Ontario Securities Commission
Commission des valeurs mobilières de l'Ontario
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IN THE MATTER OF THE *SECURITIES ACT*,
R.S.O. 1990, c. S.5, AS AMENDED

- AND -

IN THE MATTER OF
YORK RIO RESOURCES INC., BRILLIANTE BRASILCAN RESOURCES CORP., VICTOR YORK, ROBERT RUNIC, GEORGE SCHWARTZ, PETER ROBINSON, ADAM SHERMAN, RYAN DEMCHUK, MATTHEW OLIVER, GORDON VALDE AND SCOTT BASSINGDALE

REASONS AND DECISION ON SANCTIONS AND COSTS
(Sections 37, 127 and 127.1 of the Act)

Hearing:	May 14, 2013	
Decision:	March 31, 2014	
Panel:	Vern Krishna, CM, QC	- Commissioner and Chair of the Panel
	Edward P. Kerwin	- Commissioner
Appearances:	Hugh Craig Cameron Watson Zyshan Kaba	- For Staff of the Commission
	Victor York	- Self-represented
	Matthew Oliver	- Self-represented
	Gordon Valde	- Self-represented

TABLE OF CONTENTS

REASONS AND DECISION ON SANCTIONS AND COSTS

I. INTRODUCTION

A. History of the Proceeding

[1] This was a 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 sanctions and costs orders against York Rio Resources Inc. ("**York Rio**"), Brilliante Brasilcan Resources Corp. ("**Brilliante**"), Victor York ("**York**"), Robert Runic ("**Runic**"), George Schwartz ("**Schwartz**"), Ryan Demchuk ("**Demchuk**"), Matthew Oliver ("**Oliver**"), Gordon Valde ("**Valde**") and Scott Bassingdale ("**Bassingdale**") (together, "the "**Respondents**").

[2] The hearing on the merits in this matter took place over 33 days between March 21, 2011 and December 21, 2011, and additional written submissions were filed on December 25 and 27, 2011 (the "**Merits Hearing**"). On March 25, 2013, the decision on the merits was issued (the "**Merits Decision**"), along with an order setting down the sanctions and costs hearing for May 14, 2013 (the "**Sanctions and Costs Hearing**"), which included notice that "upon failure of any party to attend at the time and place aforesaid, the hearing may proceed in the absence of that party, and such party is not entitled to any further notice of the proceeding" (the "**Sanctions and Costs Hearing Scheduling Order**").

B. The Sanctions and Costs Hearing

[3] On April 15, 2013, Staff of the Commission ("**Staff**") filed written submissions, a brief of authorities, and the affidavit of Laura Fisher, sworn April 12, 2013, in support of Staff's bill of costs (the "**Fisher Affidavit**"). On May 13, 2013, Staff filed the affidavit of service of Peaches Barnaby, sworn May 13, 2013 (the "**Barnaby Affidavit**").

[4] Only two Respondents – York and Schwartz – filed written submissions on sanctions and costs. York filed written submissions on sanctions and costs, with supporting documentation, on April 29, 2012. On March 26, April 9, April 21 and April 28, 2013, Schwartz filed written submissions addressing issues he said he would raise in an appeal of the Merits Decision. He also filed a copy of a Notice of Appeal, which he said would be filed in Divisional Court before the Sanctions and Costs Hearing. On May 4, 2013, Schwartz sent an email with respect to costs.

[5] Staff filed reply submissions on May 6, 2013.

[6] Staff, York, Oliver and Valde appeared at the Sanctions and Costs Hearing and made oral submissions. Schwartz, Runic, Demchuk and Bassingdale did not appear. Although Staff did not provide an affidavit of service evidencing Staff's service of the Merits Decision and the Sanctions and Costs Hearing Scheduling Order, we note that both documents were posted on the Commission's website. We are satisfied, based on the Barnaby Affidavit, that Staff served or made reasonable attempts to serve all of the Respondents with Staff's written sanctions and costs submissions and written reply submissions, along with a covering letter which, in the subject line, gave notice of the date and time of the Sanctions and Costs Hearing. We also take note of Staff counsel's

advice that he had been in contact with counsel for Runic, who was aware of the date of the Sanctions and Costs Hearing and that Staff had not been able to locate Demchuk or Bassingdale at their last known addresses. In the circumstances, we were satisfied that the Respondents were given notice of the Sanctions and Costs Hearing in accordance with section 6 of the *Statutory Powers Procedure Act*, R.S.O. 1990, c. S.22, as amended (the "**SPPA**") and therefore that we were authorized to proceed in their absence, pursuant to subsection 7(1) of the SPPA and Rule 7.1 of the Commission's *Rules of Procedure* (2010), 33 O.S.C.B. 8017 (the "**Rules**").

C. The Merits Decision

1. The Allegations

[7] Staff alleged that York Rio and the **Individual Respondents** (York, Runic, Schwartz, Demchuk, Oliver, Valde and Bassingdale) (together, the "**York Rio Respondents**") engaged in the illegal distribution of York Rio securities from May 10, 2004 to October 21, 2008 (the "**Material Time**"). In relation to York Rio securities, Staff alleged that the York Rio Respondents contravened subsections 25(1)(a) and 53(1) and section 126.1(b) of the Act, contrary to the public interest. Staff alleged that York, Runic, Demchuk, Oliver, Valde and Bassingdale made prohibited representations that York Rio securities would be listed on an exchange, contrary to subsection 38(3) of the Act and contrary to the public interest. Staff also alleged that York, Runic and Schwartz, being directors and/or officers of York Rio, authorized, permitted or acquiesced in the contraventions of the Act by York Rio or its salespersons, representatives or agents, contrary to section 129.2 of the Act and contrary to the public interest.

[8] Staff alleged that Schwartz, by trading in York Rio securities, breached the Commission's temporary cease trade order made against him on May 1, 2006 in relation to another matter, *Re Euston Capital Corp. and Schwartz* (2006), 29 O.S.C.B. 3920, which was extended from time to time and remained in effect during the latter thirty months of the Material Time ("**Euston**" and the "**Euston Order**"), contrary to subsection 122(1)(c) of the Act and contrary to the public interest.

[9] Staff alleged that Brilliante, York, Runic, Demchuk, Oliver, Valde and Bassingdale (together, the "**Brilliante Respondents**") engaged in the illegal distribution of Brilliante securities from January 17, 2007 to October 21, 2008. Specifically, Staff alleged that the Brilliante Respondents contravened subsections 25(1)(a) and 53(1) and section 126.1(b) of the Act, contrary to the public interest. Staff alleged that Demchuk, Oliver, Valde and Bassingdale made prohibited representations that Brilliante securities would be listed on an exchange, contrary to subsection 38(3) of the Act and contrary to the public interest. Staff also alleged that York and Runic, being directors and/or officers of Brilliante, authorized, permitted or acquiesced in the contraventions of the Act by Brilliante or its salespersons, representatives or agents, contrary to section 129.2 of the Act and contrary to the public interest.

2. The Merits Hearing

[10] Staff called 20 witnesses at the Merits Hearing: two Staff investigators – Wayne Vanderlaan ("**Vanderlaan**"), a senior investigator with the Commission, who was the primary investigator assigned to the York Rio and Brilliante investigations, and Albert

Ciorma ("**Ciorma**"), a Certified Management Accountant, who prepared account profiles and summaries showing the source and use of funds that flowed through York Rio and Brilliante; two former respondents in this matter who settled with Staff before or during the Merits Hearing – Peter Robinson ("**Robinson**") and Adam Sherman ("**Sherman**"); eight individuals who were not respondents but had knowledge of York Rio or Brilliante; and eight Investor Witnesses.

[11] Staff presented a great deal of documentary evidence through Vanderlaan and Ciorma, including York Rio and Brilliante documents that were seized as a result of the execution of a search warrant on the York Rio and Brilliante premises on October 21, 2008 (the "**Search**"); print-outs from the York Rio and Brilliante websites; Corporation Profile Reports; exempt distribution reports; and section 139 certificates relating to the Respondents; account profiles and account summaries, prepared by Ciorma, which traced the flow of funds from York Rio and Brilliante investors through a number of accounts held by companies controlled by the Respondents and persons and companies associated with the Respondents; and transcripts of compelled examinations of the Individual Respondents (apart from Bassingdale, who could not be located) and others.

[12] Schwartz was the only Respondent to testify at the Merits Hearing. York did not testify, but called two witnesses: York Rio's accountant (or bookkeeper), and another witness whose evidence we found irrelevant.

