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
IMAGIN DIAGNOSTIC CENTRES INC., PATRICK J. ROONEY, CYNTHIA JORDAN, ALLAN McCAFFREY, MICHAEL SHUMACHER, CHRISTOPHER SMITH, MELVYN HARRIS and MICHAEL ZELYONY

REASONS AND DECISION ON SANCTIONS AND COSTS

Hearing:	November 12, 2010	
Decision:	June 30, 2011	
Panel:	Mary G. Condon	- Commissioner and Chair of the Panel
	Margot C. Howard	- Commissioner
Appearances:	Jon Feasby	- For the Ontario Securities Commission
	Patrick J. Rooney	- For himself and IMAGIN Diagnostic Centres Inc.

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REASONS AND DECISION ON SANCTIONS AND COSTS

I. History of the Proceeding

[1] This was a bifurcated hearing before the Ontario Securities Commission (the "Commission") pursuant to sections 127 and 127.1 of the *Securities Act*, R.S.O. 1990, c. S.5, as amended (the "Act"), to consider whether it is in the public interest to make an order with respect to sanctions and costs against IMAGIN Diagnostic Centres Inc. ("IMAGIN") and Patrick J. Rooney ("Mr. Rooney") (collectively, the "Respondents").

[2] Prior to the hearing on the merits, Cynthia Jordan ("Ms. Jordan"), Allan McCaffrey ("Mr. McCaffrey"), Michael Shumacher ("Mr. Shumacher"), Christopher Smith ("Mr. Smith"), and Michael Zelyony ("Mr. Zelyony") settled with the Commission (collectively, the "Settling Respondents") (*Re IMAGIN et al.* (2009), 32 O.S.C.B. 1441 (oral reasons)). Melvyn Harris ("Mr. Harris") passed away prior to the commencement of the merits hearing and Staff of the Commission ("Staff") did not proceed with the allegations against this individual.

[3] The hearing on the merits in this matter took place on May 19, 20 and 21, June 16, 17, 18 and 19, September 8, 9, and 10, and November 11, 2009. During the hearing on the merits, Mr. Rooney represented himself and IMAGIN. The decision on the merits was issued on August 31, 2010 (*Re Imagin Diagnostic Centres Inc. et al* (2010), 33 O.S.C.B. 7761 (the "Merits Decision")).

[4] Following the release of the Merits Decision, we held a separate hearing on November 12, 2010, to consider sanctions and costs (the "Sanctions and Costs Hearing"). Staff of the Commission ("Staff") appeared at the Sanctions and Costs Hearing and Mr. Rooney represented himself and IMAGIN. Staff provided written submissions dated October 28, 2010, along with a book of authorities, and a one page Bill of Costs. Mr. Rooney, on behalf of himself and IMAGIN, provided written submissions dated November 5, 2010, along with a book of authorities, and written submission on costs dated November 29, 2010.

[5] During the Sanctions and Costs hearing, we requested that Staff provide the Panel with further submissions and documentation to support the request for costs. Staff provided us with written submissions on costs dated November 19, 2010, which included an affidavit and dockets in support of the costs request. Mr. Rooney, on behalf of himself and IMAGIN, provided written submissions on costs on November 29, 2010.

[6] These are our Reasons and Decision as to the appropriate sanctions and costs to order against the Respondents.

II. Reasons and Decision Dated August 31, 2010

[7] The Merits Decision addressed the following issues:

1. Did the Respondents breach subsection 25(1)(a) of the Act?

    i. Did the Respondents trade IMAGIN securities?

ii. Were the Respondents registered under the Act?

iii. Were there any exemptions available to the Respondents to facilitate their trading without registration?

2. Pursuant to section 129.2 of the Act, was Mr. Rooney a *de facto* officer and director of IMAGIN who authorized, permitted or acquiesced in IMAGIN's breaches of Ontario securities law?

(Merits Decision, *supra* at para. 15)

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

1. IMAGIN and Mr. Rooney breached subsection 25(1)(a) of the Act because they:

i. engaged in trading and acts in furtherance of trades;

ii. were not registered; and

iii. did not qualify for any of the registration exemptions under the Act.

