190,000 (inclusive of the $30,000 paid to VG) for the sale of Guru Health

[107] The evidence established that Lichti:

- became a signing officer for the Guru Health bank account;

- provided Hamilton with referrals for a number of US service providers in connection with Guru Health filing a registration statement with the SEC and the Guru Health shares obtaining a ticker symbol for trading on the OTC markets in the US;

- provided cash, used by his brother, for purchases of bank drafts and money orders in amounts that corresponded to subscription amounts for certain of the 27 Alberta resident "shareholders";

- deposited into the Guru Health bank account these bank drafts and money orders;

- was copied on certain correspondence between several of the gatekeepers and the Guru email;

- located the buyer for, and organized the sale of control of, all of the outstanding shares of the company; and

- received US$30,000 in connection with the sale of Guru Health.

[108] VG's testimony provided other evidence with respect to Lichti's involvement in the matters relevant to the notice of hearing. She testified that both Hamilton and Lichti asked her to find the Alberta shareholders, that Hamilton and Lichti were "partners" in the shell manufacturing business and that Lichti asked her to tell to Commission investigators that she and JB were the real directors and officers of the company.

[109] As noted above, we did not find VG to be a credible witness. Hamilton denied that he and Lichti were partners in manufacturing shell companies and said that it was his idea for VG to find Alberta resident shareholders.

[110] Therefore, we must assess the remainder of the evidence to see if it corroborates the aspects of VG's testimony which would indicate that Lichti had an expanded role in the business and affairs of Guru Health. In that vein, the following is relevant to this analysis:

- that Lichti's cash was used by his brother to purchase a variety of bank drafts and money orders in varying amounts at multiple financial institutions demonstrates that at a minimum Lichti assisted in creating a financial paper trail for the purported subscriptions by the Alberta shareholders; and

- the circumstances of Lichti's involvement in the sale of the company (e.g. meeting a representative of the buyer in a restaurant one time, no due diligence being performed, no agreement of purchase and sale or other paperwork was prepared, etc.) are extraordinary.

[111] All of this demonstrates a far more significant role for Lichti in the manufacturing of the shell company and in its business and affairs than admitted by Lichti, and from that acknowledged by Hamilton in their respective interviews with Commission staff.

[112] However, what was critically lacking from this evidence (the importance of which is described in further detail below) was anything which established Lichti's involvement in the lack of transparency in the disclosure provided to securities regulators and gatekeepers about the true state of ownership and control of Guru Health. There was no evidence that Lichti was aware that the dollar amounts of the bank drafts and money orders were the amounts attributed to the share purchases or that Lichti was involved in, or knew of, the ultimate falsification of the bank drafts and money orders subsequently filed with securities regulators. There was no evidence (other than being copied on one email with US counsel) that tied Lichti to:

- the preparation and filing of the company's registration statement;

- the altering and filing of the share subscription payment documentation which was then provided to SS (for subsequent filing with FINRA); or

- the communications with various gatekeepers about the ownership (direction and control) and transfers of shares in the company.

[113] In this respect, the evidence before us of the conduct of the two respondents was materially different in nature.

[114] That Lichti's email was a conduit for a document that would have falsely suggested that VG was paid US$30,000 for selling her shares to the purchaser might demonstrate his participation in an attempt to cover up the previous deception of the securities regulators. However, without more evidence to demonstrate his role in the preparation of that particular document we are unable to make this finding.

[115] We agree with the respondents' submissions that the evidence of the post-sale suspicious trading activity in the shares of Guru Health was not relevant to this proceeding and we have not considered it as part of our findings below. There was no evidence that either of the respondents had any involvement with that activity, nor was there any evidence to suggest that they had knowledge that such activity would occur. More importantly, the serious and significant concerns that we have with respect to Hamilton's activities relating to Guru Heath are independent from what occurred after control of the company was sold.

[116] Before turning to an analysis of these findings in light of the law relating to the use of our public interest mandate, we will address a number of the respondents' submissions that relate to our consideration of this evidence and our jurisdiction in the circumstances.

b) Failure to allege specific contraventions under the Act

[117] The respondents submitted that it would be inappropriate for the panel to use the public interest jurisdiction because there are existing provisions under the Act under which the executive director could have made allegations that specific aspects of the respondents' conduct contravened those provisions. In particular, the respondents point to sections 61, 50, 57, and 168.1 of the Act as provisions under which the executive director could possibly have brought allegations against them in this case, but failed to do so.

