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Securities
Commission

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Citation: Re Drabinsky, 2017 ONSEC 22
Date: 2017-06-15

**IN THE MATTER OF
GARTH H. DRABINSKY, MYRON I. GOTTLIEB
and GORDON ECKSTEIN**

**REASONS AND DECISION
(Subsections 127(1) and 127(10) of the *Securities Act*, RSO 1990, c S.5)**

Hearing: February 22-24 and April 24, 2017

Decision: June 15, 2017

Panel: D. Grant Vingoe Vice-Chair and Chair of the Panel
Judith N. Robertson Commissioner
William J. Furlong Commissioner

Appearances: Pamela Foy For Staff of the Ontario Securities
Alexandra Matushenko Commission
Thomas Ng

Richard H. Shekter For Garth H. Drabinsky
Nazanin Eisazadeh

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REASONS AND DECISION

I. OVERVIEW

- [1] This matter arises from a Notice of Hearing and Amended Statement of Allegations, each issued by the Ontario Securities Commission (the **Commission**) in respect of Garth H. Drabinsky, Myron I. Gottlieb and Gordon Eckstein on February 20, 2013. These proceedings were commenced in an earlier form in July 2001 and were periodically adjourned because of the ongoing criminal proceedings that were concluded against Mr. Eckstein in February 2007 and against Mr. Drabinsky and Mr. Gottlieb in March 2009. The Commission's proceedings against Mr. Gottlieb and Mr. Eckstein were subsequently resolved through settlements. Mr. Drabinsky is the sole respondent remaining in this proceeding.
- [2] Staff of the Commission seeks an inter-jurisdictional enforcement order imposing restrictions on Mr. Drabinsky based upon his criminal convictions by the Ontario Superior Court of Justice. Because Mr. Drabinsky's offences arose from a transaction, business or course of conduct related to securities, Staff relies on paragraph 1 of the inter-jurisdictional enforcement provision found in subsection 127(10) of the *Securities Act*, RSO 1990, c S.5 (the **Act**). The hearing to determine whether such an order should be made was held on February 22, 23 and 24 and April 24, 2017.
- [3] Staff requests that the Commission issue protective and preventative sanctions that fully and permanently remove Mr. Drabinsky from participation in Ontario's capital markets. Staff argues that it is not in the public interest to allow Mr. Drabinsky's participation in Ontario's capital markets, as he was a senior director and officer of a public company who abused his positions of trust by carrying out a large-scale fraud. Staff submits that to order otherwise would undermine the proper functioning of, and public confidence in, the capital markets.
- [4] Mr. Drabinsky acknowledges that some sanctions under the Act are appropriate, but submits that Staff's proposed sanctions are improperly punitive and would prevent him from working in his chosen occupation, as a creative producer in the entertainment industry. He proposes that the sanctions be varied to allow carve-outs, which he submits would allow for his continued work as a creative producer and facilitate his tax and estate planning, but would still provide public protection.
- [5] Mr. Drabinsky called a number of witnesses to speak about his contributions to society through creative endeavors, his expressions of remorse and regret and their views on the likelihood that Mr. Drabinsky will reoffend. Staff did not call any witnesses.
- [6] We ultimately agree to the imposition of Staff's requested sanctions, with the exception that we endorse Mr. Drabinsky's proposed carve-outs from the securities acquisition and trading bans. In addition, although a respondent is always able to seek a variation of an Order issued by the Commission, we deny Mr. Drabinsky's request for a specific provision to allow him to return in four years to modify his carve-outs.
- [7] These are our reasons and decision in this matter.

II. THE AGREED STATEMENT OF FACTS

[8] Staff of the Commission and Mr. Drabinsky entered into an Agreed Statement of Facts on February 10, 2017 for the purposes of this proceeding (the **Agreed Statement of Facts**). We set out in full these undisputed facts and adopt them for the purposes of these Reasons, with only slight changes in definitions. The following paragraphs 1 through 21 are taken directly from the Agreed Statement of Facts:

1. On March 25, 2009, Mr. Drabinsky was found guilty in the Ontario Superior Court of Justice of two counts of criminal fraud over \$5,000 and one count of forgery in connection with misrepresentations made in the financial statements of Livent Inc. (**Livent**) and its predecessor companies while he was a director and officer of these companies. The findings respecting forgery were encompassed in the second of the two fraud counts and, accordingly, on the basis of the principle in *Kienapple v The Queen*, the forgery count was stayed.
2. The convictions against Mr. Drabinsky involved material misrepresentations in the financial statements used to promote the initial public offering of Livent on the Toronto Stock Exchange (the **IPO**).
3. The convictions against Mr. Drabinsky also involved material misrepresentations made in financial statements that Livent issued after it became a public company.
4. Pursuant to his conviction, Mr. Drabinsky received a sentence of 4 years of incarceration for misrepresentations related to the IPO, and 7 years for misrepresentations related to post-IPO period, to be served concurrently.
5. Mr. Drabinsky appealed his conviction and sentence. On September 13, 2011, the Ontario Court of Appeal upheld the convictions, but reduced Mr. Drabinsky's sentences to a total of 4 years and 5 years, each sentence to be served concurrently.
6. Mr. Drabinsky sought leave from the Supreme Court of Canada to appeal the ruling of the Ontario Court of Appeal, but his application was dismissed without reasons on March 29, 2012. Mr. Drabinsky completed serving his sentence in September 2016.

I. The Respondent

A. Garth H. Drabinsky

7. Mr. Drabinsky held various director and officer positions with Livent. From May 17, 1993 until June 12, 1998, Mr. Drabinsky was Chairman of the Board of Directors and Chief Executive Officer of Livent. On June 12, 1998, Mr. Drabinsky transitioned from these positions to become Vice-Chairman of the Board of Directors and Chief Creative Director, holding both of these titles until November 18, 1998.
8. Prior to the IPO, Mr. Drabinsky held various positions in Livent's privately held predecessor entities, including positions as General Partner of MyGar Partnership, an Ontario general partnership, as Director of MyGar Realty

Inc., an Ontario corporation, and as Chairman and Chief Executive Officer of Live Entertainment of Canada Inc. (**LECI**), an Ontario corporation.

