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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
REX DIAMOND MINING CORPORATION, SERGE MULLER
AND BENOIT HOLEMANS

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

Hearing:	May 11, 2009	
Decision:	August 11, 2009	
Panel:	Wendell S. Wigle, Q.C.	- Commissioner and Chair of the Panel
	David L. Knight, F.C.A.	- Commissioner
	Kevin J. Kelly	- Commissioner
Counsel:	John Corelli Shauna Flynn	- For Staff of the Ontario Securities Commission
	Matthew Scott	- For Rex Diamond Mining Corporation, Serge Muller, and Benoit Holemans

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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 Rex Diamond Mining Corporation ("Rex"), Serge Muller ("Muller") and Benoit Holemans ("Holemans") (collectively, the "Respondents").

[2] The hearing on the merits commenced on December 10, 2007, and evidence was heard on December 10, 11, 12, 13 and 14, 2007. Following the close of evidence, submissions on the merits were heard on March 31, 2008, and the decision on the merits was rendered on August 21, 2008 (*Re Rex Diamond et al*. (2008), 31 O.S.C.B. 8337 (the "Merits Decision")).

[3] Following the release of the Merits Decision, we held a separate hearing on May 11, 2009, to consider submissions from Staff and the Respondents regarding sanctions and costs (the "Sanctions and Costs Hearing").

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

II. Reasons and Decision Dated August 21, 2008

[5] The Merits Decision addressed the following allegations: (1) whether material changes occurred in Rex's operations when it found out about the potential revocation of certain mining leases (the "Leases"); (2) whether Muller and Holemans (as CEO and CFO, respectively) authorized, acquiesced or permitted a breach of section 75 of the Act; (3) whether the Respondents provided misleading disclosure in Rex's public filings; and (4) whether the Respondents misled Market Regulation Services Inc. ("RS") by providing incomplete and inaccurate information.

[6] Upon reviewing all the evidence, the applicable law and the submissions made, the Panel concluded in the Merits Decision that:

(1) it is likely that there was a material change in the business, operations or capital of Rex when Rex received the following correspondence from the Government of Sierra Leone:

   (a) the first warning letter dated January 3, 2003, which advised Rex that the Minerals Advisory Board recommended to the Minister of Mineral Resources that Rex's Leases be cancelled because Rex did not comply with the conditions set out in the Leases; and

   (b) the second warning letter dated April 16, 2003, which advised Rex that its Leases were not in good standing and that Rex failed to honour its financial obligations;

(2) material changes did occur in the business, operations or capital of Rex when:

(a) Rex received the final notice warning letter dated June 4, 2003, from the Sierra Leone Government, which advised Rex that it had 90 days to comply with the conditions of the Leases or otherwise the Leases would be revoked;

(b) Rex became aware of the Notice of Tender on December 15, 2003; and

(c) the Government of Sierra Leone issued the Tender Evaluation on March 30, 2004.

(3) Rex should have issued news releases and filed material change reports following the events referred to in paragraphs 2(a) and 2(b), and should have filed a material change report as well as issuing a news release following the event described in paragraph 2(c). By failing to do so, Rex breached section 75 of the Act and acted contrary to the public interest;

(4) Rex acted contrary to the public interest by providing inaccurate and incomplete disclosure regarding its operations in Sierra Leone in each of its public filings of February 28, 2003, August 15, 2003 and November 28, 2003;

(5) Rex acted contrary to the public interest when it provided RS with an inaccurate and incomplete chronology of events; and

(6) Muller, as a director and the CEO of Rex, authorized or permitted, and Holemans, as the CFO of Rex, acquiesced in the conduct described in paragraphs (3) to (5) above, and thereby acted contrary to the public interest.

(Merits Decision, *supra* at paras. 8 and 285)

[7] It is this conduct that we must consider when determining the appropriate sanctions to impose in this matter.

