Ontario
Securities
Commission

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

AND

IN THE MATTER OF
JOHN ALEXANDER CORNWALL, KATHRYN A. COOK,
DAVID SIMPSON, JEROME STANISLAUS XAVIER,
CGC FINANCIAL SERVICES INC. AND FIRST FINANCIAL SERVICES

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

Hearing:	February 27, 2008	
Decision:	May 5, 2008	
Panel:	Robert L. Shirriff, Q.C.	- Commissioner and Chair of the Panel
	David L. Knight, FCA	- Commissioner
	Margot C. Howard, CFA	- Commissioner
Counsel:	Melanie Adams	- For the Ontario Securities Commission
	Alistair Crawley Anna Markiewicz	- For Jerome Stanislaus Xavier
	Ian Smith	- For Kathryn A. Cook
	John Alexander Cornwall	- For himself and CGC Financial Services Inc.
	David Simpson	- For himself and First Financial Services

REASONS AND DECISION ON SANCTIONS AND COSTS

I. Background

[1] This was a bifurcated hearing before the Ontario Securities Commission (the "Commission") pursuant to sections 127 and 127.1 of the *Securities Act*, R.S.O. 1990, c. S.5, as amended (the "Act"), to consider whether it is in the public interest to make an order with respect to sanctions and costs against John Alexander Cornwall ("Cornwall"), Kathryn A. Cook ("Cook"), David Simpson ("Simpson"), Jerome Stanislaus Xavier ("Xavier"), CGC Financial Services Inc. ("CGC Financial") and First Financial Services ("First Financial") (collectively, the "Respondents").

[2] The hearing on the merits was held on February 21-23, 2007, April 23-25, 2007 and May 23-24, 2007, and a decision was rendered on November 30, 2007.

[3] Following the release of the decision on the merits, we held a separate hearing on February 27, 2008, to consider additional evidence and submissions from Staff and the Respondents regarding sanctions and costs (the "Sanctions and Costs Hearing").

[4] As at the hearing on the merits in this matter, Cornwall/CGC Financial and Simpson/First Financial were not represented by counsel; however they consented to proceed without the assistance of counsel.

[5] The Sanctions and Costs Hearing was attended by Staff of the Commission ("Staff"), Simpson, counsel for Xavier, and counsel for Cook.

[6] Cornwall did not attend the Sanctions and Costs Hearing; however, he consented to have the hearing proceed in his absence.

[7] Simpson arrived late at the Sanctions and Costs Hearing; however, he gave his consent for us to begin the hearing in his absence.

[8] These are our reasons and decision as to the appropriate sanctions and costs to order against the Respondents.

II. Reasons and Decision Dated November 30, 2007

[9] The Commission found that the Respondents were involved in a scheme that induced 87 vulnerable individuals to transfer $1,957,200 in aggregate, from their locked-in retirement savings plans ("RSPs") into new trust accounts for the purpose of investing in shares of one of four private companies, Themis Hospitality Inc. ("Themis"), Stramore Inc. ("Stramore"), Faelen Concepts ("Faelen") and Camcys Inc. ("Camcys") (collectively, the "Private Companies").

[10] The shares of the Private Companies were then used as collateral security for loans to the investors for approximately 65% to 75% of their original investment.

[11] The Private Companies were held out to be Canadian Controlled Private Corporations ("CCPCs"), shares of which can constitute a qualified investment under the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) and its Regulations for a locked-in RSP. However, the Private Companies did not qualify as CCPCs. As a result, the funds transferred out of the investors' locked-in RSPs were taxable as income, resulting in significant adverse tax consequences. The shares themselves had little or no value compared to their purchase price.

[12] The Commission found that this scheme, and the Respondents who designed and executed it, violated Ontario securities law. Specifically, the following findings were made:

(i) Cornwall, Simpson and Xavier participated in an illegal distribution of securities contrary to section 53(1) of the Act by trading in the securities of the Private Companies for which there was no exemption from the registration and prospectus requirements of the Act;

(ii) Xavier acted contrary to section 1.5 of Ontario Securities Commission Rule 31-505 by failing to ascertain the general investment needs and objectives of the investors who purchased shares of the Private Companies and the suitability of such purchases for these investors;

(iii) Xavier acted contrary to section 25(1) of the Act by failing to process trades through Keybase Investments Inc. ("Keybase"); and

(iv) Cornwall/CGC Financial, Simpson/First Financial, Xavier and Cook engaged in conduct contrary to the public interest.
(*Re Cornwall* (2007), 30 O.S.C.B. 10063 at para. 206)

[13] In addition, the Commission found that Cornwall, CGC Financial, Simpson, First Financial and Xavier took unfair advantage of people in need of immediate financial assistance (*Re Cornwall*, *supra* at paras. 192 and 196).

[14] It is this conduct that we must consider when determining the appropriate sanctions and costs to order in this matter.

III. Additional Evidence Adduced at the Sanctions and Costs Hearing

[15] In addition to the evidence led at the hearing on the merits, Staff provided evidence relating to costs of the investigation and the hearing.

[16] We were provided with a schedule listing the date, number of hours worked, and information as to the type of work that was done by each Staff member involved in this matter. The Respondents did not contest this evidence.

[17] None of the Respondents adduced additional evidence at the Sanctions and Costs Hearing.

