Ontario Securities Commission
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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
MEGA-C POWER CORPORATION, RENE PARDO, GARY USLING, LEWIS TAYLOR SR., LEWIS TAYLOR JR., JARED TAYLOR, COLIN TAYLOR and 1248136 ONTARIO LIMITED

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

Hearing:	December 7-8, 2010	
Decision:	January 26, 2011	
Panel:	James D. Carnwath	-Commissioner and Chair of the Panel
	Kevin J. Kelly	-Commissioner
Counsel:	Matthew Britton	-for Staff of the Ontario Securities Commission
	Jonathon Feasby	

Rene Pardo, Lewis Taylor Sr., Lewis Taylor Jr., Jared Taylor, Colin Taylor and 1248136 Ontario Limited were self-represented.

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REASONS AND DECISION

I. INTRODUCTION

[1] At the conclusion of the 59-day hearing on the merits, the Panel made the following findings in the reasons which issued on September 7, 2010, following the hearing on the merits (the "**Merits Decision**"):

> (a) We find Rene Pardo, Lewis Taylor Sr., Lewis Taylor Jr., Jared Taylor, Colin Taylor and 1248136 Ontario Limited contravened s. 25(1)(a) of the *Act*, contrary to the public interest.
>
> (b) We find Rene Pardo, Lewis Taylor Sr., Lewis Taylor Jr., Jared Taylor, Colin Taylor and 1248136 Ontario Limited contravened s. 53(1) of the *Act*, contrary to the public interest.
>
> (c) We find Rene Pardo, Lewis Taylor Sr., Lewis Taylor Jr., and Jared Taylor contravened s.38(3) of the Act, contrary to the public interest.
>
> (*Re Mega-C Power Corporation, Rene Pardo, Gary Usling, Lewis Taylor Sr., Lewis Taylor Jr., Jared Taylor, Colin Taylor and 1248136 Ontario Limited* ("***Re Mega-C***") (2010), 33 O.S.C.B. 8290 at paras. 346-348)

[2] After considering the submissions of Staff of the Commission ("**Staff**") and Rene Pardo, Lewis Taylor Sr., Lewis Taylor Jr., Jared Taylor, Colin Taylor and 1248136 Ontario Limited (collectively, the "**Respondents**") at an appearance on September 28, 2010, we ordered that the sanctions and costs hearing would be held on December 7 and 8, 2010 (the "**Sanctions and Costs Hearing**", that Staff must file and serve its written sanctions and costs submissions by October 15, 2010, and that the Respondents may file and serve written submissions on sanctions and costs, if they wish to do so, prior to the sanctions and costs hearing. Staff filed and served written submissions on sanctions and costs on October 15, 2010. The Respondents did not provide written submissions. We heard oral submissions from Staff and the Respondents at the Sanctions and Costs Hearing.

II. POSITIONS OF THE PARTIES

(a) Staff

[3] With respect to Mr. Pardo, Staff seeks an order: (a) that he cease trading in securities for ten years; (b) that exemptions contained in Ontario securities law should not apply to him for ten years; (c) that he be reprimanded; (d) that he resign any position he holds as a director or officer of any issuer; (e) that he be prohibited from becoming or acting as a director or officer of any issuer for ten years; and (f) that he disgorge to the Commission the amount he obtained as a result of his non-compliance with Ontario securities law, which, in Staff's submission, is CDN $400,000 plus an amount in Canadian dollars equivalent to USD $407,000.

[4] With respect to Lewis Taylor Sr., Staff seeks an order: (a) that he cease trading securities permanently; (b) that exemptions contained in Ontario securities law do not apply to him permanently; (c) that he be reprimanded; (d) that he resign any position he holds as a director or officer of any issuer; and (e) that he be prohibited from becoming or acting as a director or officer of any issuer permanently.

[5] With respect to Lewis Taylor Jr. and Jared Taylor, Staff seeks an order: (a) that they cease trading securities for twenty years; (b) that exemptions contained in Ontario securities law do not apply to them for twenty years; (c) that they be reprimanded; (d) that they resign any positions they as directors or officers of any issuer; and (e) that they be prohibited from becoming or acting as directors or officers of any issuer for twenty years.

[6] With respect to Colin Taylor, Staff seeks an order: (a) that he cease trading securities for ten years; (b) that exemptions contained in Ontario securities law do not apply to him for ten years; (c) that he be reprimanded; (d) that he resign any position he holds as a director or officer of any issuer; and (e) that he be prohibited from becoming or acting as a director or officer of any issuer for ten years.

