Ontario Securities Commission
Commission des valeurs mobilières de l'Ontario
22nd Floor, 20 Queen Street West, Toronto ON M5H 3S8
22e étage, 20, rue queen ouest, Toronto ON M5H 3S8

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

- AND -

IN THE MATTER OF
PORTFOLIO CAPITAL INC., DAVID ROGERSON, and
AMY HANNA-ROGERSON

REASONS AND DECISION ON SANCTIONS AND COSTS
(Sections 127 and 127.1 of the Act)

Hearing:	May 20, 2015	
Decision:	August 19, 2015	
Panel:	Christopher Portner	- Commissioner
Appearances:	Gavin Smyth Keir Wilmut	- For Staff of the Commission
	Timothy D. Chapman-Smith	- For David Rogerson
	Doug McLeod	- For Amy Hanna-Rogerson

TABLE OF CONTENTS

REASONS AND DECISION ON SACTIONS AND COSTS

I. BACKGROUND

A. Introduction

[1] This was a hearing (the "**Sanctions and Costs Hearing**") before the Ontario Securities Commission (the "**Commission**") pursuant to sections 127 and 127.1 of the *Securities Act*, R.S.O. 1990, c. S.5, as amended (the "**Act**") to consider whether it is in the public interest to make an order with respect to sanctions and costs against Portfolio Capital Inc. ("**Portfolio Capital**"), David Rogerson ("**Rogerson**") and Amy Hanna-Rogerson ("**Hanna-Rogerson**" and, collectively with Portfolio Capital and Rogerson, the "**Respondents**").

[2] Staff of the Commission ("**Staff**") had alleged that the Respondents solicited and sold shares of PlusPetro Inc. (Panama) ("**PlusPetro**") to more than 200 investors and potential investors, raising approximately US$980,000 and $544,000 and that the Respondents engaged in fraudulent conduct by making untrue or misleading statements to investors regarding the business of PlusPetro, the use of investor funds and the future value of PlusPetro shares.

[3] Following a hearing to consider the merits of Staff's allegations (the "**Merits Hearing**"), I issued reasons and a decision on the merits on February 26, 2015, *Re Portfolio Capital Inc.*, (2015) 38 O.S.C.B. 2071 (the "**Merits Decision**"). In the Merits Decision, I found that:

(a) The Respondents had engaged in unlawful trading contrary to subsection 25(1)(a) of the Act, as that section existed prior to September 28, 2009, and contrary to subsection 25(1) of the Act, on or after September 28, 2009;

(b) The Respondents illegally distributed securities contrary to subsection 53(1) of the Act and breached subsection 126.1(b) of the Act by engaging in acts that they knew or reasonably ought to have known perpetrated a fraud;

(c) Rogerson made prohibited representations contrary to subsection 38(3) of the Act and Hanna-Rogerson, as the director of Portfolio Capital, authorized, permitted, or acquiesced in Portfolio Capital's non-compliance of Ontario securities law, and therefore contravened Ontario securities law pursuant to section 129.2 of the Act; and

(d) The Respondents' actions were contrary to the public interest.

[4] Rogerson and Hanna-Rogerson (together, the "**Individual Respondents**") were represented at the Sanctions and Costs Hearing by separate counsel under the Commission's Litigation Assistance Program. Written and oral submissions with respect to sanctions and costs were made by Staff and counsel for each of Rogerson and Hanna-Rogerson.

[5] Although Portfolio Capital was properly served with notice of the Sanctions and Costs Hearing, it did not appear or make submissions. Given that Portfolio Capital had received adequate notice, I determined that, pursuant to subsection 7(1) of the *Statutory Powers Procedure Act*, R.S.O. 1990, c. S.22 (the "**SPPA**"), it was appropriate that the Sanctions and Costs Hearing proceed in the absence of Portfolio Capital.

II. SANCTIONS ANALYSIS

A. Sanctions Requested by Staff

1. Portfolio Capital

[6] Staff submits that Portfolio Capital should be subject to the following sanctions, namely, that:

(a) Pursuant to clause 2 of subsection 127(1) of the Act, trading in any securities or derivatives by Portfolio Capital shall cease permanently;

(b) Pursuant to clause 2.1 of subsection 127(1) of the Act, the acquisition of any securities or derivatives by Portfolio Capital shall be prohibited permanently;

(c) Pursuant to clause 3 of subsection 127(1) of the Act, any exemptions contained in Ontario securities law shall not apply to Portfolio Capital permanently;

(d) Pursuant to clause 10 of subsection 127(1) of the Act, Portfolio Capital shall jointly and severally with Rogerson and Hanna-Rogerson disgorge to the Commission a total of $2.6 million or, in the alternative $1.7 million, to be designated for allocation to or for the benefit of third parties in accordance with subsection 3.4(2)(b) of the Act; and

(e) Pursuant to section 127.1 of the Act, Portfolio Capital pay $309,812.56 of the costs of the investigation and hearing, for which it shall be jointly and severally liable with Rogerson and Hanna-Rogerson.

