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

AND

IN THE MATTER OF THOMAS VINCENT HINKE

REASONS AND DECISION ON THE MERITS RENDERED ON FEBRUARY 14, 2007 AND REASONS AND DECISION REGARDING SANCTIONS AND COSTS
(Sections 127 and 127.1 of the *Securities Act*)

Hearing:	February 14 and 28, 2007	
Panel:	Wendell S. Wigle, Q.C.	- Commissioner (Chair of the Panel)
	David L. Knight, FCA	- Commissioner
Counsel:	Anne Sonnen	- For Staff of the Ontario Securities Commission
	Thomas Hinke	- For himself

REASONS AND DECISION ON THE MERITS RENDERED ON FEBRUARY 14, 2007 AND REASONS AND DECISION REGARDING SANCTIONS AND COSTS

A. Overview

[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 was in the public interest to make an order against Thomas Vincent Hinke ("Hinke").

[2] Staff of the Commission ("Staff") alleged that Hinke breached a Commission order and settlement agreement dated May 1, 2006, and that Hinke made false statements to Staff and to the Commission.

[3] During the course of this hearing, Hinke represented himself and did not retain counsel.

[4] We held a hearing on the merits on February 14, 2007. At the close of the hearing, we rendered our decision orally and found that Hinke engaged in conduct contrary to the public interest. When considering Hinke's admissions and the evidence and submissions presented by the parties, we found that Hinke breached the Commission order and settlement agreement dated May 1, 2006, and that Hinke made false statements to Staff and the Commission.

[5] On February 28, 2007, we considered evidence and submissions from Staff and Hinke as to appropriate sanctions and costs against Hinke.

[6] These are the reasons for our decision on the merits rendered orally on February 14, 2007, and for our decision regarding sanctions and costs.

B. Background

i. The Respondent

[7] Hinke is an individual residing in Ontario. During the period between December 1996 and December 2000, Hinke was the President and Chief Executive Officer of Thermal Energy International Inc. ("TEI"). TEI was incorporated pursuant to the laws of Ontario and is a reporting issuer, as defined in the Act.

ii. History of the Proceedings Involving Hinke

(1) The First Settlement Agreement

(a) Conduct at Issue in the First Settlement Agreement

[8] Hinke's conduct during the period between December 1996 and December 2000

contravened securities law and was contrary to the public interest.

[9] Indeed, from December 1996 to December 2000, Hinke was an insider of a reporting issuer by virtue of his position as an officer and director of TEI and by virtue of his ownership or beneficial control of more than 10% of the issued and outstanding voting shares of TEI. Also, during this period, Hinke held over 20% of TEI's issued and outstanding common shares.

[10] During the same period Hinke also carried out transactions in TEI shares, and failed to file insider reports reflecting these transactions, as required by section 107 of the Act. Hinke carried out transactions in TEI shares that constituted a distribution of the securities of TEI without a prospectus contrary to subsection 53(1) of the Act.

(b) Terms of the First Settlement Agreement

[11] On April 9, 2002, Hinke entered into a settlement agreement with the Executive Director of the Commission with respect to the above mentioned conduct (the "First Settlement Agreement"). The First Settlement Agreement required Hinke to: (a) undertake to make all future required regulatory filings regarding his transactions in TEI shares in a timely manner; and (b) make a voluntary contribution in the amount of $8,000.00 to the Commission's Investor Education Fund on or before April 8, 2002.

(2) The Second Settlement Agreement

(a) Conduct at Issue in the Second Settlement Agreement

[12] During the period between April 11, 2005 to January 3, 2006, Hinke held more than 10% of the total number of TEI shares, and was therefore an insider, as defined in the Act. Hinke executed trades over 32 times in TEI, reducing his holdings in TEI from 16.1% to 10.9% and resulting in the sale of 870,050 TEI shares for a value of $188,518.40. For each of the above noted trades in TEI, Hinke failed to file an insider report as required by subsection 107(2) of the Act.

[13] On December 12, 2005, Hinke was informed by Staff that his conduct continued to violate securities law. This conduct violated the terms of the First Settlement Agreement.

[14] As of February 15, 2006, Hinke was no longer an insider of TEI in that he held less than 10% of the total number of TEI shares and was no longer employed by TEI.

(b) The Second Settlement Hearing

[15] On March 6, 2006, Staff filed a Statement of Allegations in relation to Hinke's conduct during the period of April 11, 2005, to January 3, 2006, and on that same day the Commission issued a Notice of Hearing.

[16] At a hearing held on April 12, 2006, a Panel considered an Agreed Statement of Facts, and based on that Agreed Statement of Facts, the Commission found that Hinke

had again contravened Ontario securities law and acted contrary to the public interest by failing to file insider reports during the period of April 11, 2005, to January 3, 2006. The Commission also noted that Hinke had breached the First Settlement Agreement.

(c) Terms of the Second Settlement Agreement

[17] Staff and Hinke entered into a settlement agreement (the "Second Settlement Agreement"). On May 1, 2006, the Commission issued an Order (the "May 1, 2006 Order") approving the Second Settlement Agreement, and ordered that Hinke: (a) cease trading in the securities of TEI for a six month period starting from February 15, 2006; (b) cease trading in securities of all other reporting issuers in which Hinke holds more than 5%, or for which he is deemed to be an insider for one year starting on May 1, 2006; (c) be reprimanded; (d) pay an administrative penalty of $32,000, and (e) pay $5,000 in costs. In addition, as a term of the Second Settlement Agreement, Hinke undertook to provide a copy of the Order to any registrant with whom he dealt with for a one year period from the date of the Order.

[18] The Second Settlement Agreement also refers to the fact that on March 2, 2006, the Canadian Revenue Agency ("CRA") obtained an Order from the Federal Court of Canada to seize all of Hinke's shares in TEI. The CRA seizure is currently under appeal by Hinke in Federal Court - Trial Division, Court File No. T-580-06. Hinke advised Staff that pending the outcome of the appeal, all of his remaining TEI shares are being held, in trust, with Gowling Strathy Henderson LLP in Ottawa.

