Ontario Securities Commission
Commission des valeurs mobilières de l'Ontario
P.O. Box 55, 19th Floor
20 Queen Street West
Toronto ON M5H 3S8
CP 55, 19e étage
20, rue queen ouest
Toronto ON M5H 3S8

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

- AND -

IN THE MATTER OF JAMES RICHARD ELLIOTT

REASONS AND DECISION
Subsections 127(1) and 127(10) of the *Securities Act,* R.S.O. 1990 c. S.5

Hearing:	February 25, 2009	
Decision:	August 28, 2009	
Panel:	Wendell S. Wigle, Q.C. David L. Knight, FCA	- Commissioner (Chair of the Panel) - Commissioner
Counsel:	Jonathon T. Feasby	- for Staff of the Ontario Securities Commission
	James Richard Elliott	- did not appear

TABLE OF CONTENTS

REASONS AND DECISION

I. BACKGROUND

[1] This was a hearing before the Ontario Securities Commission (the "Commission") on February 25, 2009 pursuant to section 127 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 imposing certain sanctions against James R. Elliott ("Elliott").

[2] This matter arose out of a Notice of Hearing issued by the Commission on November 24, 2008, in relation to a Statement of Allegations issued by Staff of the Commission ("Staff") on the same date. An Amended Statement of Allegations was issued by Staff on February 2, 2009, followed by an Amended Notice of Hearing issued by the Commission on February 5, 2009.

[3] Staff relies upon a procedure set out in paragraph 4 and 5 of subsection 127(10) of the Act, which provides that the Commission may make an order under subsection 127(1) or (5) "in respect of a person or company if … [t]he person or company is subject to an order made by a securities regulatory authority in any jurisdiction imposing sanctions, conditions, restrictions or requirements on the person or company" or if "[t]he person or company has agreed with a securities regulatory authority in any jurisdiction to be made subject to sanctions, conditions, restrictions or requirements".

[4] Pursuant to subsection 127(10) of the Act, Staff relies on a settlement agreement entered into by Elliott with the British Columbia Securities Commission ("BCSC"), *Re James Richard Elliott*, 2008 BCSECCOM 281 ("Settlement Agreement"), on May 28, 2008. The BCSC issued an order approving the settlement on the same date, *Re James Richard Elliott*, 2008 BCSECCOM 280 ("BCSC Order"). Facts set out in the Settlement Agreement are described fully below. Subsection 127(10) of the Act came into force on November 27, 2008, after the Settlement Agreement and BCSC Order were made.

[5] Staff filed written submissions the day before the hearing. Furthermore, in response to questions by this Panel during the hearing regarding the retrospective application of subsection 127(10) of the Act, Staff submitted supplementary written submissions on March 4, 2009.

[6] In this hearing, we have to determine whether Elliott "has agreed with a securities regulatory authority in any jurisdiction to be made subject to sanctions . . ." or "is subject to an order made by a securities regulatory authority in any jurisdiction imposing sanctions . . . ", and, if it is determined that Elliott agreed to be or has been sanctioned, whether the Commission should impose similar sanctions in Ontario.

II. PRELIMINARY ISSUES

A. Service and Elliott's Failure to Appear at the Hearing

[7] If an oral hearing is held, a party is entitled to notice of it and to be present at all times while evidence and submissions are being presented in order to obtain full disclosure of the case

the party has to meet. However, pursuant to section 7 of the *Statutory Powers Procedure Act*, R.S.O. 1990 c. S.22 (the "SPPA"), where a party who has been given proper notice of a hearing fails to respond or to attend, the tribunal may proceed in the party's absence and the party is not entitled to any further notice in the proceeding.

[8] Elliott was not present at the hearing, but we are satisfied that he received a copy of the Amended Notice of Hearing as well as a copy of the Amended Statement of Allegations. Staff submits that they were able to serve Elliott by email, and refers us to an email received from Elliott in response on February 3, 2009 as proof of service.