[7] Staff also seeks an order that Lewis Taylor Sr., Lewis Taylor Jr., Jared Taylor, Colin Taylor and 1248136 Ontario Limited (the "**Taylor Respondents**") disgorge to the Commission, on a joint and several basis, the amount they obtained as a result of their non-compliance with Ontario securities law, which, in Staff's submission, is CDN $312,742 plus the equivalent in Canadian dollars of USD $2,274,015.

[8] Staff submits that the Taylor Respondents should be ordered to pay Staff's costs in the amount of $106,700 on a joint and several basis. Staff does not seek a costs order against Mr. Pardo.

(b) Rene Pardo

[9] Mr. Pardo submits: (i) that he has recognized the seriousness of his conduct and continues to work to help investors recover their funds through the bankruptcy process, and he should therefore receive credit for co-operation; (ii) that his conduct will not be repeated because he is determined never again to be a director of a public company and he will never be involved in raising capital without very clear legal advice; (iii) that any order made against him should be equal or less severe than the order made against Gary Usling, the Chief Financial Officer ("**CFO**") of Mega-C Power Corporation ("**Mega-C**"), whose Settlement Agreement with Staff was approved by the Commission on September 17, 2009 ((2009), 32 O.S.C.B. 7813) (the "**Usling Settlement**"); (iv) that he is an experienced businessman with no history of any prior misconduct; and (v) that the Commission's sanctions orders will have an impact on his ability to earn a living in the only way he knows how – building technology companies.

[10] Mr. Pardo disputes our findings, set out at paragraph 130 of the Merits Decision, as to the amount he obtained as a result of non-compliance with Ontario securities law. That is a matter for any appeal brought before the Divisional Court under section 9 of the *Act*, and is of no assistance to us in considering sanctions and costs.

(c) The Taylor Respondents

[11] Mr. Lewis Taylor Sr. reiterates the submissions he made in the hearing on the merits, especially his position that Mr. Pardo was solely responsible for any non-compliance with Ontario securities law in this matter. The submissions of Mr. Jared Taylor, Mr. Colin Taylor and Mr. Lewis Taylor Jr. are to similar effect. The main focus of the Taylor Respondents' submissions is a challenge to our findings set out in the Merits Decision. These are matters for the Divisional Court on any appeal from the Merits Decision, and are of no assistance to us in considering sanctions and costs.

[12] The Taylor Respondents submit that Staff has selectively targeted them for harsh sanctions. Mr. Jared Taylor submits that his signature on the promissory notes reflects his recognition of his obligation to repay the "loans". He notes that while Staff seeks a twenty year director and officer ban against him and his brother, Mr. Lewis Taylor Jr., and a ten year director and officer ban against his brother, Mr. Colin Taylor, the Usling Settlement imposed only a two-year director and officer ban on the CFO of Mega-C. He submits that the Taylor Respondents should not be penalized for not settling with Staff, and should receive sanctions that are no more severe than those ordered against Mr. Usling. Mr. Colin Taylor submits that he played a limited role in these events, and does not deserve a harsher sanction than Mr. Pardo, the Chief Executive Officer ("**CEO**") of Mega-C.

[13] With respect to disgorgement, Mr. Lewis Taylor Sr. submits: (i) that the Usling Settlement did not include a disgorgement order; (ii) that any disgorgement order will have a punitive impact on the Taylor Respondents, especially in light of the legal costs they have incurred in this proceeding and other litigation relating to this matter; and (iii) that he has made representations in Canada and the U.S. that the Taylor Respondents will repay the "loans". Mr. Jared Taylor submits that Staff is unfairly seeking an increased disgorgement amount from the Taylor Respondents in order to lessen the penalty for Mr. Pardo.

[14] With respect to costs, Mr. Jared Taylor submits that the Taylor Respondents were not responsible for delays in the process, which resulted in their appearing without counsel. Mr. Lewis Taylor Sr. submits that Staff's failure to call relevant witnesses or to elicit relevant evidence contributed to an inefficient hearing, a submission we rejected on the basis that it was open to the Respondents to cross-examine Staff's witnesses, which they did, and to summons any witnesses they thought helpful to their case.

[15] To the extent the submissions of the Taylor Respondents restate their submissions at the hearing on the merits, they are of no assistance to us in considering sanctions and costs.

III. BACKGROUND FACTS

[16] We made findings of fact with respect to each of the Respondents in the Merits Decision.

[17] In the following paragraphs, we briefly re-visit those findings as they bear on the appropriate sanctions to be imposed.

(a) Rene Pardo

[18] We found that Mr. Pardo attended many of the meetings with investors in Mega-C between September 2001 and mid-2003 (the "**Relevant Period**"). At those meetings, he made representations to potential investors designed to persuade them to invest in Mega-C. These included representations that Mega-C had made or would make an application to be listed on a stock exchange, which we found to be in breach of subsection 38(3) of the *Act*.