2. Mr. Rooney was a *de facto* officer and director of IMAGIN who authorized, permitted and acquiesced in IMAGIN's breaches of Ontario securities law pursuant to section 129.2 of the Act.

(Merits Decision, *supra* at para. 159)

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

III. Sanctions and Costs Requested

1. Staff's Position

[10] Staff requests that the following order be made against the Respondents:

(a) That pursuant to paragraph 2 of subsection 127(1) of the Act, Mr. Rooney cease trading in securities in IMAGIN permanently;

(b) That pursuant to paragraph 3 of subsection 127(1) of the Act, any exemptions in Ontario securities law do not apply to Mr. Rooney or IMAGIN for a period of 15 years;

(c) That pursuant to paragraph 6 of subsection 127(1) of the Act, Mr. Rooney is reprimanded;

(d) That pursuant to paragraph 7 of subsection 127(1) of the Act, Mr. Rooney resign any position he holds as director or officer of any issuer, for a period of 15 years;

(e) That pursuant to paragraph 8 of subsection 127(1) of the Act, Mr. Rooney is prohibited from acting as a director or officer of any issuer for a period of 15 years;

(f) That pursuant to paragraph 9 of subsection 127(1) of the Act, Mr. Rooney is liable to pay an administrative penalty of $100,000;

(g) That pursuant to subsections 127.1(1) & (2) of the Act, Mr. Rooney and IMAGIN are jointly and severally liable to pay the sum of $81,018.75 toward the costs of or related to the investigation and hearing incurred by the Commission; and

(h) That pursuant to section 37 of the Act, Mr. Rooney and IMAGIN are prohibited from telephoning from within or outside Ontario for the purpose of trading in any security or in any class of securities, except that Mr. Rooney may telephone a registrant for the purpose of issuing trading instructions.

[11] In Staff's submission, the sanctions and costs requested are appropriate in light of the conduct of the Respondents.

[12] In support of their sanctions request, Staff also submits that any sanctions imposed on the Respondents should be proportionate and take into consideration the sanctions imposed on the Settling Respondents in this matter, which were as follows:

(a) Ms. Jordan

i. Five year ban from acting as director or officer of an issuer;

ii. Five year ban from acting as a registrant.

(b) Mr. McCaffrey

i. Ten year ban from acting as a director or officer of an issuer;

ii. Ten year ban from acting as a registrant;

iii. Administrative penalty of $15,000.

(c) Mr. Shumacher

i. Five year ban from acting as a director or officer of an issuer;

ii. Five year ban from acting as a registrant.

(d) Mr. Smith

i. Five year ban from acting as a director or officer of an issuer;

ii. Five year ban from acting as a registrant.

(e) Mr. Zelyony

i. Five year ban from acting as a director or officer of an issuer;

ii. Five year ban from acting as a registrant.

[13] According to Staff, the sanctions issued against the Settling Respondents reflect mitigating factors that are not present in Mr. Rooney's case and as a result Mr. Rooney and IMAGIN should be subject to higher sanctions. As explained in their written submissions on sanctions at paragraphs 12 and 13:

> … Rooney contested Staff's allegations in a document-heavy 10 day hearing and, despite no substantial defence, made no effort to "streamline the process" in any way. Rooney's sanctions therefore should not be mitigated by virtue of any saved resources or cooperation, as were the sanctions against the Settling Respondents.
>
> Further, the sanctions against the Settling Respondents should also be viewed from the perspective of the lesser role they played in breaching the Act. Rooney was the mind and management of Imagin, a de facto director and officer of the company and the architect of Imagin's breaches of the Act. His sanctions should reflect his role as the person most responsible for the illegal conduct and should be commensurate with his increased responsibility as an officer and director.

