

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

**- and -**

**IN THE MATTER OF  
ROBERT THOMISLAV ADZIJA, LARRY ALLEN AYRES,  
DAVID ARTHUR BENDING, MARLENE BERRY, DOUGLAS CROSS,  
ALLAN JOSEPH DORSEY, ALLAN EIZENGA, GUY FANGEAT, RICHARD JULES  
FANGEAT, MICHAEL HERSEY, GEORGE EDWARD HOLMES, TODD MICHAEL  
JOHNSTON, MICHAEL THOMAS PETER KENNELLY, JOHN DOUGLAS KIRBY,  
ERNEST KISS, ARTHUR KRICK, FRANK ALAN LATAM, BRIAN LAWRENCE,  
LUKE JOHN MCGEE, RON MASSCHAELE, JOHN NEWMAN, RANDALL NOVAK,  
NORMAND RIOPELLE, ROBERT LOUIS RIZZUTO AND MICHAEL VAUGHAN**

**SETTLEMENT AGREEMENT BETWEEN  
STAFF OF THE ONTARIO SECURITIES COMMISSION  
AND JOHN DOUGLAS KIRBY**

**I. INTRODUCTION**

1. By Notice of Hearing dated September 24, 1998 (the "Notice of Hearing"), the Ontario Securities Commission (the "Commission") announced that it proposed to hold a hearing to consider, among other things:

- (a) whether, pursuant to subsection 127(1) of the *Securities Act*, R.S.O. 1990, c. S.5 (the "Act"), it is in the public interest for the Commission to make an order that the exemptions contained in Ontario securities law do not apply to the respondent John Douglas Kirby ("Kirby") permanently or for such time as the Commission may direct; and
- (b) such other orders as the Commission deems appropriate.

2. By Temporary Order dated September 24, 1998, the Commission ordered that trading in securities by Kirby cease immediately except for trades in mutual fund securities and trades for his personal account (the "Temporary Order"). The Temporary Order was extended by Commission Orders dated October 9, 1998 and February 4, 1999.

## **II. JOINT SETTLEMENT RECOMMENDATION**

3. Staff of the Commission (“Staff”) agrees to recommend settlement of the proceeding respecting Kirby initiated by the Notice of Hearing in accordance with the terms and conditions set out below. Kirby consents to the making of an order against him in the form attached as Schedule “A” based on the facts set out in Part III of this Settlement Agreement.

## **III. STATEMENT OF FACTS**

### **Acknowledgement**

4. Solely for the purposes of this proceeding, and of any other proceeding commenced by a securities regulatory agency, Staff and Kirby agree with the facts set out in paragraphs 5 through 20 of this Settlement Agreement.

### **Facts**

5. Saxton Investment Ltd. (“Saxton”) was incorporated on January 13, 1995. The respondent Allan Eizenga (“Eizenga”) was Saxton’s registered director. Saxton and Eizenga established numerous offering corporations, as listed below (the “Offering Corporations”).

The Saxton Trading Corp.  
The Saxton Export Corp.  
The Saxton Export (II) Corp.  
The Saxton Export (III) Corp.  
The Saxton Export (IV) Corp.  
The Saxton Export (V) Corp.  
The Saxton Export (VI) Corp.  
The Saxton Export (VII) Corp.  
The Saxton Export (VIII) Corp.  
The Saxton Export (IX) Corp.  
The Saxton Export (X) Corp.  
The Saxton Export (XI) Corp.  
The Saxton Export (XII) Corp.  
The Saxton Export (XIII) Corp.  
The Saxton Export (XIV) Corp.  
The Saxton Export (XV) Corp.  
The Saxton Export (XVI) Corp.  
The Saxton Export (XVII) Corp.  
The Saxton Export (XVIII) Corp.  
The Saxton Export (XIX) Corp.  
The Saxton Export (XX) Corp.  
The Saxton Export (XXI) Corp.  
The Saxton Export (XXII) Corp.  
The Saxton Export (XXIII) Corp.  
The Saxton Export (XXIV) Corp.

The Saxton Export (XXV) Corp.  
The Saxton Export (XXVI) Corp.  
The Saxton Export (XXVII) Corp.  
The Saxton Export (XXVIII) Corp.  
The Saxton Export (XXIX) Corp.  
The Saxton Export (XXX) Corp.  
The Saxton Export (XXXI) Corp.  
The Saxton Export (XXXII) Corp.  
The Saxton Export (XXXIII) Corp.  
The Saxton Export (XXXIV) Corp.  
The Saxton Export (XXXV) Corp.  
The Saxton Export (XXXVI) Corp.  
The Saxton Export (XXXVII) Corp.  
The Saxton Export (XXXVIII) Corp.

6. Saxton and the Offering Corporations represented to the public that they were investing in businesses in Cuba and other Caribbean companies.