[19] Mr. Pardo also signed all but a handful of the Mega-C share certificates which were provided to investors. We found that Mr. Pardo's conduct amounted to acts in furtherance of trades and therefore satisfied the definition of "trading" in subsection 1(1) of the *Act*. As Mr. Pardo did not establish that any exemption from the registration or prospectus requirements of the *Act* was available in respect of these trades, we found that he breached subsections 25(1)(a) and 53(1) of the *Act*.

[20] We also found that Mega-C paid out funds to Mr. Pardo or companies he controlled. In particular, Mega-C paid CDN $167,000 to Mr. Pardo and 503124 Ontario Ltd., a company of which he was a director. Mega-C also transferred CDN $233,000 and USD $407,000 to NetProfitEtc Inc., a company of which he was the sole director. The USD/CDN dollar exchange rate most advantageous to Mr. Pardo in the Relevant Period is 1.3. This converts USD $407,000 to CDN $530,000. The total amount obtained by Mr. Pardo is approximately CDN $930,000, which, for purposes of determining the appropriate sanctions, we round down to CDN $900,000.

(b) The Taylor Respondents

[21] We found that the Taylor Respondents "knowingly participated in a common enterprise … to sell shares in Mega-C to the public in the guise of a loan to Jared Taylor" (Merits Decision, paragraphs 191-192). The common enterprise was "conceived and led" by Lewis Taylor Sr., described by his counsel at the time as the head of the Taylor family, who was involved in, or made, all major decisions on behalf of the Taylor family. We were persuaded that Mr. Taylor's three sons played a minor role in the decision to embark on the scheme devised by Mr. Taylor Sr. We found they were willing agents through which the scheme was executed.

[22] Lewis Taylor Sr., Lewis Taylor Jr., and Jared Taylor engaged in meetings with a wide variety of investors at which time they made representations that were designed to persuade people to invest in Mega-C. These included representations that Mega-C had made application or would make application to be listed on a stock exchange, which we found to be in breach of subsection 38(3) of the *Act*.

[23] Lewis Taylor Jr. prepared an assortment of materials which were designed to convince people to invest in Mega-C. Jared Taylor received the funds from the putative lenders, arranged for them to receive their share certificates and distributed the funds from his personal bank accounts to members of his family and corporations in which they were involved. Colin Taylor, through his company and co-Respondent, 1248136 Ontario Limited, directed Mr. Pardo to transfer Mega-C shares to a list of approximately 175 named persons.

[24] We found that the loans supposedly made by investors to Jared Taylor were not disclosed to most investors at the time they transferred their funds; most investors believed they were purchasing Mega-C shares. Following these transfers, we found that some investors protested to no avail, and many investors accepted the result though unhappy with the process. We found that such acceptance of the promissory notes was induced by the persuasive manner in which the investment in Mega-C was presented and the belief that the technology was commercially viable.

[25] Accordingly, we rejected the Taylor Respondents' characterization of these transactions as "loans" and found that the Taylor Respondents engaged in many acts in furtherance of trades. We also found that the Taylor Respondents did not establish that any exemption from the registration or prospectus requirements of the *Act* was available in respect of these trades. We found that the Taylor Respondents breached subsections 25(1)(a) and 53(1) of the *Act*.

[26] From late 2001 to early 2003, Jared Taylor issued at least 406 promissory notes. The notes indicate that Jared Taylor received approximately USD $2,274,015 and CDN $312,742. Applying the same advantageous exchange rate to USD $2,274,015 produces CDN $2.9 million approximately. The total amount obtained by Jared Taylor on behalf of the Taylor Respondents is approximately CDN $3.2 million, which, for purposes of determining the appropriate sanctions, we round down to CDN $3 million.

IV. THE PURPOSE OF SANCTIONS

[27] Section 1.1 of the *Act* states that the purposes of the *Act* are "to provide protection to investors from unfair, improper or fraudulent practices" and "to foster fair and efficient capital markets and confidence in capital markets". Section 2.1 of the *Act* states that in pursuing the purposes of the *Act*, the Commission shall have regard to certain fundamental principles, including that the primary means for achieving the purposes of the *Act* are "requirements for timely, accurate and efficient disclosure of information" and "requirements for the maintenance of high standards of fitness and business conduct to ensure honest and responsible conduct by market participants".