II. Background

B. Livent's Predecessor Entities and IPO

9. Prior to May 1993, Mr. Drabinsky and Mr. Gottlieb operated and controlled several entities involved in the live entertainment business, including LECI, MyGar Partnership, and MyGar Realty Inc.
10. On or about May 7, 1993, Livent conducted its IPO (under the name of LECI, its immediate corporate predecessor) and acquired all the assets of MyGar Partnership and all the outstanding shares of MyGar Realty Inc. in the course of the offering. Livent's shares were subsequently listed for trading on the Toronto Stock Exchange and the company became a reporting issuer in Ontario.

C. Fraud Allegations, Bankruptcy and Cease-Trading

11. In the summer of 1998, new management took control of Livent pursuant to an investment agreement, and learned of allegations that the company's prior financial statements contained misrepresentations.
12. On August 10, 1998, Livent issued a news release and filed a material change report pursuant to the Act, publicly announcing that an internal investigation had revealed serious irregularities in the company's financial records. The announcement stated that it was virtually certain that Livent's financial results for 1996 and 1997 and the first quarter of 1998 would need to be restated.
13. On February 6, 2001, shares of Livent were cease traded by the Commission in response to the company's failure to file the financial statements required by the Act.

D. Commission Proceedings, Adjournment and Criminal Proceedings

14. On July 3, 2001, Staff issued a Notice of Hearing and Statement of Allegations against Mr. Drabinsky, Mr. Gottlieb (General Partner of MyGar Partnership, a Director of MyGar Realty Inc., a Director, President and Chief Operating Officer of LECI), Mr. Eckstein (Vice-President, Finance and Administration of MyGar Partnership and LECI; later Vice-President, Finance and Administration at Livent from May 17, 1993 through November 13, 1996, and then Senior Vice-President, Finance and Administration) and Livent's Chief Operating Officer, Robert Topol, in relation to their conduct as directors and officers of Livent.
15. Subsequently, Mr. Drabinsky gave an undertaking to the Director of the Enforcement Branch of the Commission that, pending the conclusion of the proceedings, he would not apply to become a registrant, an employee of a registrant, or act in certain officer or director positions of a reporting issuer without the express written consent of the Director or an Order of the Commission.

16. On October 22, 2002, the Royal Canadian Mounted Police charged Mr. Drabinsky, Mr. Gottlieb, Mr. Eckstein and Mr. Topol with multiple counts of criminal fraud, and the Commission proceedings against the respondents were adjourned *sine die* on November 15, 2002 pending resolution of the criminal charges.
17. On May 5, 2008, the criminal trial against Mr. Drabinsky and Mr. Gottlieb commenced in Superior Court before Madam Justice Benotto sitting alone. On March 25, 2009, Mr. Drabinsky and Mr. Gottlieb were found guilty of violating Sections 380(1)(a) and 368(1)(b) of the *Criminal Code of Canada*.

III. Findings of the Superior Court against Mr. Drabinsky

18. As set forth in the decision of the Superior Court, Mr. Drabinsky and Mr. Gottlieb raised over \$500 million from the capital markets between 1993 and 1998, signing and presenting company financial statements to investors during this period. As detailed in the decisions, the financial statements included two types of fraudulent misrepresentations: one in relation to the financial statements of Livent's predecessor entities (the **MyGar Entities**) which were included in the Prospectus when Livent held its IPO, and the other in relation to the financial statements of Livent after the IPO, which were publicly filed. The final financial statements containing the misrepresentations were signed by Mr. Drabinsky and Mr. Gottlieb and were distributed to the Audit Committee and subsequently to the Board of Directors.
19. Livent raised funds from capital markets repeatedly during the post-IPO period, including the following offerings itemized in the Superior Court's decision:

Date of Offering	Offering	Approximate Funds Raised (\$ million)
September 20, 1993	Special Warrants Private Placement	\$20
February 3, 1995	Subordinated Convertible Notes Offering	\$15
February 3, 1995	Personal Shares of Mr. Drabinsky and Mr. Gottlieb	\$17
April 2, 1996	U.S. Public Offering	\$43
July 29, 1996	Subordinated Convertible Debentures	\$12
December 4, 1996	CIBC Credit Facility (loan agreement)	\$50
December 10, 1996	Senior Secured Debentures	\$73
May 8, 1997	Secondary Public Offering	\$28
October 16, 1997	Senior Notes Offering	\$173
June 12, 1998	Private Placement: Lynx Ventures	\$29
June 23, 1998	Private Placement: Southam	\$18
June 23, 1998	Private Placement: Great Pacific	\$1
June 23, 1998	Private Placement: Allen & Co.	\$1

IV. Conduct Contrary to the Public Interest

20. The conviction of Mr. Drabinsky for fraud involving financial statements distributed pursuant to the Act constitutes a basis pursuant to section

127(10) of the Act for an order in the public interest under section 127(1) of the Act.

21. In addition, by engaging in the conduct described above, Mr. Drabinsky acted in a manner contrary to the public interest, and an order is warranted pursuant to section 127(1) of the Act.

[9] The Agreed Statement of Facts also provides that Staff and Mr. Drabinsky each reserved the right to refer to and read from the criminal decisions and other documents contained in the Joint Documents Brief during the course of the evidence. Mr. Drabinsky also reserved the right to adduce further evidence during the course of the sanctions hearing. Staff and Mr. Drabinsky each reserved the right to make such other submissions concerning the above as they may advise and the Commission may permit. Staff and Mr. Drabinsky adhered to these understandings during the hearing.

[10] Staff submits and Mr. Drabinsky agrees that Mr. Drabinsky's criminal convictions satisfies the requirements for the issuance of an order pursuant to subsections 127(1) and (10) of the Act. The Panel agrees.

[11] Mr. Drabinsky also agrees that sanctions should be ordered against him in this matter, but he differs with Staff on the scope of such sanctions.