[14] Staff also acknowledges that they were seeking lesser sanctions against IMAGIN compared to Mr. Rooney. Staff explained at paragraph 22 of their written submissions on sanctions that:

> The sanctions sought against Imagin are designed to provide a public acknowledgement of Imagin's role in this matter and to restrain the Corporation from being used as an instrument to conduct further breaches of the *Act*. The necessity of sanctioning Imagin is mitigated by the removal of Rooney from further involvement with the company.

2. The Respondents' Position

[15] The Respondents take the position that the Commission should reject Staff's requested sanctions for being unfair and punitive to the Respondents and to the shareholders of IMAGIN. According to the Respondents, taken as a whole, Staff's request for sanctions is too severe and the Respondents state at paragraph 6 of their written submissions on sanctions that:

> It follows that the sanctions to be imposed on the Respondents must <u>be protective</u> and <u>preventive</u> rather than remedial or punitive. The role of the Commission at the conclusion of this administrative proceeding is to craft sanctions that will

> protect investors and prevent their exposure to similar behaviour in the future, rather than to punish the Respondents for their past conduct. Mr. Rooney believes that the proposal of the OSC Staff for sanctions is punitive in that it is effectively a call for deportation of Rooney from Ontario and perhaps Canada and perhaps a violation of his Charter Rights. [emphasis in original]

[16] Furthermore, the Respondents take the position at paragraph 7 of their written submissions on sanctions that they were "operating in good faith" and it is Rooney's first violation of the "OSC securities rules". In addition, the Respondents point out that no investors were harmed in this matter.

[17] The Respondents take the position in paragraph 2 of their written submissions that the following sanctions are better suited to be ordered in this matter:

(a) That pursuant to paragraph 2 of subsection 127(1) of the Act, Rooney cease trading in securities of Imagin permanently in the Province of Ontario except with Ontario shareholders to whom he recognizes a fiduciary duty but with the right to apply after three years to the OSC to become an exempt market dealer (EMD);

(b) That pursuant to paragraph 3 of subsection 127(1) of the Act, any exemptions in Ontario securities law do not apply to Rooney or Imagin permanently as they relate to residents of Ontario however with the right to apply after three years to the OSC to become an EMD;

(c) That pursuant to paragraph 6 of subsection 127(1) of the Act, Rooney is reprimanded; with the right of Mr. Rooney to respond at a hearing;

(d) That pursuant to paragraph 7 of subsection 127(1) of the Act, Rooney resign any position he holds as a director or officer of any Ontario issuer not to include Imagin but with [the] right to reapply to the OSC in 3 years;

(e) That pursuant to paragraph 8 of subsection 127(1) of the Act, Rooney is prohibited from acting as a director or officer of any Ontario issuer not to include Imagin permanently but with the right to reapply to the OSC to change this status after 3 years;

(f) That pursuant to paragraph 9 of subsection 127(1) of the Act, Rooney is liable to pay an administrative penalty of $1.00;

(g) That pursuant to subsections 127.1(1) & (2) of the Act, Rooney and Imagin are jointly and severally liable to pay the sum of $1.00 toward the costs of or related to the investigation and hearing incurred by the Commission; and

(h) That pursuant to [section] 37 of the Act, Rooney and Imagin will not be prohibited from telephoning from within or outside Ontario for the purpose of trading in any security or in any class of securities, as long as Rooney is

compliant with the securities laws in the place of destination of the telephone call and of Ontario.

[18] With respect to costs, the Respondents submit at paragraph 53 of their written submissions that "Imagin and other Respondents who help clarify ambiguous and dysfunctional rules of the OSC should not be penalized by Staff costs. The Respondents suggest $1.00 in costs."

IV. The Law on Sanctions

[19] Pursuant to section 1.1 of the Act, the Commission has the mandate to: (i) provide protection to investors from unfair, improper or fraudulent practices; and (ii) foster fair and efficient capital markets and confidence in capital markets. As stated by the Supreme Court of Canada in *Committee for Equal Treatment of Asbestos Minority Shareholders v. Ontario Securities Commission*, [2001] 2 S.C.R. 132, the Commission's public interest mandate is neither remedial nor punitive; instead, it is protective and preventive, and it is intended to prevent future harm to Ontario's capital markets (at para. 42). Specifically:

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

[20] In determining the appropriate sanctions to order in this matter, we must keep in mind the Commission's preventive and protective mandate set out in section 1.1 of the Act. We must also consider the specific circumstances in this case and ensure that the sanctions are proportionate (*Re M.C.J.C. Holdings*, (2002), 25 O.S.C.B. 1133 at 1134).

