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

- and -

IN THE MATTER OF RICHARD OCHNIK AND
1464210 ONTARIO INC.

REASONS FOR DECISION RENDERED ORALLY ON MARCH 9, 2006
AND FOR ORDER DATED APRIL 12, 2006

Hearing: March 1, 2, 8, 9 and April 10, 2006.

Panel:	Paul M. Moore, Q.C.	-	Commissioner (Chair of the Panel)
	Robert W. Davis, FCA	-	Commissioner
	Davis L. Knight, FCA	-	Commissioner

Counsel:	Matthew Britton	-	On behalf of Staff of the Ontario Securities Commission
	Richard Ochnik	-	Respondent
	1464210 Ontario Inc.	-	Respondent

REASONS FOR DECISION RENDERED ORALLY ON MARCH 9, 2006 AND FOR ORDER DATED APRIL 12, 2006

OVERVIEW

A. The Hearing

[1] This was a hearing before the Ontario Securities 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 was in the public interest to make an order against Richard Ochnik and 1464210 Ontario Inc. (1464210).

[2] This matter arose out of a notice of hearing issued by the commission on September 19, 2005 in relation to a statement of allegations issued by staff of the commission on that same day.

[3] On March 9, 2006, at the end of the hearing on the merits, we found that the respondents had not complied with Ontario securities law and had not acted in the public interest. We also decided to provide the parties with an opportunity to make further submissions relevant to sanctions at a later date. Hence, we adjourned the hearing until April 10, 2006.

[4] On April 10, 2006, we resumed the hearing to consider submissions as to appropriate sanctions against the respondents. Ochnik was notified of the hearing by both staff and the Secretary's Office. Nevertheless, he chose not to appear at the sanctions hearing.

[5] On April 12, 2006, we issued an order regarding sanctions against each of the respondents.

[6] These are the reasons for our decision on the merits rendered orally on March 9, 2006, and for our order dated April 12, 2006 regarding sanctions against the respondents.

[7] At the hearing held on April 10, 2006, we also decided to hold a further hearing on the issue of costs in order to provide the respondents with the opportunity to test the validity of the costs claimed by staff. We directed staff to provide to the respondents the necessary documentation to allow them to review and assess these costs prior to that hearing.

B. Preliminary Motion

[8] The notice of hearing of September 19, 2005 scheduled the commencement of the hearing on the merits in this matter for Monday, October 24, 2005. Ochnik sought an adjournment to enable him to retain and instruct counsel. Staff did not oppose Ochnik's request. The commission granted Ochnik's request and adjourned the hearing to December 5, 2005. On December 5, 2005, Ochnik did not appear at the hearing. Staff advised the commission that they believed Ochnik had not retained counsel. We decided to adjourn the hearing on our own initiative to March 1, 2006 at 10:00 a.m. In doing so, we stated on the record that we would not look favourably on any last minute request by Ochnik seeking a further adjournment on the grounds that he was still seeking to retain

counsel. We asked staff to provide to Ochnik a transcript of the hearing with our warning to Ochnik. Staff confirmed to us that they did provide Ochnik with a copy of that transcript.

[9] On March 1, 2006, Ochnik was not in attendance at 10:00 a.m. Staff had no idea if Ochnik would appear. After waiting 10 minutes, we determined to proceed with the hearing. Ochnik arrived within the next 20 minutes. Ochnik asked us to adjourn the commencement of the hearing on the grounds that he was not represented by counsel. Ochnik also submitted that he had not been provided with timely disclosure of the case against him.

[10] Staff advised that disclosure had been provided to the respondents well beyond the minimum 10 days requirement stated at Rule 3.3 of the *Ontario Securities Commission Rules of Practice*. Indeed, Ochnik was advised that the disclosure material was available to him as early as January 10, 2006.

[11] Upon considering Ochnik's request for a further adjournment, the reasons provided by him for not having retained counsel, and having no assurance that he would be represented by counsel within a reasonable period of time, we denied Ochnik's request for a further adjournment.

[12] We determined that it was in the public interest for the commission to hear this matter as soon as possible. The need to deal expeditiously with allegations of misconduct is of particular concern in a case such as this where the allegations against the respondents, if proved, are serious. Furthermore, in order to be able to regulate the capital markets effectively, it must be clear to market participants that the commission can and will deal with matters such as these in a reasonably expeditious way.

[13] A party may be represented by counsel or agent in any proceeding before this commission pursuant to Rule 1.4(1) of our rules of practice. But an individual cannot insist that proceedings be suspended or adjourned indefinitely because he has not retained counsel. We have given Ochnik a reasonable opportunity to obtain counsel. He has not provided us with a reasonable and acceptable reason why he has not retained counsel.

[14] Throughout the hearing, Ochnik was not represented by counsel. We adapted the hearing process to provide enhanced flexibility to Ochnik. We explained procedure to him at length in order to ensure a fair hearing. We emphasised that he could cross-examine witnesses called by staff and raise any issue that might help his case. We explained to him that he would be able to call his own witnesses and examine them. We also explained that it was open to him to give his side of the story by giving his own testimony as a witness. We explained the difference between giving evidence as a witness under oath, and argument in support of his case.