III. ORDER SOUGHT BY THE PARTIES

A. Staff

[12] Staff requests that the following order be issued with respect to Mr. Drabinsky, namely, that:

- a. pursuant to clause 2 of subsection 127(1) of the Act, trading in any securities by Mr. Drabinsky cease permanently;
- b. pursuant to clause 2.1 of subsection 127(1) of the Act, the acquisition of any securities by Mr. Drabinsky is prohibited permanently;
- c. pursuant to clause 3 of subsection 127(1) of the Act, any exemptions contained in Ontario securities law do not apply to Mr. Drabinsky permanently;
- d. pursuant to clause 8 of subsection 127(1) of the Act, Mr. Drabinsky be prohibited from becoming or acting as a director or officer of any issuer permanently;
- e. pursuant to clause 8.2 of subsection 127(1) of the Act, Mr. Drabinsky be prohibited from becoming or acting as a director or officer of a registrant permanently;
- f. pursuant to clause 8.4 of subsection 127(1) of the Act, Mr. Drabinsky be prohibited from becoming or acting as a director or officer of an investment fund manager permanently; and
- g. pursuant to clause 8.5 of subsection 127(1) of the Act, Mr. Drabinsky be prohibited from becoming or acting as a registrant, as an investment fund manager or as a promoter permanently.

B. Mr. Drabinsky

[13] Attached as Schedule A to these Reasons is the form of the draft order proposed by Mr. Drabinsky.

1. Director, Officer and Promoter Bans

[14] Staff submits that a permanent ban on acting as a director or officer of any issuer, whether or not a reporting issuer, is appropriate, as set out in subparagraph (d) of Staff's above proposed order.

[15] Mr. Drabinsky submits that a prohibition with regard to his assuming these roles at a reporting issuer – essentially issuers whose securities are publicly traded in Ontario – and at a registrant or investment manager, is appropriate. However, Mr. Drabinsky proposes carve-outs to provide an exemption for holding such positions at non-reporting issuers, permitting Mr. Drabinsky to perform "Permitted Activities" for "Permitted Non-Public Issuers."

[16] Mr. Drabinsky defines "Permitted Activities" as creative and marketing activities in relation to the development, production or exploitation stages of projects in television, motion pictures, live concerts, or the dramatic or musical theatre that:

- a. do not involve the preparation and final approval by Mr. Drabinsky of financial statements;
- b. do not involve soliciting investments or raising funds from investors; but for greater certainty, Mr. Drabinsky may communicate with investors or potential investors any information related to the creative or marketing aspects of the production of projects, including associated costs, budgets and timelines related thereto;
- c. do not involve authority to execute contracts, sign cheques, make final financial decisions, or control any bank accounts or other financial assets of the Permitted Non-Public Issuer;
- d. do not involve providing instructions or direction to any legal or financial advisors of the Permitted Non-Public Issuer, provided that providing input, advice and/or making recommendations to the Board, CEO or CFO of the Permitted Non-Public Issuer, or to legal and financial advisors of the Permitted Non-Public Issuer, regarding the creative and marketing services, potential contracts and proposed budgets for any project, does not constitute providing instructions or directions within the meaning of this paragraph; and
- e. do not involve making recommendations to, participating in any discussions with, or attempting in any way to influence, management or the board of, the Permitted Non-Public Issuer in relation to its compliance with its obligations under Ontario securities law.

[17] Mr. Drabinsky proposes to define "Permitted Non-Public Issuers", as any non-reporting issuer, including limited partnerships, in which:

- a. the issuer has only distributed securities to persons or companies described in subsections 2.42(2)(a), (b), (c), (d), (g) and (h) of *National Instrument 45-106* – essentially directors, officers and control persons of

the issuer and affiliates, and related family members, and existing security holders of the issuer, and investors who are Permitted Clients, as defined in *National Instrument 31-103* – consisting of certain classes of sophisticated investors, including, among others, individuals who beneficially own financial assets having a net realizable value before taxes, of greater than \$5 million;

- b. the issuer's securities, other than non-convertible debt securities, are owned by not more than 50 persons or companies, not including employees and former employees of the issuer or its affiliates; and
- c. a copy of the Order resulting from this proceeding is provided to the directors, officers and security holders of the Permitted Non-Public Issuers prior to the issuer entering into any agreement to retain Mr. Drabinsky's services, and a copy of such Order is provided to any individuals who propose to subsequently acquire securities in the issuer.

[18] Mr. Drabinsky also seeks to have this exception apply to the ban from being a promoter set out in subparagraph (g) of Staff's proposed order. For the purposes of these Reasons, we will refer to these proposed exceptions collectively as the "**Creative Services Exception**".

[19] Mr. Drabinsky agrees to the registrant bans set out in subparagraph (g) of Staff's proposed order.

[20] Mr. Drabinsky also proposes an additional exception to permit him to be an officer or director of certain family companies to enable him to engage in tax and estate planning. Specifically, a carve-out was proposed to permit him:

To act as a director or officer of an issuer where all the securities of the issuer are owned by one or more of Mr. Drabinsky, his spouse and their children and any issue thereof, his two brothers (together, his **Immediate Family**), or a family trust the beneficiaries are members of his Immediate Family, and to trade in, distribute or acquire securities of such an issuer only among members of his Immediate Family, provided that the name of the issuer is provided to Staff and the issuer does not seek to raise capital for the issuer except from Mr. Drabinsky and his Immediate Family and/or through ordinary course borrowing on usual commercial terms.

[21] For the purposes of these Reasons, we refer to this as the "**Family Company Exception**."

[22] Mr. Drabinsky also submits that the order issued in this proceeding should include a provision permitting him to apply to the Commission for a variation of the terms and restrictions applicable to the Creative Services Exception and the Family Company Exception, but no earlier than four years from the date of the Order.

2. Acquisition and Trading Bans

[23] With regard to Staff's proposed prohibition on acquisition and trading securities in subparagraphs (a) and (b) of Staff's above proposed order, Mr. Drabinsky

seeks to have the order limited to a 10-year term and submits that it is appropriate to provide an exception to enable him to trade or acquire securities or derivatives:

- a. in any account at a registered dealer in his own name of which he has the sole beneficial interest; or
- b. in a registered retirement savings plan, registered educational savings plan, any registered retirement income funds, and/or tax-free savings account (as defined in the *Income Tax Act (Canada)*) in which he has a beneficial interest;
- c. provided he does not own legally or beneficially more than 5 percent of the outstanding securities of the class or series of the class in question; and
- d. through a registered dealer (which dealer must be given a copy of the Order resulting from this proceeding) and through accounts opened in his name only.