IV. Submissions

1. Staff

i. Sanctions Requested

[18] In their written submissions, Staff requested that the following order be made against the Respondents:

(i) that the registration of Xavier be terminated;

(ii) that the Respondents cease trading in any securities permanently;

(iii) that any exemptions contained in Ontario securities laws not apply to the Respondents permanently;

(iv) that Cornwall, Simpson, Xavier and Cook resign from any positions they hold as an officer or director of any issuer;

(v) that Cornwall, Simpson, Xavier and Cook be prohibited from becoming or acting as a director of any issuer permanently;

(vi) that the Respondents be reprimanded;

(vii) that the Respondents disgorge to the Commission the following amounts: CGC Financial/ Cornwall - $367,000; Simpson/First Financial - $130,000; Xavier $45,700; Cook - $13,900; and

(viii) that the Respondents jointly pay the costs of Staff's preparation and conduct of the hearing in the amount of $108,599.25.

[19] According to Staff, the aforementioned sanctions are appropriate in this case because the proven allegations in relation to illegal distributions, unregistered trading, breaches of OSC Rule 31-505 and conduct contrary to the public interest are extremely serious and have had a significant impact on the investing public. The scheme in this case involved 87 Canadian investors and raised over $1.9 million.

[20] Given the nature of the conduct in this matter, it is the position of Staff that the sanctions sought are appropriate.

[21] To justify the sanctions sought Staff referred us to Commission cases that dealt with conduct similar to the present case. First, Staff relied on *Re Ochnik* (2006), 29 O.S.C.B.

3929. This case involved a scheme whereby investors (most of whom were experiencing financial hardship) were advised to collapse their locked-in RSPs or pensions in order to purchase shares in a private company in exchange for a non-repayable loan for between 40% and 60% of the original investment. The Commission found that this scheme was contrary to the public interest. The respondents had traded without being registered under the Act, and the trades were not exempt from the prospectus requirements of the Act. The Commission ordered that the respondents cease trading permanently and also ordered a removal of exemptions permanently. Further, Ochnik was permanently prohibited from acting as a director or officer of any issuer.

[22] Another case referred to by Staff was *Re Verbeek* (2005), 29 O.S.C.B. 69 and (2005), 28 O.S.C.B. 7106. In this case investors transferred their locked-in RSP funds into new trust accounts for the purpose of purchasing shares in CCPCs that were used as collateral security for loans representing between 60% and 80% of the original investment. The Commission found that Verbeek had participated in at least 670 transactions involving funds in excess of $17 million, and the sanctions imposed were: (1) termination of registration; (2) a reprimand; (3) a permanent cease trade order; (4) resignation and prohibition from acting as an officer or director of an issuer; and (5) costs in the amount of $94,618.75.

ii. Aggravating Factors

[23] In Staff's view, there are a number of aggravating factors which justify making an order to remove the Respondents permanently from participating in the Ontario capital markets. In particular, Staff referred us to the following aggravating factors:

(i) the Respondents made representations to investors that were misleading, inaccurate and untrue;

(ii) the materials provided to investors by the Respondents were fraudulent and fictitious;

(iii) most investors never underwent a meaningful assessment of their investment objectives;

(iv) documents with forged signatures were submitted to trust companies;

(v) investments were made without proper, or any, instructions from clients;

(vi) three of the four Private Companies were shell companies that never engaged in any legitimate business enterprise;

(vii) investors were subjected to significant administrative fees;

(viii) the shares of the Private Companies had little or no value;

(ix) investors were urged to repay their loans;

(x) investors had to pay tax on the entire value of the locked-in RSP that had been collapsed, which resulted in further victimization by the Respondents; and

(xi) the Respondents took unfair advantage of people in need of immediate financial assistance.

[24] Further, with respect to Xavier, Staff submitted that it is an aggravating factor that Xavier failed to meet the high standard of conduct expected of a registrant. According to Staff, Xavier acted in a careless and cavalier manner with the investing public, abdicating his responsibilities and role as a registrant.

iii. Costs

[25] Staff submitted that pursuant to section 127.1 of the Act, the Respondents should be ordered jointly to pay costs in the amount of $108,599.25 to indemnify the Commission for expenses and to recover a portion of the costs incurred during the hearing.

[26] According to Staff, the costs claimed in this case are reasonable and conservative because they are only for the lead litigator and investigator. No costs were sought for other investigators, counsel, clerks or assistants. Further, Staff explained that costs were only being sought for the preparation for and attendance at the hearing of this matter on the merits. No costs were sought for any time related to the investigation of this matter, or for the sanctions portion of this proceeding.

[27] To support their claim for costs, Staff provided information specifying the hours worked by Staff employees in this matter.

2. Xavier

[28] Counsel for Xavier made oral submissions at the Sanctions and Costs Hearing.

[29] Counsel for Xavier acknowledged at the outset that there were serious findings against Xavier in that he breached his duties to his clients and breached provisions of the Act. In particular, Xavier acknowledged that he breached his role as a registrant and gatekeeper and, in the words of his counsel, "his lack of appreciation of his role in those capacities has resulted in this finding. And he is now well aware of it."

[30] Notwithstanding this acknowledgement, counsel for Xavier submitted that the sanctions sought by Staff are greatly excessive and disproportionate.

[31] Counsel for Xavier pointed out that Xavier was not the mastermind, nor the architect of the scheme. He did not create the Private Companies, he did not solicit investors, he did not provide documents connected with the Private Companies and he

did not place any newspaper advertisements. Xavier only got involved with investors after they had decided to invest in these companies.