[7] Staff submits that the allegations proven against Portfolio Capital involve serious breaches of Ontario securities law and conduct contrary to the public interest, and merit severe sanctions. These breaches included unlawful trading, the illegal distribution of securities and fraudulent conduct with respect to securities. Staff refers to my finding in the Merits Decision that "substantial amounts of the investor funds that were received by Portfolio Capital were not used for the purpose represented to investors"[1] and further submits that Portfolio Capital undertook dishonest acts that could and did put investors' financial interest at risk.

[8] Staff also submits that the conduct of Portfolio Capital caused significant harm to the integrity of the capital markets and was designed to and did deprive investors of their funds and that Portfolio Capital should be permanently prevented from participating in the capital markets in any capacity.

[1] Merits Decision, *supra* at para. 123.

2. The Individual Respondents

[9] Staff submits that the Individual Respondents should be subject to the following sanctions, namely, that:

(a) Pursuant to clause 2 of subsection 127(1) of the Act, trading in any securities or derivatives by the Individual Respondents shall cease permanently;

(b) Pursuant to clause 2.1 of subsection 127(1) of the Act, the acquisition of any securities or derivatives by the Individual Respondents shall be prohibited permanently;

(c) Pursuant to clause 3 of subsection 127(1) of the Act, any exemptions contained in Ontario securities law shall not apply to the Individual Respondents permanently;

(d) Pursuant to clauses 7, 8.1 and 8.3 of subsection 127(1) of the Act, the Individual Respondents shall resign any position that they hold as a director or officer of an issuer, registrant or investment fund manager;

(e) Pursuant to clauses 8, 8.2 and 8.4 of subsection 127(1) of the Act, the Individual Respondents shall be prohibited permanently from becoming or acting as a director or officer of any issuer, registrant or investment fund manager;

(f) Pursuant to clause 8.5 of subsection 127(1) of the Act, the Individual Respondents shall be prohibited permanently from becoming or acting as a registrant, as an investment fund manager, or as a promoter;

(g) Pursuant to clause 10 of subsection 127(1) of the Act, the Individual Respondents shall jointly and severally with Portfolio Capital disgorge to the Commission a total of $2.6 million or, in the alternative $1.7 million, to be designated for allocation to or for the benefit of third parties in accordance with subsection 3.4(2)(b) of the Act;

(h) Pursuant to clause 9 of subsection 127(1) of the Act, Rogerson shall pay an administrative penalty of $500,000, to be allocated for use by the Commission in accordance with subsection 3.4(2)(b) of the Act;

(i) Pursuant to subsections 127.1(1) and (2) of the Act, Rogerson pay $309,812.56 of the costs of the investigation and hearing, for which he shall be jointly and severally liable with Portfolio Capital and Hanna-Rogerson;

(j) Pursuant to clause 9 of subsection 127(1) of the Act, Hanna-Rogerson shall pay an administrative penalty of $150,000, to be allocated for use by the Commission in accordance with subsection 3.4(2)(b) of the Act; and

(k) Pursuant to subsections 127.1(1) and (2) of the Act, Hanna-Rogerson shall pay $309,812.56 of the costs of the investigation and hearing, for which she shall be jointly and severally liable with Portfolio Capital and Rogerson.

[10] Staff submits that Rogerson and Hanna-Rogerson engaged in egregious conduct involving significant contraventions of the Act, including fraud, resulting in significant harm to investors. It is Staff's submission that the Individual Respondents' actions warrant significant sanctions commensurate with their harmful conduct in order to protect investors from future harm and to send a message of deterrence.

[11] Staff submits that the Individual Respondents engaged in unlawful activity that was planned, prolonged and widespread. Staff notes that the Commission has previously held that the registration requirements of the Act are essential to the protection of investors and that fraud is "one of the most egregious securities regulatory violations." [2]

[12] Staff submits that the Individual Respondents have not recognized the seriousness of their misconduct. As evidence of this lack of recognition, Staff refers to the Commission's finding that Rogerson's testimony at the Merits Hearing was "argumentative and evasive and simply not credible."[3]

[13] Staff submits that, although I determined in the Merits Decision that the Respondents raised $1.7 from investors, Rogerson agreed under cross-examination to having raised $2.6 million from investors. Only one investor out of 200 was reimbursed for the amount of his investment.

[14] Staff submits that the Respondents' non-compliance with Ontario securities law was not an isolated incident and took place over an extended period of time. It is Staff's position that there are no mitigating factors present and that neither of the Individual Respondents has expressed genuine remorse for their actions.

[15] Staff submits that orders removing the Individual Respondents permanently from the capital markets, significant administrative penalties and the disgorgement of all funds derived from the sale of PlusPetro shares, are proportionate to the Individual Respondents' misconduct and will convey to the Individual Respondents and to like-minded individuals that involvement in these types of fraudulent schemes will result in severe sanctions.

B. Rogerson's Submissions on Sanctions

[16] Rogerson submits that he acted reasonably and cooperated with Staff throughout the hearing process. He signed an Agreed Statement of Facts, which was filed by Staff on the first day of the Merits Hearing, and only contested the fraud allegations at the Merits Hearing which resulted in a streamlined and efficient hearing.

[17] Rogerson submits that this proceeding has ruined him financially, destroyed his reputation and strained or ended personal relationships. He submits that he accepts the findings of the Commission in the Merits Decision and does not contest the non-monetary sanctions sought by Staff, except that he seeks a carve-out from the trading ban for personal trading. He further submits that he is remorseful for the harm that he caused to investors.