III. Sanctions and Costs Requested by Staff

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

(1) that pursuant to paragraph 4 of subsection 127(1) of the Act, Rex implement a new disclosure policy developed by a third-party advisor acceptable to the Commission, before applying for re-listing on an exchange;

(2) that pursuant to paragraph 4 of subsection 127(1) of the Act, following the implementation of Rex's new disclosure policy a third-party advisor acceptable to the Commission will review Rex's disclosure practices and provide a written

report to Rex's shareholders and the Commission, all of which will occur before Rex applies for re-listing on an exchange;

(3) that pursuant to paragraph 4 of subsection 127(1) of the Act, Rex appoint to its Board an outside Director who satisfies criteria determined by a third-party advisor acceptable to the Commission, before applying for re-listing on an exchange;

(4) that pursuant to paragraph 6 of subsection 127(1) of the Act, Muller and Holemans be reprimanded;

(5) that pursuant to paragraph 7 of subsection 127(1) of the Act, Muller resign any position he holds as a director or officer of any issuer, including Rex, for a period of 10 years;

(6) that pursuant to paragraph 7 of subsection 127(1) of the Act, Holemans resign any position he holds as an officer of any issuer, including Rex, for a period of 18 months;

(7) that pursuant to paragraph 9 of subsection 127(1) of the Act, Rex and Muller pay administrative penalties in the following amounts:

(i) Rex: $100,000

(ii) Muller: $100,000

(8) That pursuant to subsections 127.1(1) & (2) of the Act, the Respondents pay the sum of $100,000 toward the costs of or related to the investigation and hearing incurred by the Commission, which amount is to be apportioned as follows:

(i) Rex: $60,000

(ii) Muller: $40,000

[9] In Staff's submission, the sanctions and costs requested are appropriate in light of the Respondents' serious breaches of the Act and conduct contrary to the public interest.

IV. The Law on Sanctions

[10] 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. 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 mandate 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). Specifically:

> … pursuant to s. 127(1), the OSC has the jurisdiction and a broad discretion to intervene in Ontario capital markets if it is in the public interest to do so. … In exercising its discretion, the OSC should consider the protection of investors and the efficiency of, and public confidence in, capital markets generally. In addition, s. 127(1) is a regulatory provision. The sanctions under the section are preventative in nature and prospective in orientation.
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> (*Canada in Committee for Equal Treatment of Asbestos Minority Shareholders v. Ontario Securities Commission, supra* at para. 45)

[11] In determining the appropriate sanctions to order in this matter, we must keep in mind the Commission's preventative and protective mandate set out in section 1.1 of the Act and we must also 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 1134).

[12] The case law sets out the following list of non-exhaustive factors that are important to consider when imposing sanctions:

(1) the seriousness of the allegations;

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

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

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

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

(6) whether the violations are isolated or recurrent;

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

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

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

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

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

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

(13) 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*, (2002), 25 O.S.C.B. 1133 at 1136 and *Re Belteco Holdings Inc.* (1998), 21 O.S.C.B. 7743 at 7746)

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

[14] 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 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" (at para. 60).

[15] As stated above, the sanctions imposed must be protective and preventative. The role of the Commission is to impose sanctions that will protect investors and the capital markets from exposure to similar conduct in the future. As articulated by the Commission in *Re Mithras Management Inc.* (1990), 13 O.S.C.B. 1600:

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

V. Appropriate Sanctions in this Case

1. Administrative Penalty

a. Staff's Submissions

[16] Staff requested an administrative penalty in the amount of $100,000 against Rex and $100,000 against Muller.

[17] In Staff's view, the imposition of administrative penalties would serve to discourage others from engaging in similar conduct. As well, Staff submitted that imposing an administrative penalty would impress upon Rex and Muller the severity of repetitive misconduct and failures to disclose the occurrence of material changes.

[18] Staff also addressed the fact that the Notice of Hearing in this matter did not specify that an administrative penalty would be sought. Staff submitted that although the Notice of Hearing was silent with respect to the imposition of an administrative penalty, the Panel could still impose such a penalty because:

(1) the legislation to impose an administrative penalty was in place and in force at the time that the Respondents' conduct occurred, and since the legislation does not mention a notice requirement for this sanction there is nothing that prohibits the imposition of an administrative penalty; and

(2) the Notice of Hearing contains a "basket clause" which states that the Commission may "make such other order as the Commission may deem appropriate". According to Staff, the "basket clause" provides notice that it is possible that other orders may be made by the Commission and this permits Staff to request additional sactions.

[19] As a result, in Staff's view, an administrative penalty may be imposed as the Commission has jurisdiction and there is no breach of fairness as the "basket clause" in the Notice of Hearing alerts the Respondents and their counsel that the Commission may make additional orders above and beyond those listed in the original Notice of Hearing. However, Staff did state that a request for an administrative penalty should normally be set out in the Notice of Hearing.

b. Respondents' Submissions

[20] Counsel for the Respondents took the position that it is inappropriate to impose an administrative penalty as this sanction was not identified as a potential sanction in the Notice of Hearing. Accordingly, imposing an administrative penalty is a breach of the duty of fairness as the Respondents now face a potential jeopardy of which they had no notice before the hearing on the merits.