[32] Further, counsel for Xavier submitted that the fees earned by Xavier ($45,700) were significantly less than those earned by Cornwall ($367,000) and Simpson ($130,000).

[33] Counsel for Xavier also explained that Xavier's conduct in this matter was the result of a number of misconceptions. First, Xavier was under the misconception that by opening the accounts for these transactions, he was not in fact acting in his capacity as a registered representative, which explains his lack of attention to the "know your client" forms he completed or received. Secondly, he was not aware of any impropriety as he had reviewed the proposal with his superiors at Keybase, and he believed that they did not have any concerns. In addition, based on the opinion letters from Cook, Xavier believed that investing in the Private Companies would not trigger adverse tax consequences.

[34] Moreover, Counsel for Xavier pointed out that with the exception of Xavier's involvement with Cornwall and Simpson, Xavier has never had any problems with any regulator. Specifically, counsel for Xavier referred to the fact that it has been four years since the Statement of Allegations was issued in this matter and seven years since the matters at issue took place and during this time period Xavier has not been involved in any problems with securities commissions and has not received any client complaints. According to counsel for Xavier, this demonstrates that Xavier does not pose a threat to the capital markets.

[35] As a mitigating factor, counsel for Xavier submitted that Xavier cooperated with the investigation in this matter from the beginning.

[36] Counsel for Xavier also submitted that Xavier's situation can be distinguished from *Re Verbeek* on a number of grounds:

(i) Verbeek was registered not only as a mutual funds salesperson, but also as a salesperson for equities and securities, and as a result, had greater experience in the market place than Xavier;

(ii) Verbeek was a branch manager, whereas Xavier was a salesperson;

(iii) Verbeek admitted to intimate involvement with the promotion and sale of shares of a private company and, in the case before us, this role was undertaken by Cornwall and Simpson not Xavier;

(iv) Verbeek solicited investors by placing advertisements in newspapers, responding to calls from investors and meeting with investors who responded to newspaper advertisements. Conversely, Xavier did not solicit investors; they had already made the decision to invest by the time they came into contact with Xavier;

(v) Verbeek processed approximately 670 transactions with a value in excess of $17 million, whereas the present case involved 87 transactions with a value of less than $2 million;

(vi) Verbeek completed loan documents and explained the loans to numerous investors, whereas in the present case, the evidence at the hearing on the merits revealed that only one investor discussed the loans with Xavier;

(vii) the Commission brought to Verbeek's attention its reservations with respect to members of the public investing in locked-in RSPs and investing those funds in small companies. Conversely, Xavier was not alerted to this issue; and

(viii) Verbeek denied receiving any compensation from processing the loan transactions, whereas Xavier admitted from the beginning that he received fees for helping investors to open their accounts, and these fees were reported in Xavier's income tax returns.

[37] With respect to the termination of Xavier's registration, counsel for Xavier submitted that there had to be some specificity in terms of the time period of such termination so that upon its expiration, Xavier could reapply for registration.

[38] As an alternative to termination, suspension of registration was suggested. Further, it was submitted that the time period in question should be proportionate to the circumstances and not punitive. In determining an appropriate time period for the suspension of registration, counsel for Xavier submitted that Xavier's ability to earn a livelihood should be considered and that a range of 6 months to 12 months would be appropriate and sufficient to provide personal and general deterrence.

[39] Counsel for Xavier also submitted that any sanction imposed on Xavier should be related to the allegations brought against Xavier. For instance, Xavier was not involved as an officer or director with any of the Private Companies; thus, a prohibition from acting as an officer and director should not be imposed on him. In addition, counsel for Xavier argued that, should a cease trade order be issued against him, he should have the benefit of a carve-out to permit him to manage his personal finances.

[40] As for costs, it was submitted that costs should not be paid jointly by the Respondents. Instead costs should be apportioned to each individual respondent. As such, the circumstances of each respondent to pay costs should be considered. Counsel for Xavier submitted that Xavier's ability to pay should be taken into account in the assessment of costs.

3. Cornwall and CGC Financial

[41] Although Cornwall did not appear at the Sanctions and Costs Hearing, he did provide the Panel with written submissions on behalf of himself and CGC Financial.

[42] Cornwall submitted that he and CGC Financial were not solely responsible for all of the conduct that took place. Cook, the chartered accountant, and Xavier, the registrant, were integral to the scheme, and without the participation of both of these professionals, the investment scheme would not have taken place.

[43] Cornwall also submitted that investors were cautioned that: (i) there might be negative implications with the Canada Revenue Agency; (ii) this was a high-risk investment; thus, it was possible that investors might lose all or part of their investment; and (iii) investors were advised to seek legal advice before signing. Staff pointed out that we were not provided with any supporting evidence in connection with this submission.

[44] Further, Cornwall admitted in his written submissions that in hindsight, he was irresponsible for not obtaining legal advice. He also pointed out that during the course of this proceeding, he cooperated with Staff, and that we should consider this to be a mitigating factor in his favour.

[45] With respect to the quantum relating to the profits made by Cornwall, it is Cornwall's position that there is insufficient evidence connecting him to the profits. Specifically, Cornwall's written submissions state:

> I submit that I did not receive $367,000.00; this as given in evidence is a guesstimate of Mr. Boyle. When Mr. Boyle gave his evidence in chief he was not sure of how much money was transferred and who received what. On cross-examination by Ms Anna Markiewicz as to how much money was received Mr. Boyle shrugged his shoulders and stated he did not know.
>
> […] I submit that this amount of $367,000.00 be given little or no credit.