[118] We do not agree with this submission.

[119] The executive director has brought allegations about a pattern of deceptive conduct by the respondents that, he says, caused harm to the capital markets. He says it is this pattern of conduct that merits the Commission making orders in the public interest against the respondents.

[120] It is true that specific aspects of the alleged misconduct of the respondents in this case could have resulted in allegations under specific sections of our Act. For example, Guru Health's registration statement, which had previously been filed with the SEC, was subsequently filed with the Commission. That document failed to disclose that Hamilton was a *de facto* director and/or officer of the company and that Hamilton had direction and control over all of the company's shares. There are several provisions under the Act (including misrepresentation) which prohibit issuers and those who control those issuers from making false statements in publicly filed documents. We do not know why these specific allegations were not made against the respondents and it is not for us to speculate.

[121] However, it is also true that there were specific aspects of the alleged misconduct in this case for which there are no specific prohibitions under the Act. For example, the alteration and filing of false documentation regarding payment of subscription proceeds by the Alberta shareholders with SS (for subsequent filing with FINRA) and Hamilton's dealing with various capital markets gatekeepers in a manner that concealed his identity are not matters specifically addressed under the Act. The respondents' submission that the executive director could (and should) have brought specific allegations of misconduct is not an answer to all of the activity described in the notice of hearing.

[122] It is the entirety of a respondent's conduct that must be assessed (see *Re Wood* , 2015 BCSECCOM 28 and *Re Lum*, 2015 BCSECCOM 189) when considering the use of the public interest jurisdiction in circumstances such as this. In this case, the deception related to Guru Health was manifested over a significant period of time, in many different ways and to many different entities. Portions of that conduct may have engaged specific provisions of our Act, but in its entirety, the misconduct is something more than fits appropriately into just one provision or contravention of the Act or even a combination of

a number of different contraventions. Furthermore, it is not inappropriate for the executive director to allege that it is the *entirety of the conduct together* (even if that conduct has distinct aspects of misconduct) that is the real and substantial harm to our capital markets.

[123] The notice of hearing clearly set out the allegations against the respondents and the manner in which the case was to proceed. There is nothing improper or unfair to the respondents by the executive director deciding to bring allegations against them in the manner set out in the notice of hearing. Requiring the executive director to proceed as outlined in the respondents' implied alternative would see the executive director having to:

a) make specific allegations against the respondents for each discreet aspect of their conduct; and

b) only ask us to use our public interest jurisdiction with respect to the portion of their conduct that did not specifically engage a provision of the Act.

This would require the executive director to proceed in a manner that would preclude him from bringing allegations about patterns of conduct that are abusive to the capital markets. It would also result in a victory of procedural minutiae over substance that is antithetical to exercising our public interest mandate in a regulatory context. There is nothing procedurally unfair or inappropriate with the executive director deciding to proceed in this way. The respondents knew the case they had to meet and the test the executive director would have to satisfy to obtain the orders he seeks.

[124] This case does not raise the potential procedural fairness concerns that may arise in circumstances similar to those in *Re Carnes* 2015 BCSECCOM 187. In that case, the conduct set out in the notice of hearing that was the subject of the allegations of fraud and the basis for the requested public interest orders was essentially the same. In other words, the notice of hearing alleged that the respondent's conduct was fraudulent and that very same conduct was contrary to the public interest. There is potential unfairness to a respondent in circumstances in which an allegation is made under a specific provision of the Act and, in the event that the executive director is unable to prove the requirements of the statutory provision, then the use of the same conduct as the basis for public interest orders. The manner in which the executive director chose to proceed with the allegations against the respondents in the case before us do not raise those issues.

c) <u>The existence of overlapping SEC enforcement jurisdiction</u>

[125] As part of their submissions that the executive director could have alleged specific contraventions of the Act, the respondents also submitted that the US securities regulatory authorities have enforcement provisions and mechanisms for pursuing misconduct of the type that the respondents are alleged to have engaged in. They tendered examples of recent publicized cases in support of this proposition. The implication is that it would be inappropriate for the panel to use its public interest jurisdiction in this case in light of the SEC's jurisdiction.