[15] We explained the considerations that he should take into account when deciding to testify or not. He indicated, at first, that he would take the opportunity to testify. However, when provided with this opportunity, he advised us that he would not testify. Hence, we did not have the benefit of his direct evidence.

C. The Allegations

[16] Staff made the following allegations against the respondents:

> (a) Ochnik and 1464210 traded securities without being registered with the commission to trade securities and without an exemption from the requirement for registration, contrary to section 25 of the Act;
>
> (b) Ochnik and 1464210 distributed securities of 1464210 without the filing of a preliminary prospectus and prospectus and the obtaining of a receipt therefor from the Director, contrary to section 53 of the Act; and
>
> (c) Ochnik and 1464210 engaged in a RRSP/loan scheme, contrary to the public interest.

THE RESPONDENTS

[17] Ochnik is a contractor and resides in the Province of Ontario. Ochnik incorporated 1464210 to develop a property as a retirement complex in Listowel, Ontario. Ochnik was the president of 1464210.

[18] 1464210 is a private company incorporated under the laws of Ontario. Its constating documents prohibit it from distributing securities to the public and limit the number of its shareholders.

[19] Neither Ochnik nor 1464210 was registered to trade securities in Ontario.

THE EVIDENCE

A. Overview

[20] Counsel for staff adduced both oral and documentary evidence, some of which was hearsay.

[21] Evidence in commission proceedings is governed by section 15 of the *Statutory Powers Procedure Act*, R.S.O. 1990, c. S. 22 (the SPPA) which provides that the commission may admit evidence at a hearing "whether or not…[that evidence is] admissible as evidence in a court." Corroboration is an important factor in assessing the weight to be given to hearsay evidence (see: *Re E.A. Manning Ltd.* (1995), 18 O.S.C.B. 5317 at para. 28). In light of the potentially serious consequences for the respondents, we only relied on hearsay evidence which was corroborated by other evidence.

[22] Staff adduced in evidence the account documentation of 43 investors who opened accounts with T-D Waterhouse Canada Inc. (TD-W). Staff also filed in evidence questionnaires that were sent to investors in 1464210 and the responses that were received from these investors. Staff also filed a number of statements from investors. Some of these were sworn statements. Some statements arose from unsworn interviews that were tape-recorded by the lead investigator on the file. Staff also filed a series of documents that describe the loan program from the Evangelical Missionary Church of the Americas (the EMCA) and investments involving both 1464210 and Ronin Resources Inc., another company with which Ochnik was allegedly involved.

[23] Staff adduced evidence that showed Ochnik to be president of 1271229. The address of 1271229 is 3044 Bloor Street West, Suite 268A. This is the same address that appears on documents that describe the loan program from the EMCA.

[24] At the hearing, Ochnik sought to file two volumes of documents which had not been previously disclosed to staff. Ochnik had not disclosed these documents to staff within the minimum time limit of 10 days before the commencement of the hearing pursuant to Rule 3.3(1) of our rules of practice. Staff undertook to review the documents after the hearing on that day. Staff identified several documents among Ochnik's two volumes which it agreed could be filed as evidence. Staff also agreed that the remaining documents could be introduced in evidence by Ochnik through other witnesses or through Ochnik himself when he testified under oath.

[25] Staff called five witnesses: John Humphreys, the primary investigator in the case; Robert Brown, a mortgage broker who referred individuals who were interested in the loan program to Ochnik; Larry Smith, a self-employed financial advisor who invested in 1464210; Dino Pantaleo, a retired General Motor's employee who invested in 1464210; and Hatice Pakdil-Notidis (Pakdil), a representative with TD-W.

[26] Ochnik only called one witness, Judith Ann Gama. Although, Ochnik had not provided staff with a witness list and a witness statement pursuant to Rule 3.5 of the Rules of Practice, staff did not object to this witness.

B. Staff

[27] Staff's witnesses and documentation revealed the following.

[28] In February 2002, Ochnik met with Pakdil at TD-W and told her that various individuals wanted to invest in 1464210. At the request of Ochnik, TD-W agreed to establish accounts for them and to arrange for the transfer of the shares in 1464210 to the individuals.

[29] Following the meeting, Ochnik provided Pakdil with the documentation necessary to transfer the shares in 1464210 to the various individuals.

[30] Ochnik agreed with TD-W that 1464210 would pay a commission to TD-W equal to 7% of the funds paid into the clients' accounts.

[31] Between May 7, 2002 and November 18, 2002, the respondents were providing RRSP/loans to the public.

[32] Ochnik arranged for various individuals facing financial difficulty to invest in 1464210. These individuals were advised that if they used funds in their locked-in RRSPs or pensions and purchased shares in 1464210, they would receive a "non-repayable loan" for between 40 and 60% of their locked-in funds.