III. ANALYSIS

A. Subsection 127(10) of the Act

[9] On November 27, 2008 subsection 127(10) of the Act came into force. Staff relies upon the inter-jurisdictional enforcement provisions of the Act, specifically paragraphs 4 and 5 of subsection 127(10) of the Act, and seeks an order from the Commission imposing similar terms on Elliott as were made against him by the BCSC. Subsection 127(10) provides the following:

> **Inter-jurisdictional enforcement**
>
> 127. (10) Without limiting the generality of subsections (1) and (5), an order may be made under subsection (1) or (5) in respect of a person or company if any of the following circumstances exist:
>
> 1. The person or company has been convicted in any jurisdiction of an offence arising from a transaction, business or course of conduct related to securities.
>
> 2. The person or company has been convicted in any jurisdiction of an offence under a law respecting the buying or selling of securities.
>
> 3. The person or company has been found by a court in any jurisdiction to have contravened the laws of the jurisdiction respecting the buying or selling of securities.
>
> 4. The person or company is subject to an order made by a securities regulatory authority in any jurisdiction imposing sanctions, conditions, restrictions or requirements on the person or company.
>
> 5. The person or company has agreed with a securities regulatory authority in any jurisdiction to be made subject to sanctions, conditions, restrictions or requirements.

[10] Specifically, Staff seeks the following order:

(1) Pursuant to subsections 127(1)2 and 127(1)2.1 of the Act, Elliott shall cease trading in and be prohibited from purchasing securities for a period commencing on the date of this Order and ending on May 27, 2013, except that he may trade in one account in his own name through a registered representative if he provides a copy of this Order to the registered representative beforehand; and

(2) Pursuant to subsections 127(1)7 and 127(1)8 of the Act, Elliott shall resign any position he holds, and be prohibited from becoming or acting, as a director or officer of any issuer until the expiration of a period commencing on the date of this Order and ending on May 27, 2013.

B. The Settlement Agreement and the BCSC Order

[11] Staff submits that the BCSC Order and Settlement Agreement meet the threshold criteria set out in paragraph 4 and 5 of subsection 127(10) of the Act. In the Settlement Agreement, Elliott agreed to the following facts:

Elliott

1. Elliott was a resident in British Columbia and a director, the president, and chief executive officer of MDMI Technologies Inc. ("MDMI") from July 27, 1998 until November 25, 2005, when he resigned from all management positions.

2. He was registered as a salesperson in British Columbia from 1985 to 1987. Elliott was not registered in any capacity under the Securities Act, RSBC 1996, c. 418 at the time of the misconduct described in this Settlement Agreement.

3. Between 2003 to 2004, Elliott transferred his options to existing MDMI shareholders for proceeds of approximately $3,000,000. He gave all of the proceeds to MDMI for it's [sic] business purposes.

MDMI

4. MDMI has never filed a prospectus under the [British Columbia Securities Act].

5. All of the funds obtained from investors by MDMI went to research, development and marketing of its products.

Misconduct

6. Elliott held presentations, met with investors, and marketed the shares of MDMI from April 1999 to March 2005, raising approximately $2,306,105 from 262 British Columbia investors.

7. Elliott relied on the "friends and family" exemption, but approximately 259 investors did not qualify for this exemption.

8. Elliott acted contrary to sections 34(1)(a) and 61 of the [British Columbia Securities Act] by distributing shares without registration and without a prospectus having been filed.

Public Interest
9. Elliott acted contrary to the public interest by engaging in the conduct set out above.

Inability to Pay
10. There is no reasonable prospect of Elliott paying $70,000 that would otherwise be assessed in the public interest for the misconduct described in this Settlement Agreement. He has provided satisfactory evidence to the Executive Director that his liabilities exceed his assets.

[12] The Settlement Agreement also contains the following provision:

Consent to Reciprocal Orders
Any securities regulator in Canada may rely on the facts admitted in this agreement solely for the purpose of making an order similar to the one contemplated above.