[46] As for the issue of costs, Cornwall takes the position that costs should not be payable jointly by the Respondents but that they "be separated amongst each respondent and Corporation". He also submitted that in other Commission cases, such as *Re Verbeek*, a lower quantum of costs was ordered.

[47] Cornwall submitted that delay in the proceeding was not due to the Respondents, but instead to Staff. However, Cornwall did not provide any evidence on this point. Cornwall also referred to Charter arguments on the issue of delay of proceedings.

[48] Cornwall also submitted that his conduct was different from *Re Verbeek*, one of the authorities that Staff relied on to support their position. He stated in his written submissions that:

> In the Brian Verbeek case Mr. Verbeek processed 670 files processing over $17,000,000.00 and had over 100 waiting to be transferred. He was levied cost of $94,618.74. In my case with 87 transactions and $1,900,200.00 the investigation costs should have been 80% less. I therefore respectfully submit that a large portion of the time billed to this

> case is overlapped on the Verbeek hearings. It should also be noted, and I respectfully submit that Mr. Verbeek continues to sell shares in small business properties after the January 2001 period. Myself and the other respondents has stopped in December 2000, before Mr. Boyle had made a visit to my office in 2001.

[49] Cornwall submitted that during the investigation of this case, witnesses were "open to be influenced by investigators that feed misinformation, or very suggestive information to the witness." However, we note that no evidence of this type of conduct was put before us.

[50] Cornwall also referred to the following mitigating factors in his written submissions: (1) since the charges were laid, he and his family have suffered for seven years; (2) he has a serious health problem for which he had surgery in October 2007; (3) he has remorse for the grief caused to his family and "remorse for the grief to some of the annuitants that want to redo the process"; and (4) many past clients have thanked him and some wanted to testify on his behalf. With respect to the fourth point, Cornwall did not provide any evidence regarding his clients' attitudes or perceptions.

[51] Finally, Cornwall submitted that the following sanctions would be appropriate in his case: (1) not to trade in securities save and except for an RSP limited to himself; (2) not to sit on any board of a publicly traded company for 25 years; (3) not to own any corporation that is an issuer; and (4) the costs assessed against him and CGC Financial Services be $15,000.00.

4. Simpson and First Financial

[52] Simpson provided oral and written submissions on behalf of himself and First Financial. It is his position that the sanctions sought by Staff are excessive.

[53] With respect to his conduct in this matter, Simpson submitted that he was not a mastermind behind the structure of the scheme. According to Simpson's written submissions, Simpson was only involved in approximately 30 transactions totalling approximately $700,000.00.

[54] Further, he pointed out that his involvement was limited to two of the Private Companies, Themis and Stramore. Themis repurchased its shares from investors, and Stramore repurchased some of its shares from investors. Simpson also pointed out that Stramore is still an active and viable company.

[55] Simpson takes the position in his written submissions that he and First Financial met all their obligations to the RSP holders and that numerous other companies were offering similar investment opportunities.

[56] Simpson submitted that any sanctions imposed should be limited to public issuers and not all issuers. Simpson's argument was that he is self-employed and in order for

him to make a living the sanctions imposed should not restrict him from being involved with any private companies.

[57] With regard to costs, Simpson submitted that the amount sought by Staff is excessive and that he cooperated with investigators and Staff in this matter. Simpson also informed us that he personally has incurred $30,000 in legal fees and related costs in this matter.

[58] In addition, Simpson also asked that an RSP carve-out for personal accounts be made available to him to permit him to manage his personal finances.

5. Cook

[59] Counsel for Cook provided oral and written submissions. In particular counsel for Cook emphasized that throughout this proceeding Cook admitted her involvement, took responsibility for her actions and showed remorse, and as a result, Cook should be given credit for this in terms of the sanctions imposed on her. In addition, Cook was disciplined by the Institute of Chartered Accountants of Ontario at a hearing in this matter where she pleaded guilty and acknowledged her conduct.

[60] With respect to imposing a permanent trading ban, counsel for Cook submitted that this sanction is excessive. It was submitted that none of Cook's conduct in this matter related to trading. She did not own or transfer any securities and did not solicit investors. Accordingly, it was submitted that Cook does not represent a danger to the investing public and that there is no need for specific deterrence in her case. As a result, a trading ban is not appropriate. In the alternative, it was submitted that if a trading ban were imposed, Cook's conduct does not merit a lengthy ban, and she should be provided with an RSP carve out.

[61] Counsel for Cook also submitted that Cook should not be permanently banned from acting as an officer or director because a permanent ban would be disproportionate to the gravity of her conduct in this case.

[62] Further, counsel for Cook submitted that a reprimand would be unnecessary because Cook was already reprimanded by the Institute of Chartered Accountants of Ontario.

[63] Counsel for Cook also pointed out a number of mitigating factors that should be considered when imposing sanctions, particularly, Cook's ability to pay. She is a single mother with three university aged children and she has experienced financial difficulties. With the exception of being disciplined by the Institute of Charted Accountants of Ontario in this matter, Cook has no other disciplinary or regulatory history.

[64] With respect to costs, counsel for Cook emphasized that from the outset of this proceeding, Cook cooperated with the Commission and this minimized costs attributable to her. As such, counsel for Cook submitted that costs in the amount of $3,000.00 or less would be appropriate.