[33] There was a five-year loan program and a ten-year loan program. The ten-year loan program was used for the most part. The loans were stated to be forgivable i.e. not repayable.

[34] If the individuals were interested, they were referred to TD-W.

[35] After the investors opened accounts with TD-W, they accessed locked-in funds with other institutions and transferred them to their TD-W accounts.

[36] TD-W issued cheques to 1464210 from the accounts of investors.

[37] Ochnik picked up the cheques from TD-W. Ochnik provided share certificates for the investors.

[38] Humphreys testified that, through the investigation, he was able to obtain from TD-W the account documentation of 43 investors who opened accounts with TD-W. Based on the "new client application form" for each of the 43 investors, none of the investors were accredited investors. (The definition of "accredited investors" in effect at the time included people who had net assets excluding their home or their RRSPs of $1,000,000 or more or individuals who had an income of $200,000 or more and expected to have the same income the following year, or couples who had an income of $300,000 or more.)

[39] Humphreys testified that some of the individuals went to a TD-W branch to secure financial hardship application forms. There were certain circumstances in which a client or a person could claim hardship and thereby, without penalty, unlock their retirement funds. He explained that TD-W would arrange with the entity that held the locked-in funds for a transfer of those funds to TD-W. Usually, most of the funds were invested through the TD-W accounts in exchange for shares in 1464210. He testified that TD-W was getting a 7 percent commission for each transaction. We accepted his evidence.

[40] Brown testified that after having received a fax advertising "money to lend" he called the number and spoke to Ochnik. Brown explained that he placed advertisements inviting individuals

who needed loans with locked-in funds. Where the clients had locked-in funds, Brown processed the investment loan application and gave the individuals' names to Ochnik. Clients were then referred to the institution chosen by Ochnik for the facilitation of trade in securities. Once the trade had been facilitated, the money came back in the normal course.

[41] In the case of 1464210, Brown explained that it was the same process; however, a number of clients did not receive their non-repayable loans. Brown testified that Ochnik would avoid talking to the individuals who had not received their loans.

[42] In the cross-examination of Brown, Ochnik implied that Brown was acting on his own and not in conjunction with Ochnik, although no evidence was adduced to indicate this.

[43] Smith testified that he saw a newspaper article that discussed the possibility of freeing up locked-in RRSPs and ended up investing his pension funds in Ronin and later in 1464210. He was in serious need of money at the time and wanted a loan. His son was seriously ill. Neither he nor his wife could work. Hence, he resorted to accessing his locked-in pension funds.

[44] Smith testified that, initially, he could not understand how he could get some money upfront and still be guaranteed 10 percent on his investment, with the loan being forgivable. When inquiring into how the investment in Ronin worked, Ochnik provided him with a lengthy explanation to satisfy him of the legitimacy of the loan. According to Smith, Ochnik explained that if they could make more money with his money then he still had his money. Smith said that he thought about this explanation and believed that Ronin, by being given 10 years to invest with his money, could be able to provide the expected return on his investment. In 2000-2001, Smith invested $60,000 of his pension funds though Ochnik. This netted him a forgivable loan of $36,000. He invested a further $40,000 in a second transaction. This provided him with a forgivable loan of $24,000.

[45] In 2002, Smith sought to obtain a third loan by investing $40,000 in Ronin. However, he was told by Brown that Ronin had not filed the proper financial statements with TD-W and so TD-W was no longer involved with Ronin. Brown suggested that he invest in the same manner, but this time, in a numbered company. Smith confirmed that he invested in 1464210 and got a loan.

[46] Pantaleo testified that he was desperate for money in 2001. He had just separated from his wife. He was falling behind in rent and had lawyer expenses and medical expenses. When looking in the Yellow Pages, he saw an advertisement: "Bad credit" whatever, "we offer loans." As a result of this advertisement, he called Brown who told him that if he invested $150,000 in 150,000 shares of 1464210, he would be able to get a loan for 4 percent for 10 years, calculated to the amount of $86,000 in cash and $64,000 (interest and costs). Further, he was told by Brown that following the transfer of funds to 1464210, it would take about 72 hours for the funds to get released to him. Pantaleo testified that he never obtained the loan. He called Pakdil at TD-W to inquire into the situation. She referred him to Ochnik. When Pantaleo called Ochnik, Ochnik, at first, denied that he knew Brown. Pantaleo testified that Ochnik told him that he would repay him his investment but that it never happened.

[47] Pakdil testified that, during the first meeting with Ochnik and another officer of 1464210, Ochnik told her that he had a list of investors who had decided to invest in a private placement for a company that Ochnik owned and that it was a real estate development project. Ochnik told her that he was raising money through mortgages as well as investors that had decided to purchase shares in the private company. He told her that 30 to 40 investors were acquaintances, friends and family members, who had decided to invest and that he needed to set up accounts for them to facilitate a swap so that shares would go into the accounts and the cash would be sent to1464210. Ochnik told Pakdil that there were no loans associated with investments in 1464210.

