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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 ANDREW KEITH LECH

REASONS AND DECISION
Section 127 of the *Securities Act*, R.S.O. 1990 c. S.5

Hearing: August 19, 2009

Decision: May 25, 2010

Panel:
Mary G. Condon - Commissioner (Chair of the Panel)
Carol S. Perry - Commissioner

Counsel:
Jonathon Feasby - for Staff of the Ontario Securities Commission

Andrew Keith Lech - did not appear

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REASONS AND DECISION

I. OVERVIEW

A. Background

[1] This was a hearing before the Ontario Securities Commission (the "Commission") on August 19, 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 Andrew Keith Lech ("Lech").

[2] This matter arose out of a Temporary Order issued by the Commission on May 1, 2003, which ordered, for a period of fifteen days that all trading in securities by Lech cease and the exemptions contained in Ontario securities law do not apply to Lech.

[3] On May 16, 2003, the Commission held a hearing pursuant to a Notice of Hearing and related Statement of Allegations, both issued on May 7, 2003. On Lech's consent, and having regard to submissions made by Staff of the Commission ("Staff"), the Commission ordered that all trading in securities by Lech cease pending further order of the Commission, all of the exemptions contained in Ontario securities law do not apply to Lech pending further order of the Commission and the hearing be adjourned *sine die*.

[4] On October 18, 2007, Lech pleaded guilty to the criminal offence of fraud over $5,000, pursuant to subsection 380(1) of the *Criminal Code*, R.S.C. 1985, c. C-46 (the "*Criminal Code*"), before Ontario's Superior Court of Justice (the "Fraud Conviction").

[5] An Amended Statement of Allegations was issued by Staff on March 20, 2009, followed by the Commission's issuance of a second Notice of Hearing on March 23, 2009. A hearing was held on July 22, 2009, which was adjourned until August 19, 2009.

[6] Staff submits that Lech's conduct, which was the basis for his guilty plea and conviction, was contrary to the public interest and contrary to sections 25, 38, 53 and 126.1 of the *Act*.

[7] Lech was not present at the hearing. We consider Lech's non-attendance below.

B. The Respondent

[8] Lech is an individual ordinarily residing in Toronto, Ontario. At the time of this hearing, Lech was an inmate at Fenbrook Institution in Ontario.

[9] Lech was registered with the Commission between April 10, 1987 and June 15, 1987 as a salesperson with B.M. Young & Partners Securities Inc. His registration was restricted to soliciting expressions of interest from prospective clients to receive company advertising. Lech has never been registered with the Commission in any other capacity, or at any other time.

C. Non-attendance

[10] Lech was not present at the hearing held on July 22, 2009, despite having been properly served. Two days prior to that hearing, Lech faxed a request for an adjournment. Staff submitted that Lech chose not to attend, and that his request for an adjournment was merely an attempt to delay the proceedings. The Commission determined that though Lech was properly served, it was in the public interest to adjourn the matter on a peremptory basis.

[11] Lech was entitled to notice of this hearing pursuant to subsection 6(3) of the *Statutory Powers Procedure Act*, R.S.O. 1990, c. S.22 (the "*SPPA*"). However, where such notice has been given the Commission may proceed in a respondent's absence (*SPPA* at s. 7):

> [w]here notice of an oral hearing has been given to a party to a proceeding in accordance with this Act and the party does not attend at the hearing, the tribunal may proceed in the absence of the party and the party is not entitled to any further notice in the proceeding.

[12] We are satisfied that it was appropriate to proceed in Lech's absence. We considered Staff's submissions, the materials before us, the fact that Vice-Chair Ritchie adjourned this matter peremptorily at the previous hearing, and the various correspondences between Staff and Lech. We also note that Lech had the opportunity to attend this hearing and, as is his right, chose not to do so, according to a letter dated August 19, 2009, from a Parole Officer at Fenbrook Institution.

D. Evidence

[13] Staff relies upon the procedure created by subsection 127(10) of the *Act* and the Fraud Conviction, in seeking an order in the public interest pursuant to subsection 127(1) of the *Act*. Therefore, rather than calling witnesses to prove the allegations, Staff relies on the findings of fact made in the course of the Fraud Conviction.