[18] Rogerson does, however, contest the monetary sanctions sought by Staff. It is his submission that the monetary sanctions sought by Staff are inappropriate in the circumstances. He submits that monetary sanctions serve the primary purpose of deterrence, and that there is no deterrent value when the monetary sanctions are so large that the respondent cannot pay them. He submits that, as he is currently indigent, the large monetary sanctions sought by Staff have no deterrent value and therefore impermissibly rise to the level of punishment.

---

[2] *Re Al-Tar Energy Corp.* (2011), 33 O.S.C.B. 5535 at para. 214.
[3] Merits Decision, *supra* at para 116.

[19] Rogerson submits that Staff's position on sanctions disregards his personal circumstances and ability to pay. He submits that his consent to permanent removal from the markets achieves the Commission's goal of protecting the market and that his consent to these sanctions should be seen as a mitigating factor.

C. **Hanna-Rogerson's Submissions on Sanctions**

[20] Hanna-Rogerson submits that she attempted to cooperate and provide forthright admissions to Staff throughout these proceedings while having no legal experience and being largely self-represented.

[21] She submits that, throughout the Material Time, she was vulnerable to and controlled by Rogerson in connection with the development of COATS[4] and that Rogerson caused her to exhaust all of her personal savings and even go into debt to help fund his investment scheme. It is her submission that she thought that the COATS scheme undertaken by Rogerson through PlusPetro was a legitimate business and that her involvement has left her destitute, deeply indebted and estranged from her family and friends.

[22] As Hanna-Rogerson thought PlusPetro was a legitimate venture, she submits that she did not understand that it was inappropriate for her to be compensated out of the funds raised from investors. It is her submission that the monthly income that she received from PlusPetro was comparable to her previous earnings as a wardrobe stylist, and it therefore did not occur to her that the compensation was improper. Hanna-Rogerson submits that, to her knowledge, much of the funds raised from investors was spent by Rogerson on legitimate business expenses.

[23] Hanna-Rogerson argues that Staff has not done enough in its detailing of the Individual Respondents' expenditures to separate the amounts spent by Hanna-Rogerson and Rogerson, respectively. In her submission, the broad categories of expenditure used by Staff fail to separate the spending of Rogerson and other PlusPetro representatives from that of Hanna-Rogerson. She submits that, by failing to provide sufficient particulars in order to allow the Panel to ascertain the alleged gain by Hanna-Rogerson, Staff has not met its burden of proof with respect to its request that Hanna-Rogerson be subject to an order of disgorgement.

[24] Hanna-Rogerson submits that she is unsophisticated with regard to financial and business matters and the securities laws of Ontario and at no time intentionally violated them. She submits that, upon learning that she was in violation of regulatory requirements, she cooperated with the Commission and admitted to her contraventions. The only allegation that she was not willing to admit to was fraud.

[25] Hanna-Rogerson submits that she was not an active participant in the fraudulent scheme and only participated on an administrative basis and that her admission that she met with investors should be viewed in this light. She submits that the appropriate sanctions regarding her actions should reflect the fact that she was not actively soliciting or recruiting new investors. She submits that this is further reflected by the Particulars of Staff's Allegations of Securities Fraud provided to Hanna-Rogerson on January 29, 2014,

[4] COATS is the acronym for Crude Oil Additive Technology Solution which is described in paragraph [22] of the Merits Decision as a break-through technology that has the ability to lower the viscosity of crude oil thereby making it easier to transport.

as it makes only minimal references to her in contrast to Rogerson. She argues that this conflation of Rogerson's actions with her own is pervasive throughout Staff's submissions.

[26] In her submission, Hanna-Rogerson states that she is currently impecunious and is considering filing for bankruptcy. She submits that she deeply regrets her involvement in the fraud and would like to be able to repay investors and those who lent her money, however, that is not possible given her financial circumstances.

[27] Hanna-Rogerson does not contest the non-monetary sanctions sought against her, save for a request that she be personally allowed to own securities so that she may one day be able to save for retirement.

[28] Hanna-Rogerson, however, argues that the monetary sanctions sought by Staff against her are punitive in nature and therefore improper. She cites the Alberta Court of Appeal's recent decision in *Walton v. Alberta (Securities Commission*), 2014 A.B.C.A. 273 ("***Walton***"), in which the Court stated that "the pursuit of general deterrence does not warrant imposing a crushing or unfit sanction on any individual appellant."[5] Hanna-Roberson argues that the large monetary sanctions sought against her have no deterrent effect and are Staff's attempt to punish her for her actions.

D. The Law

[29] When exercising its public interest jurisdiction under section 127 of the Act, the Commission must consider the purposes of the Act which, as set out in section 1.1 of the Act, are to (i) provide protection to investors from unfair, improper or fraudulent practices; and (ii) foster fair and efficient capital markets and confidence in the capital markets.

[30] In pursuing the purposes of the Act, subsection 2.1(2) of the Act requires that the Commission have regard for a number of fundamental principles including the following primary means for achieving the purposes of the Act:

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

[31] The sanctions imposed by the Commission must be protective and preventive to maintain high standards of behavior and to preserve the integrity of Ontario's capital markets. The role of the Commission is to impose sanctions that will protect investors and the capital markets from exposure to similar conduct in the future. As stated by the Commission in *Re Mithras Management Inc.,* 1990), 13 O.S.C.B. 1600 ("***Mithras***"):

[5] *Walton*, supra at para. 154.