[48] Following the transactions, Pakdil received several phone calls from individuals who had invested in 1464210. These individuals told her that they needed assistance from her because they had not received the loans that they were supposed to receive as a result of the transactions. She also testified that these individuals had been explicitly instructed not to notify or mention to TD-W that there existed a loan arrangement, and that if they did, they would not receive their loans.

[49] We also had before us the decision of this commission and reasons dated October 7, 2005, approving the settlement agreement between the commission and TD-W concerning allegations of conduct contrary to the public interest made by staff against TD-W relating to TD-W's role in this affair. In that settlement agreement, TD-W acknowledged that it failed to comply with (i) its "suitability" obligation to its clients, contrary to section 1.5 of Ontario Securities Commission Rule 31 - 505 (Conditions of Registration) and (ii) its obligations to deal with its clients fairly, by failing to disclose to its clients a commission paid to TD-W, contrary to section 2.1(2) of Rule 31 - 505.

[50] In the Settlement Agreement TD-W agreed:

> (i) To make restitution to its clients in the amount of monies that were deposited into the client accounts at TD-W and used to purchase shares of the private company, plus interest calculated by a formula to be agreed upon by staff and TD-W.
>
> (ii) To provide proof in writing to staff that restitution to its clients has been made.
>
> (iii) To make a settlement payment of $250,000 to the Commission for allocation to, and for the benefit of, third parties, under section 3.4 (2) of the Act.
>
> (iv) To provide a letter of comfort from its auditors to staff to confirm that TD-W has instituted new practices and procedures relating to preventing the facilitation of potential RRSP loan schemes.
>
> (v) Pursuant to clause 6 of subsection 127.1 of the Act, TD-W to be reprimanded.
>
> (vi) Pursuant to section 127.1 of the Act, to pay the sum of $125,000 in respect of the costs of the investigation and hearing in the matter.

C. Ochnik

[51] Ochnik called one witness, Judith Ann Gama. Gama testified that she co-brokered a couple of deals with Brown.

[52] Gama testified that Brown left threatening messages about Ochnik on her voice mail box in 2005. She testified that during a conversation with Brown, Brown told her that he was going to bring down Ochnik's company.

[53] Through Gama, Ochnik adduced in evidence an e-mail message from Gama dated February 16, 2006 where she reminds Ochnik of the alleged threats made by Brown in 2005. When asked during cross-examination whether this e-mail had been sent at the request of Ochnik, she denied that Ochnik had made such a request. However, she was unable to provide any logical reason or plausible context to explain why she sent this e-mail to Ochnik three weeks before this hearing.

[54] Much of Gama's evidence was not germane to the issues before us. Her testimony was aimed at discrediting the credibility of Brown. However, based on her cross-examination and answers to the panel, we found her testimony, although not germane, to be incredible. For example, in spite of her denials, the e-mail sent to Ochnik in February 2006 likely was prompted by Ochnik to be used as evidence in this hearing.

[55] There was also a troubling exchange during the re-examination of Gama by Ochnik where Ochnik asked her the odd question as to "whether she would lie for money". She provided an odd answer: "No, because I have other deals". Even when provided with an opportunity by Commissioner Knight to clarify this answer, she really didn't. Her answer was troubling because it implied that she would lie under oath to protect a business relationship.

[56] Although her evidence was not germane to the issues before us, her remarks were troubling and confirmed that, as a witness, she suffered from a serious lack of credibility.

[57] Following the cross-examination of Gama by staff, and the questioning of her by the panel, Ochnik inquired as to the nature of the questions that staff and the panel could ask him if he were to testify. In particular, he inquired as to whether questions of him could be limited to the issues narrowly defined, or if questions could be asked about other companies. Here is an except of our exchange with Ochnik:

> CHAIR: Thank you. You can step down. Mr. Ochnik. You're going to, in effect, be your own witness. Is that correct?
> MR. OCHNIK: I'm not on any witness list, and I think there was sufficient information here to cast sufficient doubt on the allegations by the Securities Commission as to whether or not any of the events have taken place. I have not spoken directly with counsel regarding the matter in question, and I feel kind of somewhat not at ease in testifying because I have not spoken with counsel. That's