[13] Schwartz and York had brought pre-hearing motions for a stay and an adjournment, both of which were dismissed in motion decisions issued prior to the start of the Merits Hearing. During the Merits Hearing, Schwartz brought two motions in relation to the Search (the **Search Warrant Motion** and the **Exclusion of Evidence Motion**). York joined the Search Warrant Motion with Schwartz. The Search Warrant Motion and the Exclusion of Evidence Motion were dismissed by Motions Decisions issued before the end of the Merits Hearing. Schwartz and York argued these issues again in their closing submissions at the Merits Hearing, and we dismissed their submissions at paragraphs 12-17 and 28-49 of the Merits Decision. At the close of the Merits Hearing, Schwartz brought a bias motion ("**Bias Motion**"), which we dismissed at paragraphs 50-61 of the Merits Decision.

3. The Merits Decision

[14] We made the following findings in the Merits Decision.

(a) The York Rio Investment Scheme and the Brilliante Investment Scheme

[15] There was no evidence that York Rio or Brilliante had any viable business assets or any legitimate business operations. Their only business was to issue worthless securities. York Rio raised approximately $18 million from investors during the Material Time, and Brilliante raised approximately $160,000 from late summer to October 2008. Both the York Rio Investment Scheme and the Brilliante Investment Scheme were a complete sham (paragraphs 234-276 of the Merits Decision).

[16] The money raised from York Rio and Brilliante investors was first deposited into the York Rio and Brilliante bank accounts, and then transferred, on York's authority, through the accounts of companies controlled by York and Schwartz during the Schwartz Period, and by York, Georgiadis (York's nephew) and Runic during the Runic Period.

[17] Of the approximately $18 million raised from York Rio and Brilliante investors, approximately $16 million was used, in part, to pay the overhead expenses of the York Rio and Brilliante sales operation, including salaries for qualifiers and 20% commissions for salespersons, with the remainder being spent for the personal benefit of York, Runic and Schwartz and their families and friends. Only a minimal amount went to York Rio's purported mining activity – at most, approximately 2.7% of the amount raised from York Rio investors (the "**York Rio Proceeds**"), and likely much less. There is no evidence that any of the $160,000 raised from Brilliante investors was spent on Brilliante's purported mining expenses (paragraphs 274, 276 and 297-320 of the Merits Decision).

[18] York Rio and Brilliante securities were sold by unregistered salespersons and no prospectus was filed or receipted. Although the Respondents purported to rely on the accredited investor exemption, they did not satisfy their onus of proving that the exemption was available. At least five of the eight Investor Witnesses were not accredited investors, four of the Investor Witnesses were not asked about their financial circumstances, and at least one of the Investor Witnesses was misled about the qualifications for accredited investor status. None of the Investor Witnesses received any return on their investment or any repayment of their purchase price. The disregard shown by the Respondents, especially Schwartz and York, for their obligations to investors was a significant aggravating factor in the hearing of this case (paragraphs 222-227 and 288 of the Merits Decision).

(b) York Rio

[19] York Rio securities were sold from five sales locations during the Material Time: the Langstaff Location, the Eglinton Location, the Sheppard Location, the Yonge Location and the Finch Location. Brilliante securities were sold from the Finch Location in the last few months before the office was shut down by the Search (paragraphs 277-278 of the Merits Decision).

[20] The sale of York Rio securities had all the characteristics of a fraudulent "boiler room" operation. York Rio and its employees, representatives and agents: used aliases when communicating with investors and prospective investors; used high pressure sales tactics; prepared and used sales scripts that included misrepresentations about York Rio's assets, the status of diamond production, and the qualifications and experience of officers, salespersons and other persons who were represented as having a role in the company; misrepresented the test for qualification as an accredited investor when communicating with prospective investors; posted on the York Rio website many falsehoods and misrepresentations that were intended to effect a sale of securities; made misrepresentations in the York Rio Business Plan that were intended to effect a sale of securities and had no basis in reality; failed to disclose to investors and prospective investors that the salesperson was compensated by a commission of 20%, and in some cases, misrepresented that salespersons were compensated only in securities of York Rio; filed incomplete and misleading Exempt Distribution Reports that relied on the accredited investor exemption, when it was not available, and failed to disclose the 70% fees and commissions paid to Schwartz and Runic; and made prohibited representations about a pending initial public offering and potential merger. (paragraph 342 of the Merits Decision)

(c) Brilliante

[21] The Brilliante Investment Scheme was also fraudulent. The Brilliante website was copied from Wikipedia and from a Brazilian government website about a different mine, and falsely claimed that Brilliante had a 24,000 hectare mining claim in Brazil containing uranium and that US $5 million had been invested in the mine, although there was no evidence that Brilliante engaged in any activity other than the sale and distribution of its own securities. The Brilliante business plan also included many false statements, including expenditure and net income projections that were identical to those given in the York Rio business plan and had no basis in reality. Brilliante securities were sold by the same qualifiers and salespersons who had sold York Rio securities, but using different aliases. The Brilliante sales scripts that were seized from the Finch Location contained numerous misrepresentations that were intended to solicit sales of Brilliante securities. (paragraph 367 of the Merits Decision)

(d) York

[22] York was the President and CEO of York Rio and a director of York Rio throughout the Material Time. He orchestrated the York Rio Investment Scheme and authorized, permitted or acquiesced in the contraventions of the Act by York Rio. York was also the directing mind of Brilliante and controlled the Brilliante account, orchestrated the Brilliante Investment Scheme and authorized, permitted or acquiesced in the contraventions of the Act by Brilliante. York obtained approximately $4.1 million as a result of his non-compliance with Ontario securities law (paragraphs 293, 319 and 373-474 of the Merits Decision).

(e) Schwartz

[23] Schwartz, through his company, Debrebud Capital Corporation ("**Debrebud**"), entered into an agreement with York in March 2005 to provide services for York Rio at the Eglinton Location and the Sheppard Location, in return for 70% of the York Rio Proceeds. At the Merits Hearing, Schwartz claimed that Debrebud was a "paymaster" or "outsourced" agent for York Rio and that neither he nor Debrebud engaged in trades or acts in furtherance of trades. We found that Schwartz acted in the capacity of a director or officer of York Rio and engaged in trades or acts in furtherance of trades of York Rio securities from March 2005 to mid-2007 (the "**Schwartz Period**"). Schwartz obtained approximately $2.75 million as a result of his non-compliance with Ontario securities law (paragraphs 294, 315 and 475-562 of the Merits Decision).

(f) Runic

[24] In January 2007, York entered into an agreement with Runic, who had worked with Schwartz at the Sheppard Location, that Runic would open a new York Rio sales office in return for at least 70% of the York Rio Proceeds. In the summer of 2007, York shifted all sales of York Rio securities to the new office (the Yonge Location), which was controlled by Runic. In August 2008, the York Rio sales office, still run by Runic, was moved to the Finch Location. York Rio securities continued to be sold at the Finch Location, but the focus shifted to the sale of Brilliante securities. We found that Runic acted in the capacity of a director or officer of York Rio and engaged in trades or acts in furtherance of trades of York Rio securities at the Yonge Location and the Finch

Location, and that he acted in the capacity of a director or officer of Brilliante and engaged in trades or acts in furtherance of trades of Brilliante securities at the Finch Location from January 2007 to October 2008 (the "**Runic Period**"). Runic obtained approximately $9.2 million as a result of his non-compliance with Ontario securities law (paragraphs 295-296, 318 and 563-628 of the Merits Decision).

(g) Demchuk, Oliver, Valde and Bassingdale

[25] Demchuk, Valde and Bassingdale were salespersons who sold York Rio and Brilliante securities. Oliver was a York Rio salesperson. We found that Demchuk obtained approximately $218,833.74, Oliver obtained approximately $118,615.91, Valde obtained at least $193,435.26 and Bassingdale obtained approximately $155,595.40 as a result of their non-compliance with Ontario securities law (respectively paragraphs 629-653, 654-686, 687-709 and 710-736 of the Merits Decision).

(h) Conclusions

[26] We found that Staff had proven its allegations, with the following exceptions, where we found that Staff's evidence did not satisfy the burden of proof on a balance of probabilities:

- we were not satisfied that Staff had proven its allegations against Oliver with respect to Brilliante securities (paragraphs 674 and 677 of the Merits Decision);
- we were not satisfied that Staff had proven its allegation that Demchuk made prohibited representations that Brilliante securities would be listed on a stock exchange (paragraph 644 of the Merits Decision);
- we were not satisfied that that Staff had proven its allegation that Bassingdale made prohibited representations that York Rio securities would be listed on a stock exchange (paragraph 728 of the Merits Decision); and
- we were not satisfied that that Staff had proven its allegations that Runic made prohibited representations that York Rio or Brilliante securities would be listed on a stock exchange, although we were satisfied that Runic, being a *de facto* officer of York Rio and Brilliante during the Runic Period, had authorized, permitted or acquiesced in prohibited representations made by York Rio and Brilliante salespersons, representatives or agents (paragraphs 611 and 621 of the Merits Decision).