V. Analysis

1. Relevant Considerations for Imposing Sanctions

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

[66] Protection of investors is an important aspect of the Commission's public interest jurisdiction, and this was articulated by the Commission in *Re Mithras Management Inc*.:

> […] the role of this Commission is to protect the public interest by removing from the capital markets -- wholly or partially, permanently or temporarily, as the circumstances may warrant -- those whose conduct in the past leads us to conclude that their conduct in the future may well be detrimental to the integrity of those capital markets. We are not here to punish past conduct; that is the role of the courts, particularly under section 118 [now 122] of the Act. We are here to restrain, as best we can, future conduct that is likely to be prejudicial to the public interest in having capital markets that are both fair and efficient. In so doing we must, of necessity, look to past conduct as a guide to what we believe a person's future conduct might reasonably be expected to be; we are not prescient, after all. (*Mithras*, *supra* at 1610 and 1611)

[67] As stated by the Supreme Court of Canada in *Committee for Equal Treatment of Asbestos Minority Shareholders v. Ontario (Securities Commission*), [2001] 2 S.C.R. 132, the Commission's public interest jurisdiction is neither remedial nor punitive; instead, it is protective and preventative, and it is intended to prevent future harm to Ontario's capital markets (at para. 42).

[68] In determining the appropriate sanctions to order in this matter, we must consider the specific circumstances in this case and ensure that the sanctions are proportionate (*Re M.C.J.C. Holdings*, (2002), 25 O.S.C.B. 1133 at para. 26).

[69] *Re Belteco Holdings Inc.* (1998), 21 O.S.C.B. 7743 provides at page 7746 a list of non-exhaustive factors to consider when imposing sanctions:

(i) the seriousness of the allegations;

(ii) the respondent's experience in the marketplace;

(iii) the level of a respondent's activity in the marketplace;

(iv) whether or not there has been a recognition of the seriousness of the improprieties;

(v) 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; and

(vi) any mitigating factors.

[70] Additional factors to consider were also set out in *Re M.C.J.C. Holdings Inc.*:

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

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

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

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

(v) the shame or financial pain that any sanction would reasonably cause to the respondent and the remorse of that respondent.
(*Re M.C.J.C. Holdings Inc.*, *supra* at para. 26)

[71] In addition, general deterrence is another important factor that the Commission should consider when determining appropriate sanctions. In *Re Cartaway Resources Corp.*, [2004] 1 S.C.R. 672, the Supreme Court of Canada at paragraph 60 established that "[…] it is reasonable to view general deterrence as an appropriate, and perhaps necessary, consideration in making orders that are both protective and preventative".

2. Appropriate Sanctions

i. Disgorgement

[72] First, we find that in the circumstances it is inappropriate for us to order disgorgement in this case. We recognize that as pointed out in Cornwall's written submissions, the numbers relating to amounts obtained by some of the Respondents as a result of non-compliance with the Act are estimates. This is also evident from our Reasons and Decision on the merits, where we acknowledged that Staff provided estimates and approximations of these amounts. For example, we state in our Reasons and Decision on the hearing on the merits that:

> Boyle estimated – based on a figure of 65% of the total amount invested being returned to investors – that Cornwall/CGC Financial received gross proceeds of approximately $367,000. Although this amount is an estimate and is imprecise we do find that Cornwall/CGC Financial received a substantial amount. (*Re Cornwall*, *supra* at para. 102)

[73] Further, at paragraphs 109 and 131 of our Reasons and Decision on the merits, we note that the numbers relating to the bulk of the amounts improperly obtained are estimates or approximations.

[74] Also, there is a lack of concrete and coherent evidence linking these estimates or approximations to individual Respondents. In this case, where there is such imprecision and inaccuracies with respect to amounts improperly obtained and by whom, we do not consider it appropriate to order disgorgement.

[75] The parties made submissions on the Commission's jurisdiction to order disgorgement; however, as we do not consider it to be an appropriate case to order disgorgement, it is unnecessary for us to address these jurisdictional submissions.

ii. Charter Arguments

[76] One of the Respondents took the position that the delay in this matter coming before the Commission was an infringement of his Charter rights "to be tried within a reasonable time" pursuant to section 11(b) of the Charter.

[77] Staff took the position that section 11 of the Charter does not apply to this proceeding because it is an administrative proceeding and the sanctions sought are not penal in nature. We accept Staff's position in this case and rely on the position of the Supreme Court of Canada on this issue:

> Proceedings of an administrative nature instituted for the protection of the public in accordance with the policy of a statute are also not the sort of "offence" proceedings to which s. 11 is applicable. But all prosecutions for criminal offences under the Criminal Code and for quasi-criminal offences under provincial legislation are automatically subject to s. 11. They are the kind of offences to which s. 11 was intended to apply. (*R v. Wigglesworth*, [1987] 2 S.C.R. 541 at para. 23)

iii. Xavier

[78] Xavier has been registered under the Act since September 1999 as a mutual funds salesperson with Keybase. At the hearing on the merits in this matter, it was found that Xavier abdicated his responsibilities and failed to live up to the high standard of conduct required by registrants (*Re Cornwall*, *supra* at paras. 154-172). Xavier's experience as a registrant and participant in the capital markets is important to our determination of appropriate sanctions. Registration is a privilege, not a right, and the Commission has the power to restrict registration of individuals who, as registrants, do not fulfill their duties and/or abuse the capital markets and investors.