[13] The following Order, as agreed upon in the Settlement Agreement, was made against Elliott by the BCSC:

The Executive Director, considering it to be in the public interest to do so, orders, by consent, that:

1. under section 161(1)(a) of the *Securities Act*, RSBC 1996, c. 418, Elliott will comply fully with the Act, the *Securities Rules*, BC Reg. 194/97, and any applicable regulations;

2. under section 161(1)(b) of the Act, Elliott will cease trading in and be prohibited from purchasing any securities or exchange contracts for five years from the date of this Order, except that he may trade in one account in his own name through a registered representative if he provides a copy of this Order to the registered representative beforehand; and

3. under section 161(1)(d) of the Act, Elliott will resign any position he may hold, and be prohibited from becoming or acting, as a director or officer of any issuer, be prohibited from acting in a managing or consultative capacity in connection

> with activities in the securities market, and be prohibited from engaging in investor relations activities for the later of:
>
> (a) five years from the date of this Order; and
>
> (b) the date Elliott successfully completes a course of study satisfactory to the Executive Director concerning the duties and responsibilities of directors and officers.

[14] We are satisfied that the BCSC Order is an "order made by a securities regulatory authority … imposing sanctions" for the purposes of paragraph 4 of subsection 127(10) of the Act, and that the Settlement Agreement constitutes an agreement for the purposes of paragraph 5 of subsection 127(10) of the Act.

[15] We also take notice that in the Settlement Agreement, Elliott explicitly consented to the use of the agreed upon facts by other securities regulators in Canada for the purpose of making similar orders.

C. The Applicability of Subsection 127(10) to this Matter

[16] As noted above, the Settlement Agreement was entered into on May 28, 2008, and the BCSC Order was made on the same date. Subsection 127(10) of the Act came into force on November 27, 2008. Staff submits that the fact that subsection 127(10) came into force after the Settlement Agreement and BCSC Order were made, should not impair their ability to rely on subsection 127(10) in this matter. Specifically, Staff submits that the presumption against retrospectivity is not applicable to subsection 127(10) because it is procedural and not substantive in nature.

[17] Staff refers us to the decision of the Alberta Court of Appeal in *Alberta Securities Commission v. Brost*, 2008 ABCA 326 ("*Brost*"). In *Brost* at para. 57, the Alberta Court of Appeal considered whether or not the increase in the maximum possible administrative penalty under the Alberta *Securities Act*, R.S.A. 2000, c. S-4 was retrospective:

> The Commission was correct to conclude that the presumption against retrospective application did not apply in this case because administrative penalties under the *Act* are not punitive but are instead designed to protect the public: *Brosseau v. Alberta Securities Commission*, [1989] 1 S.C.R. 301, 57 D.L.R. (4th) 458 at 471-3, cited in *Re Morrison Williams Investment Management Ltd.* (2000), 7 ASCS 2888. Moreover, contrary to what Brost and Alternatives suggest, it is well settled that "[e]xcept for criminal law, the retrospectivity and retroactivity of which is limited by s. 11(g) of the *Charter*, there is no requirement of legislative prospectivity embodied in n the rule of law or any provision of our Constitution": *British Columbia v. Imperial Tobacco Canada Ltd.*, 2005 SCC 49, [2005] 2 S.C.R. 473 at para. 69.

[18] The British Columbia Court of Appeal considered the same issue in *Thow v. B.C. (Securities Commission)*, 2009 BCCA 46 at para. 50 ("*Thow*"), and concluded that the presumption against the retrospective application of legislation does apply to the increased maximum possible administrative penalty under the British Columbia *Securities Act*, R.S.B.C. 1996, c. 418.

[19] The divergence of the conclusions reached by the Alberta Court of Appeal and the British Court of Appeal hinges, in part, on their differing interpretations of the Supreme Court of Canada decision in *Brosseau v. Alberta Securities Commission*, [1989] 1 S.C.R. 301 ("*Brosseau*").