[27] At the conclusion of the Merits Decision, we found that:

- York Rio contravened subsections 25(1)(a) and 53(1) and section 126.1(b) of the Act, contrary to the public interest, in relation to the sale of its own securities;
- Brilliante contravened subsections 25(1)(a) and 53(1) and section 126.1(b) of the Act, contrary to the public interest, in relation to the sale of its own securities;
- York contravened subsections 25(1)(a) and 53(1), subsection 38(3), section 126.1(b) and section 129.2 of the Act, contrary to the public interest, in relation to the sale of York Rio and Brilliante securities;

- Runic contravened subsections 25(1)(a) and 53(1), section 126.1(b) and, during the Runic Period, section 129.2 of the Act, contrary to the public interest, in relation to the sale of York Rio and Brilliante securities;
- Schwartz contravened subsections 25(1)(a) and 53(1), section 126.1(b), and, during the Schwartz Period, section 129.2 of the Act, contrary to the public interest, in relation to the sale of York Rio securities, and contravened Ontario securities law, contrary to subsection 122(1)(c) of the Act and contrary to the public interest, by trading in York Rio securities at a time when the Euston Order prohibited him from trading in any securities;
- Demchuk contravened subsections 25(1)(a) and 53(1) and section 126.1(b) of the Act, contrary to the public interest, in relation to the sale of York Rio and Brilliante securities, and contravened subsection 38(3) of the Act, contrary to the public interest, in relation to the sale of York Rio securities;
- Oliver contravened subsections 25(1)(a) and 53(1), subsection 38(3) and section 126.1(b) of the Act, contrary to the public interest, in relation to the sale of York Rio securities;
- Valde contravened subsections 25(1)(a) and 53(1), subsection 38(3) and section 126.1(b) of the Act, contrary to the public interest, in relation to the sale of York Rio and Brilliante securities; and
- Bassingdale contravened subsections 25(1)(a) and 53(1), section 126.1(b) of the Act, contrary to the public interest, in relation to the sale of York Rio and Brilliante securities, and contravened subsection 38(3) of the Act, contrary to the public interest, in relation to the sale of Brilliante securities.

II. STAFF'S REQUEST FOR SANCTIONS AND COSTS

[28] Staff seeks the following sanctions and costs against the Respondents:

(a) Market Participation Orders

- an order pursuant to clause 2 of subsection 127(1) of the Act that trading in any securities by the Respondents cease permanently;
- an order pursuant to clause 2.1 of subsection 127(1) of the Act that the acquisition of any securities by the Respondents be prohibited permanently;
- an order pursuant to clause 3 of subsection 127(1) of the Act that any exemptions contained in Ontario securities law do not apply to the Respondents permanently;
- an order pursuant to clause 7 of subsection 127(1) of the Act that each of the Individual Respondents resign any position he holds as a director or officer of an issuer;
- an order pursuant to clause 8 of subsection 127(1) of the Act that each of the Individual Respondents be prohibited permanently from becoming or acting as a director or officer of any issuer;

- an order pursuant to clause 8.2 of subsection 127(1) of the Act that each of the Individual Respondents be prohibited permanently from becoming or acting as a director or officer of a registrant;
- an order pursuant to clause 8.4 of subsection 127(1) of the Act that each of the Individual Respondents be prohibited permanently from becoming or acting as a director or officer of an investment fund manager;
- an order pursuant to clause 8.5 of subsection 127(1) of the Act that each of the Individual Respondents be prohibited permanently from becoming or acting as a registrant, as an investment fund manager or as a promoter;
- an order pursuant to section 37 of the Act that each of the Individual Respondents be prohibited permanently from telephoning from within Ontario to any residence within or outside Ontario for the purpose of trading in any security or any class of securities;

(b) Reprimand

- a reprimand pursuant to clause 6 of subsection 127(1) of the Act;

(c) Administrative Penalties

- an order pursuant to clause 9 of subsection 127(1) of the Act that York Rio pay an administrative penalty of $1,000,000 for each of its three failures to comply with Ontario securities law for a total of $3,000,000, to be designated for allocation to or for the benefit of third parties in accordance with subsection 3.4(2)(b) of the Act;
- an order pursuant to clause 9 of subsection 127(1) of the Act that Brilliante pay an administrative penalty of $1,000,000 for each of its three failures to comply with Ontario securities law for a total of $3,000,000, to be designated for allocation to or for the benefit of third parties in accordance with subsection 3.4(2)(b) of the Act;
- an order pursuant to clause 9 of subsection 127(1) of the Act that York pay an administrative penalty of $1,000,000 for each of his nine failures to comply with Ontario securities law for a total of $9,000,000, to be designated for allocation to or for the benefit of third parties in accordance with subsection 3.4(2)(b) of the Act
- an order pursuant to clause 9 of subsection 127(1) of the Act that Runic pay an administrative penalty of $750,000 for each of his four failures to comply with Ontario securities law in relation to the trading of York Rio securities for a total of $3,000,000, to be designated for allocation to or for the benefit of third parties in accordance with subsection 3.4(2)(b) of the Act;
- an order pursuant to clause 9 of subsection 127(1) of the Act that Runic pay an administrative penalty of $400,000.00 for each of his four failures to comply with Ontario securities law in relation to the trading of Brilliante securities for a total of $1,600,000, to be designated for allocation to or for the benefit of third parties in accordance with subsection 3.4(2)(b) of the Act;

- an order pursuant to clause 9 of subsection 127(1) of the Act that Schwartz pay an administrative penalty of $1,000,000 for each of his five failures to comply with Ontario securities law for a total of $5,000,000, to be designated for allocation to or for the benefit of third parties in accordance with subsection 3.4(2)(b) of the Act;
- an order pursuant to clause 9 of subsection 127(1) of the Act that Demchuk pay an administrative penalty of $550,000 to be designated for allocation to or for the benefit of third parties in accordance with subsection 3.4(2)(b) of the Act;
- an order pursuant to clause 9 of subsection 127(1) of the Act that Oliver pay an administrative penalty of $550,000 to be designated for allocation to or for the benefit of third parties in accordance with subsection 3.4(2)(b) of the Act;
- an order pursuant to clause 9 of subsection 127(1) of the Act that Valde pay an administrative penalty of $500,000 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
- an order pursuant to clause 9 of subsection 127(1) of the Act that Bassingdale pay an administrative penalty of $390,000 to be designated for allocation to or for the benefit of third parties in accordance with subsection 3.4(2)(b) of the Act;

(d) Disgorgement

- an order pursuant to clause 10 of subsection 127(1) of the Act that York Rio and York disgorge to the Commission a total of $18,000,000, less any payments made by Robinson and Sherman to the Commission, in full or partial satisfaction of the disgorgement orders made against them by the Commission, with respect to those violations of Ontario securities law related to the trading of York Rio securities, for which they shall be jointly and severally liable, to be designated for allocation to or for the benefit of third parties in accordance with subsection 3.4(2)(b) of the Act;
- an order pursuant to clause 10 of subsection 127(1) of the Act that Schwartz disgorge to the Commission a total of $4,000,000, less any payments made by Robinson to the Commission in full or partial satisfaction of the disgorgement order made against him by the Commission, with respect to those violations of Ontario securities law related to the trading of York Rio securities, to be designated for allocation to or for the benefit of third parties in accordance with subsection 3.4(2)(b) of the Act;
- an order pursuant to clause 10 of subsection 127(1) of the Act that Runic disgorge to the Commission a total of $12,000,000, less any payments made by Sherman to the Commission in full or partial satisfaction of the disgorgement order made against him by the Commission with respect to those violations of Ontario securities law related to the trading of York Rio securities, to be designated for allocation to or for the benefit of third parties in accordance with subsection 3.4(2)(b) of the Act;
- an order pursuant to clause 10 of subsection 127(1) of the Act that Brilliante, York, and Runic disgorge to the Commission a total of $160,000 with respect to

those violations of Ontario securities law related to the trading of Brilliante securities, for which they shall be jointly and severally liable, to be designated for allocation to or for the benefit of third parties in accordance with subsection 3.4(2)(b) of the Act;

- an order pursuant to clause 10 of subsection 127(1) of the Act that Demchuk disgorge to the Commission a total of $218,833, to be designated for allocation to or for the benefit of third parties in accordance with subsection 3.4(2)(b) of the Act;
- an order pursuant to clause 10 of subsection 127(1) of the Act that Oliver disgorge to the Commission a total of $118,615, to be designated for allocation to or for the benefit of third parties in accordance with subsection 3.4(2)(b) of the Act;
- an order pursuant to clause 10 of subsection 127(1) of the Act that Valde disgorge to the Commission a total of $193,435, to be designated for allocation to or for the benefit of third parties in accordance with subsection 3.4(2)(b) of the Act;
- an order pursuant to clause 10 of subsection 127(1) of the Act that Bassingdale disgorge to the Commission a total of $155,595, to be designated for allocation to or for the benefit of third parties in accordance with subsection 3.4(2)(b) of the Act;

(e) Costs

- an order pursuant to subsection 127.1 of the Act that York Rio, Brilliante, York and Schwartz pay $340,828.75 of the Commission's costs of the investigation and the hearing of this matter for which they shall be jointly and severally liable;
- an order pursuant to subsection 127.1 of the Act that Runic pay $50,000 of the Commission's costs of the investigation and the hearing of this matter, for he shall be severally liable; and
- an order pursuant to subsection 127.1 of the Act that each of Demchuk, Oliver, Valde and Bassingdale pay $10,000 of the Commission's costs of the investigation and the hearing of this matter, for which they shall be severally liable.