[24] For the purposes of these Reasons, we will refer to these exceptions as the **"Trading Account Exception"** and the exception in subparagraph (b) above, specifically, as the **"Tax Advantaged Account Exception."**

IV. ISSUES

[25] Given that the parties agree, and the Panel has determined, that sanctions are warranted, the main issue for this Panel to resolve is what sanctions are necessary to protect Ontario investors and the integrity of Ontario's capital markets. In so doing, this Panel must consider a number of sub-issues, including:

- a. How should the Panel apply the considerations of specific and general deterrence, given the magnitude of Mr. Drabinsky's frauds on the one hand and, on the other hand, the considerable passage of time and the fact that he has already been the recipient of substantial sanctions through his criminal convictions and incarceration?
- b. Do the proposed director, officer and promoter bans prevent Mr. Drabinsky from earning a living, including in his current role as a creative producer?
- c. What consideration, if any, should be given to Mr. Drabinsky's estate planning and tax-optimization strategies in the crafting of sanctions?
- d. Are Mr. Drabinsky's requested carve-outs appropriate and do they sufficiently allow for the protection of investors and the capital markets? Could the Commission ensure that the proposed carve-outs are so limited that there would not be any adverse consequences to the capital markets in Ontario? How, over time, could the Commission ensure that the carve-outs would not be used as vehicles for public investment in Ontario?

V. PUBLIC INTEREST ORDERS UNDER THE ACT

[26] Staff submits, and we agree, that when exercising its public interest jurisdiction under section 127, the Commission must consider the twin purposes of the Act. These purposes, set out in section 1.1 of the Act, are:

- a. to protect investors from unfair, improper or fraudulent practices; and
- b. to foster fair and efficient capital markets and confidence in capital markets.

[27] In pursuing these purposes, the Commission must also have regard for the fundamental principles described in subsection 2.1(2) of the Act. That section provides that two of the primary means for achieving the purposes of the Act are:

- a. restrictions on fraudulent and unfair market practices and procedures; and
- b. requirements for the maintenance of high standards of fitness and business conduct to ensure honest and responsible conduct by market participants.

[28] In making an order in the public interest under section 127 of the Act, the Commission's jurisdiction should be exercised in a protective and preventative manner. As expressed in the Commission's decision in *Re Mithras Management Ltd.* (1990), 13 OSCB 1600 at 1610-11:

[T]he role of this Commission is to protect the public interest by removing from the capital markets - - wholly or partially, permanently or temporarily, as circumstances may warrant - - those whose conduct in the past leads us to conclude that their conduct in the future may well be detrimental to the integrity of the capital markets. We are not here to punish past conduct; that is the role of the courts, particularly under section 118 of the Act. We are here to restrain, as best we can, future conduct that is likely to be prejudicial to the public interest in having capital markets that are both fair and efficient. In so doing we must, of necessity, look to past conduct as a guide to what we believe a person's future conduct might reasonably be expected to be; we are not prescient, after all.

[29] The Supreme Court of Canada has endorsed this approach to section 127 of the Act:¹

The role of the [Commission] under s. 127 is to protect the public interest by removing from the capital markets those whose past conduct is so abusive as to warrant apprehension of future conduct detrimental to the integrity of the capital markets.

¹ *Committee for Equal Treatment of Asbestos Minority Shareholders v Ontario (Securities Commission)*, [2001] 2 SCR 132 at para 43.

- [30] In determining the nature and duration of sanctions, the Commission has considered a number of factors, including:²
- a. the seriousness of the allegations;
 - b. the respondent's experience in the marketplace;
 - c. the level of a respondent's activity in the marketplace;
 - d. whether or not there has been a recognition of the seriousness of the improprieties;
 - e. whether or not the sanctions imposed may serve to deter not only those involved in the case being considered, but any like-minded people from engaging in similar abuses of the capital markets;
 - f. any mitigating factors;
 - g. whether the violations are isolated or recurrent;
 - h. the size of any profit made or loss avoided from the illegal conduct;
 - i. the size of any financial sanctions or voluntary payment when considering other factors;
 - j. the effect any sanction might have on the livelihood of a respondent;
 - k. the restraint any sanctions may have on the ability of a respondent to participate without check in the capital markets;
 - l. the reputation and prestige of the respondent;
 - m. the shame or financial pain that any sanction would reasonably cause to the respondent; and
 - n. the remorse of the respondent.
- [31] The Supreme Court of Canada has held that it is appropriate for the Commission to consider general deterrence in making orders in the public interest that are both protective and preventative. The Court emphasized that deterrence may be specific to the individual or general to discourage or hinder like behaviour in others. In both cases, "deterrence is prospective in orientation and aims at preventing future conduct."³

VI. ANALYSIS

A. Staff Submits the Sanctions are Appropriate without Exceptions

- [32] In applying the sanctioning factors in this case, Staff emphasizes that Mr. Drabinsky was convicted of a large-scale fraud at Livent, where he was one of a small group of senior officers and its directing mind. In the words of the trial judge, Mr. Drabinsky, together with Mr. Gottlieb, "presided over a corporation whose corporate culture was one of dishonesty". Mr. Drabinsky "was the main person in charge" and played the most central role in the fraud. The conduct was

² *Re Belteco Holdings Inc.* (1998), 21 OSCB 7743 at 7746; *Erikson v Ontario (Securities Commission)* (2003), 26 OSCB 1622 (Div Ct) at para 58; *Re MCJC Holdings Inc.* (2002), 25 OSCB 1133 at 1136).

³ *Re Cartaway Resources Corp.*, 2004 SCC 26 at para 52.

not isolated since Mr. Drabinsky allowed the misrepresentations in the financial statements to be stated and repeated in 20 financial statements that he knew did not represent the true picture of the company.

[33] Staff asserts that Mr. Drabinsky's misconduct supported the status and lifestyle that he led as a successful, prominent and powerful international entrepreneur, with the most senior roles at Livent for which he was very well-compensated. In applying the Commission's sanctioning factors, Staff submits that in these respects he profited from his misconduct.