[14] Staff did not conduct a full investigation into this matter, and instead focused on the Fraud Conviction when producing evidence and making written and oral submissions. Specifically, Staff provided evidence from a Staff investigator relating to the Fraud Conviction through the Affidavit of Jody Sikora (the "Sikora Affidavit"). The Sikora Affidavit includes three documents pertaining to the Fraud Conviction on which Staff relies: a certified copy of the indictment, a certified copy of the Agreed Statement of Facts (the "Agreed Facts") and a transcript of the guilty plea.

[15] The inter-jurisdictional enforcement provision, at subsection 127(10) of the *Act*, came into force on November 27, 2008, after the Fraud Conviction on which Staff relies. It is therefore necessary to consider whether it is appropriate for Staff to rely upon subsection 127(10) of the *Act*.

[16] Staff submits that an order can be issued which relies on subsection 127(10). Staff argues alternate grounds in support of that submission: (1) the application of subsection 127(10) is not retrospective and simply recognizes the Commission's existing authority; (2) public interest

provisions may always operate retrospectively; and (3) purely procedural provisions may operate retrospectively. We consider these arguments in our analysis below.

E. Issues

[17] Staff alleges that Lech has violated sections 25, 38, 53 and 126.1 of the *Act*, in addition to engaging in conduct that is contrary to the public interest. Relying on evidence related to the Fraud Conviction, in accordance with section 127(10) of the *Act*, Staff seeks the following sanctions against Lech:

- an order pursuant to section 127(1) clause 2 of the *Act* that trading in securities by Lech cease permanently;
- an order pursuant to section 127(1) clause 2.1 of the *Act* that acquisition of any securities by Lech be prohibited permanently;
- an order pursuant to section 127(1) clause 3 of the *Act* that any exemptions in Ontario securities law do not apply to Lech permanently;
- an order pursuant to section 127(1) clause 6 of the *Act* that Lech be reprimanded by the Commission;
- an order pursuant to section 127(1) clause 7 of the *Act* that Lech resign any position that Lech holds as a director or officer of an issuer;
- an order pursuant to section 127(1) clause 8 of the *Act* that Lech be prohibited from becoming or acting as an officer or director of any issuer;
- an order pursuant to section 127(1) clause 8.4 of the *Act* that Lech be prohibited from becoming or acting as a director or officer of an investment fund manager; and
- an order pursuant to section 127(1) clause 8.5 of the *Act* that Lech be prohibited from becoming or acting as a registrant, investment fund manager or promoter.

[18] Given an ongoing class action in the civil courts for recovery and distribution of investor funds, Staff seeks neither disgorgement nor an administrative penalty in this matter.

[19] In considering Staff's allegations and the evidence before us, we address the following issues in our analysis:

A. Does subsection 127(10) recognize the Commission's pre-existing authority?

B. Can subsection 127(10) operate retrospectively?

C. The Fraud Conviction evidence.

D. Has Lech been convicted of an offence arising from a transaction, business or course of conduct related to securities?

E. Should sanctions be imposed to protect the public interest?

F. What sanctions are appropriate and in the public interest?

II. ANALYSIS

A. Does subsection 127(10) recognize the Commission's pre-existing authority?

[20] Staff argues that section 127(10) of the *Act* merely gives legislative recognition to an existing authority of the Commission to make orders in the public interest, based on the orders of other regulators and courts. In support of this proposition Staff refers us to *Re Biller* (2005), 28 O.S.C.B. 10131 ("*Biller*"), *Re Foreign Capital Corp.* (2005), 28 O.S.C.B. 4221 ("*Foreign Capital*"), and in oral submissions Staff cited *Re Euston Capital Corp.* (2009), 32 O.S.C.B. 6313 ("*Euston*"). Staff submits that it would be antithetical to the purpose of section 127(10) for the enactment of a provision recognizing a pre-existing authority to curtail the exercise of that authority in relation to events prior to its passage.