[79] Specifically, Xavier provided blank trust company client application forms, blank Keybase application forms and blank Revenue Canada forms, for Cornwall to complete

when he met with investors. This action was integral to the functioning of the general investment scheme. Xavier processed the completed forms in order to collapse the original RSP, transfer the funds thereby obtained into the new accounts and complete the purchases of the shares in the Private Companies for the investors. Many of these forms were processed by Xavier without his having spoken to or having met with the investors even though his name appeared as the registered representative and/or investment advisor on the accounts of the investors (*Re Cornwall*, *supra* at paras. 12 and 134). In addition, some of these forms contained inaccurate information and forged signatures.

[80] By participating in this scheme, Xavier earned approximately $46,000.

[81] Counsel for Xavier argued that Xavier's conduct can be distinguished from Cornwall and Simpson and the conduct described in *Re Verbeek*. While we do recognize that Xavier was not the architect of the scheme, we find that his participation was integral to the successful functioning of the scheme. Without Xavier's participation, the scheme would not have worked.

iv. Cornwall and CGC Financial

[82] At the hearing on the merits in this matter, we found that Cornwall was one of the architects of the investment scheme in this matter. He helped to create two of the four Private Companies, solicited investors by placing advertisements in various newspapers and met with those who responded. He also had the investors sign the documentation necessary to permit the realization and transfer of their RSP funds, arranged for the purchase of the shares of the Private Companies and had the investors sign loan agreements, including a fee agreement (*Re Cornwall*, *supra* at paras. 8, 71, 187-190). These are important factors to consider when determining the appropriate sanctions to impose in this matter.

[83] This scheme also targeted vulnerable investors who were experiencing financial hardship. In our view, this deliberate conduct justifies restricting Cornwall's and CGC Financial's participation in the capital markets. Such a sanction would provide specific and general deterrence.

[84] Another relevant factor we considered was Cornwall's experience in the market place. Cornwall was registered under the Act from April 11, 2000 to October 5, 2001 as a scholarship plan dealer. As a registrant, Cornwall should have been aware of his obligations to investors and the high standard of conduct that is required from a registrant.

[85] We also find that Cornwall did not recognize the seriousness of his improprieties, which is also an important sanctioning factor to consider. Instead, in his written submissions, Cornwall attempted to justify the scheme he orchestrated by explaining that investors were advised that the investments were high risk, that they could lose all or part of the investment and that investors were advised to seek legal counsel. Further, Cornwall did not show remorse vis-à-vis all the adversely affected investors, he only exhibited

remorse regarding his personal and family situation, and "the annuitants that want to redo the process".

v. Simpson and First Financial

[86] Simpson was the sole director of First Financial, and he was involved with two of the Private Companies. Along with Cornwall, he was an architect of the scheme at issue. By his own admission, Simpson introduced Cornwall to the scheme and together they finalized its details prior to its implementation. In particular, Simpson:

(1) paid for newspaper advertisements offering people the opportunity to gain access to funds in their locked-in RSPs;

(2) together with Cornwall sought out investors and arranged for the issuance to them of shares in two of the Private Companies (Themis and Stramore);

(3) caused Themis and/or Stramore to transfer a substantial portion of the proceeds received from the investors on the purchase of their shares to First Financial;

(4) met with investors with respect to the loans made to them after the purchase by the investors of shares in Themis and/or Stramore; and

(5) arranged for the investors to sign loan agreements with First Financial, including a fee agreement.

(*Re Cornwall, supra* at paras. 188-190)

[87] Simpson and First Financial received significant proceeds from this scheme. While Simpson did receive fewer proceeds than Cornwall, his involvement and the amounts obtained were significant.

[88] In addition, while Simpson was not registered under the Act, he did have experience as an unregistered mortgage dealer, and did have knowledge of financial matters.

[89] We also note that Simpson did not recognize the seriousness of his improprieties. For example, in his written submissions, Simpson stated that he and First Financial met all their obligations to the RSP holders. He also attempted to justify his conduct by stating in his written submissions that numerous other companies were offering similar investment opportunities.

vi. Cook

[90] Cook played an integral role in this scheme. She provided opinion letters that shares of the Private Companies were qualified investments under the *Income Tax Act*. These letters were necessary; otherwise, the trust companies would not have purchased the

Private Companies' shares for the investors' RSPs. Therefore, Cook's essential role in the scheme is an important factor to consider when determining sanctions.

[91] Cook's experience is also a relevant factor. Cook is a chartered accountant, and when she participated in this scheme, she did not have any experience interpreting or applying the relevant sections of the *Income Tax Act*. She admitted that she failed to perform her professional services with integrity and due care. We also accept Staff's submission that when Cook signed the qualification letters, she did so without conducting the requisite due diligence regarding the Private Companies and the possible tax implications of the transactions for the investors.

[92] Cook admitted to receiving total fees of $13,900 in connection with this matter.

[93] While Cook has been sanctioned by the Institute of Chartered Accountants of Ontario, it is still appropriate for the Commission to sanction her for her conduct in this matter because the Commission has a distinct public interest mandate to protect the investing public. We note that Cook's participation in this scheme made it possible to raise $1.9 million from 87 investors.

[94] Although Cook was a necessary part of the scheme, she was not the architect of it. We also recognize that Cook has admitted her wrongdoing and has recognized the seriousness of her actions. She was not an architect of the scheme and she was not intimately involved with the investors. We consider these to be mitigating factors with respect to the payment of costs.

vii. Costs

[95] Based on the submissions and information presented by Staff we assess the total costs payable by the Respondents at $108,000.00. With respect to the quantum of costs payable by each of the Respondents in this matter, we have apportioned these costs against the Respondents in some cases severally and in some cases jointly and severally based on our assessment of the degree of responsibility of each Respondent.