[34] Although the collapse of Livent cannot be squarely attributed to the fraud, the Court of Appeal found that "evidence clearly justified the inference of significant economic harm to investors..." Staff asserts that there is also non-economic harm to public confidence in the integrity of the market when business leaders engage in fraudulent activity, which occurred in this case. As stated by Madam Justice Benotto in her Reasons for Sentence:⁴

Corporate fraud such as this results in tangible losses to employees, creditors and investors. It also results in less tangible, but equally significant loss to society. It fosters cynicism. It erodes public confidence in the financial markets.

[35] Staff submits that Mr. Drabinsky has been able, and will be able to continue, to earn a living even if he is constrained by the order Staff is seeking, just as he has been able to do under the parole conditions and undertakings to the Commission to which he has been subject. Staff submits that his ability to earn a living is apparent from the compensation arrangements in the Teatro Proscenium Limited Partnership (**Teatro LP**) structure put into place for the current theatrical production in which Mr. Drabinsky is involved and for future projects,⁵ as described in the testimony of Richard Stursberg.⁶ The evidence shows that Mr. Drabinsky could also participate in other aspects of the entertainment industry as a consultant or employee, including productions where the sources of funding need not include public investors. These opportunities were described in evidence provided by Norman Bacal⁷ and Mr. Stursberg.

[36] Staff submits that the full range of restrictions in its proposed order are necessary to provide specific and general deterrence to Mr. Drabinsky and those involved in the public markets who may commit financial frauds. Staff asserts that complete bans send a strong message that both criminal and regulatory

⁴ *R v Drabinsky* (2009), 246 CCC (3d) 214 (Ont SCJ) at para 53.

⁵ In 2014, Teatro LP was established to finance theatrical productions, with Mr. Drabinsky acting as creative producer. All of Teatro LP's financial controls rest with its General Partner, Teatro Proscenium Inc. (**Teatro Inc.**). Mr. Drabinsky provides services to Teatro LP through Ambassador Entertainment Inc. (**Ambassador**), which receives consulting fees and future contingent and/or royalty payments, and then pays Mr. Drabinsky a salary.

⁶ Mr. Stursberg is the current CEO of Teatro Inc. He was formerly the head of English language services at the CBC, and the CEO of Telefilm Canada and Chairman of the Board of the Canadian Television Fund, now the Canadian Media Fund.

⁷ Mr. Bacal is one of the trustees of Ambassador Trust, which owns and controls Ambassador, and whose trust beneficiaries are members of Mr. Drabinsky's immediate family, but do not include Mr. Drabinsky.

consequences will result from such abuses of public trust. The consequences of a criminal conviction, while severe, are not sufficient in this case. Separate consequences under the securities regulatory regime are required to give effect to the Commission's mandate to protect investors and promote the integrity of the market. The Commission's role is not penal in nature, but protective of investors and the markets, and distinct from the functions performed by the criminal courts.

- [37] Staff asserts that despite the Agreed Statement of Facts and Mr. Drabinsky's counsel's statements, the absence of more direct acknowledgements of wrongdoing show that Mr. Drabinsky has not acknowledged the seriousness of his misconduct and is still trying to reduce his level of responsibility.
- [38] Staff asserts that despite the character evidence to the effect that Mr. Drabinsky has, in private conversations, expressed remorse concerning his misconduct, and although uncontested that the sources of such evidence honestly believed what they said on this topic, little weight should be given to such statements. Staff asserts that most of these statements of remorse or regret primarily focused on the personal consequences to Mr. Drabinsky. This evidence includes only limited statements of regret regarding the effects on investors and the integrity of the capital markets.
- [39] Staff asserts that we should discount evidence of Mr. Drabinsky's reputation arising from his creative talents, asserting that he is at least as well known for having directed a major fraud.
- [40] Staff also submits that there should be complete acquisition and trading bans on the basis that Mr. Drabinsky participated in capital-raising activities that were in furtherance of trades where investors relied on fraudulent financial statements.
- [41] Staff argued that, in previous cases involving criminal fraud convictions, including in *Re Black* (2015), 38 OSCB 204 (***Re Black***), the Commission imposed permanent bans on being in a position of trust or authority as a participant in the capital markets.

B. Mr. Drabinsky's Submissions in Support of Carve-Outs

- [42] Mr. Drabinsky's counsel made certain general submissions concerning sanctions in this case.
- [43] He submitted that Mr. Drabinsky came "to this proceeding in full recognition of the magnitude of his transgressions and their harmful impact."
- [44] He asserted that Mr. Drabinsky's period of incarceration, together with the restrictions he is willing to abide by, "appropriately reflect the consideration of general deterrence. A strong message has been sent to the capital markets already."
- [45] Counsel stated that Mr. Drabinsky has complied with the restrictions to which he has been subject as a result of undertakings to the Commission and parole conditions over a very extended period, which reflects a reduced risk of future misconduct. As a result, counsel argued that prospective sanctions to ensure specific deterrence are not required.

- [46] Drawing from criminal sentencing principles, and consistent with the non-punitive, protective mandate of the Commission, counsel stated that the Commission should consider the least onerous order that fulfills its mandate.
- [47] Mr. Drabinsky also submits that this case was sufficiently distinct that the general bans in the case of *Re Black* should not be viewed as persuasive precedent. *Re Black* involved both a fraud conviction as well as a count of obstruction of justice and Mr. Black failed to acknowledge wrongdoing and accept responsibility throughout the proceeding. In addition, Mr. Black objected to the imposition of any sanctions.
- [48] Mr. Drabinsky's counsel also made the following overarching submissions:
- a. Mr. Drabinsky has been convicted of fraud for conduct that occurred between 19 and 24 years ago;
 - b. Mr. Drabinsky was sentenced to 5 years of imprisonment. The Ontario Court of Appeal expressly stated this sentence satisfied the requirements of denunciation and general deterrence, which are the key factors in sentencing persons who, as officers and directors of public companies, use their positions to engage in large-scale frauds;
 - c. Mr. Drabinsky will never be able to work as a creative producer again if all of the sanctions proposed by Staff are imposed;
 - d. Mr. Drabinsky served 17 months in jail and completed the balance of his sentence on probation successfully, including many months on day parole, where evenings were spent in a half-way house;
 - e. For over 16 years, Mr. Drabinsky has complied with stringent restrictions imposed by virtue of a voluntary undertaking provided to the Commission;
 - f. Actual evidence of blameless conduct over the last 19 years demonstrates that Mr. Drabinsky poses no risk of reoffending. In addition, he has fully acknowledged his conviction, accepts the factual findings of the courts, the harm that his conduct caused and is genuinely remorseful;
 - g. It is widely acknowledged that Mr. Drabinsky has unique and valuable talents as a creative producer from which the entertainment industry in Canada and abroad can continue to benefit;
 - h. The investors in [Teatro LP] will be adversely affected if Mr. Drabinsky is not able to continue working as a creative producer by virtue of the imposition of all of the sanctions proposed by Staff;
 - i. Many people presently involved in the current production, both on stage and behind the scenes, at least half of whom are Canadian, will ultimately lose the opportunity to work on any future contemplated productions, not only to the detriment of those directly involved in the current production, but also those who could, and hoped to, be involved in the productions currently in various stages of development;
 - j. Mr. Drabinsky has proposed a permanent reporting issuer director and officer ban, a promoter ban (coupled with specific carve-outs), along with other significant restrictions. His proposal reasonably and adequately