[20] In *Brosseau*, the Supreme Court of Canada considered whether or not new sections in Alberta's *Securities Act*, R.S.A. 1981, c. S-6.1, which gave the Alberta Securities Commission the authority to prohibit individuals from trading in securities and to decide whether or not certain exemptions in the act apply, should attract the presumption against retrospectivity. L'Heureux-Dubé J., writing for the court, cited the following excerpt of the decision by Dickson J. (as he then was) in *Gustavson Drilling (1964) Ltd. v. Minister of National Revenue*, [1977] 1 S.C.R. 271 at p. 279, as the general principal with respect to the retrospectivity of legislative enactments:

> The general rule is that the statutes are not to be construed as having retrospective operation unless such a construction is expressly or by necessary implication required by the language of the Act. An amending enactment may provide that it shall be deemed to have come into force on a date prior to its enactment or it may provide that it is to be operative with respect to transactions occurring prior to its enactment. In those instances the statute operates retrospectively.

[21] However, the presumption against retrospectivity does not apply to all types of legislation. L'Heureux-Dubé J., in deciding that the changes to Alberta's *Securities Act* did not attract the presumption against retrospectivity, outlined an exception to the presumption where the goal of the legislation is not to punish, but rather to protect the public:

> The so-called presumption against retrospectivity applies only to prejudicial statutes. It does not apply to those which confer a benefit. As Elmer Driedger, *Construction of Statutes* (2nd ed. 1983), explains at p. 198:
>
> > … there are three kinds of statutes that can properly be said to be retrospective, but there is only one that attracts the presumption. First, there are the statutes that attach benevolent consequences to a prior event; they do not attract the presumption. Second, there are those that attach prejudicial consequences to a prior event; they attract the presumption. Third, there are those that impose a penalty on a person who is described by reference to a prior event,

> but the penalty is not intended as further punishment for the event; these do not attract the presumption.

A sub-category of the third type of statute described by Driedger is enactments which may impose a penalty on a person related to a past event, so long as the goal of the penalty is not to punish the person in question, but to protect the public. This distinction was elaborated in the early case of *R. v. Vine* (1875), 10 L.R. Q.B. 195, where Cockburn C.J. wrote at p. 199:

> If one could see some reasons for thinking that the intention of this enactment was merely to aggravate the punishment for felony by imposing this disqualification in addition, I should feel the force of Mr. Poland's argument, founded on the rule which has obtained in putting a construction upon statutes – that when they are penal in their nature they are not to be construed retrospectively, if the language is capable of having a prospective effect given to it and is not necessarily retrospective. But here the object of the enactment is not to punish offenders, but to protect the public against public-houses in which spirits are retailed being kept by persons of doubtful character … the legislature has categorically drawn a hard and fast line, obviously with a view to protect the public, in order that places of public resort may be kept by persons of good character; and it matters not for this purpose whether a person was convicted before or after the Act passed, one is equally bad as the other and ought not to be intrusted with a licence.
>
> …

Elmer Dreidger summarizes the point in "Statutes: Retroactive, Retrospective Reflections" (1978), 56 *Can. Bar Rev.* 264, at p. 275:

> In the end, resort must be had to the object of the statute. If the intent is to punish or penalize a person for having done what he did, the presumption applies, because a new consequence is attached to a prior event. But if the new punishment or penalty is intended to protect the public, the presumption does not apply.

[22] Based on a plain reading of subsection 127(10) in the context of section 127 as a whole, we conclude that the purpose of subsection 127(10) is to protect the public. Hence, the presumption against retrospectivity is not applicable.

[23] The Supreme Court of Canada considered the nature of section 127 in *Committee for the Equal Treatment of Asbestos Minority Shareholders v. Ontario (Securities Commission),* [2001] 2 S.C.R. 132 at para. 43:

> Rather, the purpose of an order under s. 127 is to restrain future conduct that is likely to be prejudicial to the public interest in fair and efficient capital markets. The role of the OSC under s. 127 is to protect the public interest by removing from the capital markets those whose past conduct is so abusive as to warrant apprehension of future conduct detrimental to the integrity of the capital markets: *Re Mithras Management Ltd.* (1990), 13 O.S.C.B. 1600.