what I have --
CHAIR: What we might do is take a ten-minute break and come back. You should consider this.
MR. OCHNIK: Yes.
CHAIR: We have to weigh the evidence. We have to decide who we're going to believe and who we're not going to believe. There are many questions that you might be able to answer. If you don't take the stand, then, we could draw the wrong inference. We could come to the wrong conclusion. If you do take the stand, you will be under oath and you will have to answer truthfully.
MR. OCHNIK: That's no problem.
CHAIR: And you will be subject to cross-examination by counsel and subject to questions from the panel. So you should decide what you're going to do. I'll give you ten minutes to consider that, and if you don't wish to testify, then, we'll conclude for today and begin argument -- unless, which I presume you're not, unless you're ready to go into argument now. But I presume we're not going to speed things up. We'll do things tomorrow at two o'clock. So why don't we take a ten-minute break.
MR. OCHNIK: Can I have one question then, please?
CHAIR: Sure.
MR. OCHNIK: Now, with my testimony today, the allegations are all regarding 146, that corporation.
CHAIR: Yes.
MR. OCHNIK: Are the questions that I'm going to be asked going to be in accordance to the allegations that have been brought up in accordance to 146 or will it be more of a fishing expedition to see --
CHAIR: Because you don't have a counsel to object, I will be more vigilant to make sure that the questions are relevant to the allegations. I must admit that I would have been a little stricter in your questioning of your witness because I think some of the objections that were being raised by counsel were valid as they weren't directly on point. They weren't relevant. But anything that goes to the credibility of the witnesses, or questions that relate directly to the evidence that we've heard, that you could throw some light on, certainly we would permit. But if it strayed outside of that, we would not permit it as being relevant. So the test would be, it's got to be relevant.
MR. OCHNIK: That was mainly part of my, because if we're going to go into other areas or into things that we haven't even spoken about, because I haven't spoken with counsel, I'm prepared to talk about 146, what happened in 146, what my role was in 146.
CHAIR: You should be aware though that the questions won't be limited, in the sense of questions that relate to companies like EMCA which relate this matter.
MR. OCHNIK: Yes, it does.
CHAIR: Things that Mr. Brown mentioned. The other thing, just in case, for instance, if there's something in your past that sheds light on your credibility, counsel would be free to raise that. So that if you had a prior conviction for fraud, things like that, although that might appear to be unrelated to this, it might go to

credibility.
MR. OCHNIK: Yes.
CHAIR: So that I don't want to give you an assurance that the questions will be narrow, but they will have to be relevant and they will have to be relevant to these allegations. Mr. Britton might want to --
MR. BRITTON: Yes. Just so there's no confusion, I did intend to cross-examine on the predecessor companies too because I do think they're directly linked to this and are part of the story. That's the concern. Like Ronin, for example, I think is clearly relevant.
CHAIR: Yes. And that was mentioned, Ronin, as one of the things. But it has to be related to this matter and not other matters that aren't related to this matter.
MR. OCHNIK: See, the thing is, that we're dealing with allegations for 146, and we're dealing with the future of a company, future of shareholders. And when you're dealing with issues, I have no problem answering regarding Ronin or with other companies, but what I'm concerned from a legal standpoint is how does that affect146 and the allegations pertaining to 146. If I was speeding on Wednesday --
CHAIR: That would not be relevant.
MR. OCHNIK: You see, that was mainly my concern.
CHAIR: No, and we will make sure the questions are relevant, and I will pay particular attention to that, that it has to be relevant. But don't assume that counsel is restricted. It's restricted to the allegations and it has to have relevance and it can't be a fishing expedition. We'll come back here in ten minutes. We'll take a recess and come back at approximately 25 to three.
MR. OCHNIK: Thank you.
--- Afternoon recess at 2:28 p.m.---
Upon resuming at 2:44 p.m.
CHAIR: Please be seated. Mr. Ochnik.
MR. OCHNIK: Yes. In the ten minutes, I just would like to say that I do not have counsel here, although I did prefer to have counsel, that in reflecting over the evidence that was brought forth from the Commission, I believe that the evidence that was brought forth is -- I believe all the evidence is in, and I believe that my testimony would only be repeating or rehashing what's already in front of the panel, and for that reason I'd like to not add my testimony to the...

[58] As a result, Ochnik did not take the opportunity to give evidence.

PARTIES' ARGUMENTS

A. Staff

[59] Staff submitted that Ochnik engaged in a RRSP/loan scheme between May 7, 2002 and November 18, 2002. Staff submitted that Ochnik incorporated 1464210 to develop a property as a retirement complex and arranged for various individuals with financial difficulty to invest in 1464210. Interested individuals were then referred to a registered representative at TD-W who

established accounts for them and arranged for the transfer of the shares in 1464210 to the individuals.

[60] Further, Staff submitted that the conditions surrounding the loan program (e.g. non-repayable loans) did not make any sense. Staff invited us to disregard completely the argument advanced by Ochnik that Brown was responsible for the loan scheme and impersonated himself as Ochnik. Staff raised the following questions: How could Ochnik not be involved in these loans? Why and how would Brown independently make or arrange non-repayable loans for lenders? What was Brown's motivation? What was any lender's motivation? Staff submitted that obviously, Brown was getting the money from Ochnik as part of the scheme.

[61] Staff submitted that the evidence establishes that Ochnik and 1464210 traded securities in Ontario without exemptions being available to them and distributed securities of 1464210 without the filing of a preliminary prospectus and prospectus and the obtaining of a receipt contrary to the Act.

