Ontario
Securities
Commission

Commission des
valeurs mobilières
de l'Ontario

P.O. Box 55, 19th Floor
20 Queen Street West
Toronto ON M5H 3S8

CP 55, 19e 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
SHAUN GERARD MCERLEAN AND
SECURUS CAPITAL INC.

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

Hearing:	September 21, 2012	
Decision:	October 24, 2012	
Panel:	Vern Krishna, Q.C.	- Commissioner and Chair of the Panel
	James D. Carnwath, Q.C.	- Commissioner
Appearances:	Matthew Britton	- For Staff of the Commission
	Self-Represented	- Shaun Gerard McErlean
	No one appeared on behalf of Securus Capital Inc.	

TABLE OF CONTENTS

I. OVERVIEW

A. The Merits Decision

[1] The hearing on the merits in this matter began November 14, 2011 and ended on June 18, 2012 (*Re McErlean* (2012), 35 O.S.C.B. 6859 (the "**Merits Decision**")). The hearing was held to consider whether Shaun Gerard McErlean ("**Mr. McErlean**") and Securus Capital Inc. ("**Securus**") contravened Ontario securities laws and/or acted contrary to the public interest under the *Securities Act*, R.S.O. 1990, c. S.5 (the "***Act***"). This panel of the Ontario Securities Commission (the "**Commission**") found that:

(a) the Respondents engaged in or participated in an act, practice or course of conduct relating to securities that the Respondents knew, or reasonably ought to have known, perpetrated a fraud on any person or company, contrary to s. 126.1(b) of the *Act*;

(b) Mr. McErlean traded securities without being registered to trade securities and without an exemption from the dealer registration requirement, contrary to s. 25(1)(a) of the *Act*;

(c) between September 29, 2009 and August 12, 2010, without an exemption from the dealer registration requirement, the Respondents engaged in or held themselves out to be engaged in the business of trading securities without being registered in accordance with Ontario securities law, contrary to s. 25(1) of the *Act*;

(d) Mr. McErlean acted as an adviser without registration and without an exemption from the adviser registration requirement, contrary to s. 25(1)(c) of the *Act*;

(e) the Respondents, without an exemption from the adviser registration requirement, engaged in the business of, or held themselves out as engaging in the business of, advising with respect to investing in, buying or selling securities without being registered in accordance with Ontario securities law, contrary to s. 25(3) of the *Act*;

(f) the Respondents traded securities which was a distribution of securities without having filed a preliminary prospectus or a prospectus with the Director or having an exemption from the prospectus requirement, contrary to s. 53(1) of the *Act*;

(g) Mr. McErlean, as a director of Securus authorized, permitted or acquiesced in the conduct of Securus contrary to s. 129.2 of the *Act* and Ontario securities law.

(Merits Decision, above at para. 216)

B. Summary of the Findings

[2] In the Merits Decision, we made the following findings in respect of the conduct of the Respondents:

> (a) Mr. Mr. McErlean's fraudulent activities flowed from his interaction with three sets of investors – the Aquiesce investors, the German investors and Ms. LK. We found that Mr. McErlean represented to all the investors that their money would be segregated in a separate account and would be used as collateral for investments in guaranteed, high-return trading. None of the money from the three sets of investors was used for that purpose. None of the money was kept separate and apart from the Securus bank account as was represented to the investors. Steps were taken by Mr. McErlean through the use of fake screenshots and fake bank account numbers to deceive investors into thinking their funds were separate and secure. All of the investor funds were used by Mr. McErlean to pay personal expenses, to repay previous investors and to invest in private companies in which he or his family members had a financial interest (Merits Decision, above at para. 204).
>
> (b) Mr. McErlean's dishonest acts caused investors' funds to be placed at risk or lost entirely. Funds were used to pay off personal expenses and repay previous investors. Other funds were used to make capital contributions into high-risk enterprises. It matters not whether these investments were successful, which they were not. His actions exposed the investors to risk. These actions constitute the *actus reus* of fraud (Merits Decision, above at para. 205).
>
> (c) We rejected entirely Mr. McErlean's evidence that the German intermediaries concocted fake evidence and forged his signature to implicate him in wrongdoing. We found he attempted to deceive the Panel. Nothing in the documentary evidence supported his claim that he is the victim of fraudulent conduct. We found the mental element of fraud to have been established (Merits Decision, above at para. 210).
>
> (d) We found that Mr. McErlean engaged in trading securities. The agreements between the investors and Securus were investment contracts which are included in the definition of a security under the *Act*. Investors advanced the funds with the expectation of profit. Fortunes of the investors depended upon the efforts of Mr. McErlean. His efforts affected the success or failure of those investments. He traded securities while not registered to trade nor was he exempt from the dealer registration requirement (Merits Decision, above at paras. 211-212).
>
> (e) Mr. McErlean held himself out to be engaged in the investment business, invited investors to advance money to Securus on the understanding that the money would be pooled and used to enable him to trade securities. In doing so, Mr. McErlean acted as an adviser without registration and without exemption from the registration requirement (Merits Decision, above at paras. 212-213).