[29] Although Staff had, in its written submissions on sanctions and costs, requested an order, pursuant to clause 2 of subsection 127(1) of the Act, that any trading in the securities of York Rio and Brilliante cease permanently, this request was withdrawn during closing argument because such an order had not been requested in the Notice of Hearing (see paragraph 62 below).

III. THE LAW ON SANCTIONS

[30] Pursuant to section 1.1 of the Act, the Commission's mandate is (i) to provide protection to investors from unfair, improper or fraudulent practices; and (ii) to foster fair and efficient capital markets and confidence in capital markets.

[31] In exercising its public interest jurisdiction under section 127 of the Act, the Commission must act in a protective and preventive manner. As stated by the Commission in *Re Mithras Management Ltd.*:

> . . . 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. And in so doing, we may well conclude that a person's past conduct has been so abusive of the capital markets as to warrant our apprehension and intervention, even if no particular breach of the Act has been made out.
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> (*Re Mithras Management Ltd.* (1990), 13 O.S.C.B. 1600 at 1610-1611 ("***Mithras***"))

[32] In *Committee for the Equal Treatment of Asbestos Minority Shareholders v. Ontario (Securities Commission)*, [2001] 2 S.C.R. 132 ("***Asbestos***"), the Supreme Court of Canada described the Commission's public interest jurisdiction in similar terms, stating:

> . . . the purpose of an order under s. 127 is to restrain future conduct that is likely to be prejudicial to the public interest in fair and efficient capital markets. The 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: *Re Mithras Management Ltd.* (1990), 13 O.S.C.B. 1600.
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> (*Asbestos*, *supra* at paragraph 43)

[33] In *Re Cartaway Resources Corp.*, [2004] 1 S.C.R. 672 ("***Cartaway***"), the Supreme Court of Canada stated that "… it is reasonable to view general deterrence as an appropriate, and perhaps necessary, consideration in making orders that are both protective and preventative". The Court stated, "[t]he weight given to general deterrence will vary from case to case and is a matter within the discretion of the Commission." (*Cartaway*, *supra*, at paragraphs 60 and 64).

[34] The Commission has previously identified the following as some of the factors that it should consider when imposing sanctions:

(a) the seriousness of the conduct;

(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) the need to deter a respondent and other like-minded individuals from engaging in similar abuses of the capital markets in the future;

(f) whether the violations are isolated or recurrent;

(g) the size of any profit obtained or loss avoided from the illegal conduct;

(h) any mitigating factors, including the remorse of the respondent;

(i) the effect any sanction might have on the livelihood of the respondent;

(j) the effect any sanction might have on the ability of a respondent to participate without check in the capital markets;

(k) in light of the reputation and prestige of the respondent, whether a particular sanction will have an impact on the respondent and be effective;

(l) the size of any financial sanctions or voluntary payment when considering other factors; and

(m) the shame, or financial pain, that any sanction would reasonably cause to the respondent.

(*Re Belteco Holdings Inc.* (1998), 21 O.S.C.B. 7743 at p. 7746 ("***Belteco***"); *Re M.C.J.C. Holdings Inc. and Michael Cowpland* (2002), 25 O.S.C.B. 1133 ("***M.C.J.C. Holdings***") at p. 1136)

[35] The applicability and importance of each factor will vary according to the circumstances of each case.

[36] The Commission has held that the sanctions imposed must be proportionate to the conduct of the respondent in the circumstances of each case (*M.C.J.C. Holdings*, *supra*, at 1134; *Re Sabourin* (2010), 33 O.S.C.B. 5299 ("***Sabourin Sanctions***"), at paragraph 56). In addition, when imposing administrative penalties and disgorgement orders, the overall financial sanctions imposed on each respondent should be considered (*Sabourin*, *supra*, at paragraph 59). Ability to pay is a relevant, but not a predominant or determinant factor (*Sabourin Sanctions*, *supra*, at paragraph 60).

IV. SUBMISSIONS OF THE PARTIES

A. Staff

[37] Staff submits that significant sanctions are warranted in this matter, commensurate with the Panel's findings as to the seriousness of the Respondents' non-compliance with Ontario securities law and the resulting harm to investors. At the heart of this matter lies "rampant securities fraud contrary to section 126.1(b) of the Act".

[38] Staff submits that there are a number of aggravating factors in this matter, and no mitigating factors.

[39] Staff submits that the following factors are particularly relevant.

The seriousness of the allegations, the level of the Individual Respondents' activity in the marketplace, and whether the violations were isolated or recurrent

[40] Staff submits that each of the Respondents was found to have engaged in serious non-compliance with Ontario securities law, including securities fraud contrary to section 126.1(b) of the Act and contrary to the public interest. Staff describes the unlawful activity as "planned, prolonged and widespread" and submits that the York Rio and Brilliante Investment Schemes were "wholly designed to defraud" and resulted in the loss of approximately $18 million from over 200 investors.

Individual Respondents' recognition of the seriousness of the improprieties

[41] Staff submits that the Individual Respondents engaged in the knowing and persistent deception of investors and "demonstrated an utter contempt for Ontario securities law and investors". Staff submits that York engineered the York Rio and Brilliante Investment Schemes and was the driving force behind them, and used approximately $4.1 million for his benefit or the benefit of his friends and family. Staff submits that Schwartz, in particular, has failed to recognize the seriousness of his illegal actions and shown nothing but disdain for Ontario securities law, particularly considering that his role in the fraudulent York Rio Investment Scheme occurred while he was bound by the Euston Order.

Profit made or loss avoided from illegal conduct related to York Rio

[42] As a result of the conduct of the Respondents, approximately $18 million was obtained from investors. Staff submits that the amount of the loss to investors "lays the fraud bare and, respectfully, should shock the conscience of the Commission's stakeholders".

The restraint any sanctions may have on the ability of the Individual Respondents to participate without check in the capital markets

[43] Staff submits that the conduct of the Individual Respondents was so harmful and the risk to the investing public so great that they should be prevented from participating in the capital markets in any capacity. Staff seeks trading and acquisition bans against all the Individual Respondents without any "carve-out" exception.

Specific and general deterrence

[44] Staff submits that there is a need in this matter "to send a strong message to the Individual Respondents and the public at large. Orders removing the Individual Respondents permanently from the capital markets, significant administrative penalties and disgorgement of all funds obtained from the fraudulent investment schemes are proportionate to the Individual Respondents' misconduct, and will send a message to the Individual Respondents and to like-minded individuals that involvement in these types of schemes will result in severe sanctions."

[45] Staff relies on the following precedents for appropriate sanctions in cases involving fraudulent conduct: *Re Ochnik* (2006), 29 O.S.C.B. 3929 ("***Ochnik***"); *Re Limelight* (2008), 31 O.S.C.B. 12030 ("***Limelight Sanctions***"); *Sabourin Sanctions*, *supra*; *Re Al-tar Energy Corp.* (2011), 34 O.S.C.B. 447 ("***Al-tar Sanctions***"); *Re Richvale Resource Corp.* (2012), 35 O.S.C.B. 10699 ("***Richvale Sanctions***"); *Re Lyndz*

Pharmaceuticals Inc. (2012), 35 O.S.C.B. 7357 ("***Lyndz Sanctions***"); and *Re Goldpoint Resources Corp.* (2013), 36 O.S.C.B. 1464 ("***Goldpoint Sanctions***").

B. The Respondents

1. York

[46] York's written submissions begin with the following statement:

> First and foremost I am genuinely remorseful for having contributed to the financial loss to all and any investors in this matter. I have brought shame and humiliation upon myself and my family as a result and take full responsibility for my actions.

[47] York submits that he has separated himself from social or community activities out of shame and to spare his family the humiliation of his actions. He submits that he has been prescribed anti-anxiety medication since 2008 and as a result of other health problems, "[t]he quality and length of my remaining lifespan in many regards is neither high nor long."