[126] We do not agree with this submission.

[127] That another foreign securities regulator (in this case the SEC) has enforcement tools and the jurisdiction to use those tools in a manner that is similar to, and in some respects overlaps, the enforcement tools and the jurisdiction of the Commission is not relevant to whether the Commission should take action in appropriate circumstances.

[128] Our mandate is to protect British Columbia investors and the integrity of our capital markets. At the relevant time the respondents were and remain residents of the province. The conduct of the respondents, relevant to the matters in the notice of hearing, was almost entirely carried out from within the province. The nature of our capital markets is that securities related conduct often spans multiple jurisdictions. Our regulatory authority to issue orders in the public interest must extend to circumstances such as these in order for the Commission to fulfill its mandate. Reliance on a foreign regulatory authority to use its regulatory powers will not ensure that our capital markets are protected from those within our jurisdiction who represent a risk.

d) Using the public interest jurisdiction to create a new offense

[129] The respondents also submitted that the executive director is asking the panel to use its inherent jurisdiction to create a new contravention. They say the panel should not do so where the legislature or administrative body as a matter of policy has declined to create that offense. The respondents say that in this case, the conduct at issue was specifically considered in creating a new regulatory approach in the OTC Rule.

[130] They submit that the panel should assume, in the circumstances, that in enacting the OTC Rule and the related legislative changes, the legislature intended not to create an offense of manufacturing a shell (in the manner in which the respondents did with respect to Guru Health). They submit that market participants and OTC issuers should be able to structure their affairs within the context of specific provisions of the Act and the OTC Rule, without fear of enforcement actions alleging wrongdoings not encoded in the Act, the regulations or Commission rules.

[131] The respondents' rationale for this submission was that the OTC Rule effectively "covered the field" with respect to a regulatory response to concerns (including the manufacturing of shell companies that were later used in manipulative trading schemes) the Commission had about a variety of issues relating to companies quoted on an OTC market in the US, involving residents of British Columbia.

[132] In making this argument, the respondents also referenced material published by the Commission in connection with publishing the OTCBB Notice and the OTC Rule for comment (and to public statements made by Commission staff at that time also to that effect) that suggested the reason that the Commission was proposing the rule was, in part, directed at concerns the Commission had with respect to the manufacturing of shell companies on the OTCBB.

[133] As a result of this "covering the field" with the OTC Rule, the respondents submitted that:

- the Commission lacks the jurisdiction to make orders in the public interest for misconduct related to the manufacturing of shell companies on the OTC markets, as the legislature (which had to amend certain provisions of the Act in connection with the adoption of the OTC Rule) has already turned its mind to what are the appropriate rules in this area and the making of orders in the public interest would create further prohibitions with respect to this activity beyond that contemplated by the OTC Rule and the legislature; and

- on a related note, the OTCBB Notice and the OTC Rule created a "reasonable expectation" in the minds of market participants that the contents of that rule set out the limits of the Commission's regulatory response in this area and that if a market participant's conduct did not contravene the OTC Rule then that person could reasonably assume that the Commission would not take regulatory action against them for that conduct.

[134] The respondents say the executive director has not established why the creation of a new contravention is necessary or why the existing provisions of the Act are not sufficient to address the problems the Commission saw in the OTC markets that led to the introduction of the OTC Rule.

[135] We do not agree with the respondents' submissions in this regard.

[136] These submissions misconstrue the nature and effect of the OTC Rule. The OTC Rule did not "cover the field" with respect to the regulation of manufacturing shell companies which are subsequently quoted for trading on the OTCBB. It did not prescribe new prohibited conduct in the province's regulatory regime or set out a complete regulatory regime for OTC issuers. Instead, the central tenet of the OTC Rule is that it deems certain issuers to be "reporting issuers" under the Act (that would otherwise not be). By deeming certain issuers to be "reporting issuers" under the Act, the OTC Rule imposed reporting and disclosure obligations on these issuers and insiders of those issuers. The effect of the OTC Rule was also to allow certain of the Act's existing investigative and enforcement tools to be used with respect to those issuers (deemed to be reporting issuers) and its insiders.