[28] To effect these purposes, the *Act* requires that unless a registration exemption is available, persons or companies who trade securities must be registered with the Commission. This ensures that persons or companies who trade securities satisfy requirements for competence and integrity. The *Act* also prohibits the distribution of securities without a qualified prospectus, unless a prospectus exemption applies. The prospectus must provide full, true and plain disclosure of all material facts relating to the securities issued or to be distributed. This ensures that prospective investors receive relevant information about a potential investment before they make an investment. The *Act* also prohibits persons or companies from making certain types of representations to investors with the intention of effecting a trade in a security. This prevents persons or companies from making certain specific representations to investors which are likely to constitute a powerful inducement to purchase the securities.

[29] In *Asbestos*, the Supreme Court of Canada confirmed that "the Commission's public interest jurisdiction is neither remedial nor punitive; it is protective and preventive, intended to be exercised to prevent likely future harm to Ontario's capital markets." The purpose of an order under section 127 of the *Act* "is to restrain future conduct that is likely to be prejudicial to the public interest in fair and efficient capital markets" 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."

> (*Committee for Equal Treatment of Asbestos Minority Shareholders v. Ontario (Securities Commission)*, [2001] 2 S.C.R. 132 at paras. 42-43)

[30] In considering how best to fulfill its protective and preventive role, the Commission must take into account the circumstances appropriate to specific respondents. As well, the Commission may go beyond the need for the specific deterrence of a respondent and make an order designed to deter like-minded persons from engaging in similar conduct in the future.

> (*Re Cartaway Resources Corp.*, [2004] 1 S.C.R. 672 at paras. 60-62)

[31] We agree with the submissions of Staff that in determining the nature and duration of sanctions, we should consider the following factors as they apply to the Respondents:

(a) the seriousness of the misconduct and the harm done;

(b) the characteristics of the respondents including their capital market experience;

(c) benefits received by the respondents;

(d) whether there has been a recognition of the seriousness of the improprieties and remorse;

(e) the risk to investors if the respondents were allowed to continue to operate in the capital markets; and

(f) mitigating factors.

(*Re Belteco Holdings Inc.* (1998), 21 O.S.C.B. 7743 at 7746-7; *Re M.C.J.C. Holdings and Michael Cowpland* (2003), 26 O.S.C.B. 8206 at para. 55; *Re Lamoureux*, [2002] A.B.S.C. No. 125)

V. SANCTIONS AND COSTS ANALYSIS

(a) Rene Pardo

(i) The Pardo Settlement Agreement

[32] On September 28, 2009 (the day before the hearing on the merits was to start), a settlement panel considered whether an agreement reached between Staff and Mr. Pardo (the "**Pardo Settlement Agreement**") should be approved. The Taylor Respondents appeared at the settlement hearing and objected to Mr. Pardo being permitted to settle. The Settlement Panel adjourned the matter to the hearing on the merits, stating:

> We are not in a position to determine if the settlement would be prejudicial to the respondents other than Mr. Pardo, and we've decided that we will not consider the Settlement Agreement this afternoon.
>
> (Hearing Transcript, September 29, 2009, p. 42)

[33] Having heard submissions on the matter at the beginning of the hearing on the merits, we decided that the Pardo Settlement Agreement should not be considered until the completion of the hearing on the merits. We said:

> We find it would not be in the public interest to deal with the Settlement Agreement at this time, nor do we find it in the public interest to send it to another Panel. Any consideration of the proposed settlement should be done on a complete record. Any settlement with Mr. Pardo we find would interfere with the Taylor Respondents' right to make full answer and defence, given the adversarial relationship we find to exist between them.
>
> (Hearing Transcript, September 30, 2009, p. 31)

[34] After the Merits Decision was issued, Mr. Pardo requested that approval of the Pardo Settlement Agreement be considered by the Commission before the start of the Sanctions and Costs Hearing. On September 28, 2010, we dismissed this motion and deferred the matter of the Pardo Settlement Agreement to the Sanctions and Costs Hearing, which was set for December 7 and 8, 2010.

[35] Mr. Pardo then moved for adjournment of the Sanctions and Costs Hearing pending resolution of the matter of the Pardo Settlement Agreement. We dismissed the motion on November 25, 2010, for reasons given by endorsement on November 30, 2010. At that time, we said:

> Counsel submits that Mr. Pardo has been denied procedural fairness by the failure of the Commission to consider the settlement agreement that he entered into with Staff of the Commission. While it appears to us that the settlement agreement was

> "considered" by the panel of September 29th, 2009, this is a matter for the Divisional Court.
>
> Counsel further submits that a hearing panel cannot consider a settlement agreement after the start of the hearing on the merits. Subject to any submissions made at the sanctions hearing, this would appear to us to be a correct analysis of Commission practice and procedure absent, of course, total agreement by all the parties before the hearing panel. This also is a matter for the Divisional Court.
>
> (*Re Mega-C* (2010), 33 O.S.C.B. 11719 at paras. 3-4)

[36] We have heard nothing at the Sanctions and Costs Hearing that would cause us to resile from that ruling. There has been a full hearing on the merits, and our findings are set out in the Merits Decision. Staff submits, and we agree, that the Pardo Settlement Agreement is of no assistance to us. Our role now is to determine appropriate sanctions based on our findings made on the evidence.