[48] York identifies several mitigating factors, and distinguishes his conduct from that of Schwartz and Runic. York submits that:

- he is an unrepresented respondent;
- he cooperated with the Commission during the investigation;
- he did not attempt to hide his gains from his activities, unlike Runic;
- he has advised Staff that he will give up any claim to monies held by Munket Capital Holdings Inc. ("**Munket**");
- he has never echoed Schwartz's disparaging sentiments or lack of respect for the Commission and was respectful to all parties during the Merits Hearing, unlike Schwartz;
- he has not joined Schwartz in appealing the Merits Decision; and
- he has not been the subject of any prior regulatory findings or criminal conviction.

[49] York submits, considering these factors, and particularly considering the roles played by Schwartz and Runic, that the administrative penalty sought by Staff against him is excessive and disproportionate, compared to previous decisions – *Lyndz Sanctions supra*, *Goldpoint Sanctions, supra*, *Re Pogachar* (2012), 35 O.S.C.B. 6479 ("***Pogachar Sanctions***"), *Re Hibbert* (2012), 35 O.S.C.B. 8583 ("***Hibbert Sanctions***") and *Richvale Sacntions, supra*.

[50] In any event, York submits that he is unable to pay the amounts requested, given his current and future financial circumstances.

2. Schwartz

[51] Schwartz, in his "Reply to the Panel's Order of March 25, 2013", stated that he would appeal the Merits Decision by April 25, 2013 and "cannot and should not" give submissions on sanctions and costs. Schwartz also filed several documents called "Notice of Appeal". In his documents filed with the Commission, Schwartz:

- restated his submissions on institutional bias, which were dismissed by Commissioner Carnwath in December 2010 (the Stay Motion and the Stay Decision are described at paragraphs 12-14 of the Merits Decision);
- restated his submissions on attitudinal bias, which we dismissed during the Merits Hearing (the Bias Motion is described at paragraphs 50-61 of the Merits Decision);
- restated his submission, which we rejected in the Merits Decision, that the Euston Order expired at the beginning of the June 9, 2006 temporary order hearing, or alternatively, at the end of that hearing, and was not continued after June 9, 2006 (see paragraphs 545-557 of the Merits Decision); and
- submitted that the Commission's findings that he contravened sections 25(1)(a) and 53(1), 126.1(b), 129.2 and 122(1)(c) of the Act were unfounded and unreasonable, amongst other grounds.

[52] We have disregarded these submissions, which relate to matters to be decided by the Divisional Court on any appeal or judicial review, and have no bearing on the sanctions and costs issues before us in this proceeding.

[53] In his May 4, 2013 email with respect to costs, Schwartz submitted that section 17.1 of the SPPA allows costs awards only where "the conduct or course of conduct of a party has been unreasonable, frivolous or vexatious or a party has acted in bad faith."

3. Oliver

[54] At the Sanctions and Costs Hearing, Oliver read a statement in which he acknowledged the seriousness of the allegations and took no issue with our findings. He noted that in the Merits Decision we found him to have been a salesman only, and not a directing mind of York Rio. He submitted that he has taken steps to address the substance abuse issues that clouded his judgement during the Material Time, and that he is trying to obtain gainful employment. Oliver took no issue with Staff's request that he be ordered to disgorge the approximately $118,000 he earned in commissions, but submitted that the administrative penalty of $550,000 that was requested by Staff is harsh and excessive, and that he is unable to pay it.

4. Valde

[55] Valde submitted that when he started working for York Rio in 2007, he relied on what other people told him about York Rio and York, and was shown on a computer that the shares of York Rio were registered with the appropriate securities commission. He was given a sales script, and worked at York Rio for a little over a year. He believed that the investors he called had been qualified as accredited investors before he called them, and said he had the same information that was given to the investors. Valde also submitted that he was 70 years old at the time of the Sanctions and Costs Hearing, and could not afford to pay the sanctions requested by Staff.

C. Staff Reply Submissions

[56] Staff accepts York's statement that he is genuinely remorseful, but submits that York, by stating that he takes no issue with our findings in the Merits Decision, is

admitting that he engaged in fraud. Staff submits that despite York's attempt to distance himself from Schwartz and Runic, York played a key role in York Rio, including directing the flow of funds from one fraudulent entity to another and receiving $4.1 million, which was used, ultimately, for his benefit or the benefit of his friends and family.

[57] In brief reply to York's submissions with respect to Munket, Staff states that on October 21, 2008, Staff froze assets in the Munket account at Toronto Dominion Canada Trust (the "**Munket Account**") and that the funds, which currently total $43,133.25, remain frozen pursuant to orders of the Ontario Superior Court of Justice. Staff confirms that on April 28, 2013, York, who was the sole director of Munket and the sole signatory on the Munket Account, sent an email to Staff, abandoning any claim to the monies held in the Munket Account. Staff submits that this email can be considered in some mitigation of any sanctions or costs, but asks us to keep in mind that the email was sent after the Merits Decision was issued.

[58] In reply to Schwartz's correspondence, Staff submits that it does not assist the Commission in respect of sanctions or costs.

[59] In reply to Oliver's submissions, Staff acknowledges Oliver's substance abuse problems and accepts that Oliver's statement "is a heartfelt expression of remorse", but points out that securities worth approximately $1.1 million were distributed through Oliver's illegal efforts.

[60] Staff also submits, in reply to the submissions of Oliver and Valde, that ability to pay is a factor to be considered with respect to administrative penalties, but not with respect to disgorgement orders.

V. APPROPRIATE SANCTIONS IN THIS MATTER

A. Market Participation Orders

[61] The Individual Respondents' conduct is deserving of the most serious condemnation. They knowingly engaged in a prolonged fraudulent scheme, for their personal benefit, that was designed to deceive investors and regulators. Their disregard for investors and contempt for Ontario securities law warrants market participation orders that permanently ban them from any position of trust, authority or direction in Ontario capital markets, prohibit them from trading or acquiring securities on any basis, without any exception or carve-out, and prohibit them from telephoning from within Ontario to any residence within or outside Ontario for the purpose of trading in securities.

[62] Accordingly, the market participation orders requested by Staff pursuant to clauses 2, 2.1, 3, 7, 8, 8.2, 8.4 and 8.5 of subsection 127(1) of the Act and pursuant to section 37 of the Act will be granted, except for the request for an order prohibiting the trading of York Rio or Brilliante securities, which was not requested in the Notice of Hearing (*Re Rex Diamond Mining Corp.* (2009), 32 O.S.C.B. 6467, *Lyndz Sanctions*, *supra* and *Re FactorCorp Inc. et al.* (2013), 36 O.S.C.B. 9361) and was withdrawn by Staff at the Sanctions and Costs Hearing (see paragraph 29 above). With respect to the latter point, we note Staff's submission that York Rio and Brilliante securities are not currently trading, and that our orders will permanently ban York Rio and Brilliante and

each of the Individual Respondents in this matter from trading or acquiring any securities, including York Rio or Brilliante securities.

B. Disgorgement

[63] Pursuant to clause 10 of subsection 127(1) of the Act, if a person or company has not complied with Ontario securities law, the Commission has power to order the person or company to disgorge to the Commission any amounts obtained as a result of the non-compliance. Disgorgement is intended to ensure that a person or company does not retain any financial benefit from non-compliance with the Act and to provide specific and general deterrence (*Limelight Sanctions*, *supra*, at paragraph 47, *Sabourin Sanctions*, *supra*, at paragraph 65).

[64] The Commission has held that all amounts obtained from investors as a result of non-compliance with Ontario securities law can be ordered disgorged, not just the profits (*Limelight Sanctions*, *supra*, at paragraph 49). Staff bears the onus of proving what amounts were obtained as a result of non-compliance with Ontario securities law (*Sabourin Sanctions*, *supra*, at paragraph 67).

[65] In *Limelight Sanctions*, the Commission set out a non-exhaustive list of the factors to be considered when contemplating a disgorgement order, in addition to the general sanctioning factors listed at paragraphs 30-36 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 other market participants.
>
> (*Limelight Sanctions*, *supra*, at paragraph 52)

[66] We agree with the principle, set out in *Limelight Sanctions*, that all amounts obtained by a respondent from illegal activity are disgorgeable, not just the profits. We also accept that, as established in *Re Xi Biofuels Sanctions and Costs* (2010), 33 O.S.C.B. 10917, at paragraph 73, the Commission's authority to order disgorgement of "amounts obtained" includes amounts received or disposed of by a respondent.