B. Ochnik

[62] Ochnik submitted that there was no documentation before us to establish that he or 1464210 were involved in a RRSPs or locked-funds/loan scheme, nor was there any documentation to establish where the loans came from and if the individuals who were supposed to get a loan ultimately obtained the loan. Ochnik argued that the only evidence presented was that of individuals who said that they obtained loans from Brown. Out of the 43 individuals, he submitted that only 12 of them said that they had been promised a loan from Brown but none of them mentioned that they had been promised a loan from 1464210 or from Ochnik. Ochnik submitted that Brown, by faxing letters to investors and making them look like they were coming from him, was responsible for the loan scheme and impersonated himself as Ochnik, which was a fraudulent act.

[63] With respect to the allegations that Ochnik traded securities without being registered with the commission and without an exemption available to him, Ochnik submitted that TD-W's responsibility was to the account holders, the purchasers of the shares, that only TD-W had access to the clients' personal information and hence, only TD-W would have known whether or not the clients were accredited investors. He also submitted that TD-W was provided with full disclosure with respect to 1464210 and was invited to the property and was provided with photographs of the company.

[64] Further, Ochnik argued that Pakdil admitted that she had no experience with this kind of placement but nevertheless, signed a "know your client form". Ochnik argued that TD-W was the only company involved with the transactions, and that TD-W knew the terms of the prospectus exemptions requirements. TD-W had a responsibility to stop at the maximum number of investors if no other additional exemptions for accredited investors were available.

ONUS

[65] The applicable burden of proof in this case is the balance of probabilities. Staff has met this burden by providing clear and cogent evidence that satisfies us in a convincing manner that the allegations have been proved.

[66] In this case, staff had to establish that Ochnik engaged in trading in securities, distributed securities without a preliminary prospectus or a prospectus, and engaged in conduct contrary to the public interest.

[67] When staff discharged its burden of proof that the respondents traded without registration and distributed securities without a prospectus, the onus shifted to the respondents to establish that one or more exemptions from the registration and prospectus requirements were available to them. This they failed to do.

FINDINGS

[68] Virtually all of staff's evidence in this matter was uncontroverted, and, for the most part credible.

[69] We accepted the evidence of staff's witnesses: Humphreys, Smith, Pantaleo and Pakdil. We also relied, for the most part, on the evidence of Brown. With respect to the credibility of Brown, we concluded that the witness could be relied upon. Much of the evidence to which he referred us was not inconsistent with other evidence. Although Ochnik referred us to evidence that, he argued, went to the credibility and motivation of Brown in testifying, we concluded that generally, Brown's evidence on key points was credible. In the end, we believed that Brown was acting in conjunction with Ochnik in enticing investors to invest in 1464210 in return for forgivable loans.

[70] The following facts were established by the evidence.

[71] Prior and during 2002, loans were advertised to the public by way of small word advertisements in newspapers distributed in each province (except Saskatchewan). These ads stated "4% interest only loan. Don't cash out your RSPs, locked investments. Call" and had a toll free number which was 1-877-509-LOAN.

[72] Some investors were led to believe that the lender was the EMCA, although information about the loan program was sketchy. Other investors had no clear idea of who would be making the loan. They, however, were told that an investment in 1464210 was a prerequisite to receiving the loan.

[73] Documentation described Ochnik as president of 1271229. Documentation referring to EMCA shows the address of EMCA to be the same as the address of 1271229. Based on this and other evidence, we accepted as fact that EMCA or people behind EMCA were involved in the RRSP/locked-in funds loan scheme connected with investments in 1464210.

[74] In February 2002, Ochnik met with Pakdil and told her that various individuals wanted to invest in 1464210. At the request of Ochnik, TD-W agreed to establish accounts for them and to arrange for the transfer of the shares in 1464210 to the individuals.

[75] Between May 7, 2002 and November 18, 2002, the respondents engaged in a RRSP/locked-in funds loan scheme. Ochnik was the directing mind of the scheme.

[76] Individuals with serious financial difficulties called the phone number in the advertisement to obtain a loan.

[77] When inquiring about the loan, the individuals were then advised that if they collapsed their locked-in RRSPs or pensions and purchased shares in 1464210, they would receive a "non-repayable loan" for between 40 and 60% of their locked-in funds. The loans were conditional on the making of investments.

[78] Between June 7, 2002 and December 31, 2002, 43 clients of TD-W deposited approximately $1.5 million in their accounts. After commissions were paid to TD-W, the remainder of the monies were paid out to 1464210.

[79] The 43 individuals who invested in 1464210 were not accredited investors.

[80] Of the 43 clients, many did not receive their "non-repayable loans" that were promised to them.

[81] Ochnik would not answer inquiries from individuals about the loans or would provide misleading information. Ochnik offered to pay back one individual but never did.

[82] Neither TD-W, nor Pakdil, were aware that there were to be loans associated with the investments in the company's shares or that the investment was designed as a method to enable investors to withdraw assets from their locked in RRSPs.

[83] Pakdil specifically asked Ochnik whether there were loans associated with the investment and was advised by him that no loans were involved.