[24] While the courts in *Brost* and *Thow* had to consider the retrospective application of a provision which expanded the sanctioning powers of a securities regulator, subsection 127(10) does no such thing. Rather, subsection 127(10) simply allows the Commission to consider any convictions or orders made against an individual in other jurisdictions, when deciding whether or not to make an order under subsection 127(1) or (5) in the public interest.

[25] Moreover, this Commission has considered the conduct of individuals in other jurisdictions in the past when making an order under subsections 127(1) and (5) in the public interest, even before subsection 127(10) came into effect (see *Re Biller* (2005), 28 O.S.C.B. 10131).

[26] In light of our conclusion that the presumption against retrospectivity is inapplicable due to the public protection purpose of subsection 127(10), it is not necessary to consider whether subsection 127(10) is procedural or substantive in nature.

D. Should Sanctions be Ordered?

[27] The applicability of subsection 127(10) to the BCSC Order and the Settlement Agreement does not automatically lead to the conclusion that this Panel must make an order similar to that made by the BCSC against Elliott. Rather, we must first consider whether or not sanctions are necessary to protect the public interest, before exercising any powers granted to us under subsections 127(1) and (5), and second, if necessary, consider what the appropriate sanctions should be.

[28] In deciding whether or not it is in the public interest that an order be made against Elliott, we are guided by the underlying purposes of the Act, as set out in section 1.1:

> (a) to provide protection to investors from unfair, improper or fraudulent practices; and
>
> (b) to foster fair and efficient capital markets and confidence in capital markets.

[29] In pursuing the purposes of the Act, we are also guided by the fundamental principles of the Act as enunciated by section 2.1, which include: “the maintenance of high standards of fitness and business conduct to ensure honest and responsible conduct by market participants”; that “effective and responsive securities regulation requires timely, open and efficient administration and enforcement of this Act by the Commission”; and that the “integration of capital markets is supported and promoted by the sound and responsible harmonization and co-ordination of securities regulation regimes”.

[30] In making an order under section 127 of the Act, the Commission exercises its public interest jurisdiction in a protective and preventative manner. As stated in *Re Mithras Management Ltd*. (1990), 13 O.S.C.B. 1600 at pp. 1610-1611:

> …, the role of this Commission is to protect the public interest by removing from the capital markets – wholly or partially, permanently or temporarily, as the circumstances may warrant – those whose conduct in the past leads us to conclude that their conduct in the future may well be detrimental to the integrity of those capital markets. We are not here to punish past conduct; that is the role of the courts, particularly under section 118 [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 doing so 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.

[31] In view of the Settlement Agreement, we considered the following factors in deciding whether or not sanctions against Elliott are in the public interest:

- Elliott admitted that his conduct in British Columbia was contrary to the public interest, and consented to the use of the agreed facts by other securities regulators in Canada for the purpose of making an order similar to the BCSC Order;

- the proposed sanctions by Staff are prospective in nature, and only affect Elliott if he attempts to participate in the Ontario capital markets;

- the proposed sanctions by Staff correspond with the fundamental principle that the Commission maintain "high standards of fitness and business conduct to ensure honest and responsible conduct by market participants" (section 2.1, paragraph 2 of the Act);

- relying on the BCSC Order and the Settlement Agreement as per subsection 127(10) of the Act, promotes a timely, open and efficient administration and enforcement of the Act by the Commission (section 2.1, paragraph 3 of the Act);

- if Elliott's conduct, as described in the Settlement Agreement, had occurred in Ontario with Ontario investors, that conduct would have contravened subsection 25(1)(a) of the Act for trading in securities without registration and subsection 53(1) of the Act for distributing securities without a prospectus or receipt from the Director;

- the terms of the BCSC Order and Settlement Agreement indicate that the BCSC viewed Elliott's conduct as a serious threat to the public interest;

- the scale of Elliott's violation of the British Columbia Securities Act was large, Elliott raised approximately $2.3 million from 262 investors, only 3 of whom actually qualified for the "family and friends" exemption relied on by Elliott; and

- Elliott held presentations, met with investors, and marketed the shares of MDMI over a lengthy period of time (from April 1999 to March 2005).