(ii) Sanctions and Costs

[37] We found that Mr. Pardo's conduct was serious and caused great harm to hundreds of investors. He attended many meetings with investors where he made representations to potential investors that Mega-C had applied or would apply to be listed on a stock exchange. He facilitated the Taylor Respondents' promissory note scheme by issuing Mega-C share certificates as directed by the Taylor Respondents. Hundreds of investors lost thousands of dollars in Mega-C; we found that investors lost a total of approximately CDN $3.2 million.

[38] Mr. Pardo maintained in his submissions that he relied on legal advice to trade in Mega-C shares and that he always acted in the best interest of Mega-C investors. However, the outcome of his conduct was that he failed to protect Mega-C investors from harm and received benefits from Mega-C of approximately CDN $900,000. Mr. Pardo is an experienced businessman with considerable capital market experience. His conduct shows a lack of understanding of his responsibilities as an officer of an issuer. We find that the public interest requires us to make an order that will protect investors from any similar conduct in the future.

[39] In mitigation, Mr. Pardo appears to understand the seriousness of his conduct and indeed has expressed regret that matters turned out as they did. He asserts that when he saw the harm being done to investors he made efforts to assist them. We find evidence that supports this claim. Indeed, Mr. Pardo abandoned his interest in his Mega-C shares in the bankruptcy proceedings in Nevada.

[40] In considering appropriate and proportionate sanctions for Mr. Pardo, we note that the Usling Settlement states that Mr. Usling, who was the CFO of Mega-C, received in excess of 1.25 million treasury shares from Mega-C and traded them to members of the public whom he solicited to invest. He abandoned his interest in his Mega-C shares in the bankruptcy proceedings. Pursuant to the settlement agreement between Mr. Usling and Staff, which was approved by the Commission on September 17, 2009, Mr. Usling was reprimanded and prohibited for two years from becoming or acting as a director or officer of a reporting issuer.

[41] It is not our role to consider what would have been appropriate sanctions for Mr. Usling had the Usling Settlement not been approved. The Commission has stated on a number of occasions that "The role of a panel reviewing a settlement agreement is not to substitute the sanctions it would impose in a contested hearing for what is proposed in the settlement

agreement, but rather to make sure the agreed sanctions are within acceptable parameters" (*Re Koonar et al.* (2002), 25 O.S.C.B. 2691 at 2692). Instead, our role is to decide on the appropriate sanctions for Mr. Pardo and the Taylor Respondents based on our findings in the Merits Decision. We have had the benefit of a long and searching examination of the related activities of Mr. Usling, Mr. Pardo and the Taylor Respondents over some 55 days of evidence, and that understanding compels us to order the sanctions that are proportionate to the conduct of the Respondents before us – Mr. Pardo and the Taylor Respondents.

[42] In assessing the appropriate sanction for Mr. Pardo we have not considered his failure to settle as an aggravating factor.

(b) The Taylor Respondents

[43] As noted above, Lewis Taylor Sr. devised and led the common enterprise based on the promissory note scheme. He enlisted the help of his three sons.

[44] Lewis Taylor Jr., in his capacity of an officer of Mega-C, employed his sales skills in meeting with investors and preparing written materials to persuade investors that Mega-C was worthwhile.

[45] Jared Taylor opened Canadian and U.S. bank accounts with the Toronto Dominion Bank. He issued the promissory notes to investors, collected the funds from them, instructed Mr. Pardo to issue share certificates to named investors and distributed investor funds from his accounts to the Taylor Respondents, to companies controlled by them or to associates of the Taylor Respondents or companies controlled by them.

[46] Colin Taylor played a lesser role. Through his company, he directed Mr. Pardo to transfer Mega-C shares into the names of numerous individuals who invested through the Taylor Respondents.

[47] There is little or no evidence of the business experience of Lewis Taylor Jr., Colin Taylor or Jared Taylor. They appear to have had limited business experience.

[48] Lewis Taylor Sr. was an experienced business man. He had previously been found to have contravened Ontario securities law for "touting activities" which led to an order that exemptions contained an Ontario securities law would not apply to him for a period of ten years ((1990), 13 O.S.C.B. 3887). Apart from his own account, he was prohibited from committing any act, advertisement or other conduct involved in the sale or disposition of securities to the public. The order expired on September 11, 2000.