(3) The Conduct at Issue in this Hearing

(a) Staff's Allegations

[19] The matter before us arose out of a Notice of Hearing issued by the Commission on November 7, 2006, in relation to a Statement of Allegations issued by Staff on that same day.

[20] The Statement of Allegations alleges that:

(1) Hinke breached the cease trade term of the May 1, 2006 Order;

(2) Hinke breached his undertaking in the Second Settlement Agreement to provide a copy of the Order to all registrants with whom he dealt; and

(3) Hinke made misleading or untrue statements to Staff and the Commission regarding his assets and liabilities and TEI shareholdings.

[21] A hearing was held on December 8, 2006, to consider preliminary matters, and to set a date for the hearing on the merits and the hearing for sanctions and costs. On December 13, 2006, the Commission made an order setting down the date for the hearing on the merits on February 14, 2007, and the date for the hearing on sanctions and costs on February 28, 2007.

C. The Hearing on the Merits

i. Preliminary Matter

[22] At the commencement of the hearing on the merits, Hinke made a request to have the entire proceeding held in camera. Submissions on this request were heard in camera. Hinke made oral submissions and Staff presented oral and written submissions on this issue. Staff did not oppose two matters being dealt with in camera. After considering the submissions from both parties we decided that it was appropriate to hear CRA related matters in camera.

ii. Evidence

(1) Staff's Evidence

[23] Documentary evidence filed by Staff to establish the alleged breach of the Second Settlement Agreement included: (1) the Agreed Statement of Facts, dated April 10, 2006, which was relied on by the Commission to enter into the Second Settlement Agreement; (2) the Second Settlement Agreement; and (3) the May 1, 2006 Order that accompanied the Second Settlement Agreement. Staff also filed a brief of documents containing correspondence, trading documents, Hinke's BMO Nesbitt Burns ("BMO") account statements and Hinke's sworn statement of assets and liabilities as of April 1, 2006.

[24] Staff provided evidence to establish that Hinke was prohibited from trading TEI shares. Staff referred us to sub-paragraph 2(i) of the May 1, 2006 Order which states:

> 2. Pursuant to Clause 2 of sub-section 127(1) of the Act, that trading by Thomas Hinke shall cease:
>
> > (i) in the securities of Thermal Energy International Inc. ("TEI") for a six-month period commencing from the date of his last trade in TEI, being February 15th, 2006.

[25] Staff also submitted evidence to show that Hinke made an undertaking to provide a copy of the May 1, 2006 Order to all registrants with whom he dealt. Staff referred us to the preamble of the May 1, 2006 Order, which states:

> And upon Hinke agreeing to provide a copy of this Order to any registrant with who he deals for the next year from the date of this Order.

[26] Further, Staff adduced evidence to demonstrate that Hinke advised Staff that all his TEI shares were seized by the CRA and held in trust by Gowling, Strathy & Henderson LLP. Staff directed us to paragraph 12 of the Second Settlement Agreement which reads as follows:

> […] all of Hinke's remaining TEI shares are being held, in trust, with Gowling Strathy Henderson LLP in Ottawa.

[27] Staff also called two witnesses to give evidence. We heard evidence from George Gutierrez, the Commission investigator who was assigned to Hinke's case, and Sharon Murray, the individual from the BMO branch who took the order from Hinke to sell his TEI shares.

(a) Gutierrez's Testimony

[28] George Gutierrez ("Gutierrez") is an investigator in the Case Assessment Team of the Commission's Enforcement Branch.

[29] Gutierrez testified that Enforcement Management asked him to review the trading of TEI shares, and as a result, he ordered trading data for TEI. The correspondence and documents obtained during Gutierrez's investigation of the sale of TEI shares and the Section 19(3) Order of the Commission, dated August 3, 2006, which directed BMO to produce the documents, were filed in evidence.

[30] Gutierrez testified that the trading data he received in the document from the Market Regulation Services Inc.'s Trading Summary for TEI revealed that there was only one visible trade on July 7, 2006, through BMO, and this was from Hinke's account for the sale of 17,478 shares of TEI at $0.1541. This document also showed that a commission of $125.12 was charged for this transaction, leaving a net value of $2,568.169.

[31] Further, Gutierrez testified that correspondence from BMO, dated September 11, 2006, showed that Hinke traded TEI shares on July 7, 2006. In particular, the attachments to the September 11, 2006 letter included a copy of the trade ticket for the electronic sale of 17,478 TEI shares and a copy of the certified cheque that was issued to Hinke on July 12, 2006 for the sale of these shares.

[32] In his testimony, Gutierrez explained that the electronic trade ticket summarizes the trade activity on the July 7, 2006 sale of the 17,478 TEI shares. The electronic trade ticket states that the TEI shares were sold at three different prices on July 7, 2006: 16,500 shares were sold at $0.15500, 500 shares were sold at $0.15000 and 478 shares were sold at $0.13000.

[33] Gutierrez also gave testimony relating to a letter from BMO dated December 1, 2006. The attachment to this letter included a copy of a signed e-mail, dated March 14, 2006, from Hinke stating his correct address so that his account could be reactivated.

[34] In addition, Staff submitted as evidence copies of statements from Hinke's BMO account. Gutierrez testified that the June 30, 2006 statement indicated that there were 17,478 TEI shares in the account, and the July 31, 2006 statement indicated the sale of 17,478 TEI shares at a price of $0.1541 per share. Gutierrez also testified that the statements for March to July indicated Hinke's correct address.

(b) Murray's Testimony

[35] Sharon Murray ("Murray") is an investment representative at BMO at the Dalhousie branch in Ottawa. Murray has been employed as an investment representative with BMO for 10 years and she works for four registered representatives (investment advisers) at BMO.

[36] Murray testified that in her capacity as an investment representative at BMO at the Dalhousie branch in Ottawa, she dealt with Hinke regarding his BMO account.