[21] It was submitted that a party must be aware of the type of proceeding and the potential jeopardy being faced. According to the Respondents, the starting point for understanding what is at issue in a proceeding is the Notice of Hearing along with the Statement of Allegations. The Notice of Hearing lists the sanctions that are sought by Staff and informs the Respondents of the jeopardy that they face. As an administrative penalty was not listed, it was submitted that had the Respondents been aware that this sanction was at issue in this proceeding, they might have approached the proceeding in a different manner.

[22] With respect to the "basket clause", the Respondents are of the view that the "basket clause" cannot permit the addition of new sanctions at the last minute. It was submitted that the "basket clause" is only available to modify the types of orders listed in the Notice of Hearing to ensure that they have some practical effect. The "basket clause" should not be used to add new additional sanctions at the last minute.

c. Conclusion

[23] We are of the view that it would be unfair to impose an administrative penalty because the Notice of Hearing did not include a request for this remedy. The Respondents did not receive notice that an administrative penalty would be sought until five days before the Sanctions and Costs Hearing. If a request for an administrative penalty had been included in the Notice of Hearing, the Respondents might have taken a different approach in their preparation for the hearing. It is unfair to inform the Respondents after the merits hearing has concluded and only a

few days before the Sanctions and Costs Hearing commences that an administrative penalty is sought. As stated in *Judicial Review of Administrative Action in Canada*:

> It has been held in many different contexts that it is a breach of the duty of fairness to fail to inform the individual of the gist, or key issues, of the case to be met.
>
> …
>
> As well, since fairness requires that a person who has been found liable must normally be given an opportunity to address the decision-maker on the question of the appropriate penalty, *the parties should be given notice of the range of penalties to which they may be exposed.*
>
> [Emphasis added]
>
> (Brown and Evans, *Judicial Review of Administrative Action in Canada*, Looseleaf ed. (Toronto: Canvasback Publishing, 2008) at pp. 9-40 and 9-47)

[24] As a result, we have decided not to impose any administrative penalties in this case, as the Notice of Hearing did not contemplate that such a sanction might be imposed. In our view, Staff should have amended the Notice of Hearing to include a request for an administrative penalty in advance of the hearing on the merits.

2. Rex

a. Staff's Submissions

[25] Staff sought the following sanctions against Rex: (1) the implementation of a new disclosure policy developed by a third-party advisor acceptable to the Commission, before applying for re-listing on an exchange; (2) following the implementation of Rex's new disclosure policy, a third-party advisor acceptable to the Commission will review Rex's disclosure practices and provide a written report to Rex's shareholders and the Commission, all of which will occur before Rex applies for re-listing on an exchange; and (3) Rex appoint to its Board an outside Director who satisfies criteria determined by a third-party advisor acceptable to the Commission, before applying for re-listing on an exchange. Staff relied on paragraph 4 of subsection 127(1) of the Act to impose these sanctions.

[26] Staff explained in their submissions that the sanctions sought against Rex were designed to ensure that the company will not repeat the same misconduct in the future. According to Staff, Rex did not have adequate policies in place to either identify material changes when they occurred or to make disclosure of material changes once they were identified. For this reason, Staff requested that sound policies (as described above) be put in place because the policy Rex had in place failed to ensure timely disclosure of the difficulties surrounding the mining leases.

[27] In Staff's view, new policies along with the appointment of an outside Director would lay the foundation for cultural change at Rex. In addition, Staff took the position that the sanctions

requested would enable Rex to work with the Commission towards ensuring that similar breaches do not occur in the future.

b. Respondents' Submissions

[28] Counsel for the Respondents pointed out that the Notice of Hearing states "pursuant to paragraph 4 of subsection 127(1) that Rex submit to a review of its practices and procedures and institute such changes as may be ordered by the Commission", however, the Notice of Hearing did not flesh out all the details of the practices and procedures.