protects the public interest, serves the principle of general and specific deterrence, and sufficiently protects the capital markets; and

- k. Where fully informed and sophisticated accredited investors wish to invest, that is evidence in itself that the public interest does not demand absolute bans involving an issuer.

[49] In addition, as to the application of the sanctioning factors, Mr. Drabinsky's counsel argued that we should consider the following circumstances:

- a. Mr. Drabinsky has never declared bankruptcy and he has settled all civil claims against him;
- b. Staff adduced no evidence to contradict the honestly held views of the many respected individuals who testified or provided letters as to the extent of Mr. Drabinsky's remorse; and
- c. Mr. Drabinsky cannot function in his only manner of making a living, as a creative producer, unless he can interact with investors in the manner proposed. The proposed conditions "guarantee a complete 'separation of the financial from the creative'."

C. Are the Proposed Carve-Outs in the Public Interest?

[50] Mr. Drabinsky was responsible for one of the most significant Canadian financial frauds in recent decades.

[51] The purposes of the Commission's sanctions are protective and not punitive. We have to ensure that the sanctions are broad enough to protect investors and the integrity of the markets. Participation in the capital markets is not a right, but a privilege. We do not have a crystal ball and cannot predict whether a person will engage in future misconduct. We must instead view sanctions through the lens of the misconduct that person carried out.

[52] Mr. Drabinsky accepts that an order is appropriate under subsections 127(1) and 127(10) of the Act, subject to the carve-outs that he proposes. Our task is therefore fundamentally to assess whether these carve-outs water down the sanctions in a manner and degree that fail to protect investors and the integrity of the markets. In doing so, we need to consider whether these carve-outs are consistent with the application of the Commission's sanctioning factors.

[53] Given the magnitude of the frauds committed by Mr. Drabinsky, we give limited weight to the issues of recognition of wrongdoing, the absence of which is an aggravating factor, and remorse, a mitigating factor. The statements about Mr. Drabinsky's emotional state, as reported to us by the live witnesses and in the form of letters sent on his behalf, are of interest but are not very specific. They concern the effect of convictions and incarceration on Mr. Drabinsky and those close to him, but fail to directly address the impact of his activities on Livent investors and the integrity of Canadian capital markets.

[54] The director and officer carve-outs proposed by Mr. Drabinsky include highly tailored provisions inviting us to speculate how they could or could not potentially be used as a foundation for future misconduct. The nature of these carve-outs invites us to engage in a bespoke predictive analysis to help Mr. Drabinsky achieve his business and personal tax and estate planning objectives. In that regard, we accept the evidence from Mr. Drabinsky's personal

accountant, Irving Feldman, that the Tax Advantaged Account Exception and the Family Company Exception would help Mr. Drabinsky optimize his and his family's tax position under current tax rules. We also accept Mr. Bacal's evidence that Mr. Drabinsky earns a salary as a consultant and that he has received compensation in the form of advances related to his current production, with the prospect of substantial income if it and other productions prove successful, although this is inherently uncertain.

- [55] With the Family Company Exception, we are not being asked to permit Mr. Drabinsky's continued involvement with specific, existing entities, but rather to permit a class exemption for his involvement with all entities established in the future meeting defined characteristics. We are being asked to contemplate changes in these restrictions after four years, presumably to address the possibility of modifying these restrictions if tax laws or Mr. Drabinsky's personal planning circumstances should change.
- [56] These provisions could be likened in their objectives to contractual restrictions in key executive employment agreements or in debt instruments where the parties are seeking to negotiate protections for all the reasonably foreseeable circumstances that may affect their interests and for which they need protection. If Mr. Drabinsky's proposal in this matter was a contractual offer, he would be asserting private interests in maximizing his potential to accumulate wealth through carve-outs and we would be protecting the public interest in respect of the circumstances that we need to take into account that may affect investors or touch on the capital markets.
- [57] We reject the proposition that we should engage in an adjudicative process akin to a negotiation, where we have to parse every carve-out proposed by a respondent and assess whether it is justified as minimally intrusive when taking into account the respondent's tax and estate planning and other personal objectives. We accept that Mr. Drabinsky's right to earn a living is an appropriate and necessary sanctioning consideration, but we do not accept that we need to consider how best to shelter his income from tax or to build or pass on wealth to his beneficiaries. Such a process, if it is to occur at all, would be best conducted through settlement negotiations with Staff.
- [58] Mr. Drabinsky's counsel, near the end of the hearing, proposed that consideration of these issues be transformed into a quasi-settlement process, suggesting that, rather than making a conclusive order, we could establish certain principles and then set Staff to the task of negotiating the details and the form of an order with Mr. Drabinsky. The time for that is past and Staff is within its prerogatives to refuse to engage in such a process.
- [59] If we were to consider the detailed proposed carve-outs for the reasons suggested by Mr. Drabinsky, it would open up the sanctions phase of this proceeding, and others were this principle to be more widely accepted, to additional complexity and days of considering the impact of highly tailored sanctions on respondents. The efficiency of hearings would be harmed and the public would bear the direct and indirect costs of delays and the deployment of resources to these matters. Expert testimony would likely be required on both sides. This type of analysis is not part of the Commission's mandate and not contemplated in the sanctioning factors.