[37] She recalled that Hinke phoned her regarding his account in early March 2006, and she could not find it on the system. Murray testified that she explained to Hinke that the reason this can happen is if an address has been changed without notification and when mail is returned, accounts are restricted and put in a special house code for addresses unknown.

[38] Staff filed in evidence a copy of an e-mail sent to Murray from Hinke with his new address and signature to reactivate the account. Murray testified that this was accurate and that Hinke subsequently phoned her to ensure that the address was updated. Murray also testified that Hinke phoned her to verify the contents of his BMO account.

[39] Murray testified that Hinke called her on July 7, 2006, to sell his TEI shares, and that Hinke made an unusual request for the funds from the sale of his TEI shares to be sent out to him in a certified cheque.

[40] Murray testified that she had no knowledge of the Commission's May 1, 2006 Order, and that if she had had knowledge of the May 1, 2006 Order, she would not have been able to effect the sale of Hinke's TEI shares.

(2) Hinke's Evidence and Admissions

[41] Hinke adduced oral and documentary evidence. He also testified on his own behalf.

[42] Hinke provided evidence regarding his BMO account statements. He referred to the copy of the January 31, 2006 statement which states "Stat returned by Canada Post" to show that BMO did not have his correct address on file. During his cross-examination of Murray, Hinke questioned Murray about his BMO account and she stated that she "could not access the account […] most likely because mail had been sent out and returned by Canada Post and it had been over 30 days".

[43] With regards to the status of his BMO account, Hinke cross-examined Murray who gave oral testimony that the account was dormant and that the last account transaction took place in 1999.

[44] In Hinke's testimony, he acknowledged that after Staff contacted him in October, he realized that he had technically breached the cease trade provision in the May 1, 2006 Order. Hinke also testified that he breached the undertaking in the Second Settlement

Agreement because he did not provide to BMO a copy of the Second Settlement Agreement.

[45] In addition, Hinke provided medical evidence to demonstrate that he was suffering from anxiety and stress during 2005 and 2006, at the time when the conduct in this matter arose.

iii. Submissions

(1) Staff's Submissions

[46] Staff alleges that Hinke: (a) breached the cease trade provision in the May 1, 2006 Order; (b) breached an undertaking made to staff in the Second Settlement Agreement; and (c) made misleading statements to Staff.

[47] Staff submits that the evidence establishes that Hinke breached the May 1, 2006 Order. Contrary to the cease trade term of the Order, on July 7, 2006, Hinke sold 17,478 TEI shares from his BMO account, and by cheque dated July 12, 2006, Hinke received funds in the amount of $2,554,45 on account of the trade.

[48] Staff relies on Hinke's own admission set out above along with the evidence of Gutierrez, who produced copies of documents which reflect the content of Hinke's BMO account, the subsequent sale of Hinke's TEI shares on July 7, 2006, and the certified cheque demonstrating the proceeds of that sale.

[49] Staff also submits that the breach of the cease trade order has been established by Murray's testimony that Hinke phoned her to reactivate his account and to subsequently to sell his TEI shares on July 7, 2006.

[50] In addition, Staff submits that the monetary amount from the sale of Hinke's TEI shares in the BMO account is not insignificant, and that Staff relied on Hinke's sworn statement of assets and liabilities and would not have entered into the Second Settlement Agreement with Hinke under its terms if they believed that Hinke had exigible assets which they could proceed to collect upon. Staff also submits that if respondents could make representations to Staff and to this Commission in their settlement agreements and then claim inadvertence with respect to subsequent non-compliance with the agreements or that instance of non-compliance were *de minimus*, this would set a dangerous precedent.

[51] Further, Staff submits that Hinke had an obligation to provide a copy of the May 1, 2006 Order to any registrant he dealt with and this is evident from paragraph 13(f) of the Second Settlement Agreement which states:

> Hinke shall provide a copy of the order issued by the Commission to any registrant with whom he deals for the next year

[52] Staff relies on Hinke's own admission that he did not provide a copy of the May 1, 2006 Order to BMO, as well as the evidence from Murray that BMO never received a

copy of the May 1, 2006 Order, and that if they had, the July 7, 2006 trade would not have been authorized.

[53] With regards to the misrepresentation or misstatements made by Hinke to Staff, Staff submits that in a sworn statement of assets and liabilities Hinke did not reveal his TEI shares held in the BMO account in the schedule. Staff also submits that whether the statement of assets and liabilities was effective as of April 1, 2006 or April 28, 2006, it did not reflect Hinke's TEI shares held in the BMO account.

[54] In addition, Staff cited paragraph 12 of the Second Settlement Agreement which states:

> […] all of Hinke's remaining TEI shares are being held, in trust, with Gowling Strathy Henderson LLP in Ottawa.

[55] Staff submits that contrary to paragraph 12 of the Second Settlement Agreement, the 17,478 shares sold by Hinke through his BMO account on July 7, 2006, were not held in trust with Gowling Strathy Henderson LLP and were not disclosed to Staff in the sworn statement of assets and liabilities.

[56] Staff also submits that Hinke's conduct was in contravention of Ontario securities law and was contrary to the public interest.

[57] Moreover, Staff submits that it has provided clear and convincing evidence based upon cogent evidence. With regard to the bank statements submitted through Gutierrez, Staff submits that hearsay is reliable pursuant to section 15 of the *Statutory Powers Procedure Act*, R.S.O. 1990, c. S.22, as amended, according to the Commission's recent decision in *Re Allen* (2005), 28 O.S.C.B. 8541. As well, it is Staff's submission that the banking records submitted through Gutierrez have all the hallmarks of reliability; they are kept in the regular course of banking records, and the evidence regarding the sale of Hinke's TEI shares was corroborated by Murray.

[58] Further, in Staff's written submissions, Staff submitted that evidence of a respondent's intention to breach a cease trade order does not go to whether the respondent engaged in conduct contrary to the public interest, but rather to the sanctions to be imposed.

[59] Staff also submitted that any medical issues raised by Hinke are irrelevant to the conduct portion of a hearing held under section 127 of the Act, and that such evidence, would only be relevant and admissible at the sanctions hearing.