[32] In light of the reasons listed above, we find that sanctions against Elliott are in the public interest.

E. The Appropriate Sanctions

[33] In determining the nature and duration of the appropriate sanctions, the Commission may consider a number of factors including:

(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 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; and

(f) any mitigating factors.

(*Re Belteco Holdings Inc.* (1998), 21 O.S.C.B. 7743, at paras. 25-26)

[34] Further, the Supreme Court of Canada in *Re Cartaway Resources Corp.*, [2004] 1 S.C.R. 672 has affirmed that the Commission may properly impose sanctions which are a general deterrent, stating "… it is reasonable to view general deterrence as an appropriate, and perhaps necessary, consideration in making orders that are both protective and preventative".

[35] Staff referred us to the following cases in support of their proposed sanctions against Elliott: *Re James Frederick Pincock* (2002), 26 O.S.C.B. 1602 ("*Pincock*"), *Re Anwar Heidary* (2000), 23 O.S.C.B. 591 ("*Heidary*"), and *Re Robert James Emerson* (2002), 25 O.S.C.B. 1125 ("*Emerson*").

[36] In *Pincock*, the Commission approved a settlement agreement in which the respondent admitted to trading in securities where such trading was a distribution, without complying with the prospectus requirements, without the benefit of an exemption and without registration. Pincock raised over $2 million from over 150 investors and received over $200,000 in commissions. Under the terms of the settlement, the respondent was prohibited from trading in

securities or acting as an officer or director of an issuer for five years, reprimanded and required to pay $20,000 in costs.

[37] In *Heidary*, the Commission approved a settlement agreement in which the respondent admitted to selling shares in two corporations without a prospectus or applicable exemption. The settlement agreement indicates that the respondent imprudently relied upon legal advice which indicated that his conduct was legal, but did not knowingly or intentionally violate the act. The respondent was prohibited from trading in securities for five years, with an exception for personal trading. The respondent was also allowed to sell scholarship plans, after two years from the date of the order if he completed the educational requirements necessary for registration.

[38] In *Emerson*, the Commission approved a settlement agreement in which the respondent admitted to trading in securities without complying with the prospectus requirements and to failing to deal with his clients honestly, fairly, and in good faith by transferring securities to clients when he was aware the securities were not distributed pursuant to a receipted prospectus. The respondent was prohibited from acting as an officer or director of a registrant or issuer with an interest in a registrant for five years, with the exception of his own company. He was prohibited from holding interest in a registrant and prohibited from trading for five years. He also received a reprimand.

[39] While we are mindful that in determining the appropriate sanctions in this matter, we must consider the specific circumstances to ensure that the sanctions are proportionate to the conduct involved (see *Re M.C.J.C. Holdings Inc. and Michael Cowpland*, (2002), 25 O.S.C.B. 1133 ("Re M.C.J.C. Holdings") at para. 26), we observe that Staff is seeking sanctions against Elliott which are similar to those imposed in the three cases discussed above; all of which involved conduct similar to Elliott's.

[40] We also observe that Elliott was not personally enriched by his conduct, that all of the funds obtained from investors in MDMI went to research, development, and the marketing of its products, and that Elliott's liabilities exceed his assets.

[41] Consequently, we find that Staff's proposed sanctions further the goals of the Act, and reflect a fair and proportionate outcome relative to Elliott's admitted conduct.

IV. CONCLUSION

[42] For the aforementioned reasons, we find that it is in the public interest to impose those sanctions sought by Staff against Elliott, which we note are similar to those imposed by the BCSC, as set out in our order dated August 28, 2009, which provides that Elliott cease trading in securities until May 27, 2013 with the exception that he may trade in one account in his name through a registered representative, and that Elliott resign any positions he holds as a director or officer of an issuer and be prohibited from becoming or acting as an officer or director of an issuer until May 27, 2013.

Dated at Toronto this 28th day of August, 2009

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

Wendell S. Wigle, Q.C. David L. Knight, FCA