7. On or about October 7, 1998, the Court appointed KPMG Inc. (“KPMG”) as the custodian of Saxton’s assets. In early 1999, KPMG reported that the Offering Corporations had raised approximately \$37 million from investors. All funds invested in the Offering Corporations had been transferred to Saxton. At that time, KPMG held the view that the value of the Saxton assets, at its highest (as reported by related companies), was approximately \$5.5 million.

8. Kirby became registered with the Commission in October 1986. During the material time, Kirby was registered to sell mutual fund securities between January 1995 and May 1, 1997. Kirby could sell mutual fund securities and limited market products between May 15, 1997 and the end of 1998. Kirby has not been registered with the Commission since January 1, 2000.

9. Between 1996 and 1998, Kirby sold to Ontario investors securities of one or more of the Offering Corporations (the “Saxton Securities”). Kirby sold the Saxton Securities to approximately 140 Ontario investors for a total amount sold of approximately \$7,000,000.

10. The Offering Corporations were incorporated pursuant to the laws of Ontario. Kirby’s sales of the Saxton Securities constituted trades in securities of an issuer that had not been previously issued.

11. None of the Offering Corporations filed a prospectus with the Commission. By selling the Saxton Securities to his clients, Kirby traded in securities, which trades were distributions, without a prospectus being filed or receipted by the Commission and with no available exemption from the prospectus requirements of Ontario securities law.

12. Kirby failed to provide his clients with access to substantially the same information concerning the Saxton Securities that a prospectus filed under the Act would provide. Kirby never reviewed an Offering Memorandum or financial statements respecting the Saxton Securities. None of Kirby’s clients received an Offering Memorandum prior to purchasing the

Saxton Securities. The only documentation provided to clients by Kirby was vague promotional material prepared by Saxton.

13. Kirby misrepresented to his clients the nature and quality of the Saxton Securities. Kirby marketed the Saxton Securities to his clients as a GIC-like product.

14. Kirby engaged in an advertising campaign to sell the Saxton Securities. Kirby advertised the Saxton Securities in *Maturity* magazine. This magazine is directed at seniors. Kirby's advertisement introduced "the perfect alternative to Canada Savings Bonds and Bank GIC's" and offered a "10 ¼% FIXED DIVIDEND ACCOUNT for a three (3) year term". The advertisement provided a toll free number by which prospective clients could contact Kirby. Approximately 60 potential investors contacted Kirby through the advertised toll free number.

15. Kirby failed to adequately assess the suitability of his clients' investments in the Saxton Securities. Certain elderly clients transferred existing RRIF's or redeemed mutual funds to purchase the Saxton Securities.

16. Kirby failed to inform his sponsoring firm that he was selling the Saxton Securities.

17. Kirby received commissions of approximately \$350,000 on the sales described in paragraph 9 above.

18. Kirby failed to diligently respond to concerns from Staff of the Commission that he was selling exempt securities without being registered to do so.

19. Kirby's conduct in selling the Saxton Securities was contrary to Ontario securities law and the public interest.

20. Kirby co-operated with the Commission's investigation respecting the sale of Saxton Securities.

#### **IV. TERMS OF SETTLEMENT**

21. Kirby agrees to the following terms of settlement:

- (a) the making of an order:
  - (i) approving this settlement;
  - (ii) that trading in any securities by Kirby cease for twelve years with the exception that, after three years from the date of the approval of this settlement, Kirby is permitted to trade securities for his own account and the account of his registered retirement savings plan (as defined in the *Income Tax Act (Canada)*);

- (iii) that Kirby is prohibited from becoming or acting as a director or officer of any issuer for twelve years;
  - (iv) reprimanding Kirby;
  - (v) that the Temporary Order no longer has any force or effect; and
- (b) Kirby will undertake to the Commission that he will not apply to the Commission for registration for twelve years; and
  - (c) within one year prior to applying to the Commission for registration, Kirby will successfully complete the Canadian Securities Course and Conduct and Practices Handbook Course.

## **V. STAFF COMMITMENT**

- 22. If this settlement is approved by the Commission, Staff will not initiate any other proceeding under the Act against Kirby in relation to the facts set out in Part III of this Settlement Agreement.

## **VI. APPROVAL OF SETTLEMENT**

- 23. Approval of the settlement set out in this Settlement Agreement shall be sought at the public hearing of the Commission scheduled for October 9, 2002, or such other date as may be agreed to by Staff and Kirby (the "Settlement Hearing"). Kirby will attend in person at the Settlement Hearing.
- 24. Counsel for Staff or Kirby may refer to any part, or all, of this Settlement Agreement at the Settlement Hearing. Staff and Kirby agree that this Settlement Agreement will constitute the entirety of the evidence to be submitted at the Settlement Hearing.
- 25. If this settlement is approved by the Commission, Kirby agrees to waive his rights to a full hearing, judicial review or appeal of the matter under the Act.
- 26. Staff and Kirby agree that if this settlement is approved by the Commission, they will not make any public statement inconsistent with this Settlement Agreement.
- 27. If, for any reason whatsoever, this settlement is not approved by the Commission, or an order in the form attached as Schedule "A" is not made by the Commission:
  - (a) this Settlement Agreement and its terms, including all discussions and negotiations between Staff and Kirby leading up to its presentation at the Settlement Hearing, shall be without prejudice to Staff and Kirby;