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

(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 a recognition of the seriousness of the improprieties;

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

(f) whether the violations are isolated or recurrent;

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

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

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

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

(k) in light of the reputation and prestige of the respondent, whether a particular sanction will have an impact on the respondent and be effective;

(l) the size of any financial sanctions or voluntary payment when considering other factors.

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

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

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

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

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

V. Appropriate Sanctions in this Case

1. Specific Sanctioning Factors Applicable in this Matter

[25] Overall, the sanctions we impose must protect investors and Ontario capital markets by barring or restricting the Respondents from participating in those markets in the future.

[26] In considering the sanctioning factors set out in the case law, we find the following specific factors and circumstances to be relevant in this matter, based on our findings in the Merits Decision:

(a) The seriousness of the allegations: The Respondents engaged in unregistered trading. Registration requirements serve an important role in securities regulation and as stated in paragraph 53 of the Merits Decision:

> In order for there to be fairness and confidence in Ontario's capital markets it is critical that brokers, dealers and other market participants who are in the business of selling or promoting securities meet the minimum registration, qualification and conduct requirements of the Act.

The Respondents should have obtained proper registration prior to trading IMAGIN securities and ensured that they qualified for exemptions. The Merits Decision held that IMAGIN was a market intermediary and therefore could not access the accredited investor exemption to distribute securities without being registered. The Respondents chose to ignore the registration requirements. We find it problematic that the Respondents take the liberty of picking and choosing which registration rules to follow. Registration requirements are obligatory for all market participants and must be adhered to by all market participants.

(b) The Respondents' experience in the marketplace: At the merits hearing, Mr. Rooney testified that he had many years of experience working in the capital markets. Staff points out that in a press release dated June 26, 2003, Mr. Rooney was described as:

> … having caused approximately 150 IPOs to be completed through his N.Y.C.-based investment banking firm. He owned or controlled 5 seats on the N.Y.S.E., was the Chairman and CEO of a high-growth N.Y.S.E.-traded company and has established and/or financed leading-edge companies and technologies over the years …
>
> Mr. Rooney is considered an expert in IPOs, reverse takeovers (RTOs), proxy contests and hostile tender offers.

For someone with so much experience in the capital markets, we find it troublesome that Mr. Rooney did not take all the necessary steps to ensure that he complied with Ontario securities law. In our view, Mr. Rooney chose to disregard

the registration requirements in Ontario. In addition, it was brought to our attention during the Sanctions and Costs Hearing that Mr. Rooney has also disregarded securities and tax laws in other jurisdictions (see: *USA v. Rooney*, 1988, 866 F. 2d 28 (U.S. Ct. Ap. 2nd Circuit); SEC News Digest, Dec. 28, 1988, Issue 88-248; SEC News Digest, June 26, 1989, Issue 89-120; *In the matter of Patrick J. Rooney and Adrian Antoniu Alexander*, S.E.C. administrative Proceeding File No. 3-10506, June 13, 2001; *USA v. Rooney*, 1997 U.S. Ap. LEXIS 40507; *U.S. Securities and Exchange Commission Litigation Release* No. 17425/March 20, 2002; and *U.S. Securities and Exchange Commission Litigation Release* No. 16733/September 27, 2000). In our view, this shows a pattern of recidivist behaviour in ignoring securities law.