> …the role of this Commission is to protect the public interest by removing from the capital markets -- wholly or partially, permanently or temporarily, as the circumstances may warrant -- those whose conduct in the past leads us to conclude that their conduct in the future may well be detrimental to the integrity of those capital markets. We are not here to punish past conduct; that is the role of the courts, particularly under section 118 [now 122] of the Act. We are here to restrain, as best we can, future conduct that is likely to be prejudicial to the public interest in having capital markets that are both fair and efficient. In so doing we must, of necessity, look to past conduct as a guide to what we believe a person's future conduct might reasonably be expected to be; we are not prescient, after all.[6] [Emphasis added.]

[32] As stated by the Supreme Court of Canada in *Committee for Equal Treatment of Asbestos Minority Shareholders v. Ontario Securities Commission*, [2001] 2 S.C.R. 132 ("***Asbestos***"), the Commission's public interest mandate is neither remedial nor punitive; instead, it is protective and preventive, and it is intended to prevent future harm to Ontario's capital markets.[7] More specifically, the Court stated that "[T]he role of the OSC 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."[8]

[33] Sanctions imposed must be appropriate and proportionate to the circumstances of the case and the conduct of each respondent. The Commission has enumerated a number of factors that it considers in determining sanctions including, the seriousness of the allegations, the respondent's experience in the marketplace, recognition of the seriousness of the improprieties, deterrence and whether there are any mitigating factors present in the case.[9] In exercising its discretion, the Commission should consider the protection of investors and the efficiency of, and public confidence in, capital markets generally.

E. Application of the Factors

[34] Having regard to the factors referred to in paragraph [33] above, I consider the following to be of particular relevance to the Respondents:

1. The seriousness of the conduct

[35] The Respondents were found to have engaged in acts that they knew or reasonably ought to have known perpetrated a fraud. Their actions show complete disregard for the regulatory foundations of Ontario's capital markets and the protection of investors. The Respondents inflicted harm on investors in Ontario by means of a prolonged scheme through which approximately 200 investors were defrauded of at least $1.7 million. To

---

[6] *Mithras, supra* at paras. 1610 and 1611.
[7] *Asbestos, supra* at para. 42.
[8] *Asbestos, supra* at para. 43.
[9] For a non-exhaustive list of sanctioning factors that the Commission may consider, see *Re Belteco Holdings Inc.* (1998), 21 O.S.C.B. 7743 at 7746; *Re M.C.J.C. Holdings Inc.* (2002), 25 O.S.C.B. 1133 at 1136.

date, only one investor has been repaid and, based on the facts in evidence at the Merits Hearing, there is no prospect of any recovery by the remaining investors.

2. The Respondents' experience and knowledge

[36] Although none of the Respondents was ever registered in any capacity under the Act, Rogerson, by his own submission, has been involved in the financial and capital markets for over 25 years. Rogerson devised and executed the COATS scheme which involved hundreds of investors and large amounts of investor funds. The evidence, including, in particular, the elaborate web of deceit created by Rogerson's purported update letters to shareholders, demonstrated that Rogerson had a high level of sophistication relating to the manner in which securities are successfully marketed.

[37] By way of contrast, Hanna-Rogerson submits that she has little to no experience in the securities or oil and gas industries and that her role with Portfolio Capital was administrative in nature. While I accept that she may not have been as sophisticated as Rogerson with respect to securities matters, she was involved with Portfolio Capital for an extended period of time, was actively involved with investors in the completion of the documents associated with the purchase of PlusPetro shares and had control over the bank accounts to which investor funds were deposited. As I found in the Merits Decision, her claims of ignorance regarding the misleading nature of the PlusPetro investments were "not credible"[10].

3. Recognition of the seriousness of the improprieties and remorse

[38] Rogerson submits that he is remorseful for the harm that he has caused the approximately 200 investors he defrauded. While Rogerson's counsel was correct in submitting that his client was entitled to defend himself at the Merits Hearing, I am not convinced that Rogerson has any remorse for the fraud in which he engaged. His testimony at the Merits Hearing demonstrated him to be a person who is deceitful and manipulative. While my findings in the Merits Decision were based on the $1.7 million alleged by Staff to have been received from investors, Rogerson's own testimony confirmed that he received another $900,000 from investors relating to the sale of PlusPetro shares, however, he refused to answer any of Staff's further questions with respect to this amount. Rogerson now submits that he is impecunious as a result of these proceedings without providing a plausible explanation with respect to the large sum of money that he admits to having received.

[39] Although Hanna-Rogerson also claims to be remorseful for the harm that her role in the fraud caused, she remains steadfast in her refusal to accept the finding that she engaged in fraud. In her submissions on sanctions and costs, she continues to argue that she did not have the sophistication necessary to understand the fraudulent nature of the COATS scheme and "disagrees that she engaged in fraud". The Sanctions and Costs Hearing is not, however, the forum to re-litigate the Panel's finding on the merits. While I believe that Hanna-Rogerson regrets her involvement in the COATS scheme, her refusal to recognize that there was any culpability on her part with respect to the commission of the fraud is a matter of concern when considering sanctions.