[137] It is true that the evidence of the policy rationale for adoption of the OTC Rule included an explanation that the rule was a regulatory response to various abuses of the capital markets by BC residents participating in the OTCBB markets (including shell company manufacturing). The OTCBB Notice stated that its intention was to improve disclosure and discourage the manufacture and sale in British Columbia of US OTC quoted shell companies that could be used for abusive purposes. It stated that the Commission's overall goal was to reduce the attractiveness of BC as a place to engage in this abusive behaviour because of the harm it causes to the reputation of the BC markets.

[138] The manner in which the Commission sought to discourage this behaviour was to increase the cost and effort involved in engaging in the behaviour. The Act already applied to any OTC issuer that distributed its securities in British Columbia. The legislature amended the Act so that issuers quoted on an OTC market in the US with a connection to British Columbia could be deemed to be reporting issuers. This meant that the additional obligations on reporting issuers in the Act, including continuous disclosure obligations, applied to these OTC issuers.

[139] It is impossible to view the provisions of the OTCBB Notice or OTC Rule as "covering the field" or setting out a code of prohibited (or permitted) conduct such that compliance with its provisions could have generated a reasonable expectation, on the part of the respondents, that if they did not contravene a provision in the OTC Rule then there would be no basis for regulatory action.

[140] In the context of the reasonable expectations of market participants, this case is different from the circumstances before the panel in *Carnes*. In that case, fraud allegations and a request for orders using the Commission's public interest jurisdiction were made against a short seller who wrote and published a report about a publicly listed company. The allegations of fraud were dismissed on the basis that the panel found that the short seller's report did not contain any untrue statements, even though the panel also found that the report did not contain a fair and balanced representation of all of the facts that the short seller knew about certain of the concerns raised in the report. The panel expressed concern about using its public interest jurisdiction to make orders against a person (who did not have disclosure obligations (or standards for that disclosure) under the Act) for issuing statements which did not meet a standard of full and balanced presentation of all known facts about an issuer, when the legislature had already defined prohibited conduct (e.g. fraud and misrepresentation) for third party statements.

[141] That is not the situation that we are faced with in this case.

[142] The OTC Rule does not prescribe certain activity as misconduct that we would be undermining by finding similar activity to be contrary to the public interest. Nor is this a situation in which the executive director has set out that the conduct constitutes both a contravention of a specific provision of the Act and (or in the alternative) is conduct for which we should use our public interest jurisdiction. There are no allegations in this case about compliance with the OTC Rule.

[143] We also do not agree with the respondents' submissions that any orders in the public interest in this case would be contrary to the reasonable expectations of the parties. Our reasons for this are set out in paragraphs 166 to 168 below.

e) <u>Evidence of the respondents' conduct prior to Guru obtaining a ticker symbol</u>

[144] The respondents also submitted that the evidence of their involvement with respect to Guru Health prior to the date that the Guru Health shares were given an OTC ticker symbol should not be considered by the panel *in its consideration of whether to use its public interest jurisdiction.*

[145] We have highlighted the last part of that submission because the respondents' drew a clear temporal distinction and further submitted that conduct that occurred prior to this date could have been considered by the panel if the executive director had brought specific allegations of misconduct against them (in relation to that conduct) under one or more of the misconduct provisions (e.g. illegal distribution or misrepresentation) of the Act.

[146] The OTC Rules deems an issuer with the requisite connection to BC to be a reporting issuer as of the date of obtaining a ticker symbol on an OTC market. The respondents submit that because there is a temporal limitation (obtaining a ticker symbol) on the Commission's jurisdiction to regulate conduct pursuant to the OTC Rule, the panel should not be permitted to rely on alleged abusive OTC related conduct that occurred prior to that time in exercising any residual public interest jurisdiction.

[147] As set out above, the executive director is not making allegations of a breach of the OTC Rule. The fact that the OTC Rule sets obtaining a ticker symbol as a threshold for its application, meaning that it is at that point that an issuer quoted on an OTC market with a connection to British Columbia will be deemed to be a reporting issuer, does not mean that the Commission has no jurisdiction over the issuer or those involved with such an issuer prior to that time. This temporal limitation argument similarly attempts to interpret the OTC Rule as a "complete code of conduct," as outlined above.