(2) Hinke's Submissions

[60] With regard to Staff's first allegation that the trade of TEI shares executed on July 7, 2006, violated the cease trade term set out in the May 1, 2006 Order, Hinke submits that he had no memory of the trade until he was contacted by Staff in October. He also submits that he had no idea he had done anything wrong until he was contacted by Staff in October.

[61] Hinke also submits that the trade of his TEI shares on July 7, 2006 was a misunderstanding. Hinke submits that he thought that the variance that was granted to the CRA by the Commission to sell his TEI shares also applied to him and he submitted this in his letter to Staff dated October 26, 2006:

> […] my legal understanding of the OSC cease trade order may have been wrong or in error, because I believed that the OSC's granting of a confidential variance to allow my ceased TEI shares to be sold one month earlier by the CRA in July 2006 – would also extend to me.

[62] Hinke further submits that he suffered from financial hardship and had to sell the shares. In his letter to Staff dated October 26, 2006, he states:

> I was financially devastated with no assets or money, I could not afford to pay the multiple lawyers that would have been needed to amend the complex CRA payment arrangement and to interface with the OSC, if I had disclosed the existence of the "Dormant" BMO account and the TEI shares to both the OSC and CRA.

[63] Hinke admits that he breached the undertaking in the Second Settlement by not providing registrants with a copy of the May 1, 2006 Order.

[64] With regard to Staff's allegation that Hinke made misleading statements to Staff and the Commission, Hinke submits that he had no knowledge of the TEI shares contained in the BMO account when his statement of assets and liabilities was prepared. Hinke referred us to his letter addressed to Staff, dated October 26, 2006, in which he submitted:

> […] I did not know about the existence of the BMO account in question on May 1, 2006, as its existence was completely forgotten for over the past 8 years […].

[65] In addition, Hinke submits that the correct date of the preparation of his statement of assets and liabilities was April 1, 2006 and not April 28, 2006. Staff pointed out that it did not take issue with the fact that the statement of assets and liabilities was made on April 1, 2006.

[66] Hinke submits that he never received any account statements from BMO for seven to eight years and that he was not aware of the content of the account. He refers to the fact that the January 31, 2006 BMO account statement states, "Stat returned by Canada Post", and that he never received his BMO account statements in the mail. Hinke also points out that in his e-mail correspondence with Murray on March 14, 2006, there is no mention of the quantity or type of shares in his BMO account.

[67] Hinke submits that once his address was corrected on the BMO statements, he had no knowledge of the content of the account because he did not open his mail for several months as he was heavily involved in litigation and under stress and anxiety. Hinke

maintains that he did not see a BMO account statement until about late June or early July, and that was the first time he knew about the content of his BMO account.

[68] Lastly, Hinke disagreed that he had made misrepresentations to Staff in his statement of assets and liabilities. Hinke submits that the sale of his TEI shares on July 7, 2006, involved only a small quantity, less than 0.27% of his total holdings and that it was not significant enough to report or disclose. He adds that this amount is insignificant and would not have changed the numbers in his assets and liabilities.

iv. Analysis and Conclusion

[69] Hinke admitted to Staff's first two allegations that he did in fact breach the cease trade term in the May 1, 2006 Order and that he breached an undertaking made to staff in the Second Settlement Agreement by not providing a copy of the May 1, 2006 Order to the individuals he dealt with at BMO.

[70] With respect to Staff's third allegation dealing with whether Hinke made misrepresentations and misstatements to Staff, we find that Staff's clear and cogent evidence established that Hinke did indeed misrepresent information contained in his sworn statement of assets and liabilities. In particular, it is clear that the TEI shares in Hinke's BMO account were not included in the sworn statement of assets and liabilities. This omission is evident from the content of the statement of assets and liabilities. The evidence also shows that at the time the statement of assets and liabilities was prepared, Hinke possessed 17,478 TEI shares in his BMO Account. This is evident from the March 31, 2006 BMO account statement, which also stated Hinke's correct mailing address. Hinke did not provide any documentation to contradict this and we are of the view that his submission that he neglected to open his mail is irrelevant.

[71] Staff's evidence in this matter was uncontroverted, and credible. We accept the evidence of Staff's witnesses Gutierrez and Murray.

[72] We find that Murray was a credible witness, and we accept her testimony regarding her phone conversations with Hinke during March 2006, that subsequent to reactivating his BMO account, Hinke confirmed the content of his account with Murray and was aware that he held TEI shares in his BMO account.

[73] Also, whether the statement of assets and liabilities was dated April 1, 2006, or April 28, 2006, is irrelevant. It is reasonable to believe that after the reactivation of his BMO account on March 15, 2006, Hinke had access to sufficient information to verify the content of his BMO account.

[74] Furthermore, Hinke knew he had an account at BMO with something in it when he contacted Murray.

[75] We reject Hinke's argument that because the sale of his TEI shares on July 7, 2006 involved only a small quantity, less than 0.27% of his total holdings in TEI, it was not significant enough to report or disclose. Instead, we are of the view that Hinke misrepresented his assets and liabilities to Staff because he did not disclose the existence

of the BMO account, and the exact quantity of shares contained in this account does not change the fact that Hinke failed to inform Staff, the CRA and his accountants about owning a BMO account. Further, we accept that Staff would not have entered into the Second Settlement Agreement with Hinke under its terms if they believed that Hinke had exigible assets, which they could proceed to collect upon. We agree with Staff that if respondents could make representations to Staff and to this Commission in their settlement agreements and then claim inadvertence with respect to subsequent non-compliance with the agreements or that instances of non-compliance were *de minimus*, this would set a dangerous precedent.

[76] Based on Hinke's admissions and the evidence and submissions presented by the parties, we are of the view that the evidence is clear and uncontradicted that Hinke:

(1) breached the cease trade term of the May 1, 2006 settlement order;

(2) breached his undertaking in the Second Settlement Agreement to provide a copy of the order to all registrants with whom he dealt; and

(3) made false statements to Staff and the Commission regarding his assets and liabilities in TEI.