[10] Merits Decision, *supra* at para. 96.

4. Mitigating Factors

[40] Although the Individual Respondents did work with Staff to create the Agreed Statement of Facts which resulted in some efficiency during the Merits Hearing, they otherwise caused innumerable delays and additional costs and inconvenience by failing to comply with the orders of the Panel and the Commission's *Rules of Procedure* (2012), 35 O.S.C.B. 10071 (the "**Rules of Procedure**"). In addition, Rogerson's testimony was argumentative and evasive thereby unnecessarily prolonging the Merits Hearing. As a result, there are no mitigating factors in evidence.

5. Deterrence

[41] Specific and general deterrence are important considerations that should be taken into account when sanctions are imposed. General deterrence requires the imposition of sanctions that will send a strong message to other like-minded individuals (in this case, officers and directors) that the misconduct engaged in is unacceptable and will not be tolerated by the Commission. Specific deterrence requires the imposition of sanctions that will send a strong message to respondents to discourage them from engaging in further misconduct in the future.

[42] In *Re Cartaway Resources Corp.*, [2004] 1 S.C.R. 672 ("***Cartaway***"), the Supreme Court of Canada explained that deterrence is "…an appropriate, and perhaps necessary, consideration in making orders that are both protective and preventive" (at para. 60). The Supreme Court also emphasized that deterrence may be specific to the respondent or general so as to deter the public at large:

> Deterrent penalties work on two levels. They may target society generally, including potential wrongdoers, in an effort to demonstrate the negative consequences of wrongdoing. They may also target the individual wrongdoer in an attempt to show the unprofitability of repeated wrongdoing. The first is general deterrence; the second is specific or individual deterrence: see C. C. Ruby, *Sentencing* (5th ed. 1999). In both cases deterrence is prospective in orientation and aims at preventing future conduct.
>
> (*Cartaway*, *supra* at para. 52)

F. Previous Sanctions Decisions

[43] Staff refers to a number of previous Commission decisions that Staff submits provide guidance as to the appropriate sanctions in this matter. Staff further submits that the previous decisions of the Commission support its submission that the Individual Respondents' misconduct warrants severe sanctions.

[44] In *Re Lyndz Pharmaceuticals Inc.* (2012), 35 O.S.C.B. 7357 ("***Lyndz***"), the Commission found that the respondents engaged in an illegal distribution and fraud, raising approximately $1.7 million from more than 70 investors. The respondents used the investor funds for personal purposes and were found to have engaged in fraud contrary to section 126.1(b) of the Act.

[45] The individual respondents in *Lyndz* were ordered to pay administrative penalties of $600,000 and $500,000 and disgorge the total amount raised from investors. Although the respondents sought a personal trading carve-out, the Commission did not agree that they could be safely trusted to participate in the capital markets and ordered that they be permanently banned from the capital markets.

[46] In *Re Moncasa Capital Corp.* (2014), 37 O.S.C.B. 229 ("***Moncasa***"), the Commission found that the respondent illegally traded and distributed securities and engaged in fraud in breach of section 126.1(b) of the Act and acted contrary to the public interest. The Commission ordered that the respondents, having been found to have raised approximately $1.2 million from 57 investors, be banned from the market, disgorge the amount illegally raised and pay an administrative penalty of $400,000 on a joint and several basis.

[47] Both Rogerson and Hanna-Rogerson rely on *Walton* in their respective submissions that monetary sanctions are not appropriate in either of their cases. In *Walton*, the Alberta Court of Appeal held that "a monetary penalty that is beyond the capacity of the individual offender cannot be justified on the basis that it will deter others who are in a better financial condition."[11]

[48] However, the Court in *Walton* also recognized that "if the maximum financial consequence of [a breach of the Act] was a disgorgement of the profits realized, there would be no true deterrent".[12] The Court did not indicate what appropriate financial sanctions were in that case. Rather, it found that it was not able to undertake a reasonable review of the sanctions ordered by the Alberta Securities Commission as its decision lacked the requirements of justification, transparency and intelligibility. As a result, the Court directed the Alberta Securities Commission to reconsider the issue of sanctions.

G. Analysis and Findings

1. Trading and Other Bans

[49] Both of the Individual Respondents agreed that their actions warranted the non-monetary sanctions sought against them by Staff, except that both of them requested that they be granted an exemption for personal trading, i.e., a carve-out from the general trading ban sought by Staff.

[50] Both of the Individual Respondents submit that, although they are currently impecunious, they hope to rebuild their lives and be able to save for their retirement.

[51] As a permanent trading ban is among the most severe sanctions that the Commission may impose on a respondent, it is necessary to ensure that the sanctions imposed on each respondent remain "preventative in nature and prospective in orientation"[13] and do not rise to a level at which they are punitive. In *Erikson v. Ontario (Securities Commission*, (2003), 120 A.C.W.S. (3d) ("***Erikson***"), the Divisional Court stated that "participation in the capital markets is a privilege and not a right."[14] The Commission has held that it can

[11] *Walton, supra* at para. 165.
[12] *Walton, supra* at para. 156.
[13] *Asbestos, supra* at para. 45.
[14] *Erikson, supra* at para. 55.

only "look to past conduct as a guide to what we believe a person's future conduct might reasonably be expected to be".[15]

[52] As discussed above, I am not satisfied that the Individual Respondents demonstrate any meaningful insight with respect to the harm that they have caused to investors and, as they continue in my view to represent a risk to Ontario's capital markets, they should not be entitled to trade in securities. I am, however, persuaded that, if the Individual Respondents pay in full the disgorgement, administrative penalty and cost amounts described below, they should be permitted to trade in registered accounts for personal savings.