[67] We find it appropriate, in this matter, to order full disgorgement from the Respondents to ensure that no Respondent benefits from non-compliance with Ontario securities law. However, although Staff's request for disgorgement orders against York Rio and its directing minds – York, Schwartz (during the Schwartz Period) and Runic (during the Runic Period) – is net of any amounts that may be paid by Robinson or Sherman in full or partial satisfaction of the disgorgement orders made against them, it fails to recognize that the York Rio Proceeds were initially deposited into the York Rio

Account, then flowed through a number of accounts controlled by York, Schwartz and Runic before their ultimate disbursement to the Individual Respondents (paragraphs 297-320 of the Merits Decision). As a result, the disgorgement orders requested by Staff, if paid in full by the Respondents, would result in disgorgement of approximately $34.8 million, almost twice the approximately $18 million obtained as result of the Respondents' non-compliance with Ontario securities law. The Commission's authority under paragraph 10 of subsection 127(1) of the Act is limited to ordering disgorgement of "any amounts obtained as a result of non-compliance with Ontario securities law".

[68] We are also concerned that the disgorgement orders requested by Staff may be unenforceable because the amount owing by any Respondent cannot be determined with certainty at any given time. Pursuant to section 19 of the SPPA, an order of the Commission may be filed in the Ontario Superior Court of Justice, and, on filing, is deemed to be an order of that Court and enforceable as such. To that end, subsection 17(2) of the SPPA says, "A tribunal that makes an order for the payment of money shall set out in the order the principal sum, and if interest is payable, the rate of interest and the date from which it is to be calculated." We are unable to order the payment of a principal sum based on the form of orders requested by Staff.

[69] Finally, we accept York's submission that it would be unfair to make him jointly and severally liable, with York Rio, for the total amount obtained as a result of the York Rio Respondents' non-compliance with Ontario securities law, without also imposing the same joint and several responsibility on Schwartz and Runic for the amounts obtained by York Rio during, respectively, the Schwartz Period and the Runic Period. We note that it would be very difficult to determine the basis for joint and several disgorgement orders against the three directing minds in this case because of the different and overlapping roles they played throughout the Material Time and because of the commingling of funds, which flowed through a number of accounts controlled by or associated with the Respondents before their ultimate disposition by the Individual Respondents.

[70] In these circumstances, we will order each of the Individual Respondents to disgorge to the Commission the amount that he obtained as a result of his non-compliance with the Act, in relation to the York Rio Investment Scheme, on a joint and several basis with York Rio, and in relation to the Brilliante Investment Scheme, on a joint and several basis with Brilliante. This form of order recognizes the different roles played by the Individual Respondents, deprives each Respondent of his ill-gotten gains, and is more readily enforceable against each Respondent.

[71] Accordingly, we will order that the Individual Respondents disgorge the following amounts to the Commission, totalling approximately $16.7 million, all of which payments are to be designated for allocation or use by the Commission in accordance with subsection 3.4(2)(b) of the Act:

(a) York shall disgorge to the Commission, on a joint and several basis with York Rio, $4.1 million that he obtained as a result of his non-compliance with Ontario securities law in relation to the sale of York Rio securities (paragraph 432 of the Merits Decision);

(b) Schwartz shall disgorge to the Commission, on a joint and several basis with York Rio, $2.75 million that he obtained as a result of

his non-compliance with Ontario securities law in relation to the sale of York Rio securities (paragraph 530 of the Merits Decision);

(c) Runic shall disgorge to the Commission, on a joint and several basis with York Rio, $9.2 million that he obtained as a result of his non-compliance with Ontario securities law in relation to the sale of York Rio securities (paragraph 608 of the Merits Decision);

(d) Demchuk shall disgorge to the Commission, on a joint and several basis with York Rio and Brilliante, $218,833.74 that he obtained as a result of his non-compliance with Ontario securities law in relation to the sale of York Rio and Brilliante securities (paragraph 647 of the Merits Decision);

(e) Oliver shall disgorge to the Commission, on a joint and several basis with York Rio, $118,615.91 that he obtained as a result of his non-compliance with Ontario securities law in relation to the sale of York Rio securities (paragraph 680 of the Merits Decision);

(f) Valde shall disgorge to the Commission, on a joint and several basis with York Rio and Brilliante, $193,435.26 that he obtained as a result of his non-compliance with Ontario securities law in relation to the sale of York Rio and Brilliante securities (paragraph 700 of the Merits Decision); and

(g) Bassingdale shall disgorge to the Commission, on a joint and several basis with York Rio and Brilliante, $155,595.40 that he obtained as a result of his non-compliance with Ontario securities law in relation to the sale of York Rio and Brilliante securities (paragraph 731 of the Merits Decision).

[72] Approximately $5 million worth of assets has been frozen by orders of the Commission and the British Columbia Securities Commission (paragraphs 8-11 of the Merits Decision). As noted at paragraph 48 above, York has stated that he will not claim any of the funds in the Munket Account. Staff notes that Runic, in his compelled examination, admitted that the funds that are frozen in British Columbia as well as the funds that were used to buy the Aurora Property are traceable to York Rio investors (paragraphs 584-588 of the Merits Decision). Staff submits that these admissions may facilitate Staff's attempts to recover the frozen assets, which may affect the disgorgement order. For clarity, we will add a clause to our disgorgement order reflecting section 144 of the Act, which provides that the Commission "may make an order revoking or varying a decision of the Commission on the application of the Executive Director or a person or company affected by the decision, if in the Commission's opinion the order would not be prejudicial in the public interest".

C. Administrative Penalties

[73] Staff seeks administrative penalties from the Respondents totalling approximately $27.1 million, including penalties of $3 million from each of York Rio and Brilliante, and orders of $9 million from York, $5 million from Schwartz and $4.6 million from Runic.

[74] Paragraph 9 of subsection 127(1) of the Act authorizes the Commission to order an administrative penalty of "not more than $1 million for each failure to comply" with Ontario securities law. Staff explains the $3 million administrative penalty requested from each of York Rio and Brilliante, for example, as $1 million for each Respondent's failure to comply with a specific provision of Ontario securities law, on the basis of our finding, in the Merits Decision, that each of York Rio and Brillante contravened three provisions of the Act – subsections 25(1)(a) and 53(1) and section 126.1(b). In addition, the administrative penalties requested from each of the three directing minds are broken down as between the York Rio and Brilliante Investment Schemes. For example, York's $9 million administrative penalty is explained as $5 million for his contraventions of subsections 25(1)(a) and 53(1), subsection 38(3), section 126.1(b) and section 129.2 in relation to the York Rio Investment Scheme, plus $4 million for his contraventions of subsections 25(1)(a) and 53(1), section 126.1(b) and section 129.2 in relation to the Brilliante Investment Scheme.

[75] We accept Staff's submission that this case involved significant contraventions of the Act, including fraud, that the unlawful activity was planned, prolonged and widespread, and that the York Rio and Brilliante Investment Schemes were fraudulent from the outset. As a result of the Respondents' non-compliance with Ontario securities law, over 200 investors lost approximately $18 million. We accept that the amount of an administrative penalty should be more than the cost of doing business and should properly reflect the Commission's denunciation of the Respondents' wrongdoing and provide specific and general deterrence.

[76] We have considered the Commission's prior case-law in determining the administrative penalties that are proportionate to the circumstances in this matter. Staff relied on *Sabourin Sanctions*, *supra*, which involved investor losses of $33.9 million, in which the highest administrative penalty awarded by the Commission was $1.2 million awarded on a joint and several basis against Peter Sabourin and the five corporate respondents of which he was the directing mind. Staff also relied on *Al-tar Sanctions*, *supra*, *Richvale Sanctions*, *supra*, *Lyndz Sanctions*, *supra*, and *Goldpoint Sanctions*, *supra*, in all of which fraud cases the Commission ordered very substantial administrative penalties of several hundred thousand dollars, but not exceeding $750,000, against each of the individual respondents. In our view, these and other similar Commission decisions provide appropriate precedents for assessing proportionate administrative penalty sanctions in this case.

[77] As stated in paragraph 36 above, the Commission has held that the sanctions imposed must be proportionate to the conduct of the respondent in the circumstances of each case.

[78] In this case, we found, in the Merits Decision, that the three directing minds (York, Schwartz and Runic) knowingly defrauded investors, and benefitted greatly from their knowing participation in the fraudulent schemes. We are not persuaded that there are any mitigating factors with respect to York or Schwartz, and we accept that their conduct calls for the Commission to send the strongest message of specific and general deterrence. Further, we are not persuaded it is appropriate to reduce the award against York based on ability to pay, considering that he orchestrated and was the directing mind of the fraudulent York Rio and Brilliante Investment Schemes that resulted in

approximately $18 million of investor losses throughout the Material Time. Schwartz's conduct was especially egregious, considering his breach of the Commission's cease trade order in the Euston matter, his disregard for investors, and his utter lack of remorse. We are prepared to accept Staff's submissions that Runic's admissions to Staff during his compelled examination, his admission that the $5 million frozen funds in British Columbia came from investors and his admitted substance abuse issues at the Material Time are mitigating factors.