D. The Hearing on Sanctions and Costs

i. Hinke's Request to Adjourn the Hearing on Sanctions and Costs

[77] At the close of the hearing on the merits, Hinke asked to adjourn the hearing on costs and sanctions to be held on February 28, 2007, to a later date on the grounds that he needed more time to make arrangements for his medical doctor to testify at the hearing.

[78] We declined to grant Hinke's request for adjournment on the basis that Hinke had adequate time to make the necessary arrangements with his doctor. As of December 8, 2006, Hinke was aware that a hearing on sanctions and costs would be held on February 28, 2007. During the hearing on December 8, 2006, the Chair of the Panel set down the hearing on sanctions and costs for February 28, 2007, and explained to Hinke that, "[…] it may well be that Staff would think it appropriate that the Panel hear from the [doctor], or have an affidavit or it may be just enough for there to be a letter".

[79] As a result, Hinke was aware on December 8, 2006, of the position of the Panel on this issue. Between December 8, 2006, and February 28, 2007, Hinke had approximately 11 weeks, almost three months, to make the necessary arrangements with his doctor to attend the hearing. In our view, 11 weeks is sufficient time.

ii. Evidence

[80] In addition to the evidence presented during the hearing on the merits, Staff and Hinke provided additional evidence at the hearing on sanctions and costs.

(1) Staff's Evidence

[81] During the hearing on sanctions and costs, Staff called one witness, Gutierrez, to testify. Gutierrez gave testimony regarding trades dealing with TEI shares. Gutierrez gave evidence that a brokerage account under the name of Econolibrium Energy Inc. ("Econolibrium"), which was incorporated on June 28, 2006 and whose sole director was Hinke, received 225,000 TEI shares from Hinke's mother, Elizabeth Hinke, on July 7, 2006. Gutierrez also gave evidence that on August 21, 2006, six days after the end of the cease trade imposed on Hinke, 13,500 TEI shares were sold at $0.155.

[82] Gutierrez also gave evidence regarding why Hinke engaged in conduct that breached the Act in 2001 and 2002. He referred to correspondence between himself and Hinke's lawyers dated October 15, 2001, August 24, 2001, and January 10, 2006. In particular, the letter dated August 24, 2001 from Borden Ladner Gervais LLP states that:

> During the relevant time period, [TEI] was in financial distress. As such, Mr. Hinke's efforts were completely directed towards the survival of the company and he neglected his own personal obligations. As well, Mr. Hinke was under the mistaken belief that the annual disclosure contained in the proxy circular was sufficient disclosure and that shareholders approval of the transactions was all that was required.

[83] In addition, a letter dated January 10, 2006 from Benson Edwards LLP states that Hinke engaged in conduct that breached the Act because:

> Mr. Hinke was unclear that the definition of "insider" included holding 10% or more of the shares of a reporting issuer, without also requiring a knowledge component of inside information obtained by being a director, officer or other type of service provider privy to such knowledge.
>
> During the period in question, Mr. Hinke was under a doctor's care suffering from anxiety and depression and did not retain counsel with regulatory reporting knowledge to assist him in his dealings with respect to [TEI].

[84] Further, correspondence from Hinke himself to the Commission, dated October 26, 2006, also explained Hinke's conduct:

> In reality, based on my misunderstanding of the OSC variance to the cease trade order, I did not realize until August 2006 that a mistake was made in closing out the BMO account in July 2006. However, at the time, I was under extreme stress and duress, was of poor mental health, and I did not believe that I had a choice – under the abnormal circumstances I was dealing with.

[85] In addition, Gutierrez gave evidence regarding a conference call between himself, Hinke, Staff, and Hinke's former therapist Dr. Iris Jackson, held on February 27, 2007. Gutierrez recounted that Dr. Jackson is a clinical psychologist and that she indicated that

Hinke was suffering from anxiety, stress and occasional bouts of memory loss over the last few years. Gutierrez also pointed out that although Dr. Jackson had in the past provided Hinke with letters for different litigation proceedings, she did not provide a specific letter for this matter.

[86] Lastly, Staff adduced evidence relating to Hinke's pattern of repetitive conduct in this matter. Staff referred us to two decisions dated November 2, 2006 of Madam Justice Linhares de Sousa, namely *Thomas Vincent Hinke v. Linda Jane Lake* (2 November 2006), Ottawa 94-FL-21584 (Ont. Sup. Ct.) ("*Hinke v. Lake Reasons on Motion*"), and *Linda Lake v. Thomas Hinke* (2 November 2006), Ottawa 99-FL-376 (Ont. Sup. Ct.) (the "Endorsement"), to show that Hinke structures his affairs to suit whatever need he has at the time and to show how Hinke has utilized his TEI shares in the past. Specifically, Staff referred us to paragraph 6 of the Endorsement which states the following:

> Mr. Hinke divested himself of his property for the purpose of satisfying other debts of his choosing. This he did by transferring TEI shares to his current spouse, Ms. Shulkov, and to other creditors in order to satisfy his personal debts […] Mr. Hinke does not deny these transfers and confirms them in his affidavit material in these proceedings. His explanation is that he himself could not sell the TEI shares because of their nature and the restrictions attached to them. He could, however, transfer them to 3rd parties who would accept the transfer.

(2) Hinke's Evidence

[87] First of all, Hinke gave evidence relating to Dr. Jackson's qualifications. He recounted that Dr. Jackson is a clinical psychologist and is qualified under the *Canada Health Act*, R.S.C. 1985, c. C-6. Staff did not contest the qualifications of Dr. Jackson.

[88] Hinke referred to three letters written by Dr. Jackson dated January 30, 2007, July 15, 2006, and August 31, 2005.

[89] All three letters written by Dr. Jackson discuss the fact that Hinke was suffering from anxiety and acute stress.

[90] Further, Hinke submitted as evidence letters from Borden Ladner Gervais LLP dated June 15, 2001, and December 15, 2000, which dealt with Hinke's conduct relating to the first Settlement Agreement.