[53] Based on the foregoing, I find that the Respondents should be banned from trading until such time as they have paid in full the disgorgement, administrative penalty and cost amounts described below.

[54] The Individual Respondents agreed that the market bans sought by Staff which would prohibit them from becoming or holding positions as officers and directors, promoters, registrants and investment fund managers are warranted given their conduct. In the circumstance, I find that the public interest requires that the Individual Respondents be permanently barred from holding such positions in the future.

2. Disgorgement

[55] Staff seeks the disgorgement of $2.6 million, or, in the alternative, $1.7 million, from the Respondents notwithstanding the fact that I found in the Merits Decision that the Respondents raised $1.7 million from investors.

[56] In *Re Limelight Entertainment Inc. et al.* (2008), 31 O.S.C.B. 12030 ("***Limelight***"), the Commission held that, as paragraph 10 of subsection 127(1) of the Act refers to "any amounts obtained", "all money illegally obtained from investors can be ordered to be disgorged, not just the profit made as a result of the activity."[16]

[57] The *Limelight* case sets out a non-exhaustive list of factors to consider when contemplating a disgorgement order, which include:

(a) Whether an amount was obtained by a respondent as a result of non-compliance with the Act;

(b) The seriousness of the misconduct and the breaches of the Act and whether investors were seriously harmed;

(c) Whether the amount that a respondent obtained as a result of non-compliance with the Act is reasonably ascertainable;

(d) Whether the individuals who suffered losses are likely to be able to obtain redress; and

(e) The deterrent effect of a disgorgement order on the respondents and other market participants.

[15] *Mithras, supra* at 1610 and 1611.
[16] *Limelight, supra* at para 49.

[58] *Limelight* goes on to state that, once Staff has proven on a balance of probabilities the amount illegally obtained by a respondent, the risk of uncertainty in calculating disgorgement should fall on the wrongdoer whose non-compliance with the Act gave rise to the uncertainty.[17]

[59] Hanna-Rogerson submits that a disgorgement order against her is inappropriate because Staff has been unable to detail the amount of investor funds that she expended. As stated in *Limelight*, any uncertainty in calculating the disgorgement falls on the respondent once Staff has proven on a balance of probabilities that the respondent received the funds in question.

[60] Applying the factors described above and having regard to the following:

(a) All of the investor funds were raised as a result of the Respondents' illegal distribution of securities and fraudulent conduct;

(b) The Respondents' conduct was egregious and harmed investors;

(c) The Respondents received $1.7 million from investors;

(d) All but one of the investors will be unable to recover the amounts that they have invested; and

(e) A disgorgement order for the entire amount raised by the Respondents would have a significant specific and general deterrent effect;

I find that it is appropriate to order that the Respondents disgorge $1.7 million on a joint and several basis.

3. Administrative Penalties

[61] Staff seeks an administrative penalty against Rogerson in the amount of $500,000. Rogerson submits that the amount is exorbitant given that he has "met financial ruin as a result of these proceedings."[18]

[62] The Act permits the Commission to order up to $1.0 million for each breach of the Act to serve as specific and general deterrence to respondents and like-minded individuals from conducting themselves in a manner that is contrary to the Act. However, in each specific instance in which the Commission considers an administrative penalty to be warranted, the amount ordered cannot be so excessive that it is punitive.

[63] Rogerson was found to have breached four separate provisions of the Act and to have acted contrary to the public interest over a period of five years. He defrauded approximately 200 investors of at least $1.7 million and, in doing so, demonstrated indifference amounting to contempt for Ontario's securities laws. The administrative penalty that Staff seeks is reasonable and consistent with previous cases involving similarly sized frauds.[19] Accordingly, I find that Rogerson should be required to pay an administrative penalty of $500,000, an amount that is both proportionate and reasonable in the circumstances.

[17] *Limelight, supra* at para. 53.
[18] Rogerson's Written Submissions on Sanctions and Costs at para. 19.
[19] *Re Rezwealth Financial Services Inc.* (2014), 37 O.S.C.B. 6731; *Lyndz, supra.*

[64] Staff also seeks an administrative penalty against Hanna-Rogerson in the amount of $150,000. Staff submits that it is seeking a lower administrative penalty against Hanna-Rogerson as she played a lesser role in the fraud than Rogerson. Staff, however, argues that Hanna-Rogerson still played an essential role and was aware of the flow of investor funds through Portfolio Capital.

[65] Hanna-Rogerson submits that the administrative penalty sought by Staff against her is inappropriate as a large monetary sanction against her is punitive in the circumstances. Hanna-Rogerson submits that she plans to file for bankruptcy and that her inability to pay the sanction should be taken into consideration in the determination of the quantum of the administrative penalty.