[49] The Taylor Respondents do not recognize the seriousness of their misconduct. They blame Mr. Pardo, Staff investigators and counsel for Staff, as well as the Panel. This failure to recognize the seriousness of their misconduct suggests they may act in a similar manner in the future. The investing public should be protected from such conduct.

[50] The seriousness of the misconduct and the resulting harm requires sanctions that not only deter the Taylor Respondents but as well send a message of general deterrence to others who may consider similar contraventions of the *Act*.

[51] In mitigation, we take into account that Lewis Taylor Jr., Colin Taylor and Jared Taylor have no previous record of any kind with the Commission. Also in mitigation is the fact that it is almost ten years since the start of the promissory note scheme; the three Taylor sons were relatively young men at the time. Nothing in the evidence suggests they would have been able to

assess the merits of the scheme and its compliance or otherwise with the *Act*. It would have been difficult for the Taylor sons to resist participation in the scheme devised by their father. Our experience in the hearing is that Lewis Taylor Sr. becomes aggressive when crossed. We recall an occasion during the hearing on the merits when Lewis Taylor Jr. was asked if he planned to make closing submissions. He replied he wasn't planning to and Lewis Taylor Sr. said to him, "Yes you are."

VI. DISGORGEMENT

[52] Mr. Pardo received funds from Mega-C during the period between August 20, 2001 and February 29, 2004. The promissory notes issued by Jared Taylor range from late 2001 to early 2003 with the majority of them issued in 2002.

[53] On April 7, 2003, certain amendments to the *Act* came into force. These amendments included s. 127(1)10, which gives the Commission power to order a person or company to disgorge any amounts obtained as a result of non-compliance with Ontario securities law. This raises the question of whether the provision can be applied retrospectively with respect to amounts obtained as a result of non-compliance with Ontario securities law before the enactment of s. 127(1)10.

[54] The amendments of April 7, 2003 also provided for an administrative penalty. Subsequent jurisprudence has distinguished between disgorgement and the administrative penalty insofar as retroactivity is concerned. In *Rowan* the Commission found:

> We agree with and prefer to follow the reasoning and rationale of the British Columbia Court of Appeal in *Thow*, although we would emphasize that the imposition of a fine is a penalty and would downplay the use of the word punitive even though it is used in a limited sense in that decision. The law as developed by the Supreme Court of Canada cases, and followed in *Thow*, is that ongoing constraints or prohibitions may be applied retrospectively but penalty provisions, particularly monetary penalties, should not be applied retrospectively.
>
> (*Re Rowan et al.* (2010), 33 O.S.C.B. 91 at paras. 94.; *Thow v. British Columbia (Securities Commission)*, [2009] BCCA 46 at paras. 47-49)

[55] However, disgorgement has been found to apply retroactively. In *Re White et al.* (2010), 33 O.S.C.B. 8893 ("***White***") at para. 36, the Commission stated:

> The April 7, 2003 amendment to the *Act* also gave the Commission authority to order disgorgement of funds obtained by misconduct. Since the Commission did not have authority to order disgorgement for misconduct prior to that amendment, it is argued that the disgorgement should not apply to monies obtained prior to that date. Disgorgement is an order directing that any unlawfully obtained funds be removed from the transgressor. Notwithstanding some of the funds were invested in this scheme prior to the coming into force of the disgorgement provision, our order should not be reduced to reflect monies invested prior to April 7, 2003. The rationale of disgorgement is to reflect the principle that a person from whom funds were unlawfully obtained has a legal right to have those funds returned.

[56] We agree with the Commission's statement of the law in *White*.

[57] The details of disgorgement are discussed below.

[58] In *Re Limelight et al.* (2008), 31 O.S.C.B. 12080 ("***Limelight***") at para. 52, the Commission set out the following non-exhaustive list of factors to consider when contemplating issuing a disgorgement order:

> (a) whether an amount was obtained by a respondent as a result of non-compliance with the *Act*;
>
> (b) whether the amount that a respondent obtained as a result of non-compliance with the *Act* is reasonably ascertainable;
>
> (c) the seriousness of the misconduct and the breaches of the *Act* and whether investors were seriously harmed;
>
> (d) whether the individuals who suffered losses are likely to be able to obtain redress by other means; and
>
> (e) the deterrent effect of a disgorgement order on the respondents and other market participants.