[91] In addition, Hinke testified on his own behalf and gave oral evidence. In his testimony, Hinke stated that he was sorry and had the utmost respect for the Commission.

[92] Hinke also gave testimony relating to his financial situation and problems, and that as a result of being involved in employment litigation and litigation of a family matter, he was in poor financial shape. In his oral evidence, Hinke stated that since he was in a very difficult financial situation, his mother offered to provide assistance through a loan of her TEI shares to Hinke's company Econolibrium.

[93] In order to establish his past work experience, Hinke adduced into evidence a copy of his resume to demonstrate the work he has done in the past. In his resume, Hinke represents that he is "completely familiar with public company corporate governance and compliance issues", however in testimony, Hinke admitted that he has never held any brokerage designations.

[94] Hinke also called his wife, Elena Shulkov ("Shulkov"), to testify on his behalf. Shulkov testified that she was sorry and that she supports her husband.

iii. Submissions

(1) Staff's Submissions

[95] Staff presented oral and written submissions relating to relevant considerations and the law in connection with sanctions, and it is Staff's submission that the following sanctions would be appropriate for Hinke:

(1) Cease trading in securities directly or indirectly and that Hinke be prohibited from acquiring securities of any issuer for a period of 10 years;

(2) Prohibition from being an officer or director of an issuer for 10 years and that no exemptions contained in Ontario securities law shall apply to Hinke for the same period of time; and

(3) In lieu of an administrative penalty and disgorgement, Hinke shall pay $15,000 towards Staff's costs of the investigation and hearing of this matter.

Staff also submits that there should be no carve-out for an RRSP and that Hinke should be removed from the market completely because Hinke's pattern of conduct reveals that he structures his affairs to meet whatever priorities he has at the moment.

[96] In Staff's view, the efficacy and the integrity of Commission orders, undertakings and settlement agreements should not be eroded by respondents who repeatedly disrespect and disregard their clear terms. As well, Staff submits that breaches of a respondent of obligations made in connection with Commission settlement agreements is conduct contrary to the public interest which should be taken seriously and considered as an aggravating factor in determining appropriate sanctions. In particular, Staff referred us to the following passage in *Re Mithras Management Ltd.* (1990), 13 O.S.C.B. 1600 ("*Mithras*"):

> […] 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. (*Mithras*, *supra* at 1610 and 1611.)

[97] Further, Staff submits that we are not in a situation where we have an individual who has inadvertently breached the Act. It is Staff's submission that Hinke's conduct underscores a pattern of behaviour that reflects clearly what can be expected from this respondent in the future. Staff submits that in this case, where Hinke violated two prior settlement agreements and the May 1, 2006 Order, and since three proceedings have been commenced over the course of five years all related to the same sort of conduct, there is a need to protect the investing public from Mr. Hinke. Staff also submits that it is in the public interest to impose significant sanctions on Mr. Hinke in order to send a strong message of deterrence to those who would ignore orders of this Commission.

[98] In support of its position, Staff relies on the Commission's decision in *Re Prydz* (2000), 23 O.S.C.B. 3399. Staff submits that the situation in *Re Prydz* is similar since it dealt with a respondent that breached undertakings made in a settlement agreement with the Commission. Specifically, Staff referred us to paragraph 20 of this decision which states:

> In this case, Mr. Prydz not only breached his undertakings made in the Settlement Agreement, he did so in three different respects, showing, in our view, that he considered the Settlement Agreement as no more than a means of getting rid of the settled proceedings, with no real intention of being bound by the Settlement Agreement. In our view, such conduct exacerbates the breaches of the Act admitted by Mr. Prydz in the Settlement Agreement, and shows that Mr. Prydz continues to have little regard for the securities laws of this province. In our view, the public interest clearly requires that Mr. Prydz be removed from the capital markets of this province for a very substantial period of time in order to protect those markets and investors in this province. (*Re Prydz*, *supra* at para. 20)

[99] During submissions, Staff also referred us to other decisions where securities commissions have in the past sanctioned respondents for breaching undertakings made to a securities commission. In particular, Staff referred us to *Re National Gaming Corp.* (2000), 9 A.S.C.S. 4592, a decision of the Alberta Securities Commission and *Re Koonar* (2002), 25 O.S.C.B. 2691 and *Re Rash* (2006), 29 O.S.C.B. 7403, decisions of this Commission.

[100] Staff also submits that the fact that Hinke tried to conceal his actions surrounding the trade in his TEI shares on July 7, 2006, is an aggravating factor that should be considered when determining appropriate sanctions for Hinke. According to Staff, the fact that: (1) Hinke did not disclose his TEI shares in the BMO account to the CRA, and

(2) Hinke did not set out the TEI shares in his BMO account in his sworn statement of assets and liabilities, all infer that Hinke was trying to ensure that his TEI shares could not be traced.

[101] With regard to Hinke's physical health and mental state, Staff submits that Hinke was still able to function and this is demonstrated from the fact that during June and July 2006, Hinke incorporated a company and was able to have shares transferred to that company and he sold those shares shortly afterwards. Staff also submits that the evidence relating to Hinke's physical health and mental state is generic therapeutic evidence and does not relate to the specifics of this case since his doctors were never provided with any details or facts of this case or the situation surrounding this case. Further, Staff submits that it is a dangerous precedent if respondents under serious stress and anxiety are somehow held to a lesser standard of conduct, and consequently, stress and anxiety should not be a license for repeated violations of the Act.

[102] Regarding costs, Staff submitted a time sheet detailing Staff's work for all aspects of the proceeding, and only requested that $15,000 in costs be sought instead of $60,000. Furthermore, the costs detailed by Staff only reflected the costs of litigation counsel and the primary investigator and not the costs of other investigators, law clerks and disbursements.

(2) Hinke's Submissions

[103] Hinke made submissions regarding mitigating factors for the Panel to consider. Throughout his submissions, Hinke referred to the fact that he was sorry and wanted to move on with his life. He also asked the Panel to consider the fact that he is trying to recover and get back on his feet to rebuild his future.