[21] In both *Biller* and *Foreign Capital* the Commission relied upon evidence from proceedings brought pursuant to section 380(1) of the *Criminal Code*, with respect to securities related fraud (*Biller*, at para. 22 and *Foreign Capital*, at para. 15). In *Biller* the Commission relied upon findings by the British Columbia Securities Commission and the British Columbia Supreme Court.

[22] In *Foreign Capital* at para. 23, the Commission concluded that Staff was entitled to rely on documents from a related criminal proceeding brought against one of the respondents:

> [s]taff was entitled to rely on the Transcript (in which Montpellier entered the guilty plea) as evidence of Montpellier's admission of the facts which he admitted in the criminal proceeding. Staff was also entitled to rely on Montpellier's conviction as proof of the facts which supported the conviction. See *Woods, Re* (1995), 18 O.S.C.B. 4625 (Ont. Securities Comm.) at 4626, and section 15.1 of the *Statutory Powers Procedures Act*, R.S.O. 1990, c. S.22, as amended.

[23] In *Euston*, careful consideration was given to the authorities discussed above. We agree with the Commission's statement in *Euston* at para. 46:

> [a]ccordingly, we conclude that we can make an order against the Respondents pursuant to our public interest jurisdiction under section 127 of the Act on the basis of decisions and orders made in other jurisdictions, if we find it necessary in order to protect investors in Ontario and the integrity of Ontario's capital markets.

B. Can subsection 127(10) operate retrospectively?

[24] On July 31, 2009, Staff provided Lech and the panel with the Commission's recent decision in *Euston*, which was released on July 29, 2009. During oral submissions, Staff argued that the issue of retrospective operation of subsection 127(10) falls squarely within the *Euston* decision, there are no distinguishing factors and the Commission's decision in Euston resolves the question of whether subsection 127(10) is capable of operating retrospectively. In particular, Staff relies upon *Euston* at para. 56, where the Commission states that, "the presumption against retrospectivity is not applicable, and subsection 127(10) may operate retrospectively".

[25] In *Euston*, the Commission considered the divergent decisions of the British Columbia Court of Appeal and the Alberta Court of Appeal, with respect to the retrospective application of an increased maximum administrative penalty.

[26] In *Alberta Securities Commission v. Brost*, 2008 ABCA 326 ("*Brost*"), the Court of Appeal concluded that,

> [t]he 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: *Barry v. Alberta (Securities Commission)*, [1989] 1 S.C.R. 301, 57 D.L.R. (4th) 458 (S.C.C.) at 471-3, cited in *Morrison Williams Investment Management Ltd., Re* (2000), 9 A.S.C.S. 2888 (Alta. Securities Comm.). 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 ... any provision of our Constitution": *British Columbia v. Imperial Tobacco Canada Ltd.*, 2005 SCC 49, [2005] 2 S.C.R. 473 (S.C.C.) at para. 69.
>
> (*Brost*, at para. 57. See also, *Euston*, at para. 50. *Barry v. Alberta* is alternately cited as *Brosseau v. Alberta Securities Commission*, [1989] 1 S.C.R. 301.)

[27] In *Thow v. B.C. (Securities Commission)*, 2009 BCCA 46 ("*Thow*"), at para. 41, Groberman J.A. noted that while the Supreme Court's decision in *Brosseau* "may be interpreted as supporting a very broad 'protection of the public' exception to the presumption against retrospectivity, I do not think that was the Court's intention". (*Brosseau v. Alberta Securities Commission*, [1989] 1 S.C.R. 301 ("*Brosseau*")) In explaining the Court's conclusion that the B.C. Securities Commission erred in finding that the presumption against retrospectivity was inapplicable, the Court in *Brosseau* stated, at para. 49:

> … the Commission's imposition of the fine was arguably not "punitive" in the narrow sense of the word; that is, it may not have been imposed as a punishment for Mr. Thow's moral failings, and it may not have been motivated by a desire for retribution or to denounce his conduct. Nonetheless, it was "punitive" in the broad sense of the word; it was designed to penalize Mr. Thow and to deter others from

> similar conduct. It was not merely a prophylactic measure designed to limit or eliminate the risk that Mr. Thow might pose in the future.