[148] It is incongruous to contemplate that the Commission would have the jurisdiction to consider the respondents' conduct prior to the date that the Guru Health shares obtained a ticker symbol for certain purposes under the Act and not others with respect to exercising our public interest jurisdiction. Our mandate is to protect the public, and to create such an artificial distinction as proposed by the respondents is overly procedurally prescriptive and contrary to the purposes of the Act.

f) Public interest orders

[149] There was no dispute about the general law as it relates to our authority to use the public interest jurisdiction to make orders without finding a specific contravention of the Act, including in the enforcement context.

[150] This authority stems from the decision of the Supreme Court of Canada in *Asbestos* and its use has been elaborated upon in various court decisions and decisions from securities regulators across the country (including this Commission).

[151] A few principles emerge from a review of those cases:

- in using and defining the scope of the public interest jurisdiction, panels must tie their analysis to the twin mandates of the Act, which are investor protection and ensuring fair and efficient capital markets;

- any analysis should focus on the totality of a respondent's conduct, rather than just specific aspects of that conduct; and

- the public interest jurisdiction must be exercised cautiously as any orders that flow from its use serve to restrain conduct that is otherwise not expressly prohibited by statute or regulation.

[152] As set out in *Carnes* (see paragraph 94 above), various decisions from commissions across the country have considered the use of the public interest jurisdiction in both the regulatory and the enforcement context and have struggled with the breadth of this jurisdiction. Some decisions (suggesting a narrower approach) have suggested that the public interest jurisdiction should only be used when the conduct in question is clearly abusive to the capital markets and other decisions (suggesting a broader approach) have indicated that it may be used where the conduct contravenes one of the "animating principles" of the applicable statute.

[153] In *Carnes*, the panel suggested that in the enforcement context, at least, the abuse threshold was appropriate. We affirm that view.

[154] The concept of "abusive to the capital markets" is not defined in the cases. Without attempting to provide a fulsome description of that concept (which might inadvertently or unnecessarily restrict the interpretation in future cases) we think this threshold is a high one and connotes, at least, the following concepts:

- serious behaviour that is outside the ordinary course of conduct in the capital markets, and

- either risk, or actual harm, to the capital markets arising from the conduct.

[155] We also think a useful check on a conclusion that conduct is "abusive to the capital markets" is whether the reasonable expectations of participants in the capital markets would be met with the exercise of the Commission's public interest jurisdiction in the given circumstances.

[156] Looked at in its totality, the evidence in this case describes circumstances in which a shell company, Guru Health, was created and a ticker symbol was obtained to have its shares quoted on the OTCBB in a manner (in many different ways and at many different times) which concealed the true identity of those who controlled and directed the company from securities regulators, gatekeepers and the public.

[157] The executive director alleges that the respondents "**created a publicly trading shell company** ideal for **use in a securities manipulation** by **deceiving foreign regulators and the public**." We have highlighted the three distinct issues that are described in this paragraph because they are critical to understanding what this case is, and just as importantly, what it is not about, from a public interest perspective:

- we do not think public interest issues arise with the mere creation of publicly traded shell companies – our Canadian stock exchanges have capital pool company programs that actually encourage the creation of publicly listed shell companies;

- that publicly traded shell companies may be used in manipulative trading schemes does not in the context of this case raise public interest concerns; and

- material public interest concerns arise as a consequence of the sustained and concerted effort, in this case to deceive foreign regulators (and the Commission by subsequent filings of the registration statement), critical gatekeepers in the capital markets and the public about the true ownership and control of Guru Health. Our consideration of whether the respondents' conduct should engage the Commission's public interest jurisdiction is focused on this deceit.

[158] We are mindful that the evidentiary threshold for sustaining a public interest allegation is the same as that required to prove an allegation of a breach of a provision in the Act. The evidence with respect to the participation in the deceit described above (as between the two respondents) was materially different.