[66] I found in the Merits Decision that Hanna-Rogerson "knew, and at the very least, ought to have known, that her actions with respect to the management and use of investor funds resulted in deprivation to investors."[20] I also found that "…the evidence overwhelmingly demonstrates that the Respondents treated investor funds as their own and used the majority of the funds received from PlusPetro's investors to pay their personal expenses."[21]

[67] In the circumstances, it is entirely appropriate that an administrative penalty be imposed on Hanna-Rogerson as a signal to her and to like-minded individuals that the Commission views fraudulent activity as one of the most serious breaches of the Act which will result in serious consequences.

[68] Based on the foregoing, I find that Hanna-Rogerson should pay an administrative penalty of $150,000.

III. COSTS

[69] Staff requests that the Respondents pay $309,812.56, on a joint and several basis, towards the costs of the hearing and the investigation. Staff filed a Bill of Costs that attests the total cost of the investigation and hearing to be over $700,000, and submits that the costs award sought represents an almost 60 percent discount from that total.

[70] Rogerson submits that it would be unjust to award costs in this case. Rogerson submits that section 17.1 of the SPPA provides that a tribunal shall not make an order to pay costs unless a party's conduct has been unreasonable or in bad faith and that the Commission has made no such finding against him. He further submits that he contributed to an efficient process by agreeing to a wide array of facts in the Agreed Statement of Facts.

[71] Hanna-Rogerson submits that it would be contrary to the principles of natural justice to award costs against her in this matter. She argues that the large costs award sought by Staff against her is yet another example of Staff conflating her actions with those of Rogerson. Like Rogerson, she submits that Staff has not made out the requirements of section 17.1 of the SPPA against her. She argues that the majority of the evidence led against her by Staff at the Merits Hearing was directed at establishing facts already admitted by her.

[20] Merits Decision, *supra* at para. 127.
[21] Merits Decision, *supra* at para 109.

[72] Section 127.1 of the Act gives the Commission the power to order a respondent to pay the costs of an investigation and hearing if it is satisfied that the person has breached the Act or has acted contrary to the public interest. A costs order is not a sanction but rather a means by which the Commission can recoup costs expended during the hearing and investigation stages of a matter.

[73] In *Re Ochnik* (2006), 29 O.S.C.B. 5917 ("***Ochnik***"), the Commission lists the following criteria that have been considered in awarding costs[22]:

(a) Failure by staff to provide early notice of an intention to seek costs may result in a reduced costs award, as early notice may have facilitated early settlement, thereby reducing overall costs;[23]

(b) The seriousness of the charges and the conduct of the parties;[24]

(c) Abuse of process by a respondent may be a factor in increasing the amount of costs;[25]

(d) The greater investigative/hearing costs that the specific conduct of a respondent required in the case;[26] and

(e) The reasonableness of the costs requested by staff.[27]

[74] The Rules of Procedure set out the following factors to be considered with respect to costs:

> **18.2 Factors Considered When Awarding Costs** – In exercising its discretion under section 127.1 of the Act to award costs against a person or company, a Panel may consider the following factors:
>
> (a) whether the respondent failed to comply with a procedural order or direction of the Panel;
>
> (b) the complexity of the proceeding;
>
> (c) the importance of the issues;
>
> (d) the conduct of Staff during the investigation and during the proceeding and how Staff's conduct contributed to the costs of the investigation and the proceeding;
>
> (e) whether the respondent contributed to a shorter, more efficient, and more effective hearing, or whether the conduct of the respondent unnecessarily lengthened the duration of the proceeding;

[22] *Ochnik*, supra at para. 29.
[23] See *Re Tindall* (2000), 23 O.S.C.B. 6889 at para. 74.
[24] See *Re YBM Magnex International Inc.* (2003), 26 O.S.C.B. 5285 at para. 608.
[25] See *Re YBM Magnex International Inc.*, *ibid* at para. 606.
[26] See *Re YBM Magnex International Inc.*, *ibid* at para. 606.
[27] See *Re Lydia Diamond Exploration of Canada* (2003), 26 O.S.C.B. 2511 at para. 217.

(f) whether any step in the proceeding was taken in an improper, vexatious, unreasonable, or negligent fashion or in error;

(g) whether the respondent participated in the proceeding in a way that helped the Commission understand the issues before it;

(h) whether the respondent participated in a responsible, informed and well-prepared manner;

(i) whether the respondent co-operated with Staff and disclosed all relevant information;

(j) whether the respondent denied or refused to admit anything that should have been admitted; or

(k) any other factors the Panel considers relevant.

[75] The allegations against the Respondents, which Staff has successfully proved, represented serious breaches of the Act stemming from a complex set of facts that required a number of hearing days. The Respondents choose not to participate in or attend the Merits Hearing, however, following its conclusion, the Individual Respondents brought a motion to re-open the Merits Hearing so that they could introduce evidence. This required a significant duplication of effort on Staff's behalf and extra hearing days.

[76] In addition to the foregoing, and as noted in paragraph [40] above, the Individual Respondents caused innumerable delays by failing to comply with the orders of the Panel and the Rules of Procedure thereby causing Staff and the Commission to incur additional and unnecessary costs and manage the serious inconvenience caused by their behavior. Rogerson, in particular, obfuscated or failed to disclose all of the facts relating to the purported development of the COATS technology, the amounts received from investors and his and Hanna-Rogerson's use of such amounts.