- (b) Staff and Kirby shall be entitled to all available proceedings, remedies and challenges, including proceeding to a hearing of the allegations in the Notice of Hearing and Statement of Allegations of Staff, unaffected by this Agreement or the settlement discussions/negotiations;
- (c) the terms of this Settlement Agreement will not be referred to in any subsequent proceeding, or disclosed to any person, except with the written consent of Staff and Kirby or as may be required by law; and
- (d) Kirby agrees that he will not, in any proceeding, refer to or rely upon this Settlement Agreement, the settlement discussions/negotiations or the process of approval of this Settlement Agreement as the basis for any attack on the Commission's jurisdiction, alleged bias or appearance of bias, alleged unfairness or any other remedies or challenges that may otherwise be available.

**VII. DISCLOSURE OF SETTLEMENT AGREEMENT**

- 28. Except as permitted under paragraph 24 above, this Settlement Agreement and its terms will be treated as confidential by Staff and Kirby until approved by the Commission, and forever, if for any reason whatsoever this settlement is not approved by the Commission, except with the consent of Staff and Kirby, or as may be required by law.
- 29. Any obligations of confidentiality shall terminate upon approval of this settlement by the Commission.

**VIII. EXECUTION OF SETTLEMENT AGREEMENT**

- 30. This Settlement Agreement may be signed in one or more counterparts which together shall constitute a binding agreement.
- 31. A facsimile copy of any signature shall be as effective as an original signature.

**DATED** this 30th day of September , 2002

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**WITNESS**

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**JOHN DOUGLAS KIRBY**

**DATED** this 4th day of October , 2002

**STAFF OF THE ONTARIO  
SECURITIES COMMISSION**

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**MICHAEL WATSON**  
Director, Enforcement Branch

**SCHEDULE “A”**

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

**- and -**

**IN THE MATTER OF  
ROBERT THOMISLAV ADZIJA, LARRY ALLEN AYRES, DAVID ARTHUR  
BENDING, MARLENE BERRY, DOUGLAS CROSS, ALLAN JOSEPH DORSEY,  
ALLAN EIZENGA, GUY FANGEAT, RICHARD JULES FANGEAT, MICHAEL  
HERSEY, GEORGE EDWARD HOLMES, TODD MICHAEL JOHNSTON, MICHAEL  
THOMAS PETER KENNELLY, JOHN DOUGLAS KIRBY, ERNEST KISS,  
ARTHUR KRICK, FRANK ALAN LATAM, BRIAN LAWRENCE, LUKE JOHN  
MCGEE, RON MASSCHAELE, JOHN NEWMAN, RANDALL NOVAK, NORMAND  
RIOPELLE, ROBERT LOUIS RIZZUTO AND MICHAEL VAUGHAN**

**ORDER**

**(Subsection 127(1) and section 127.1)**

**WHEREAS** on September 24, 1998, the Ontario Securities Commission (the “Commission”) issued a Notice of Hearing pursuant to section 127 of the *Securities Act*, R.S.O. 1990, c. S.5, as amended (the “Act”) respecting John Douglas Kirby (“Kirby”) and others;

**AND WHEREAS** on September 24, 1998, the Commission made a Temporary Order as against Kirby and others, such Temporary Order which was extended by Commission Orders dated October 9, 1998 and February 5, 1999 (the “Temporary Order”);

**AND WHEREAS** Kirby entered into a Settlement Agreement dated • (the “Settlement Agreement”) in which he agreed to a proposed settlement of the proceedings, subject to the approval of the Commission;

**AND UPON** reviewing the Settlement Agreement and the Statement of Allegations of Staff of the Commission and upon hearing submissions from Kirby and from Staff of the Commission;

**AND WHEREAS** the Commission is of the opinion that it is in the public interest to make this Order pursuant to subsection 127(1) and section 127.1 of the Act;



**IT IS ORDERED THAT:**

1. the attached Settlement Agreement is approved;
2. pursuant to subsection 127(1), paragraph 2, trading in any securities by Kirby cease for twelve years commencing on the date of this Order except that, after three years, Kirby may trade securities for his own account and the account of his registered retirement savings plan (as defined in the *Income Tax Act (Canada)*);
3. pursuant to subsection 127(1), paragraph 8, Kirby is prohibited from becoming or acting as a director or officer of any issuer for twelve years commencing on the date of this Order;
4. pursuant to subsection 127(1), paragraph 6, Kirby is reprimanded; and
5. the Temporary Order as against Kirby no longer has any force or effect.

**DATED** at Toronto this 9th day of October, 2002

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