[159] The evidence establishes that Hamilton was principally responsible for the litany of deceptions that represent an abuse on our capital markets. Regarding Lichti, we are able to find from the direct evidence and the circumstantial evidence that his role in the manufacturing of Guru Health was more significant than admitted by either of the respondents. There is no doubt that Lichti's conduct relating to the acquisition of a ticker symbol for Guru Health, as well as its subsequent sale, leave a lingering doubt about the manner in which he conducted himself in this affair. However, reviewing the totality of the evidence before us, we are not able to find, on a balance of probabilities, that Lichti had any material role in the deception of foreign regulators, gatekeepers and the public that is the material issue in this case. Frankly, based on the evidence, VG's role in aiding in this abuse was more significant than that of Lichti. Therefore, we dismiss the allegations against him.

[160] In dismissing the allegation against Lichti, it is important to note that we do not dismiss the idea that those who aid and abet a principal actor in misconduct may be subject to public interest orders. However, the aiding and abetting must be alleged and linked to the misconduct that raises public interest concerns.

[161] In contrast, Hamilton was responsible for all aspects of the deceit. His conduct amounted to a serious and prolonged scheme to deceive securities regulatory authorities, gatekeepers in the capital markets and the investing public about the true nature of ownership and control of a public company.

[162] Honesty, transparency and voluntary disclosure about the true nature of ownership and control of public companies are cornerstone principles in our securities regulatory regime.

[163] Transparency relating to the control and direction of companies seeking to be quoted on an OTC market informs securities regulators, gatekeepers and ultimately the investing public. The ability to make evaluations about issuers and whether to issue a ticker symbol requires receipt of accurate and honest information about who controls the company, and who is making business decisions for it. Obscuring, or completely hiding, this information prevents securities regulators, gatekeepers, and the investing public from being able to evaluate the suitability and integrity of those involved in the company, and ultimately prevents the public from being able to make informed investment decisions.

[164] A blatant pattern of deceit practiced on capital markets gatekeepers also raises significant concerns, and undermines fundamental protections of the regulatory regime.

[165] Hamilton's conduct was so egregious and raises such concern for the investing public and the integrity of our capital markets that it was clearly abusive.

[166] In assessing our conclusion that Hamilton's conduct was abusive to the capital markets, we have considered the reasonable expectations of the market participants. We have no difficulty in determining that a participant in our capital markets would reasonably expect to suffer significant securities regulatory consequences for conduct such as Hamilton's.

[167] Even with knowledge of the OTCBB Notice and OTC Rule, we find that the public would not be surprised (or its reasonable expectations thwarted) by a finding that those who:

- conceal their control and direction of a public company and file false disclosure documents with securities regulatory authorities;

- conceal their identity from critical gatekeepers in the capital markets;

- fabricate records and file them with securities regulatory authorities; and

- secretly sell control of a public company,

risk securities regulatory sanction.

[168] This distinguishes the reasonable expectations of market participants when considering Hamilton's conduct, from the reasonable expectations of market participants when considering the conduct of the respondent in *Carnes*. In *Carnes*, there would have been a wide range of expectations among market participants when considering the fact pattern involving a short seller, who declared his economic interest on the face page of the report, subsequently facing securities regulatory sanctions for issuing a report about a public company that did not contain a misrepresentation but was not a fair and balanced presentation of all facts known by the author relating to the concerns addressed in the report. The policy implications and uncertainty that would be created for research analysts, newspaper reporters and others who write opinions about public companies from such a decision are manifest.

[169] We find that Hamilton's conduct with respect to Guru Health was abusive to the capital markets and that we should exercise our public interest jurisdiction to make order against him accordingly.

V. Conclusions

[170] We find that Hamilton's conduct was abusive to the capital markets and that it is in the public interest to make orders against him.

[171] We dismiss the allegations against Lichti.

VI. Submissions on Sanctions

[172] We direct the parties to make their submissions on sanction as follows:

By November 2, 2018	The executive director delivers submissions to Hamilton and to the secretary to the Commission.
By November 16, 2018	Hamilton delivers response submissions to the executive director and to the secretary to the Commission. Either party seeking an oral hearing on the issue of sanctions so advises the secretary to the Commission. The secretary to the Commission will contact the parties to schedule the hearing as soon as practicable after the executive director delivers reply submissions (if any).
By November 23, 2018	The executive director delivers reply submissions (if any) to Hamilton and to the secretary to the Commission.

October 9, 2018

For the Commission

Nigel P. Cave
Vice Chair

Judith Downes
Commissioner

Gordon L. Holloway
Commissioner