[84] Ochnik's acts of solicitation of investors, and facilitating the issue of shares and share certificates of 1464210 and other acts were in furtherance of trades, and constituted trading. By issuing its shares 1464210 was trading. Neither respondent was registered to trade. The issues of shares of 1464210 to investors were distributions of shares. The requirements of the Act for distributions of the shares were not complied with.

[85] At the time of the trading and distribution of shares of 1464210, there was an exemption from the registration and prospectus requirements of the Act available to issuers seeking to raise capital: the closely held issuer exemption, which allows an issuer to raise up to $3,000,000 from 35 persons

or less, excluding directors, officers, employees or former employees, who did not have to be accredited investors. Because, there were 43 investors in 1464210, the 35 investor limit was exceeded.

[86] The respondents failed to prove proper reliance by them on an applicable exemption.

[87] It is incumbent upon an issuer to bring itself within the parameters of an exemption in order to rely on it. The fact an issuer had done some due diligence inquiry will not help the issuer if all the parameters are not, in fact, met. However, bona fide and reasonable due diligence can be a mitigating factor in determining sanctions.

[88] There was no mitigating due diligence inquiry by the respondents.

[89] We rejected Ochnik's argument that the respondents relied on TD-W. TD-W was not acting on behalf of the respondents, but on behalf of its clients, the investors, although in a limited capacity. There was no evidence that TD-W assumed any duty to assist the respondents in their endeavour. Furthermore, TD-W was misled by Ochnik.

[90] TD-W's role was limited and was with respect to the account holders, the purchasers of the shares in 1464210. TD-W accepted instructions from the investors regarding the transactions because they were alleged to be made in connection with a private placement.

[91] TD-W was not purporting to give advice to investors nor was it purporting to engage in due diligence for the investors.

[92] In conclusion, the respondents breached the Act as alleged. They traded securities without being registered with the commission to trade securities and without an exemption from the requirement for registration contrary to section 25 of the Act, and they distributed securities of 1464210 without the filing of a prospectus and obtaining a receipt therefore from the Director, contrary to section 53 of the Act.

[93] The conduct of the respondents was contrary to the public interest in that the breaches of the Act by the respondents were done, not only without required disclosure, but also with misinformation and prevarication by Ochnik and others acting in conjunction with him, particularly in connection with an RRSP/loan scheme that was deliberately hidden from TD-W who were induced with deception to participate in facilitating investments in 1464210 and involving investors in financial difficulty who were induced to invest in 1464210.

[94] The RRSP/loan scheme took advantage of individuals who were financially vulnerable. The conduct of the respondents was not inadvertent. Rather, it was egregious and predatory.

SANCTIONS

A. The Hearing

[95] On April 10, 2006, we held a hearing to determine appropriate sanctions against the respondents and to determine whether an application should be made to the Superior Court of Justice for a declaration pursuant to subsection 128(1) of the Act that the respondents have not complied with Ontario securities law and that, if such declaration be made, the Superior Court of Justice make such further orders pursuant to subsection 128(3) of the Act as it considers appropriate including orders pursuant to subsection 128(3) clause 10 directing that the respondents repay to security holders monies paid for securities and orders pursuant to subsection 128(3) clause 13 requiring the respondents to compensate or make restitution to aggrieved parties, such as investors in 1464210, and perhaps TD-W.

[96] On March 30, 2006, staff provided the respondents with written submissions regarding the sanctions sought against them. The respondents did not file any responding submissions with respect to sanctions.

[97] Ochnik received a notice of the sanctions hearing from both staff and the Office of the Secretary but chose not to appear at the hearing. He did not communicate in any manner with staff or with the Office of the Secretary to seek an adjournment of the sanctions hearing. Pursuant to section 7 of the SPPA, where a party who has been given proper notice of a hearing fails to respond or to attend, the tribunal may proceed in the party's absence and the party is not entitled to any further notice in the proceeding.

[98] Hence, on April 12, 2006, following the hearing, we made an order as to appropriate sanctions against the respondents.

B. Staff's Submissions

[99] Staff submitted that the respondents engaged in deliberate dishonesty and that the duration and length of the sanctions should be designed to insure that investors are protected from the future misconduct of the respondents and to provide a message of general deterrence.

[100] Staff sought an order of the commission that:

> (a) pursuant to subsection 127(1) clause 3 of the Act, the exemptions contained in Ontario securities law not apply to the respondents, Ochnik and 1464210 Ontario Inc. (1464210) permanently or for such term as specified in the order;
>
> (b) pursuant to subsection 127(1) clause 6 of the Act, the respondents be reprimanded;

(c) pursuant to subsection 127(1) clause 2 of the Act, trading in securities by the respondents cease permanently or for such period as specified in an order;

(d) pursuant to subsection 127(1) clause 7 of the Act, Ochnik resign any positions that he may hold as an officer or director of any issuer;

(e) pursuant to subsection 127(1) clause 8 of the Act, Ochnik be prohibited from becoming or acting as a director or officer of any issuer;

(f) pursuant to section 127.1 of the Act, the respondents pay the costs of staff's investigation and the costs of related to this proceeding;

(g) such other orders as the commission deems appropriate.