[79] Accordingly, we will order that each of York Rio, Brilliante, York, Schwartz and Runic shall pay an administrative penalty of $1 million.

[80] Staff submitted that the administrative penalties requested from the four salesmen (Demchuk, Oliver, Valde and Bassingdale) represent approximately twice the amount each obtained as a result of his non-compliance with Ontario securities law. We accept that the profit obtained or loss avoided as a result of the respondent's non-compliance with Ontario securities law is a relevant factor in determining the amount of an administrative penalty, and we also accept that the sanctions imposed by the Commission must be more than the cost of doing business, if they are to have deterrent effect. However, we do not accept that a mathematical approach is consistent with the principle that the sanctions imposed should be proportionate considering all the circumstances relating to the conduct of the respondent, any aggravating and mitigating circumstances, and the administrative penalties imposed in similar cases, amongst other factors (*M.C.J.C. Holdings*, *supra*, at 1134; *Re Rowan* (2009), 33 O.S.C.B. 91 ("***Rowan Sanctions***"), at paragraphs 157 and 195, *Sabourin Sanctions*, *supra*, at paragraph 56; *Lyndz Sanctions*, *supra*, at paragraph 95; and *Goldpoint Sanctions*, *supra*, at paragraphs 77-80).

[81] Demchuk, Oliver, Valde and Bassingdale engaged in securities fraud, but they were not the directing minds of the schemes and participated and benefitted to a much more limited degree than York, Runic and Schwartz. We find it appropriate to consider their relatively less important roles in the schemes in determining a proportionate administrative penalty to be awarded against them. We also accept that ability to pay is a factor, though not a significant factor, in our assessment of the appropriate administrative penalty to be ordered against them. Considering all the circumstances, we will order Demchuk to pay an administrative penalty of $200,000, Oliver to pay $75,000, Valde to pay $190,000 and Bassingdale to pay $150,000, all of which payments are to be designated for allocation or use by the Commission in accordance with subsection 3.4(2)(b) of the Act.

[82] We have also considered the proportionality of the disgorgement and administrative penalty orders made against each Respondent, and the global sanctions ordered against all of the Respondents. We note that the disgorgement and administrative penalties ordered against the Respondents total approximately $22.3 million, comprised of $1 million ordered against each of York Rio and Brilliante, $5.1 million ordered against York, $3.75 million ordered against Schwartz, $10.2 million ordered against Runic, $418,833.74 ordered against Demchuk, $193,615.91 ordered against Oliver, $383,435.26 ordered against Valde, and $305,595.40 ordered against Bassingdale. These very substantial orders will send the strongest message of specific and general deterrence to the Respondents and like-minded individuals.

D. Subsection 3.4(2)(b)

[83] Staff requested that amounts received in satisfaction of the disgorgement and administrative penalty orders be "designated for allocation to or for the benefit of third parties pursuant to section 3.4(2)(b) of the Act". Subsection 3.4(2), as amended, provides that money received by the Commission in satisfaction of administrative penalty or disgorgement orders shall be paid into the Consolidated Revenue Fund, other than money:

> (b) that is designated under the terms of the order or settlement,
>
> (i) for allocation to or for the benefit of third parties, or
>
> (ii) for use by the Commission for the purpose of educating investors or promoting or otherwise enhancing knowledge and information of persons regarding the operation of the securities and financial markets.

[84] In accordance with this provision, monies received in satisfaction of our disgorgment and administrative penalty orders shall be designated for allocation or for use by the Commission, at the discretion of the Commission, pursuant to section 3.4(2)(b) of the Act.

E. Reprimand

[85] For all the reasons stated, the Respondents are reprimanded.

VI. COSTS

A. Staff's Submissions

[86] Staff submits that the Commission should order the Respondents to pay a portion of the Commission's investigation and hearing costs in the amount of $430,828.75. Staff seeks an order that York Rio, Brilliante, York and Schwartz pay costs of $340,828.75, for which they shall be jointly and severally liable, and that Runic pay costs of $50,000, for which he shall be severally liable. Staff also seeks costs orders of $10,000 against each of Demchuk, Oliver, Valde and Bassingdale.

[87] Staff submits that in preparing its Bill of Costs, it:

- employed a conservative approach;
- used only a portion of the hours incurred by the investigators – Vanderlaan and Ciorma, and by the two Senior Litigation Counsel who appeared during the Merits Hearing – Hugh Craig ("**Craig**") and Cameron Watson ("**Watson**");
- claimed no time related to the investigation and hearing in this matter for persons other than Vanderlaan, Ciorma, Craig and Watson;
- claimed no time for Craig prior to January 1, 2011;
- claimed no time for preparing or attending at the Sanctions and Costs Hearing;

- claimed no amounts for disbursements; and
- used the Commission's standard schedule of hourly rates – $185 per hour for investigation employees, and $205 per hour for litigation employees.

[88] Staff provided the Fisher Affidavit in support of its request for costs. Part 1 of the Bill of Costs is a chart showing the breakdown of the total costs requested:

Investigator Costs: Vanderlaan and Ciorma (February 12, 2008 to December 31, 2011)			
Investigator	**Number of Hours**	**Hourly Rate**	**Total Cost**
Vanderlaan	1,035.0	$185	$191,475.00
Ciorma	483.5	$185	$89,447.50
Litigator Costs: Craig and Watson (January 1-December 31, 2011)			
Litigator	**Number of Hours**	**Hourly Rate**	**Total cost**
Craig	343.5	$205	$70,417.50
Watson	387.75	$205	$79,488.75
Total Investigator and Litigator Costs			**$430,828.75**

[89] Staff provided an Appendix for each of the investigators and litigators, breaking down the hours claimed by tasks. For example, Craig's 343.5 hours are broken down into analysis (28.75 hours), attending hearing/court proceeding (88.5 hours), conducting interviews (10 hours), preparing hearing/court proceeding (198.25 hours), and preparing proceeding documents (18 hours). No supporting time-sheets or dockets were provided, although Fisher attests that she relied on a docket summary when preparing the bill of costs.

B. The Respondents' Submissions

[90] As stated at paragraph 53 above, Schwartz submitted that section 17.1(2) of the SPPA allows costs awards only where "the conduct or course of conduct of a party has been unreasonable, frivolous or vexatious or a party has acted in bad faith."

[91] None of the other Respondents made specific submissions on costs, though York, Oliver and Valde made general submissions, as stated above, with respect to their inability to pay the total sanctions and costs amounts requested by Staff.

C. Analysis and Conclusions on Costs

1. Application of the SPPA

[92] Schwartz submits that our power to award costs is limited by subsection 17.1(2) of the SPPA, which states:

> 17.1(2) A tribunal shall not make an order to pay costs under this section unless,
>
> (a) the conduct or course of conduct of a party has been unreasonable, frivolous or vexatious or a party has acted in bad faith; and
>
> (b) the tribunal has made rules under subsection (4).

[93] The Commission's Rules are made under the SPPA and must be consistent with it, and in the case of any conflict between the SPPA and the Rules, the SPPA prevails (SPPA sections 25.1 and 32, Rule 1.2(2)). However, subsection 17.1(6) of the SPPA expressly preserves the authority of a tribunal to order costs in circumstances other than those set out in subsection 17.1(2)(a), if the order is made under the authority of a statutory provision that was already in force on February 14, 2000. Subsection 17.1(6) is as follows:

> Despite section 32, nothing in this section shall prevent a tribunal from ordering a party to pay all or part of another party's costs in a proceeding in circumstances other than those set out in, and without complying with, subsections (1) to (3) if the tribunal makes the order in accordance with the provisions of an Act that are in force on February 14, 2000.

[94] In *Rowan Sanctions*, *supra*, the Commission stated:

> The Commission's jurisdiction to award costs is established by section 127.1 of the Act (enacted in December 1999). The application of that provision is expressly contemplated by subsection 17.1(6) of the SPPA. A costs award by the Commission is not made "under" section 17.1 of the SPPA as argued by the Respondents. This provision does not apply to the present proceeding.

[95] Schwartz has given us no reason to depart from the Commission's reasons in *Rowan*, with which we agree. Our authority to award costs is set out in section 127.1 of the Act and in Rule 18, and is not limited by subsection 17.1(2)(a) of the SPPA.

2. Appropriate Costs in this Proceeding

[96] Pursuant to section 127.1 of the Act, the Commission may order a person or company to pay costs of the investigation and/or the hearing if the Commission is satisfied that the person or company has not complied with the Act or has not acted in the public interest. As we have noted at paragraph 27 above, we found, at the conclusion of the Merits Hearing, that the Respondents have not complied with the Act and have not acted in the public interest.