It is not necessary for us to reconcile the *Brost* and *Thow* decisions because all of the sanctions sought in this case, with the exception of the reprimand, are forward looking in the sense that they seek to restrict Lech's ability to participate in Ontario's capital markets. This matter falls squarely within the narrower interpretation of the exception to the presumption against retrospectivity envisioned in *Thow*.

[28] As the Commission noted in *Euston* at para. 52, the divergence in the decisions of the Alberta Court of Appeal and B.C. Court of Appeal can be traced back to differing interpretations of *Brosseau*. The Supreme Court discusses the applicability of the presumption against retrospectivity, where the purpose of the sanction is the protection of the public, in *Brosseau* at paras. 50-53:

> [t]he 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 subcategory 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), L.R. 10 Q.B. 195 , where Cockburn C.J. wrote at pp. 199-200:
>
> > If one could see some reason 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 Driedger 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.

[29] In *Brosseau* at para. 57, the Supreme Court went on to note, with respect to retrospectivity, that:

> [t]he provisions in question are designed to disqualify from trading in securities those persons whom the commission finds to have committed acts which call into question their business integrity. This is a measure designed to protect the public, and it is in keeping with the general regulatory role of the commission. Since the amendment at issue here is designed to protect the public, the presumption against the retrospective effect of statutes is effectively rebutted.

[30] The purpose of the *Act* is clearly established at section 1.1, as being: "(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". More specifically, the Supreme Court has clearly articulated the purpose of section 127 of the *Act* in *Committee for the Equal Treatment of Asbestos Minority Shareholders v. Ontario (Securities Commission)*, [2001] 2 S.C.R. 132 ("*Asbestos*"), at para. 43:

> … [t]he administrative sanctions are the most frequently used sanctions and are grouped together in s. 127 as "Orders in the public interest". Such orders are not punitive: *Re Albino* (1991), 14 O.S.C.B. 365. 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. In contradistinction, it is for the courts to punish or remedy past conduct under ss. 122 and 128 of the Act respectively: see D. Johnston and K. Doyle Rockwell, *Canadian Securities Regulation* (2nd ed. 1998), at pp. 209-11.

[31] Having carefully considered the above authorities, we adopt the conclusion of the Commission in *Euston*, at para. 56:

> [b]ased on a plain reading of subsection 127(10) in the context of section 127 as a whole, and after taking into account the Supreme Court of Canada's decisions in *Brosseau* and *Asbestos*, we conclude that the purpose of purpose of [*sic*] subsection 127(10) is to protect the public. Hence, the presumption against retrospectivity is not applicable, and subsection 127(10) may operate retrospectively.

[32] Given our conclusion that subsection 127(10) of the *Act* is capable of retrospective operation, it is unnecessary for us to consider whether subsection 127(10) is procedural or substantive in nature and the implications that follow from that determination.

C. The Fraud Conviction evidence

[33] We rely on the materials submitted by Staff with respect to the Fraud Conviction, and in particular the documents contained in the Sikora Affidavit: a certified copy of the indictment, a certified copy of the Agreed Statement of Facts and a transcript of the guilty plea.

[34] The investigation leading up to Lech being charged was lengthy and complex. It took over three years and involved over a hundred interviews of victims, witnesses and involved parties, the execution of 52 search warrants, the assignment of an accountant to work almost exclusively on this investigation for two years, and the examination of 36 bank accounts and 18 investment accounts.

[35] On March 2, 2007, Lech was charged with 88 counts of fraud over $5,000 pursuant to subsection 380(1) of the *Criminal Code*, which states:

> 380. (1) Every one who, by deceit, falsehood or other fraudulent means, whether or not it is a false pretence within the meaning of this Act, defrauds the public or any person, whether ascertained or not, of any property, money or valuable security or any service,
>
> (*a*) is guilty of an indictable offence and liable to a term of imprisonment not exceeding fourteen years, where the subject-matter of the offence is a testamentary instrument or the value of the subject-matter of the offence exceeds five thousand dollars; or
>
> (*b*) is guilty
>
> (i) of an indictable offence and is liable to imprisonment for a term not exceeding two years, or
>
> (ii) of an offence punishable on summary conviction,
>
> where the value of the subject-matter of the offence does not exceed five thousand dollars.