(f) We found the trades with investors were in securities which had not previously been issued. There was a distribution of securities, contrary to s. 53 of the *Act*. Investors were entitled to know that their funds were going to be used to pay Mr. McErlean's relatives, his personal expenses, repay previous investors and invest in private companies in which Mr. McErlean or his family members had a financial interest. This knowledge would have possibly affected their investment decisions. Securus was obliged to file a prospectus with the Commission providing investors full, true and plain disclosure of all material facts relating to the securities (Merits Decision, above at para. 214).

(g) Mr. McErlean was the directing mind of Securus, thus rendering Securus in breach of trading and advising allegations. In addition, Mr. McErlean's direction of Securus rendered him in breach of trading and advising allegations as well (Merits Decision, above at para. 215).

C. Sanctions and Costs Hearing

[3] Following the Merits Decision, Staff and Mr. McErlean appeared before us on September 21, 2012. Staff sought orders permanently excluding the Respondents from the securities industry, that they be reprimanded, that the Respondents should jointly and severally pay a disgorgement order of $9,375,829, that each Respondent should pay an administrative penalty "in the range of $500,000," and that the Respondents pay jointly and severally costs to the Commission in the amount of $327,608.82.

[4] Mr. McErlean took no objection to being permanently removed from the securities industry. He does wish to own securities in the future and submits that no evidence has been presented to justify Staff's request for a permanent ban from owning securities.

[5] Mr. McErlean submits that the disgorgement order sought by Staff conflicts with contracts that he has signed with the investors he defrauded. He alleged that a repayment schedule is accepted by the investors and that he is legally bound to abide by those contracts. Failure to comply, he says will result in legal action being taken against him. We are unable to give an credence to this submission since we have not seen those contracts.

[6] In oral submissions, Mr. McErlean described his attempts to free up approximately $1,900,000 of investor money in the Securus bank account. He also referred to the freeze placed by the Commission on a commercial property in Barrie, Ontario, which he proposes be secured by a $1,500,000 lien in the name of the six investors he defrauded.

[7] We cannot concern ourselves with whatever arrangements Mr. McErlean alleges he has made with defrauded investors. Suffice it to say that any monies recovered from the bank account or the commercial property that is returned to investors will reduce the amount of the disgorgement ordered to be paid in this decision.

[8] Mr. McErlean submits the costs sought for the time spent by Mr. Radu and Mr. Dhillon, of the enforcement branch, are excessive. He claims it was not required that they be present during the entire hearings. Staff's decision with respect to procedure and resources falls within

the ambit of prosecutorial discretion with which we decline to interfere. However, something less than full indemnity is appropriate in this case, as discussed later at paragraphs 24 and 25.

II. THE APPLICABLE LAW

A. Approach to the Imposition of Sanctions

[9] The Commission must ensure that the sanctions imposed in each case are proportionate to the circumstances and conduct of the particular respondent. The factors the Commission should consider include:

(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 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 financial sanction might have on the livelihood of a respondent;

(k) the restraint any sanction might 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 reasonable cause the respondent; and

(n) the remorse of the respondent.