1. Director, Officer and Promoter Bans

- [60] We are not satisfied that Mr. Drabinsky's proposed specific director, officer and promoter carve-outs are, in fact, protective of the public.
- [61] With regard to the Creative Services Exception, Mr. Drabinsky is essentially asking us to endorse alternative definitions of "director" and "officer" from those set out in the Act. Among other matters, we are being asked to endorse certain types of interactions with investors that we are told would not involve soliciting investments or Mr. Drabinsky being held out as the person in charge of the issuer. We cannot know how these communications will be delivered or received. We cannot know if the intended restrictions will be carefully observed in practice, or with a wink and a nod suggesting that people should invest because Mr. Drabinsky is calling the shots. Currently, Mr. Drabinsky works in a structure that includes an experienced and apparently independent management team, some of whom testified at the hearing. We do not know, however, whether the individuals exercising management and governance responsibilities within this structure in the future will have the integrity, capabilities and engagement to make these restrictions work in the spirit of keeping Mr. Drabinsky out of the capital markets and financial decision-making.
- [62] The proposed carve-outs could operate in such a manner that Mr. Drabinsky could, in reality, take all the restricted financial actions and then have them rubber-stamped by others. The restrictions may be adhered to in form and not in substance, eviscerating the protective intent of the sanctions and creating enforcement challenges. We also foresee that the formulation of these restrictions incorporated in a Commission order could invite an overly formalistic analysis and disagreements as to interpretation.
- [63] It is a highly fact-based inquiry whether someone is an officer, director or promoter or is soliciting investment, where conduct rather than mere titles or corporate resolutions conferring authority needs to be considered. It would be unwise and inappropriate for us to prejudge the effect and sustainability of these proposals, in the absence of specific facts, and to preclear activities based on the high-level statements set out in the proposed carve-outs.
- [64] If we accept carve-outs that permit certain limited activities described at a high level, it would lead us to consider as part of the Commission's protective mandate whether to impose some type of review or monitoring by Staff or perhaps an outside monitor appointed by the Commission. These proposed detailed carve-outs are problematic without a means of verification. However, such ongoing monitoring would impose an undue burden on Staff and treat Mr. Drabinsky very differently than respondents in other enforcement proceedings involving fraudulent conduct. Our order should be final and should not include subjective elements requiring ongoing supervision or use definitions that differ from the Act and the Commission's rules.
- [65] Staff does not assert in this hearing that Mr. Drabinsky's present activities involve being an officer, director or promoter of an entity, and we do not have evidence before us to establish whether he is acting in such capacities. The evidence shows that he is using his talents in a current theatrical production at this very time, indicating that he is not being prevented from earning a living by the existing restrictions.

- [66] We also are not satisfied that the Commission's protective purpose would be achieved by the proposed restriction of serving as director, officer or promoter to only entities in the definition of "Permitted Non-Public Issuers". We note that the fraud orchestrated by Mr. Drabinsky began with the MyGar Entities, which were private companies. Frauds occurring in the exempt market and with Permitted Clients must also be deterred. Creating an allowance for outside investors in exempt market activities fails to recognize the importance of the exempt markets in today's securities regulatory environment and the fact that Mr. Drabinsky's fraud originated with such entities.
- [67] In the case of the Family Company Exception, such an entity could become a Permitted Client and invest, or even control, the Permitted Non-Public Issuer. Mr. Drabinsky could still assert that he falls within the Creative Services Exception even if he was the sole director and officer and controlling shareholder of an entity that was the controlling shareholder of a Permitted Non-Public Issuer. In this respect, the proposed restrictions are incomplete and inconsistent with the Commission's protective goals since Mr. Drabinsky should not be permitted to control entities operating in the capital markets, including the exempt markets. This example shows the danger of trying to anticipate all the ways in which such carve-outs may operate to circumvent the intended outcome of protecting the capital markets.
- [68] Such an entity could also conceivably participate in the securities markets outside of Ontario and become the equivalent of a reporting issuer in other jurisdictions, potentially harming investors and bringing Canadian capital markets into disrepute should we allow this to occur. Again, the proposed restrictions do not take into account even reasonably foreseeable circumstances, let alone unanticipated, unintended consequences.
- [69] Allowing for carve-outs with potential loopholes that would allow Mr. Drabinsky's participation in the capital markets, of the kind that we have described, would not fulfill the Commission's protective mandate. In addition, the existence of such loopholes affects general deterrence by creating a complex set of restrictions that, on close scrutiny, are open to evasion.
- [70] The Commission's protective mandate requires consideration of whether public protection is required to ensure honest and responsible conduct by market participants. Despite the passage of time since the underlying offences, it is only recently that, after a period of incarceration, Mr. Drabinsky is now in a position in which investor funds may be utilized in the course of his creative endeavours. Although there is no evidence of inappropriate conduct on his part since the lifting of his parole restrictions, the Commission is nonetheless required in this case to adopt protective measures. This Panel has no crystal ball. We acknowledge that Mr. Drabinsky agrees to the imposition of sanctions, leaving the scope of carve-outs as the substantial issue in this proceeding. We find that it is conceivable that the opportunity to restart his career could create pressures to circumvent the letter or spirit of these carve-outs.
- [71] Although we do not predict this misconduct, we need to protect against it. On this point, we consider, in particular, the seriousness of Mr. Drabinsky's past misconduct. Protective steps are consistent with the Commission's precedents and with the Commission's duty to maintain high standards of fitness and business conduct to ensure honest and responsible conduct by market

participants. We emphasize that we have no reason to believe that Mr. Drabinsky has any intention to reoffend in the future and we take at face value that Mr. Drabinsky accepts the consequences of his misconduct. However, we find that allowing for the requested carve-outs to the director, officer and promoter bans would not ultimately be in the public interest.

[72] Given the manner in which we address the carve-outs and the absence of additional submissions regarding the availability of exemptions, we have determined to grant the prohibition on securities law exemptions applying to Mr. Drabinsky, as requested by Staff in paragraph (c) of their proposed Order.

[73] For these reasons, we reject all the director, officer and promoter carve-outs proposed by Mr. Drabinsky and we agree with Staff's proposed permanent bans.