[36] Voluntarily and with the benefit of legal advice, on October 18, 2007, Lech pleaded guilty to count 86 before Ontario's Superior Court of Justice. Lech pleaded guilty to the following charge:

> … ANDREW LECH STANDS CHARGED THAT he, between the 1st day of January in the year 2001 and the 1st day of May in the year 2003 at the City of London, in the said region or elsewhere in the Province of Ontario did by deceit, falsehood or other fraudulent means defraud Public of money in excess of $5,000 contrary to Section 380, Sub-section (1) of the Criminal Code of Canada.

[37] The nature of Lech's fraud on the public of Ontario is outlined in the Agreed Facts, which were presented to the Superior Court of Justice as part of Lech's guilty plea. Lech reviewed the Agreed Facts, and acknowledged in Court that the facts are substantially correct.

[38] Though a specific number of investors is not provided, the Agreed Facts state that the investment scheme appears to have started with a very small group of investors, and expanded rapidly over a number of years to include hundreds of investors located primarily in Ontario.

[39] The Agreed Facts state that while Lech ran the investment scheme, he was assisted by a number of intermediaries (the "Intermediaries"). The Intermediaries managed groups of investors for Lech, for which they received bonuses in the form of extra interest or additional payments. According to the Agreed Facts, the four main Intermediaries were Gary McNaughton, Dennis Yacnowiec, Dan Shuttleworth and Joseph Vandervelden.

[40] Investors in the scheme were sought by Lech and the Intermediaries using word of mouth and community ties. For example, the Agreed Facts state that, **"**[t]he Baptist investors were lead [*sic*] to believe that LECH was a fellow Baptist and he was allowing fellow Baptists to invest with him as a service to fellow Christians".

[41] As part of the investigation, a forensic audit was conducted that examined the period between January 2001 to September 2003 (the "Forensic Audit"). While the figures remain somewhat approximate, the Agreed Facts confirm the results of the Forensic Audit, which found that $35.9 million CAD and $10.0 million USD of investors' money was received by Lech.

[42] The funds were received on the basis of Lech's representation that he had expertise as an investor in securities, and that he would use that expertise to generate high returns for his investors with little risk. The Agreed Facts describe the investment scheme as follows:

> [t]he investment operated through LECH. The investors were told that LECH was managing this large family fortune and he would allow individual investors to piggyback on his family investment and also generate high rates of returns on their investments. There was no documentation provided to investors by LECH with any investment details and as time went on investors were provided with promissory notes or guarantees signed by LECH. The investors were told that LECH was a futures trader who could generate large returns even in times when the stock market lost money. LECH was said to be a genius who invested in nothing but very large blocks of blue chip corporate stocks. Investors were led to believe that LECH was trading daily in the millions of dollars.

[43] Lech made a number of representations to investors, including that he: had a net worth of $500 million; is the grandson of an owner of Richardson Greenshields, a well known financial services firm; personally guaranteed the principal invested; and had paid the tax on investment income and therefore the money received by an investor was not subject to further taxation.

[44] Representations made with respect to the rate of return on the investment varied over time, and were in part a function of the size and source of the financial commitment made by investors. In the Agreed Facts the range of returns promised, typically through the Intermediaries, are summarized as follows:

> … [e]arly in the scheme LECH was typically paying interest rates of 15% for investments of $50,000 or less, 18% for investments of $50,000 - $100,000 and 20% for investments of $100,000 or greater. Intermediaries were told that if the investor was a pastor or other member of the clergy, LECH would pay the investor a higher rate of interest.
>
> … Just before the collapse of the scheme LECH was accepting investments into 3 month short term contracts that were paying 40% return in 3 months…

[45] The Forensic Audit revealed that of the approximately $35.9 million CAD and $10 million USD in investor funds received by Lech, $35.1 million CAD (97.7%) and $9.5 million USD (95%) was not invested. This finding of the Forensic Audit was subsequently confirmed by Lech's approval of the Agreed Facts.