(*Re Belteco Holdings Inc.* (1998), 21 O.S.C.B. 7743 at paras. 23-26;
Re M.C.J.C. Holdings Inc. (2002), 25 O.S.C.B. 1133 at paras. 10, 16-19 and 26)

[10] The Commission may also consider general and specific deterrence in crafting appropriate sanctions. The weight given to general deterrence will vary from case to case and is a matter within the discretion of the Commission (*Re Cartaway Resources Corp.*, [2004] 1 S.C.R. 672 at paras. 60 and 64; *Re Momentas Corp.* (2007), 30 O.S.C.B. 6475 at paras. 51-52).

B. Application of Factors

[11] We find the factors noted below to be particularly relevant in considering the appropriate sanctions to be applied.

(i) The Seriousness of the Allegations

[12] The findings in the Merits Decision established serious contraventions of the *Act*, particularly fraud. The Commission has previously held that fraud is "one of the most egregious securities regulatory violations," both "an affront to the individual investors directly targeted" and something that "decreases confidence in the fairness and efficacy of the entire capital market system" (*Re Al-Tar Energy Corp.* (2010), 33 O.S.C.B 5535 at para. 214).

[13] The Respondents committed a series of acts including illegal distribution, unregistered advising and unregistered trading of securities. Mr. McErlean engaged in an ongoing course of fraudulent conduct designed to personally enrich him and members of his family at the expense of innocent investors. We have reviewed Mr. McErlean's conduct in the Summary of Findings set out above in paragraph 2. We agree with Staff's submission that the Respondents should be ordered to disgorge a substantial sum, which we find to be $8,892,906, as described at paragraph 14 below.

(ii) The Profit Made from Illegal Conduct

[14] Exhibit 10 of the merits hearing is a document entitled Source and Application of Funds for the Securus Royal Bank account 03342-101-842-3 for the period from December 22, 2009 to August 9, 2010. The source of funds totals $9,421,409, from which must be subtracted $8,611, described as a deposit from an unknown source. This leaves $9,412,798 as money provided by the six defrauded investors. To this sum must be added $832,522, being funds received from LK, which never entered the bank account but which were immediately directed to pay a former client of Mr. McErlean. This results in the sum of $10,245,320 received from the six investors, from which must be subtracted the sum of $1,352,414 shown as having been paid to current investors on Exhibit 10. This result establishes the loss to investors of $8,892,906 (see Merits Decision, above at paras. 23-24).

(iii) Specific and General Deterrence

[15] Mr. McErlean's actions demonstrate a clear intention to deceive investors and use their money, at least in part, to substantially improve the financial position of himself and his family. We agree with Staff's submission there is a requirement to send a strong message of specific deterrence to Mr. McErlean. The relative ease with which Mr. McErlean raised over $10 million

from offshore investors demonstrates a particular need to convince any like-minded individuals that any profits they make will be taken from them, should they engage in fraudulent activity.

C. Permanent Bans

[16] Given their conduct, the Respondents should be permanently banned from trading in securities, acquiring securities and having exempt status. Likewise, Mr. McErlean should be permanently prohibited from acting as an officer or director of any issuer, registrant or investment fund manager. Mr. McErlean should also be prohibited from becoming or acting as a registrant, investment fund manager or promoter permanently.

D. Disgorgement

[17] Pursuant to clause 10 of section 127(1) of the *Act*, the Commission has the power to order disgorgement of "any amounts obtained as a result of the non-compliance" with Ontario securities law. The Commission has previously held that "all money illegally obtained from investors can be ordered to be disgorged, not just the 'profit' made as a result of the activity." (*Re Limelight Entertainment Inc.* (2008), 31 O.S.C.B. 12030 ("***Limelight***") at para. 49).

[18] In *Limelight*, the Commission held it should consider the following factors when contemplating a disgorgement order, in addition to the general factors for sanctioning listed at paragraph 9 above:

> (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 market participants.
>
> (*Limelight*, above at para. 52)

[19] We have found the total amount obtained as a result of the Respondents' non-compliance with Ontario securities law, less repayment to investors, is $8,892,906. The Respondents must jointly and severally disgorge this sum. We reject Staff's invitation to deal with the assets currently subject to Staff's freeze orders. We shall order that any funds disgorged be dealt with in accordance with subsection 3.4(2)(b) of the *Act*.