[96] We find that the architects of the scheme should bear the bulk of the costs incurred. As such, we have allocated 70% of the costs to the architects of the scheme. Cornwall and CGC Financial are jointly and severally responsible for 35% of the costs. Simpson and First Financial are jointly and severally responsible for 35% of the costs.

[97] While Xavier was not an architect of the scheme, as a registrant he had a great deal of interaction with investors and his participation in the scheme was necessary to make it function, and we find that Xavier is responsible for 25% of the costs.

[98] Lastly, we find that Cook is responsible for 5% of the costs. The lower percentage of costs attributed to Cook is a result of the mitigating factors in her favour.

VI. Decision on Sanctions

[99] We consider that it is important in this case to: (1) impose sanctions that reflect the seriousness of the securities law violations that occurred in this matter; and (2) impose sanctions that not only deter the Respondents but also like-minded people from engaging in future conduct that violates securities law.

[100] For the reasons stated above, we are of the opinion that it is in the public interest to make the following order with respect to sanctions against the Respondents.

[101] With respect to the respondent Xavier, it is ordered that:

(A) the registration of Xavier is terminated and he is not eligible to reapply for registration for a period of twelve months;

(B) trading, directly or indirectly, in any securities by Xavier, for his own account or for the account of others shall cease until the earlier of registration under the Act or the date which is 5 years from the date of this Order with the exception that:

(1) Xavier is permitted to trade in securities for his own account or for the account of a registered retirement savings plan, a registered education savings plan or registered retirement income fund (as defined in the *Income Tax Act* (Canada)) in which he or his immediate family members have sole legal and beneficial ownership and interest, directly or indirectly, provided that:

(a) the securities are listed and posted for trading on the Toronto Stock Exchange, the TSX Venture Exchange, the New York Stock Exchange, the National Association of Securities Dealers Automated Quotation System or the London Stock Exchange (or their successor exchanges) or are issued by a mutual fund which is a reporting issuer;

(b) Xavier, or any such immediate family member, does not own alone or jointly, legally or beneficially, directly or indirectly, more than one per cent of the outstanding securities of the class or series of the class in question; and

(c) Xavier must carry out permitted trading through a registered dealer and through accounts opened, only in:

(i) his name;

(ii) his immediate family members' names; or

(iii) the name of an issuer where all of the securities are held by Xavier, Xavier's immediate family members or an individual who beneficially owns, directly or indirectly, financial assets, as defined in National Instrument 45-106 *Prospectus and Registration Exemptions*, having an aggregate realizable value that, before taxes but net of any related liabilities, exceeds $5 million or its equivalent in another currency as certified by the individual ("Permitted Investor");

(d) Xavier must close any accounts which he has opened, and in which he or his immediate family members, or a Permitted Investor, have any legal or beneficial ownership, direct or indirect, which are not in compliance with the provisions of item (c) of paragraph 101(B)(1) of this Order.

(2) Xavier is permitted to trade in the securities issued by an issuer where all of the securities issued by the issuer are held by Xavier, Xavier's immediate family members or a Permitted Investor and where after any trade such securities will continue to be held by Xavier, Xavier's immediate family members or a Permitted Investor.

(C) any exemptions contained in Ontario securities law do not apply to Xavier until the earlier of registration under the Act or the date which is 5 years from the date of this Order, except for those exemptions necessary to enable Xavier to trade in securities as permitted by paragraph 101(B) of this Order;

(D) Xavier shall resign any positions he holds as an officer or director of any issuer with the exception that Xavier may continue as an officer or director of an issuer, referred to in paragraph 101(B)(2) of this Order;

(E) Xavier is prohibited from becoming or acting as an officer or director of any issuer until the earlier of his registration under the Act or the date which is 5 years from the date of this Order, with the exception that Xavier may become or act as an officer or director of an issuer referred to in paragraph 101(B)(2) of this Order;

(F) Xavier is hereby reprimanded; and

(G) Xavier shall pay costs of $27,000.

[102] With respect to the respondent Cornwall, it is ordered that:

(A) trading, directly or indirectly, in any securities by Cornwall, for his own account or for the account of others shall cease permanently, with the exception that:

(1) Cornwall is permitted to trade in securities for his own account or for the account of a registered retirement savings plan, a registered education savings plan or registered retirement income fund (as defined in the *Income Tax Act* (Canada)) in which he or his immediate family members have sole legal and beneficial ownership and interest, directly or indirectly, provided that:

(a) the securities are listed and posted for trading on the Toronto Stock Exchange, the TSX Venture Exchange, the New York Stock Exchange, the National Association of Securities Dealers Automated Quotation System or the London Stock Exchange (or their successor exchanges) or are issued by a mutual fund which is a reporting issuer;

(b) Cornwall, or any such immediate family member, does not own alone or jointly, legally or beneficially, directly or indirectly, more than one per cent of the outstanding securities of the class or series of the class in question; and

(c) Cornwall must carry out permitted trading through a registered dealer and through accounts opened, only in:

(i) his name;

(ii) his immediate family members' names; or

(iii) the name of an issuer where all of the securities are held by Cornwall, Cornwall's immediate family members or a Permitted Investor;

(d) Cornwall must close any accounts which he has opened, and in which he or his immediate family members, or a Permitted Investor, have any legal or beneficial ownership, direct or indirect, which are not in compliance with the provisions of item (c) of paragraph 102(A)(1) of this Order.