[29] It was submitted that since all the details of the practice and procedures were not set out in the Notice of Hearing, Staff's request under paragraph 4 of subsection 127(1) of the Act falls outside of what would be considered fair in the circumstances as there was no notice that there would be a new director or third party advisor appointed.

c. Conclusion

[30] Staff seeks an order under paragraph 4 of subsection 127(1) of the Act that: (1) Rex implement a new disclosure policy developed by a third-party advisor acceptable to the Commission, before applying for re-listing on an exchange; (2) following the implementation of Rex's new disclosure policy, a third-party advisor acceptable to the Commission will review Rex's disclosure practices and provide a written report to Rex's shareholders and the Commission, all of which will occur before Rex applies for re-listing on an exchange; and (3) Rex appoint to its Board an outside Director who satisfies criteria determined by a third-party advisor acceptable to the Commission, before applying for re-listing on an exchange.

[31] While the Notice of Hearing refers to paragraph 4 of subsection 127(1) of the Act, the specific sanctions that Staff has requested under this section are not mentioned in the Notice of Hearing. These proposed sanctions were articulated for the first time on the record in Staff's written submissions. This document is dated May 6, 2009, five days before the date of the Sanctions and Costs Hearing.

[32] We are of the view that it would be unfair to impose sanctions on Rex under paragraph 4 of subsection 127(1) of the Act because the Notice of Hearing did not provide Rex with sufficient detail about the scope and type of the sanctions sought by Staff.

[33] In our view, the wording in the Notice of Hearing "that Rex submit to a review of its practices and procedures and institute such changes" is vague and does not provide the Respondents with an understanding of the type of review Staff is now seeking. There is no mention of the requirements of the review, nor of the duration of the review. Further, the Notice of Hearing did not mention the possibility that Rex would be required to appoint a new director or third party advisor. It is unfair to inform any respondent after the merits hearing has concluded and days before the Sanctions and Costs Hearing commences that new sanctions (such as the appointment of a new director or third party advisor) are sought.

[34] As stated above at paragraph 23 of our Reasons and Decision, procedural fairness requires that a respondent be given notice of the range of sanctions to which they may be exposed (*Judicial Review of Administrative Action in Canada*, *supra* at p. 9-47). As a result, we have decided not to impose any sanction under paragraph 4 of subsection 127(1) in this case.

3. Muller

a. Staff's Submissions

[35] Staff sought the following sanctions against Muller: a reprimand and that Muller resign from any position he holds as a director or officer of any issuer, including Rex, for a period of 10 years.

[36] Staff submitted that since Muller's conduct was at the core of the non-disclosure and misleading disclosure that occurred in this case, his sanctions should reflect this and be more severe than the sanctions for Rex or Holemans.

[37] Staff also submitted that a 10 year director and officer ban is consistent with the case law. Staff pointed out that in *Mithras*, the Commission explained that the removal of individuals from the capital markets by the use of director and officer bans is an effective mechanism for protecting the public. In Staff's view, such a sanction is necessary to prevent future reoccurrences of similar conduct.

[38] Further, Staff focused on the fact that Muller was personally aware of information regarding Rex's mining leases and that he failed to communicate this information with others at Rex and in Rex's public filings. Staff emphasized that others at Rex deferred to Muller with respect to disclosure issues and that Muller's actions prevented disclosure of relevant information. According to Staff, Muller's conduct demonstrated a lack of appreciation of what a material change is, especially since Muller ignored advice that a material change had occurred.

b. Respondents' Submissions

[39] Counsel for the Respondents brought to our attention mitigating factors relating to Muller. It was submitted that although Muller did breach the continuous disclosure provisions of the Act, there was no malice involved on the part of Muller. Counsel for the Respondents argued that Muller merely exercised poor judgment with respect to Rex's disclosure. There was no evidence of personal gain by Muller or any of the other Respondents and there was no evidence of investor harm. As well, Muller cooperated with Staff during the course of the investigation and the hearing.

[40] With respect to the length of the officer and director ban, counsel for the Respondents submitted that a ban in the range of five or six years would be appropriate, or in the alternative a ban in the range between three to seven years would be acceptable in the circumstances. According to counsel for the respondents, imposing an officer and director ban in these ranges would be consistent with the ban imposed in *Re Anderson* (2009), LNABASC 87. In that case an officer and director ban was imposed for a period of 7 years in conjunction with an administrative penalty and costs for conduct relating to inaccurate disclosure in news releases.

[41] Counsel for the Respondents agreed that a reprimand is an acceptable sanction to impose under the circumstances of this case.

c. Conclusion

[42] Muller's actions were the core of the misconduct at issue in this case. Muller had the information about the mining leases and he decided not to make disclosure. Muller was the driving force behind the decisions that were made at Rex with respect to disclosing the material changes and as such, he must take responsibility for his actions. In the circumstances, we find that it is appropriate to impose a reprimand and to prohibit Muller from acting as an officer or director or any issuer for a period of 10 years.