E. Administrative Penalties

[20] Staff seek an order for payment of an administrative penalty of $500,000 by each of the Respondents. We accept Staff's submissions on this point.

[21] In cases involving the illegal distribution of securities, unregistered trading, misrepresentations, and particularly in cases involving fraud, the Commission has awarded significant administrative penalties.

[22] The Commission has held that an administrative penalty should be of a magnitude sufficient to ensure effective specific and general deterrence. Factors to be considered in determining an appropriate administrative penalty include: the scope and seriousness of a respondent's misconduct; whether there were multiple and/or repeated breaches of the *Act*; and the level of administrative penalties imposed in other cases (*Limelight*, above at paras. 67, 71 and 78).

[23] Persons like Mr. McErlean who enjoy the trust and confidence of others must be deterred from acting as he did. Having regard to the cases cited by Staff, we find an appropriate amount to reflect the principal of general deterrence is the imposition of an administrative penalty set out above.

F. Costs

[24] A costs order pursuant to section 127.1 of the *Act* is not a penalty. An order of costs is a way of recovering the costs of a hearing or investigation from persons or companies who have breached Ontario securities law or acted contrary to the public interest. It is recognized that a costs order will not necessarily recover the entirety of the costs incurred by the Commission but it is appropriate that a respondent pay some portion of the costs of a hearing where a respondent is found to have contravened securities law. In assessing the quantum of costs, the panel is entitled to take into consideration whether the respondent's conduct has contributed to the efficient hearing of the matter.

[25] We award the Commission costs of $250,000, inclusive of fees and disbursements, to be paid jointly and severally by the Respondents. Staff's submission on costs fails to recognize the principle that something less than full indemnity is appropriate.

G. Reprimand

[26] We find it appropriate to reprimand Mr. McErlean and Securus.

III. CONCLUSION

[27] It is ordered that:

(a) pursuant to s. 127(1)2 of the *Act*, all trading by the Respondents shall cease permanently;

(b) pursuant to s. 127(1)2.1 of the *Act*, the acquisition of any securities by the Respondents is prohibited permanently;

(c) pursuant to s. 127(1)3 of the *Act*, any exemptions contained in Ontario securities law do not apply to the Respondents permanently;

(d) pursuant to s. 127(1)6 of the *Act*, we hereby reprimand Shaun Gerard McErlean and Securus Capital Inc. for their conduct;

(e) pursuant to s. 127(1)8 of the *Act*, Mr. McErlean is prohibited from becoming or acting as a director or officer of any issuer permanently;

(f) pursuant to s. 127(1)8.2 of the *Act*, Mr. McErlean is prohibited from becoming or acting as a director or officer of a registrant permanently;

(g) pursuant to s. 127(1)8.4 of the *Act*, Mr. McErlean is prohibited from becoming or acting as a director or officer of an investment fund manager permanently;

(h) pursuant to s. 127(1)8.5 of the *Act*, the Respondents are prohibited from becoming or acting as a registrant, as an investment fund manager or as a promoter permanently;

(i) pursuant to s. 127(1)9 of the *Act*, Mr. McErlean and Securus shall jointly and severally pay to the Commission an administrative penalty of $500,000 each, which is designated for allocation or for use by the Commission pursuant to s. 3.4(2)(b) of the *Act*;

(j) pursuant to s. 127(1)10 of the *Act*, Mr. McErlean and Securus shall disgorge to the Commission jointly and severally the amount of $8,892,906, which is designated for allocation or for use by the Commission pursuant to s. 3.4(2)(b) of the *Act*; and

(k) pursuant to s. 127.1 of the *Act*, the respondents shall pay on a joint and several basis $250,000, representing partial costs and disbursements incurred by the Commission in the investigation and hearing.

Dated at Toronto this 24th day of October, 2012.

"Vern Krishna"

Vern Krishna, Q.C.

"James D. Carnwath"

James D. Carnwath, Q.C.