(2) Cornwall is permitted to trade in the securities issued by an issuer where all of the securities issued by the issuer are held by Cornwall, Cornwall's immediate family members or a Permitted Investor and where after any trade such securities will continue to

be held by Cornwall, Cornwall's immediate family members or a Permitted Investor.

(B) any exemptions contained in Ontario securities law do not apply to Cornwall permanently, except for those exemptions necessary to enable Cornwall to trade in securities as permitted by paragraph 102(A) of this Order;

(C) Cornwall shall resign any positions he holds as an officer or director of any issuer with the exception that Cornwall may continue as an officer or director of an issuer referred to in paragraph 102(A)(2) of this Order;

(D) Cornwall is prohibited from becoming or acting as an officer or director of any issuer, with the exception that Cornwall may become or act as an officer or director of an issuer referred to in paragraph 102(A)(2) of this Order; and

(E) Cornwall is hereby reprimanded.

[103] With respect to the respondent CGC Financial, it is ordered that:

(A) trading, directly or indirectly, in any securities by CGC Financial, for CGC Financial's own account or for the account of others shall cease permanently, with the exception that CGC Financial is permitted to dispose of those securities held for its own account as of the date of this Order;

(B) any exemptions contained in Ontario securities law do not apply to CGC Financial permanently, except for those exemptions necessary to permit CGC Financial to dispose of those securities held for its own account as of the date of this Order as permitted by paragraph 103(A) of this Order; and

(C) CGC Financial is hereby reprimanded.

[104] With respect to the respondents Cornwall and CGC Financial, it is ordered that:

(A) Cornwall and CGC Financial shall pay, jointly and severally, costs of $38,000.

[105] With respect to the respondent Simpson, it is ordered that:

(A) trading, directly or indirectly, in any securities by Simpson, for his own account or for the account of others shall cease permanently, with the exception that:

(1) Simpson is permitted to trade in securities for his own account or for the account of a registered retirement savings plan, a registered education savings plan or registered retirement income fund (as defined in the *Income Tax Act* (Canada)) in which he or his immediate family members have sole legal and beneficial ownership and interest, directly or indirectly, provided that:

(a) the securities are listed and posted for trading on the Toronto Stock Exchange, the TSX Venture Exchange, the New York Stock Exchange, the National Association of Securities Dealers Automated Quotation System or the London Stock Exchange (or their successor exchanges) or are issued by a mutual fund which is a reporting issuer;

(b) Simpson, or any such immediate family member, does not own alone or jointly, legally or beneficially, directly or indirectly, more than one per cent of the outstanding securities of the class or series of the class in question; and

(c) Simpson must carry out permitted trading through a registered dealer and through accounts opened, only in:

(i) his name;

(ii) his immediate family members' names; or

(iii) the name of an issuer where all of the securities are held by Simpson, Simpson's immediate family members or a Permitted Investor;

(d) Simpson must close any accounts which he has opened, and in which he or his immediate family members, or a Permitted Investor, have any legal or beneficial ownership, direct or indirect, which are not in compliance with the provisions of item (c) of paragraph 105(A)(1) of this Order;

(2) Simpson is permitted to trade in the securities issued by an issuer where all of the securities issued by the issuer are held by Simpson, Simpson's immediate family members or a Permitted Investor and where after any trade, such securities will continue to be held by Simpson, Simpson's immediate family members or a Permitted Investor.

(B) any exemptions contained in Ontario securities law do not apply to Simpson permanently, except for those exemptions necessary to enable

Simpson to trade in securities as permitted by paragraph 105(A) of this Order;

(C) Simpson shall resign any positions he holds as an officer or director of any issuer with the exception that Simpson may continue as an officer or director of an issuer referred to in paragraph 105(A)(2) of this Order;

(D) Simpson is prohibited from becoming or acting as an officer or director of any issuer, with the exception that Simpson may become or act as an officer or director of an issuer referred to in paragraph 105(A)(2) of this Order; and

(E) Simpson is hereby reprimanded.

[106] With respect to the respondent First Financial, it is ordered that:

(A) trading, directly or indirectly, in any securities by First Financial, for First Financial's own account or for the account of others shall cease permanently, with the exception that First Financial is permitted to dispose of those securities held for its own account as of the date of this Order;

(B) any exemptions contained in Ontario securities law do not apply to First Financial permanently, except for those exemptions necessary to permit First Financial to dispose of those securities held for its own account as of the date of this Order as permitted by paragraph 106(A) of this Order; and

(C) First Financial is hereby reprimanded.

[107] With respect to the respondents Simpson and First Financial:

(A) Simpson and First Financial shall pay, jointly and severally, costs of $38,000.

[108] With respect to the respondent Cook, it is ordered that:

(A) Cook is hereby reprimanded; and

(B) Cook shall pay costs of $5,000.

Dated at Toronto, this 5th day of May, 2008.

"*Robert L. Shirriff*"
Robert L. Shirriff, Q.C.

"*David L. Knight*"
David L. Knight, FCA

"*Margot C. Howard*"
Margot C. Howard, CFA

Relevant Excerpt of National Instrument 45-106
Prospectus and Registration Exemptions

1.1 Definitions – In this Instrument

[…]

"financial assets" means

(a) cash,

(b) securities, or

(c) a contract of insurance, a deposit or an evidence of a deposit that is not a security for the purposes of securities legislation.