[97] Rule 18.2 of the Commission's Rules provides that the Commission may consider the following factors in exercising its discretion to order costs against a person or company under section 127.1 of the Act:

(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;

(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.

[98] In this case, we have considered the following factors in awarding costs:

- The York Rio and Brilliante Investment Schemes were related and entirely fraudulent scams, and as a result of the Respondents' non-compliance with Ontario securities law, investors lost approximately $18 million. This proceeding involved the most serious misconduct and caused significant harm to investors.
- To effect the fraudulent scheme, the three directing minds – York, Schwartz (during the Schwartz Period) and Runic (during the Runic Period) – participated in the flow of investor funds through a number of bank accounts in an attempt to hide their fraudulent conduct from investors and regulators and to protect their ill-gotten gains. Tracing the flow of funds from investors through to their ultimate use by or for the benefit of the Respondents and their families and friends added significantly to the factual complexity of the investigation and the hearing.
- Throughout the Merits Hearing, we gave very considerable leeway to Schwartz and York because they were not represented by counsel, for example, by repeatedly waiving the time limits set out in the Rules for filing and serving motion materials. However, their self-represented status does not explain or excuse their conduct. As stated above, Schwartz brought two motions before the start of the Merits Hearing (a Stay Motion and an Adjournment Motion) and three motions during the Merits Hearing (the Search Warrant Motion, the Exclusion of Evidence Motion and the Bias Motion). York joined with Schwartz in the two pre-hearing motions and the Search Warrant Motion. Although all these motions were dismissed with reasons, Schwartz and York repeated the positions they had taken in these motions in their closing submissions at the Merits Hearing. The conduct of Schwartz and York in pursuing their motions resulted in significant delays in concluding the Merits Hearing and caused the Commission to waste its resources in what were, essentially, attempts to obstruct or delay the proceeding (paragraphs 32-49 of the Merits Decision).

- In cross-examining the investor witnesses called by Staff, Schwartz and York made clear their view that the investors were responsible for their losses. Their callous disregard for their obligations to investors and their obvious lack of concern about the consequences of their actions was a significant aggravating factor in this matter (paragraphs 288 and 489-494 of the Merits Decision).
- Runic was a directing mind of York Rio and Brilliante during the Runic Period, and was a key player in raising approximately $12 million from York Rio and Brilliante investors. He also played a leading role, during the Runic Period, in flowing investor funds through various bank accounts in Ontario and British Columbia, using investor funds to buy the Aurora Property, and attempting to transfer other funds offshore. Runic also evaded the Commission's attempt to serve him with a section 13 summons for some time, but eventually provided compelled evidence to the Commission, and made a number of admissions. He did not attend the Merits Hearing or the Sanctions and Costs Hearing.
- Staff proved its allegations except for its allegations against Oliver with respect to Brilliante and certain of its allegations of prohibited representations against Runic, Demchuk and Bassingdale (see paragraph 26 above).

[99] Considering all these factors, we find it appropriate to award Staff a significant portion of the costs it requested. However, we find it appropriate to discount the amounts requested by 20% because of Staff's non-compliance with the requirements for supporting documentation set out in Rule 18.1(2)(b). Accordingly, we will make the following costs orders against the Respondents:

- an order pursuant to subsection 127.1 of the Act that York Rio, Brilliante, York and Schwartz shall pay $272,500 of the Commission's costs of investigation and the hearing of this matter, for which they shall be jointly and severally liable;
- an order pursuant to subsection 127.1 of the Act that Runic shall pay $40,000 of the Commission's costs of investigation and the hearing of this matter; and
- an order pursuant to subsection 127.1 of the Act that each of Demchuk, Oliver, Valde and Bassingdale shall pay $8,000 of the Commission's costs of investigation and the hearing of this matter.

VII. CONCLUSION

[100] For the reasons given, we find that it is in the public interest to make the following orders:

1. pursuant to clause 2 of subsection 127(1) of the Act, trading in any securities by York Rio, Brilliante, York, Runic, Schwartz, Demchuk, Oliver, Valde and Bassingdale shall cease permanently;
2. pursuant to clause 2.1 of subsection 127(1) of the Act, the acquisition of any securities by York Rio, Brilliante, York, Runic, Schwartz, Demchuk, Oliver, Valde and Bassingdale is prohibited permanently;
3. pursuant to clause 3 of subsection 127(1) of the Act, any exemptions contained in Ontario securities law do not apply to York Rio, Brilliante,

York, Runic, Schwartz, Demchuk, Oliver, Valde and Bassingdale permanently;

4. pursuant to clause 7 of subsection 127(1) of the Act, each of York, Runic, Schwartz, Demchuk, Oliver, Valde and Bassingdale shall resign any position he holds as a director or officer of an issuer;

5. pursuant to clause 8 of subsection 127(1) of the Act each of York, Runic, Schwartz, Demchuk, Oliver, Valde and Bassingdale is prohibited permanently from becoming or acting as a director or officer of any issuer;

6. pursuant to clause 8.2 of subsection 127(1) of the Act, each of York, Runic, Schwartz, Demchuk, Oliver, Valde and Bassingdale is prohibited permanently from becoming or acting as a director or officer of a registrant;

7. pursuant to clause 8.4 of subsection 127(1) of the Act, each of York, Runic, Schwartz, Demchuk, Oliver, Valde and Bassingdale is prohibited permanently from becoming or acting as a director or officer of an investment fund manager;

8. pursuant to clause 8.5 of subsection 127(1) of the Act, each of York, Runic, Schwartz, Demchuk, Oliver, Valde and Bassingdale is prohibited permanently from becoming or acting as a registrant, as an investment fund manager or as a promoter;

9. pursuant to section 37 of the Act, each of York, Runic, Schwartz, Demchuk, Oliver, Valde and Bassingdale is prohibited permanently from telephoning from within Ontario to any residence within or outside Ontario for the purpose of trading in any security or any class of securities;

10. pursuant to clause 9 of subsection 127(1) of the Act, each of the Respondents shall pay an administrative penalty in the following amounts, which shall be designated for use or allocation by the Commission pursuant to subsection 3.4(2)(b) of the Act:

    (a) York Rio shall pay an administrative penalty of $1 million;

    (b) Brilliante shall pay an administrative penalty of $1 million;

    (c) York shall pay an administrative penalty of $1 million;

    (d) Schwartz shall pay an administrative penalty of $1 million;

    (e) Runic shall pay an administrative penalty of $1 million;

    (f) Demchuk shall pay an administrative penalty of $200,000;

    (g) Oliver shall pay an administrative penalty of $75,000;

    (h) Valde shall pay an administrative penalty of $190,000; and

    (i) Bassingdale shall pay an administrative penalty of $150,000;

11. pursuant to clause 10 of subsection 127(1) of the Act, each of the Respondents shall disgorge to the Commission the following amounts, which shall be designated for use or allocation by the Commission pursuant to subsection 3.4(2)(b) of the Act:

    (a) York shall disgorge to the Commission, on a joint and several basis with York Rio, $4.1 million;

    (b) Schwartz shall disgorge to the Commission, on a joint and several basis with York Rio, $2.75 million;

    (c) Runic shall disgorge to the Commission, on a joint and several basis with York Rio, $9.2 million;

    (d) Demchuk shall disgorge to the Commission, on a joint and several basis with York Rio and Brilliante, $218,833.74;

    (e) Oliver shall disgorge to the Commission, on a joint and several basis with York Rio, $118,615.91;

    (f) Valde shall disgorge to the Commission, on a joint and several basis with York Rio and Brilliante, $193,435.26;

    (g) Bassingdale shall disgorge to the Commission, on a joint and several basis with York Rio and Brilliante, $155,595.40;

    (h) for clarity, Staff or any Respondent may apply to the Commission, pursuant to section 144 of the Act, to vary or revoke clauses 11(a) - (g) of this Order in the event of a change in circumstances; and

12. pursuant to section 127.1 of the Act, the Respondents shall pay the Commission's costs of the investigation and hearing in the following amounts:

    (a) York Rio, Brilliante, York and Schwartz shall pay costs of $272,500 on a joint and several basis;

    (b) Runic shall pay costs of $40,000;

    (c) Demchuk shall pay costs of $8,000;

    (d) Oliver shall pay costs of $8,000;

    (e) Valde shall pay costs of $8,000; and

    (f) Bassingdale shall pay costs of $8,000.

DATED at Toronto this March 31, 2014.

"Vern Krishna" *"Edward P. Kerwin"*

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Vern Krishna, CM, QC Edward P. Kerwin