[59] The burden is on Staff, to prove on a balance of probabilities, the amount obtained by a respondent as a result of that respondent's non-compliance with the *Act*. In *Limelight*, the Commission explained at para. 49 that:

> … paragraph 10 of subsection 127(1) of the *Act* provides that disgorgement can be ordered with respect to "any amounts obtained" as a result of non-compliance with the *Act*. Thus, the legal question is not whether a respondent "profited" from the legal activity but whether the respondent "obtained amounts" as a result of that activity. In our view, this distinction is made in the *Act* to make clear that all money illegally obtained from investors can be ordered to be disgorged, not just the "profit" made as a result of the activity. This approach also avoids the Commission having to determine how "profit" should be calculated in any particular circumstance. Establishing how much a respondent obtained as a result of his or her misconduct is a much more straightforward test. In our view, where there is a breach of Ontario securities law that involves the widespread and illegal distribution of securities to members of the public, it is appropriate that a respondent disgorge all the funds that were obtained from investors as a result of that illegal activity. In our view, such a disgorgement order is authorized under paragraph 10 of subsection 127(1) of the *Act*.

[60] We find a disgorgement order is appropriate in this case to ensure that none of the Respondents benefits from breaches of the *Act* and to deter them and others from similar misconduct. Therefore, Mr. Pardo will be ordered to disgorge to the Commission the amount of CDN $900,000, which is the amount he obtained as a result of his non-compliance with Ontario securities law. We found that the Taylor Respondents acted in a common enterprise, and accordingly the disgorgement order against them will be payable on a joint and several basis. The Taylor Respondents will be ordered to disgorge to the Commission, on a joint and several basis, the amount of CDN $3 million, which is the amount they obtained as a result of their non-

compliance with Ontario securities law. The amounts disgorged by Mr. Pardo and the Taylor Respondents shall be allocated to or for the benefit of third parties in accordance with subsection 3.4(2)(b) of the *Act*.

VII. COSTS

[61] Staff seeks costs of the hearing in the amount of $106,700, to be paid by the Taylor Respondents on a joint and several basis. We agree with Staff's submission that Staff have been conservative in their calculation of costs, which does not include investigation or preparation time. However, there shall be no order as to costs.

[62] We make no order as to costs for the following five reasons:

(i) On September 7, 2007, a panel of the Commission issued its reasons and decision on a motion for particulars filed by various Respondents ((2010), 33 O.S.C.B. 8278). At paragraph 57, the Panel found as follows:

> In our view the allegations made in the Statement of Allegations, the July Letter and all the other comprehensive disclosure made by Staff to the Respondents are not sufficient to permit the Respondents to know the particulars of the case they have to meet and to make full answer and defence. Accordingly, we have directed Staff to provide the additional particulars referred to above.

(ii) On October 1, 2008, a panel of the Commission issued its decision on a motion for a stay brought by the Respondents ((2010), 33 O.S.C.B. 8285). At paragraph 17, Staff was directed to produce a written itemized inventory of documents and materials in its possession that were relevant to the proceeding that Staff did not intend to disclose to the Respondents.

(iii) In the course of the Nevada bankruptcy, Staff released compelled testimony of some Respondents that ultimately reached persons not entitled to have that testimony. We find that Staff was less than vigilant in taking steps to ensure that the compelled testimony was revealed to only those persons qualified to receive it.

(iv) During the course of the investigation, Staff received videos of presentations made to potential investors recorded by Kirk Tierney. The videos were lost while in the possession of Staff. While we are not satisfied that the videos could have assisted the Respondents, Staff's failure to preserve this evidence contributed to the Taylor Respondents' submission that Staff was biased against them.

(v) During the course of the investigation, counsel for Staff interviewed A.M., a member of the Toronto Police Service. As a result of that conversation, A.M. formed the opinion that Staff counsel was attempting to influence his evidence as a witness in the Mega-C proceeding. A.M. and a fellow officer present at the interview testified as to the conduct of the interview. None of the three members of Staff present at that meeting was called in

reply. We found the actions of Staff counsel were unwarranted, inappropriate and overreaching.

[63] For the foregoing reasons we make no order as to costs.

VII. DECISION ON SANCTIONS AND COSTS

[64] We consider that it is important in this case to impose sanctions that reflect the seriousness of the securities law violations that occurred. We further consider it important to impose sanctions that deter not only the Respondents but also like-minded persons from engaging in future conduct that violates securities law.