[104] Hinke submits that his conduct is not repetitive and his actions regarding the First Settlement Agreement, the Second Settlement Agreement and the breach of the May 1, 2006 Order are totally separate independent events with different sets of circumstances.

[105] Hinke also submits that his conduct was unintentional because when he breached the First Settlement Agreement, he did not realize that he was still an insider. In addition, Hinke submits that since his conduct was unintentional, he was not harmful to the capital markets and did not affect any third part. Further, Hinke submits that he was only trading TEI shares, and not the shares of other companies.

[106] Lastly, Hinke submits that the family law decisions referred to by Staff are irrelevant, and that the decision *Hinke v. Lake Reasons on Motion*, is currently being appealed.

iv. Analysis and Conclusion

(1) Relevant Considerations for Imposing Sanctions

[107] The Commission's mandate in upholding the purposes of the Act is set out in

section 1.1 of the Act:

> (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.

[108] The Commission is guided by section 1.1 of the Act, and as well, the Commission has the role to exercise public interest jurisdiction. This role is set out in *Mithras*:

> [...] the role of the 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. (*Mithras, supra* at 1610.)

[109] In determining appropriate sanctions, we must consider the specific circumstances of the case and ensure that sanctions are proportionate. As set out in *Re M.C.J.C. Holding and Michael Cowpland* (2002), 25 O.S.C.B. 1133 ("*Cowpland*"):

> We have a duty to consider what is in the public interest. […] 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. (*Cowpland, supra* at paras. 9 and 10.)

[110] The Commission in *Re Belteco Holdings Inc.* (1998), 21 O.S.C.B. 7743 at 7746, has indicated the followings factors that it may consider when imposing sanctions:

> (a) the seriousness of the allegations;
>
> (b) the respondent's experience in the marketplace;
>
> (c) the level of a respondent's activity in the marketplace;
>
> (d) whether or not there has been a recognition of the seriousness of the improprieties;
>
> (e) whether or not the sanctions imposed may serve to deter not only those involved in the case being considered, but any like-minded people from engaging in similar abuses of the capital markets;
>
> (f) the size of any profit (or loss avoided) from the illegal conduct;
>
> (g) any mitigating factors such as the effect any sanction might have on the livelihood of the respondent; and
>
> (h) the remorse of the respondent.

[111] Further, the Supreme Court in *Re Cartaway Resources Corp.*, [2004] 1 S.C.R. 672 ("*Cartaway*"), has confirmed that the Commission may consider general deterrence as a factor in determining appropriate sanctions. The Court stated at paragraph 60 of *Cartaway* that "[…] it is reasonable to view general deterrence as an appropriate, and perhaps necessary, consideration in making orders that are both protective and preventive".

[112] In addition, we must also take into consideration the respect a respondent has shown for past Commission settlement agreements, orders and undertakings. This approach was taken in *Re Prydz*, where the Commission found that the respondent had intentionally and knowingly breached a settlement agreement which he had previously entered with the Commission. The Commission found that breaching a Commission settlement agreement constitutes a disregard for the securities laws of this province. Specifically, in *Re Prydz*, the Commission stated that:

> […] *intentional breaches by a respondent party to a settlement agreement, which has been approved by a Commission order, of that party's undertakings in the settlement agreement* (which undertakings must be assumed to have been bargained for by Staff as necessary, in its view, for the protection of the public interest) is itself an action contrary to the public interest and *shows a lack of regard by the party for his or her obligations under Ontario securities l*aw sufficient to warrant an inquiry as to what, if any, additional sanctions should be imposed by the Commission in order to protect investors in, and the capital markets of, Ontario. (Emphasis added.) (*Re Prydz*, *supra* at para. 18)

[113] Accordingly, it is necessary in each case to consider not only the respondent's conduct in the current matter, but also the respondent's past conduct in his dealings with the Commission. Such considerations ensure that others are deterred from disregarding Commission orders, undertakings and settlements, and this allows the Commission to fulfill its mandate under the Act to protect investors and to ensure the fair and efficient operation of the capital markets.

(2) Appropriate Sanctions and Costs in this Case

[114] For the reasons that follow, we have decided that it would be in the public interest to make the following order against Hinke:

(1) Pursuant to subsection 127(1) clause 2 of the Act, that Hinke cease trading in securities directly or indirectly and that he be prohibited from acquiring securities of any issuer for a period of ten years, with the exception that Hinke be permitted to trade in securities for the account of a registered retirement savings plan or registered retirement income fund (as defined in the *Income Tax Act* (Canada)) in which he has sole legal and beneficial ownership and interest, provided that:

(i) the securities are listed and posted for trading on the Toronto Stock Exchange or the New York Stock Exchange (or their successor exchanges) or are issued by a mutual fund which is a reporting issuer;

(ii) Hinke does not own beneficially more than one percent of the outstanding securities of the class or series of the class in question; and

(iii) Hinke must carry out permitted trading through a registered dealer and through accounts opened in his name only and must close any accounts in which he has any legal or beneficial ownership or interest that were not opened in his name only;

(2) Pursuant to subsection 127(1) clause 8 of the Act, Hinke be prohibited from becoming or acting as an officer or director of any issuer for ten years;

(3) Pursuant to subsection 127(1) clause 3 of the Act, no exemption contained in Ontario securities law shall apply to Hinke for ten years; and

(4) Pursuant to section 127.1 of the Act, Hinke pay $15,000 towards Staff's costs relating to the investigation and hearing of this matter.

[115] In keeping with the principles of sanctioning established by the Commission, strong effective sanctions are warranted in this case in order to protect investors and maintain confidence in the capital markets. As established in *Committee for Equal Treatment of Asbestos Minority Shareholders v. Ontario (Securities Commission)*, [2001] 2 S.C.R. 132 ("*Asbestos*"), the Commission's jurisdiction under sections 127 and 127.1 of the Act is protective and preventive and it is intended to be exercised to prevent future harm to Ontario's capital markets. (*Asbestos*, *supra* at para. 42)

[116] Hinke's past conduct of breaching the First Settlement Agreement, the Second Settlement Agreement and the cease trade term of the May 1, 2006 Order may well be representative of what might be expected of this respondent in the future. We consider his pattern of conduct to be an aggravating factor.