(c) The Respondents' activity in the marketplace: IMAGIN was involved in a systematic process of soliciting potential investors and selling its securities. At page 5 of their written submissions on sanctions, the Respondents admit that the activity in question "took place over a period of approximately three and a half years and involved hundreds of investors". Soliciting investors and selling IMAGIN securities was a predominant activity of IMAGIN employees. As set out in the Merits Decision at paragraph 120:

> …the evidence shows that IMAGIN was organized to distribute securities. We recognize that selling securities may not have been the only job function of IMAGIN employees, and they may not have engaged in selling IMAGIN securities 100% of the time. However, taken as a whole, there was a team of employees at IMAGIN that was involved in a systematic process to market and solicit sales in IMAGIN securities. As long as there is a predominant function at an entity to distribute securities in an organized fashion (even though the entity might also have other business purposes at the same time), that entity is captured by the definition of a market intermediary.

(d) Whether there has been a recognition of the seriousness of the improprieties: Mr. Rooney has not shown any recognition of the seriousness of his improprieties. As stated on page 5 of the Respondents' written submissions on sanctions:

> There has been no recognition of the seriousness of the improprieties because it is clear that Rooney believes that [IMAGIN] operated within the Rules of 45-501 of the OSC and that [IMAGIN] had no obligation to file as an LMD.

In addition, at paragraph 37 of their written submissions on sanctions the Respondents emphasize that they have no remorse for their actions in this matter:

> … I have no remorse because it is clear to me that it is the modus operandi of entrepreneurs in all jurisdictions globally including the USA that accredited investors can be solicited by entrepreneurs and his or her

> associates directly without a broker and without an LMD or broker/dealers licence. Any other interruption would stop most all new business formation in Ontario.

Further, at page 6 of their written submissions on sanctions, the Respondents state that:

> There is no remorse since the Respondents acted in good faith on a common sense reading of the rules after seeking advice and guidance from experts including the OSC and legal counsel.

With respect to obtaining legal advice, the Respondents further submit at paragraph 20 of their written submissions on sanctions that:

> … IMAGIN demonstrated and testified that they sought and received favourable advice from legal counsel and from a member of the OSC both of whom blessed the capital raising plan of IMAGIN.

The Respondents take the position that they properly interpreted the law and that their conduct was within the bounds of the regulatory requirements. With respect to the Respondents' reliance on legal advice, we note that although the Respondents did obtain a summons to call their lawyer as a witness, the Respondents voluntarily decided not to call their lawyer as a witness during the merits hearing. Therefore, we had no evidence before us as to the precise legal advice that the Respondents were given in this matter.

(e) Mitigating factors: The Respondents take the position that since they paid fees to the Commission in relation to Form 45-501 filings, this meant that they were in compliance with securities law in Ontario. Specifically in their written submissions on sanctions the Respondents state at page 5 that:

> It was clear that IMAGIN believed that it was complying with the rules and in fact made initial filings and updated filing of offering memorandums [*sic*] with the OSC and paid fees to the OSC every 10 days or so as designated by the Rules of the OSC. The fact that these procedures and fees exist makes it deductive that the compliance over a 3 ½ year period was consistent with the Rules and implied an acceptance by the OSC of the [IMAGIN] methodology. If there was no acceptance, the rules of filings and paying fees is a form of entrapment by the OSC of [IMAGIN] and all issuers in Ontario (of which there are thousands annually) who choose to raise capital and file with the OSC, by form of a private placement in Ontario.

In our view paying fees to the Commission does not relieve market participants from the responsibility of ensuring that they are in compliance with Ontario securities laws at all times. The onus is on the market participant to ensure that

they have ongoing access to the appropriate registration exemption. However, the fact that the Respondents did make payments in good faith to the Commission and never intentionally withheld payments from the Commission is a factor to consider when determining the appropriate sanctions.