[101] Staff also requested that the respondents be required to pay to the commission $30,720.75 as the costs of the commission related to the hearing of this matter.

[102] We decided to hold a further hearing on the issue of costs to provide the respondents with an opportunity to test the validity of the costs claimed by staff. We also directed staff to provide the necessary documentation to the respondents to allow them to review and assess these costs. This hearing will be held in the future.

C. Relevant Considerations for Imposing Sanctions

[103] The commission's mandate in upholding the purposes of the Act is set out at section 1.1:

a. to provide protection to investors from unfair, improper or fraudulent practices; and

b. to foster fair and efficient capital markets and confidence in capital markets.

[104] In accordance with paragraphs 2.1(2)(i) and (iii) of the Act, the commission is guided by certain fundamental principles in pursuing the purposes of the Act, including the requirement for "responsible conduct by market participants" and "timely, accurate and efficient disclosure of information." Further, the commission has regard to the principle set out in subsection 2.1(3) of the Act, that "[e]ffective and responsible securities regulation requires timely, open and efficient administration and enforcement of this Act by the Commission."

[105] The role of the commission in exercising its public interest jurisdiction is set out in *Mithras Management Ltd.* (1990), 13 O.S.C.B. 1600 at pp. 1610-1611:

… 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 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.

[106] Appropriate sanctions should be determined by considering the specific circumstances of the case at issue and be proportionate. As set out in *Re M.C.J.C. Holdings and Michael Cowpland* (2002), 25 O.S.C.B. 1133 at 1134 (Carswell):

> We have a duty to consider what is in the public interest. To do that, we have to take into account what sanctions are appropriate to protect the integrity in the marketplace…
>
> In doing this, we have to take into account circumstances that are appropriate to the particular respondents. This requires us to be satisfied that proposed sanctions are proportionately appropriate with respect to the circumstances facing the particular respondents.

[107] The commission also indicated in *Re Belteco Holdings Inc.* (1998), 21 O.S.C.B. 7743, and *Re Cowpland*, (2002), 25 O.S.C.B. 1133 at p. 1136, that it may consider the following factors when imposing sanctions on a respondent:

(a) the seriousness of the allegation proved;

(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 restraint of future conduct that is likely to be prejudicial to the public interest (with reference to past conduct)

(f) any mitigating factors;

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

(h) the reputation and prestige of the respondent; and

(i) the remorse of the respondent.

D. Appropriate Sanctions

[108] Having found that Ochnik and 1464210 engaged in a RRSP/loan scheme contrary to the public interest; traded securities without being registered with the commission to trade securities and without an exemption from the requirement for registration contrary to section 25 of the Act; and distributed securities of 1464210 without the filing of a preliminary prospectus and prospectus and the obtaining of a receipt contrary to section 53 of the Act, we concluded that the sanctions sought by Staff were appropriate.

[109] In particular, we found that a permanent cease trade order was necessary to provide protection to investors from unfair, improper or fraudulent practices of the respondents. We also found that any exemptions contained in Ontario securities law should not apply to the respondents permanently**.** In coming to this conclusion, we considered that the RRSP/loan scheme took advantage of individuals who were financially vulnerable. We also considered the fact that Ochnik was the directing mind in the RRSP/loan scheme and misled the public.

[110] In carrying out this scheme, Ochnik also engaged in deceptive behaviour with the representative of TD-W.

[111] There was no evidence in mitigation of the respondents' conduct in this case.

[112] In light of the egregiousness of Ochnik's conduct, we also found that it was appropriate to require him to resign any positions that he may hold as an officer or director of any issuer and to prohibit him from becoming or acting as a director or officer of any issuer permanently.

[113] We received no submissions that suggest a carve-out should be available to allow Ochnik to trade securities in limited circumstances. If the respondents wish to seek any carve-outs from the cease trade order, an application for an order pursuant to section 144 of the Act is available to them.

E. Subsection 128(3) of the Act

[114] The commission concludes that it is appropriate under the circumstances to make an application to the Superior Court of Justice for a declaration pursuant to subsection 128(1) of the Act that the respondents have not complied with Ontario securities law and that the Superior Court of Justice make such further orders pursuant to subsection 128(3) of the Act as it considers appropriate including orders pursuant to subsection 128(3) clause 10 directing that the respondents repay to security holders monies paid for securities and orders pursuant to subsection 128(3) clause 13 requiring the respondents to compensate or make restitution to aggrieved parties, such as investors in 1464210, and perhaps TD-W.

Dated at Toronto this 4th day of May, 2006.

“Paul M. Moore”

Paul M. Moore

“Robert W. Davis"

Robert W. Davis

“David L. Knight”

David L. Knight