[46] The findings of the Forensic Audit with respect to the structure of the investment scheme are summarized and confirmed in the Agreed Facts, which state that:

> … LECH was using a multitude of bank accounts and numerous financial institutions to run a combined Ponzi and cheque-kiting scheme by taking in victims money, [*sic*] depositing the funds and then circulating the same money back to the victims through the intermediaries.

[47] The Forensic Audit further reveals that Lech made personal withdrawals of $1.1 million CAD and $1,800 USD, while additional withdrawals of $3.8 million CAD and $0.3 million USD could not be accounted for. These figures were confirmed by Lech's adoption of the Agreed Facts.

[48] Additional funds were paid out to the Intermediaries as bonuses in the form of extra interest or additional payments. For example, according to the Agreed Facts adopted by Lech, Shuttleworth was paid between $1.4 million and $1.6 million from the investment scheme.

[49] Following Lech's guilty plea before the Superior Court of Justice, he was sentenced to serve six years in a penitentiary. In accepting the recommended sentence of six years Justice Templeton noted that given time served, pursuant to a contempt order in a related civil proceeding, Lech would be effectively deprived of his liberty for a period of nine years, "which is in the range for this kind of massive, massive fraud". Further, Templeton J. emphasized that

the "massive fraud" perpetrated by Lech was financially and emotionally devastating to the victims.

D. Has Lech been convicted of an offence arising from a transaction, business or course of conduct related to securities?

[50] Section 127(10) of the *Act* provides:

> (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.
>
> …

[51] Lech pleaded guilty to the criminal offence of fraud over $5,000, pursuant to section 380(1) of the *Criminal Code*, before the Superior Court of Justice. The Agreed Facts, discussed in detail above, clearly establish that the fraudulent course of conduct was related to securities.

E. Should sanctions be imposed to protect the public interest?

[52] In deciding whether to exercise our public interest jurisdiction we are guided by the purposes of the *Act*, at section 1.1:

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

[53] In pursuing the objects of the *Act*, the Commission's primary means of achieving the purposes of the *Act* include: "restrictions on fraudulent and unfair market practices and procedures", and "requirements for the maintenance of high standards of fitness and business conduct to ensure honest and responsible conduct by market participants". (*Act*, s. 2.1)

[54] In furtherance of the purposes of the *Act* the Commission imposes minimum standards. As the Commission stated in *Re Momentas Corp.* (2006), 29 O.S.C.B. 7408 at para. 46:

> [i]n order to ensure that there is fairness and confidence in Ontario's capital markets, it is critical that brokers, dealers and other market participants in the business of selling or promoting securities meet the minimum registration, qualification and conduct requirements of the Act.

[55] In making an order in the public interest, pursuant to section 127 of the *Act*, the Commission seeks to exercise its jurisdiction in a protective and preventative manner. As the Commission stated in *Re Mithras Management Ltd.* (1990), 13 O.S.C.B. 1600 at p. 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.

[56] We considered the following factors in determining whether or not sanctions against Lech are appropriate in order to protect the public interest, in accordance with our mandate:

- Lech has pleaded guilty to, and been convicted of, fraud over $5,000;
- the Fraud Conviction involved investments in securities, and representations made to investors about the investment of their funds in securities;
- as part of Lech’s investment scheme, fraudulent statements were made to investors concerning matters such as the nature of the proposed investment, the risk and return of the investment, Lech’s credentials as an investor, and how investors’ funds would be invested;
- approximately $35.9 million CAD and $10 million USD in investor funds were received by Lech, less than 5% of which were invested;
- significant amounts of money could not be accounted for, were withdrawn by Lech, or were paid out to the Intermediaries;
- the complexity of the investment scheme is evident from the Forensic Audit, which examined 54 bank and investment accounts, finding that both aggregate deposits and aggregate withdrawals were in excess of $150 million CAD and $20 million USD;
- the investment scheme relied on new investor funds, in order to make pay-outs related to existing investments;
- there were hundreds of investors involved in the investment scheme, most of whom were located in Ontario;
- many of the investors shared community ties with Lech or the Intermediaries; and
- the fraud occurred over a significant period of time.