[117] Also, Hinke's past conduct reveals that he has shown disregard for the Commission and its orders on two separate occasions. Prior reprimands and cease trade orders have had no effect on Hinke's conduct. We find that this is repetitive conduct, and we do not find Hinke's submissions regarding that he did not really mean to breach the settlement agreements credible since during family law proceedings, Hinke made the admission that "during the years 2000, 2005 and 2006 [Hinke] disposed of his shares for the benefit of himself to satisfy his personal debts […]". (*Hinke v. Lake Reasons on Motion*, *supra* at para. 70, subpara. 4.) As a result, we find that we are not in a situation where we have an individual who has inadvertently breached the Act. Instead, we are in a situation where an individual has repeatedly breached the Act. We rely on the Commission's decision in *Re Prydz* as authority that repeated breaches of Commission

settlement agreements are an aggravating factor that comes into play when determining sanctions.

[118] Also, we find that an additional aggravating factor is the fact that Hinke tried to conceal his actions surrounding the trade of his TEI shares in the BMO account on July 7, 2006. As a result, we find it reasonable to impose a 10 year cease trade term on Hinke.

[119] With respect to Hinke's evidence and submissions relating to his physical and mental health, we note that none of the doctor's letters presented in evidence were prepared specifically for this proceeding. As a result, we do not attach much weight to these letters. We also note that Hinke was physically and mentally healthy enough to incorporate his company Econolibrium and actively seek work during 2006.

[120] While appearing before us, Hinke also stated that he is sorry and his wife has also testified to this effect. However, we note that during his testimony and submissions, Hinke presented us with a series of contradictory excuses. First, Hinke submitted he forgot about the BMO account; then, subsequently, Hinke submitted he knew about the BMO account but the amount of TEI shares contained in it were insignificant, and later Hinke submitted that he believed that at the time he was in fact authorized to trade his TEI shares because he thought the Commission variance granted to the CRA also applied to him too. These contradictory statements by Hinke diminish his credibility.

[121] Further, we do not agree with Hinke's submission that the breach of the cease trade order was insignificant because the sale of his TEI shares on July 7, 2006, involved only a small quantity of TEI shares relative to his total TEI holdings. In our view, a breach of a cease trade order is a breach regardless of the number of shares that are traded. Therefore, there should not be a sliding scale for breaches of a cease trade order such that little breaches do not count.

[122] We also find that severe sanctions are warranted in this case because it is necessary to protect the public from Hinke's future conduct and to deter others from engaging in similar conduct. Hinke has made representations in his resume that he is "completely familiar with public company corporate governance and compliance issues". His conduct between 2000 and 2006 is inconsistent with these representations, and as such, we find it reasonable to prohibit Hinke from acting as a director and officer for 10 years. The same rational applies to our decision to: (1) impose a 10 year cease trade order on Hinke; and (2) that exemptions contained in Ontario securities law will not apply to Hinke for a period of 10 years.

[123] In addition, we took into consideration Hinke's financial situation and Staff's submissions not to impose disgorgement in this case.

[124] Lastly, with respect to costs, we find that Staff's request for $15,000 is reasonable. In total, Staff incurred over $60,000 in costs for litigation counsel and its primary investigator, and this sum does not include the costs of other investigators, law clerks and disbursements. We find that Staff took a very conservative approach to determine the amount of costs to ask for. Considering that Staff only asked for 25% of

their costs to be reimbursed, we find this to be generous to Mr. Hinke in the circumstances. Staff also submitted a detailed timesheet listing all work hours for different aspects of the proceeding which clearly accounts for the work Staff performed in this matter. Hinke did not file any written submissions or evidence to question or challenge the costs claimed by Staff.

[125] We are mindful that the relevant criteria that the Commission should consider when awarding costs include, but are not limited to, the seriousness of the charges and the conduct of the parties (*Re YBM Magnex International Inc.* (2003), 26 O.S.C.B. 5285 at para. 608) and the reasonableness of the costs requested by Staff (*Re Lydia Diamond Exploration of Canada* (2003), 26 O.S.C.B. 2511 at para. 217). In light of these two criteria, we find that $15,000 in costs is an appropriate amount.

E. Decision on Sanctions and Costs

[126] We consider that it is important in this case to impose sanctions that not only deter the respondent but also like-minded people from engaging in future conduct that violates securities law.

[127] For these reasons, we are of the opinion that it is in the public interest to order that:

(1) Pursuant to subsection 127(1) clause 2 of the Act, Hinke cease trading in securities directly or indirectly and that he be prohibited from acquiring securities of any issuer for a period of ten years, with the exception that Hinke be permitted to trade in securities for the account of a registered retirement savings plan or registered retirement income fund (as defined in the *Income Tax Act* (Canada)) in which he has sole legal and beneficial ownership and interest, provided that:

   (i) the securities are listed and posted for trading on the Toronto Stock Exchange or the New York Stock Exchange (or their successor exchanges) or are issued by a mutual fund which is a reporting issuer;

   (ii) Hinke does not own beneficially more than one percent of the outstanding securities of the class or series of the class in question; and

   (iii) Hinke must carry out permitted trading through a registered dealer and through accounts opened in his name only and must close any accounts in which he has any legal or beneficial ownership or interest that were not opened in his name only;

(2) Pursuant to subsection 127(1) clause 8 of the Act, Hinke be prohibited from becoming or acting as an officer or director of any issuer for ten years;

(3) Pursuant to subsection 127(1) clause 3 of the Act, no exemption contained in Ontario securities law shall apply to Hinke for ten years; and

(4) Pursuant to section 127.1 of the Act, Hinke pay $15,000 towards Staff's costs relating to the investigation and hearing of this matter.

DATED at Toronto, this 25th day of May, 2007.

"Wendell S. Wigle"	"David L. Knight"
Wendell S. Wigle	David L. Knight