[43] A ten year officer and director ban is appropriate in light of the numerous aggravating factors present. In particular, Muller's misconduct was not an isolated occurrence. Muller repeatedly failed to disclose material changes at Rex over a period of 10 months, and ignored the advice of others (such as the chief geologist, Rombouts) that material changes had in fact occurred.

[44] Another aggravating factor present is the fact that Muller only told certain individuals about what was happening to Rex's mines, therefore the general public did not have access to the same information. We note that this kind of selective disclosure exacerbates problems with equal access to information in the capital markets.

[45] In our view, these breaches of the Act's continuous disclosure regime are very serious in nature. Disclosure is a cornerstone of securities laws and regulations because the capital markets are dependent on current, truthful and accurate information that levels the playing field for all market participants. Muller failed to ensure that Rex complied with its continuous disclosure obligations. Specifically, Rex's public filings withheld crucial information about the mining leases and the prospects for Rex in Sierra Leone. In addition, Muller did not exhibit any recognition of the seriousness of his misconduct. In fact, he criticized the Commission for the pursuit of the allegations.

[46] Taking all of this into consideration, we find that it is appropriate for Muller to resign as an officer and director of Rex and to be prohibited from acting as an officer or director of any issuer for a period of 10 years. In our view, a 10 year ban is appropriate taking into consideration the specific facts present in this case and our findings in Merits Decision (see Merits Decision, *supra* at paras. 237 to 239).

[47] As well we find that it is appropriate for Muller to be reprimanded. The reprimand will provide strong censure of Muller's past conduct and impresses on the public the importance of timely, accurate and complete disclosure. Together, the combined sanctions will provide general and specific deterrence to help ensure that similar conduct does not take place in the future.

4. Holemans

a. Staff's Submissions

[48] Staff sought the following sanctions against Holemans: a reprimand and an order that Holemans resign any position that he holds as an officer of any issuer, including Rex, and be prohibited from acting as an officer of an issuer for a period of 18 months.

[49] In Staff's view, these sanctions reflect the level of Holemans' responsibility and take into account that in the Merits Decision, the Commission found Holemans' conduct less serious than Muller's conduct as Holemans lacked awareness of many of the events that transpired. For this reason, Staff has requested a shorter time period for Holemans' ban from acting as an officer.

b. Respondents' Submissions

[50] Counsel for the Respondents submitted that a reprimand is a sufficient sanction in the circumstances given Holemans' lack of awareness of the events that transpired, the fact that Holemans did not demonstrate any lack of respect to the Commission, and because Holemans cooperated with the Commission voluntarily.

[51] However, it was submitted that in the alternative if the Commission finds that it is necessary to remove Holemans from his position as CFO with Rex, then a ban of six months to one year would be appropriate in the circumstances.

[52] Counsel for the Respondents also emphasized that the Merits Decision found that Holemans' conduct was less blameworthy than Muller's conduct, and as a result, Holemans should be subject to lesser sanctions proportionate to his misconduct.

c. Conclusion

[53] Holemans was the CFO of Rex. As CFO, he occupied a position of authority, responsibility and trust within the company. He was ultimately responsible for Rex's financial reporting obligations and was named in Rex's disclosure policy as someone responsible for determining materiality.

[54] Regardless of his limited knowledge of events that transpired, as CFO, Holemans ought to have known about and was required to make further inquiries with respect to the status of the Leases, rather than simply deferring to Muller's instructions. Holemans' errors flowed from his failure as CFO to have sufficient processes in place to ensure that he was kept informed of material information and to diligently inquire into potentially material information that did come to his attention.

[55] In our view, imposing a reprimand and forced resignation as an officer of the company for a period of 12 months will deter Holemans from engaging in similar misconduct in the future. We find that a 12 month prohibition from becoming or acting as a director or officer of Rex or any other issuer is appropriate because Holemans'conduct was less serious than Muller's conduct as Holemans lacked awareness of many of the events that transpired (see Merits Decision, *supra* at para. 240).

[56] Together, all the sanctions imposed on Holemans will impress upon him and the public in general that there are consequences when an officer such as a CFO does not fulfill their duties.

VI. Costs

1. Staff's Submissions

[57] Staff requested, pursuant to section 127.1 of the Act, that Rex and Muller be ordered to pay a total of $100,000 to cover the costs of the investigation and hearing. Staff submitted that the total of $100,000 should be apportioned accordingly: Rex paying $60,000 in costs and Muller paying $40,000 in costs.