2. Acquisition and Trading Bans

[74] Mr. Drabinsky's conduct underlying his convictions related to trading in securities through the effect of fraudulent financial statements used in capital-raising transactions, rather than market manipulation or other misconduct effected through the use of brokerage accounts. As in *Re Black*, we do not believe that a protective purpose is served by prohibiting routine personal investments through tax-advantaged or other accounts maintained at a registered dealer. On this point, we accept the carve-outs to the acquisition and trading bans proposed by Mr. Drabinsky, as set out in paragraph (b) of Schedule A to these Reasons.

VII. CONCLUSION

[75] The public interest requires that we order the permanent bans requested by Staff that are designed to prevent Mr. Drabinsky from acting in a position of trust and authority for entities that may participate in the capital markets. These sanctions follow from the need to deter Mr. Drabinsky and others from the misconduct reflected in his criminal convictions. Since Mr. Drabinsky's misconduct had a limited connection to trading in securities through brokerage accounts, we have accepted Mr. Drabinsky's submissions on this point, imposing limited acquisition and trading bans.

Dated at Toronto this 15th day of June, 2017.

"D. Grant Vingoe"

D. Grant Vingoe

"Judith N. Robertson"

Judith N. Robertson

"William J. Furlong"

William J. Furlong

SCHEDULE A – Order Proposed by Mr. Drabinsky

IT IS HEREBY ORDERED THAT:

- (a) pursuant to clause 6 of subsection 127(1) of the *Act*, Mr. Drabinsky is reprimanded;
- (b) pursuant to clauses 2 and 2.1 of subsection 127(1) of the *Act*, Mr. Drabinsky is prohibited from trading or acquiring any securities or derivatives for 10 years, except that during that period he may trade or acquire securities or derivatives:
 - i. in any account at a registered dealer in his own name of which he has the sole beneficial interest; or
 - ii. in a registered retirement savings plan, registered education savings plan, any registered retirement income funds, and/or tax-free savings account (as defined in the *Income Tax Act* (Canada)) in which only he has a beneficial ownership;
 - iii. he does not own legally or beneficially more than five percent of outstanding securities of the class or series of the class in question; and
 - iv. he carries out any permitted trading through a registered dealer (which dealer must be given a copy of this Order) and through accounts opened in his name only;
- (c) pursuant to clause 8 of subsection 127(1) of the *Act*, Mr. Drabinsky is permanently prohibited from becoming or acting as a director or officer of a reporting issuer or an affiliate of a reporting issuer;
- (d) pursuant to clause 8 and 8.5 of subsection 127(1) of the *Act*, and subject to the exception in paragraph (iii) below, Mr. Drabinsky is permanently prohibited from becoming or acting as a director or officer of an issuer that is not a reporting issuer, or a promoter. For greater certainty, this prohibition against acting as a director or officer of an issuer, or a promoter, does not preclude Mr. Drabinsky from performing "Permitted Activities" for "Permitted Non-Public Issuers", as defined below:
 - i. Permitted Activities are defined as providing creative and marketing services in relation to the development, production or exploitation stages of projects in television, motion pictures, live concerts, or the dramatic or musical theatre that:
 - 1. do not involve the preparation and final approval by Mr. Drabinsky of financial statements;
 - 2. do not involve soliciting investments or raising funds from investors; but, for greater certainty, Mr. Drabinsky may communicate with investors or potential investors any information related to the creative or marketing aspects of the production of projects including associated costs, budgets and timelines related thereto;
 - 3. do not involve authority to execute contracts, sign cheques, make final financial decisions, or control any bank accounts or other financial assets of the Permitted Non-Public Issuer;

4. do not involve providing instructions or direction to any legal or financial advisors of the Permitted Non-Public Issuer; provided that providing input, advice and/or making recommendations to the Board, CEO or CFO of the Permitted Non-Public Issuer, or to legal and financial advisors of the Permitted Non-Public Issuer, regarding the creative and marketing services, potential contracts, and proposed budgets for any project, does not constitute providing instructions or directions within the meaning of this paragraph; and
 5. do not involve making recommendations to, participating in any discussions with, or attempting in any way to influence, management or the board of, the Permitted Non-Public Issuer in relation to its compliance with its obligations under Ontario securities law.
- ii. Permitted Non-Public Issuers are defined as any issuer that is not a reporting issuer, including limited partnerships, in which:
 1. the issuer has only distributed securities to persons or companies described in Sections 2.4(2)(a), (b), (c), (d), (g), (h) of *National Instrument 45-106* or to an investor who is a "permitted client" as defined in *National Instrument 31-103*;
 2. the issuer's securities, other than non-convertible debt securities, are owned by not more than 50 persons or companies, not including employees and former employees of the issuer or its affiliates; and
 3. a copy of this Order is provided to the directors, officers and security holders of the Permitted Non-Public Issuer prior to the Permitted Non-Public Issuer entering into any agreement to retain Mr. Drabinsky's services, and a copy of this Order is provided to any individuals who propose to subsequently acquire securities in the Permitted Non-Public Issuer.
 - iii. Notwithstanding the provisions of this Order, Mr. Drabinsky is permitted to act as a director or officer of an issuer where all of the securities of the issuer are owned by one or more of Mr. Drabinsky, his spouse and their children and any issue thereof, his two brothers (together, his "Immediate Family"), or a family trust the beneficiaries of which are members of his Immediate Family, and to trade in, distribute or acquire securities of such an issuer only among members of his Immediate Family, provided that the name of the issuer is provided to Staff and the issuer does not seek or raise capital for the issuer except from Mr. Drabinsky and his Immediate Family and/or through ordinary course borrowing on usual commercial terms.
- (e) pursuant to clauses 8.2 and 8.5 of subsection 127(1) of the *Act*, Mr. Drabinsky is permanently prohibited from becoming or acting as a registrant or a director or officer of a registrant;
 - (f) pursuant to clauses 8.4 and 8.5 of subsection 127(1) of the *Act*, Mr. Drabinsky is permanently prohibited from becoming or acting as an investment fund manager or as a director or officer of an investment fund manager; and

- (g) Mr. Drabinsky shall be at liberty to seek leave of the Commission no sooner than 4 years from the date of the entry of this Order to vary the terms of this Order with reference to the terms and restrictions contained in paragraph (d) herein.