[57] Based on the Fraud Conviction and the Agreed Facts we are satisfied that we can make an order pursuant to subsection 127(10) paragraph 1 of the *Act*.

[58] Given the factors summarized above, we find that sanctions against Lech are appropriate in order to protect the capital markets in Ontario.

F. What sanctions are appropriate and in the public interest?

[59] In determining the appropriate sanctions in this matter, it is necessary to consider the specific circumstances of the case before us. As the Commission stated in *Re M.C.J.C. Holdings Inc.* (2002), 25 O.S.C.B. 1133 at paras. 9-10:

> … [w]e have a duty to consider what is in the public interest. To do that, we have to take into account what sanctions are appropriate to protect the integrity of the marketplace...
>
> In doing this, we have to take into account circumstances that are appropriate to the particular respondents. This requires us to be satisfied that proposed sanctions are proportionately appropriate with respect to the circumstances facing the particular respondents. We should not just look at absolute values, e.g. what has been paid voluntarily in other settlements, or what has been found to be appropriate sanctions by way of cease trade orders in other cases.

[60] 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 proved;

(b) the respondents' experience in the marketplace;

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

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

(e) whether or not the sanctions imposed may serve to deter not only those involved in the case being considered, but any like-minded people from engaging in similar abuses of the capital markets; and

(f) any mitigating factors.

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

[61] In *Re Cartaway Resources Corp.*, [2004] 1 S.C.R. 672 at para. 60, the Supreme Court of Canada 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".

[62] In *Erikson v. Ontario (Securities Commission)* (2003), 26 O.S.C.B. 1622 (Ont. Div. Ct.), at para. 56, it was held that participation in Ontario's "capital markets is a privilege and not a right" (see also: *Re E.A. Manning Ltd.* (1996), 19 O.S.C.B. 5557 (Ont. Div. Ct.)).

[63] Through the Fraud Conviction, Lech has admitted to conducting a fraudulent scheme characterized by a level of deceitfulness, complexity, dollar value and number of investors that place it at the most serious end of the continuum of unfair, improper and fraudulent market practices. The magnitude of the fraud perpetrated by Lech is clear from the Agreed Facts, but is also reflected by the severity of the sentence imposed in spite of his guilty plea.

[64] We note that Lech is not a registered market participant. Further, the sanctions proposed by Staff are prospective and protective in nature.

[65] Therefore we find that the sanctions proposed by Staff are consistent with the purposes of the *Act*, and appropriate and proportionate given the evidence of Lech's conduct.

[66] Submissions were not made requesting a carve-out from the order proposed by Staff, to allow for restricted trading by Lech. In the present case, the conduct at issue is criminal fraud related to securities. Lech's conduct was egregious and demonstrates a serious risk to the public. In this case, it is better to err on the side of caution. We therefore find that it is neither appropriate nor in the public interest to provide such a carve-out.

III. CONCLUSION

[67] Pursuant to our public interest jurisdiction under section 127 of the *Act*, and for the aforementioned reasons, we find it is in the public interest to make an order that:

- pursuant to section 127(1) clause 2 of the Act, trading in any securities by Lech cease permanently;
- pursuant to section 127(1) clause 2.1 of the Act, acquisition of any securities by Lech is prohibited permanently;
- pursuant to section 127(1) clause 3 of the Act, any exemptions contained in Ontario securities law do not apply to Lech permanently;
- pursuant to section 127(1) clause 6 of the Act, Lech is reprimanded;
- pursuant to section 127(1) clause 7 of the Act, Lech resign all positions that Lech holds as a director or officer of an issuer;
- pursuant to section 127(1) clause 8 of the Act, Lech is prohibited from becoming or acting as director or officer of any issuer;

- pursuant to section 127(1) clause 8.4 of the Act, Lech is prohibited from becoming or acting as a director or officer of an investment fund manager; and
- pursuant to section 127(1) clause 8.5 of the Act, Lech is prohibited from becoming or acting as a registrant, as an investment fund manager or as a promoter.

Dated at Toronto this 25th day of May, 2010.

"Mary G. Condon"	*"Carol S. Perry"*
Mary G. Condon	Carol S. Perry