[58] In support of this request, Staff provided evidence relating to costs of the investigation and the hearing. 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 two Staff members involved in this matter: (1) investigative counsel, who was the lead investigator in this case, and (2) an investigator in the surveillance group, who performed the initial assessment of the case before it was transferred to a full investigation.

[59] Staff did not claim costs for any other Staff members that worked on the file, such as litigation counsel, other investigators, law clerks, students and assistants. According to Staff, the work of these other Staff members constituted approximately 20% of the total time dedicated to this case.

[60] Staff explained that its costs were calculated in accordance with Staff"s schedule of hourly rates for various members of Staff of the Enforcement Branch. This schedule was recommended by a consultant that was retained for the purpose of calculating an average hourly rate that would be used be all Staff to calculate costs. Specifically, investigation staff are billed at $185 per hour and litigation staff are billed at $205 per hour. Staff also explained that these billing rates do not reflect miscellaneous expenses that may arise in the conduct of an investigation or hearing. According to Staff's calculations, the total investigation costs for this case since January 2007 amount to $133,385 (721 hours billed by investigation staff). However, Staff only requested costs in the amount of $100,000.

2. The Respondents' Submissions

[61] Counsel for the Respondents submitted that the amount of costs payable by Rex and Muller should be discounted by 30% as the Respondents cooperated with Staff during the course of the proceeding. For example, the Respondents participated in voluntary interviews and provided documentation to Staff during the investigation. In addition, the cooperation of the Respondents enabled the Commission to conclude the merits hearing in six days (five days of evidence and one day for closing submissions).

[62] Counsel for the Respondents also questioned the amount of Staff's time and the costs claimed for correspondence (57.2 hours) and planning and reports (168 hours). It was submitted that these numbers appear to be excessive, but without the benefit of cross-examining the investigator it is difficult to ascertain the appropriateness of those hours and the costs associated with them. As a result, it was submitted that costs be discounted by 30% and that the allocation of 60% to Rex and 40% to Muller is appropriate in the circumstances.

3. Conclusion

[63] Pursuant to section 127.1 of the Act, the Commission has the discretion to order a person or company to pay the costs of the investigation (127.1(1)) and hearing (127.1(2)) if the Commission is satisfied that the person or company has not complied with the Act or not acted in the public interest.

[64] We have reviewed the documentation provided by Staff relating to the costs of the investigation and hearing and in the circumstances we find that it is appropriate for Muller to pay $40,000 in costs and Rex to pay $60,000 in costs. We note that Staff's total costs for the hearing amounted to $133,385 and Staff only requested recovering $100,000 of that total, a discount of approximately 25% of the total costs incurred. In our view, this discount reflects the fact that the Respondents cooperated with Staff during the course of the proceeding.

VII. Decision on Sanctions and Costs

[65] 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.

[66] We will issue an order giving effect to our decision on sanctions and costs and we order that:

(1) pursuant to paragraph 6 of subsection 127(1) of the Act, Muller and Holemans be reprimanded;

(2) pursuant to paragraph 7 of subsection 127(1) of the Act, Muller immediately resign as a director and officer of Rex for a period of 10 years commencing from the date of this Order;

(3) pursuant to paragraph 7 of subsection 127(1) of the Act, Holemans immediately resign as an officer of Rex for a period of 12 months commencing from the date of this Order;

(4) pursuant to paragraph 8 of subsection 127(1) of the Act, Muller be prohibited from becoming or acting as a director or officer of Rex or any other issuer for a period of 10 years commencing from the date of this Order;

(5) pursuant to paragraph 8 of subsection 127(1) of the Act, Holemans be prohibited from becoming or acting as a director or officer of Rex or any other issuer for a period of 12 months commencing from the date of this Order;

(6) pursuant to subsections 127.1(1) and (2) of the Act, Rex pay the amount of $60,000 toward the costs of or related to the investigation and hearing incurred by the Commission; and

(7) pursuant to subsections 127.1(1) and (2) of the Act, Muller pay the amount of $40,000 toward the costs of or related to the investigation and hearing incurred by the Commission.

Dated at Toronto, this 11th day of August, 2009.

"*Wendell S. Wigle*"
Wendell S. Wigle, Q.C.

"*David L. Knight*"
David L. Knight, F.C.A.

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