[65] We consider it in the public interest to make the following order:

1. Rene Pardo:

   (i) shall cease trading securities for ten (10) years, pursuant to clause 2 of subsection 127(1) of the *Act*, except that he is permitted to trade securities for the account of his registered retirement savings plans, registered retirement income plans, registered education savings plans or tax-free savings accounts (as defined in the *Income Tax Act (Canada)*) in which he or his spouse have sole legal and beneficial ownership, provided that:

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

      (b) he does not own legally or beneficially (in the aggregate, together with his spouse) more than one percent of the outstanding securities of the class or series of the class in question;

      (c) he carries out any permitted trading through a registered dealer and through trading accounts opened in his name only (and he must close any trading accounts that are not in his name only); and

      (d) he gives a copy of the Merits Decision, the Sanctions and Costs Decision and the Sanctions and Costs Order to any registered dealer through which he will trade in advance of any trading;

   (ii) any exemptions available under Ontario securities law shall not apply to him for ten (10) years, pursuant to clause 3 of subsection 127(1) of the *Act*;

   (iii) is reprimanded, pursuant to clause 6 of subsection 127(1) of the *Act*;

(iv) shall resign as a director or officer of any issuer, pursuant to clause 7 of subsection 127(1) of the *Act*;

(v) is prohibited for ten (10) years from becoming or acting as a director or officer of any issuer, pursuant to clause 8 of subsection 127(1) of the *Act*; and

(vi) pursuant to clause 10 of subsection 127(1) of the *Act*, he shall disgorge to the Commission the sum of $900,000, to be allocated by the Commission to or for the benefit of third parties in accordance with subsection 3.4(2)(b) of the *Act*.

2. Lewis Taylor, Sr.:

(i) shall cease trading securities permanently, pursuant to clause 2 of subsection 127(1) of the *Act*, except that he is permitted to trade securities for the account of his registered retirement savings plans, registered retirement income plans, registered education savings plans or tax-free savings accounts (as defined in the *Income Tax Act (Canada)*) in which he or his spouse have sole legal and beneficial ownership, provided that:

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

(b) he does not own legally or beneficially (in the aggregate, together with his spouse) more than one percent of the outstanding securities of the class or series of the class in question;

(c) he carries out any permitted trading through a registered dealer and through trading accounts opened in his name only (and he must close any trading accounts that are not in his name only); and

(d) he gives a copy of the Merits Decision, the Sanctions and Costs Decision and the Sanctions and Costs Order to any registered dealer through which he will trade in advance of any trading;

(ii) any exemptions provided for under Ontario securities laws shall not apply to him permanently, pursuant to clause 3 of subsection 127(1) of the *Act*;

(iii) is reprimanded, pursuant to clause 6 of subsection 127(1) of the *Act*;

(iv) shall resign any position he holds as a director or officer of any issuer, pursuant to clause 7 of subsection 127(1) of the *Act*; and

(v) is prohibited from acting as a director or officer of any issuer permanently, pursuant to clause 8 of subsection 127(1) of the *Act*.

3. Lewis Taylor Jr., Jared Taylor and Colin Taylor:

(i) shall cease trading securities for four (4) years, pursuant to clause 2 of subsection 127(1) of the *Act*, except that each of them is permitted to trade securities for the account of his registered retirement savings plans, registered retirement income plans, registered education savings plans or tax-free savings accounts (as defined in the *Income Tax Act (Canada)*) in which he or his spouse have sole legal and beneficial ownership, provided that:

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

(b) he does not own legally or beneficially (in the aggregate, together with his spouse) more than one percent of the outstanding securities of the class or series of the class in question;

(c) he carries out any permitted trading through a registered dealer and through trading accounts opened in his name only (and he must close any trading accounts that are not in his name only); and

(d) he gives a copy of the Merits Decision, the Sanctions and Costs Decision and the Sanctions and Costs Order to any registered dealer through which he will trade in advance of any trading;

(ii) any exemptions provided for in Ontario securities law shall not apply to them for four (4) years, pursuant to clause 3 of subsection 127(1) of the *Act*;

(iii) are reprimanded, pursuant to clause 6 of subsection 127(1) of the *Act*;

(iv) shall resign as directors or officers of any issuer, pursuant to clause 7 of subsection 127(1) of the *Act*; and

(v) are prohibited from becoming or acting as a director or officer for any issuer for a period of four (4) years, pursuant to clause 8 of subsection 127(1) of the *Act*.

4. Lewis Taylor Sr., Lewis Taylor Jr., Colin Taylor and Jared Taylor, pursuant to clause 10 of subsection of 127(1) of the *Act*, shall disgorge to the Commission, on a joint and several basis, the sum of CDN $3,000,000, to be allocated by the Commission to or for the benefit of third parties in accordance with subsection 3.4(2)(b) of the *Act*.

[66] There shall be no order as to costs.

[67] An order will issue separately.

DATED at Toronto this 26th day of January, 2011.

"James D. Carnwath"	*"Kevin J. Kelly"*
James D. Carnwath	Kevin J. Kelly