[77] On the basis of the foregoing, I find that the costs sought by Staff are reasonable in the circumstances.

[78] Given her lesser role in this matter, Hanna-Rogerson shall pay investigation and hearing costs of $150,000 which shall be payable on a joint and several basis with Rogerson and Portfolio Capital.

[79] Rogerson shall pay investigation and hearing costs of $309,812.56, $150,000 of which shall be payable on a joint and several basis with the Hanna-Rogerson and Portfolio Capital and the remaining $159,812.56 of which shall be payable on a joint and several basis with Portfolio Capital.

[80] Portfolio Capital shall pay investigation and hearing costs of $309,812.56, $150,000 of which shall be payable on a joint and several basis with the Hanna-Rogerson and Rogerson and the remaining $159,812.56 of which shall be payable on a joint and several basis with Rogerson.

IV. CONCLUSION

[81] I will issue an order giving effect to my findings on sanctions and costs as follows:

(a) With respect to the Individual Respondents:

(i) pursuant to clause 2 of subsection 127(1) of the Act, trading in any securities or derivatives by the Individual Respondents shall cease permanently;

(ii) pursuant to clause 2.1 of subsection 127(1) of the Act, the acquisition of any securities or derivatives by the Individual Respondents is prohibited permanently;

(iii) pursuant to clause 3 of subsection 127(1) of the Act, any exemptions contained in Ontario securities law do not apply to the Individual Respondents permanently;

(iv) pursuant to clauses 7, 8.1 and 8.3 of subsection 127(1) of the Act, the Individual Respondents shall resign any position that they hold as a director or officer of an issuer, registrant, or investment fund manager;

(v) pursuant to clauses 8, 8.2 and 8.4 of subsection 127(1) of the Act, the Individual Respondents shall be prohibited permanently from becoming or acting as a director or officer of any issuer, registrant, or investment fund manager; and

(vi) pursuant to clause 8.5 of subsection 127(1) of the Act, the Individual Respondents shall be prohibited permanently from becoming or acting as a registrant, as an investment fund manager, or as a promoter;

(b) With respect to the Respondents, pursuant to clause 10 of subsection 127(1) of the Act, the Respondents shall jointly and severally disgorge to the Commission $1.7 million, which amount shall be designated for allocation or for use by the Commission in accordance with paragraphs (b)(i) or (ii) of subsection 3.4(2) of the Act;

(c) With respect to Rogerson:

(i) pursuant to clause 9 of subsection 127(1) of the Act, Rogerson shall pay an administrative penalty of $500,000 for his multiple failures to comply with Ontario securities law, which amount shall be designated for allocation or use by the Commission in accordance with paragraphs (b)(i) or (ii) of subsection 3.4(2) of the Act; and

(ii) pursuant to subsections 127.1(1) and (2) of the Act, Rogerson shall pay investigation and hearing costs of $309,812.56, of which $150,000 shall be payable on a joint and several basis with Hanna-Rogerson and Portfolio Capital, and the remaining $159,812.56 of which shall be payable on a joint and several basis with Portfolio Capital;

(d) With respect to Hanna-Rogerson:

(i) pursuant to clause 9 of subsection 127(1) of the Act, Hanna-Rogerson shall pay an administrative penalty of $150,000 for her multiple failures to comply

with Ontario securities law, which amount shall be designated for allocation or use by the Commission in accordance with paragraphs (b)(i) or (ii) of subsection 3.4(2) of the Act; and

(ii) pursuant to subsections 127.1(1) and (2) of the Act, Hanna-Rogerson shall pay investigation and hearing costs of $150,000 on a joint and several basis with Rogerson and Portfolio Capital;

(f) With respect to Portfolio Capital:

(i) pursuant to clause 2 of subsection 127(1) of the Act, trading in any securities or derivatives by Portfolio Capital shall cease permanently;

(ii) pursuant to clause 2.1 of subsection 127(1) of the Act, the acquisition of any securities or derivatives by Portfolio Capital is prohibited permanently;

(iii) pursuant to clause 3 of subsection 127(1) of the Act, any exemptions contained in Ontario securities law do not apply to Portfolio Capital permanently; and

(iv) pursuant to subsections 127.1(1) and (2) of the Act, Portfolio Capital shall pay investigation and hearing costs of $309,812.56, of which $150,000 shall be payable on a joint and several basis with the Hanna-Rogerson and Portfolio Capital and the remaining $159,812.56 of which shall be payable on a joint and several basis with Rogerson.

[82] After each of the Individual Respondents has made full payment of the amounts that he or she is required to pay pursuant to paragraph [81] above, he or she, as the case may be, shall be entitled, as an exception to the provisions of subparagraphs (i), (ii) and (iii) of paragraph [81](a) above, to trade in or acquire securities in any registered retirement savings plan accounts and/or tax-free savings accounts and/or registered education savings plan and/or personal trading accounts, for which he or she has the sole legal and beneficial ownership, or is a sponsor, or for any immediate family member.

Dated at Toronto this 19th day of August, 2015.

"Christopher Portner"

_____

Christopher Portner