(f) The effect any sanction might have on the livelihood of the Respondent: At the Sanctions and Costs Hearing, we were not provided with any evidence that the Respondents did not have the financial means to pay monetary sanctions. However, Mr. Rooney took the position that Staff's proposed sanctions would have the effect of deporting him from Canada and it would prevent him from earning a living in Canada and would be a violation of his Charter rights. Specifically, Mr. Rooney submits at paragraph 40 of the Respondents' written submissions on sanctions that:

> Mr. Rooney was born in Ontario, has doctors in Ontario, has relationships in Ontario, has every one of his 7 brothers and sisters in Ontario. Yet the OSC Staff is now suggesting my life's work cannot be done from Ontario. You must move. That Charter of Rights gives Rooney the right to live in Ontario but the OSC says that you cannot live in Ontario and survive. The OSC's Staff proposes to deport Rooney from Ontario.

Mr. Rooney is not being deported from Canada. Staff's requested sanctions do not prohibit Mr. Rooney from being employed in Ontario.

2. Trading and Other Prohibitions

Trading

[27] Staff takes the position that in the circumstances of this case, it would be appropriate to order that Mr. Rooney cease trading in securities of IMAGIN permanently and that exemptions contained in Ontario securities law not apply to any of the Respondents for a period of 15 years. Staff did not request a cease trading order against IMAGIN itself, nor did Staff request that Mr. Rooney cease trading in securities other that IMAGIN. According to Staff, an order to require Mr. Rooney to permanently cease trading all securities is unnecessary because:

> … the matter is certainly close to the line where it would be appropriate to impose a complete ban, however, the Notice of Hearing makes it clear that the only capital market exclusion being sought is specific to [IMAGIN] and at this point I think it would be a matter of fairness to Mr. Rooney, [that] staff is not seeking to exclude him completely, but just with respect to [IMAGIN] and exemptions as indicated.
>
> So although it's clearly at the very most serious end of the scale of activity where one would not receive a complete cease trade order and other complete exclusions, it's [S]taff's submission it remains on the other side of that line.
>
> (Hearing Transcript, November 12, 2010 at page 36 lines 3 to 16)

[28] Mr. Rooney takes the position that the cease trade order requested by Staff (in combination with the other sanctions requested by Staff) is not appropriate and is too restrictive. As stated above, Mr. Rooney claims that such a cease trade order will hinder him from working in Ontario. We disagree. Such a cease trade order would only prohibit him from trading IMAGIN securities; it would not preclude Mr. Rooney from trading other securities.

[29] Participation in the capital market is a privilege, not a right (*Erikson v. Ontario (Securities Commission),* [2003] O.J. No. 593 (Sup. Ct.) at para. 56). As stated in *Manning v. Ontario (Securities Commission)*, [1996] O.J. No. 3414 at para. 47:

> There is no right of any individual to participate in the capital markets in Ontario. […] the Act provides certain exemptions which allows individuals to make certain trades without being registered, however, the OSC has explicit jurisdiction to remove the exemptions if an individual engages in conduct contrary to the letter or spirit of the Act, whether such conduct causes damage to investors or is detrimental to the integrity of the capital markets.

[30] We note that Staff's allegations were limited to a breach of subsection 25(1)(a) of the Act. There were no allegations of misappropriation of funds or harm to investors.

[31] Taking all of this into consideration, we find it appropriate to order that Mr. Rooney shall cease trading IMAGIN securities permanently, and that any exemptions in Ontario securities law do not apply for 15 years to Mr. Rooney and IMAGIN. In our view, it is necessary to impose a permanent ban on Mr. Rooney with respect to the trading of IMAGIN securities because he was the directing mind of IMAGIN and took all steps to facilitate and encourage the systematic solicitation and selling of IMAGIN securities.

Director and Officer Bans

[32] Staff also requests that Mr. Rooney resign any position that he may hold as a director or officer of any issuer, and that he be prohibited from becoming or acting as a director or officer of any issuer for a period of 15 years. Staff takes the position at paragraph 16 of their written submissions on sanctions that:

> …when dealing with a small company, such as Imagin, this type of sanction is necessary to protect against recidivism. This is particularly so in cases where, as here, the Respondent is the sole officer and director or otherwise has substantial influence in the decision-making of the company.

[33] Mr. Rooney takes the position that he should not be restricted from acting as a director or officer of any issuer. As mentioned above, he claims that such a restriction would prevent him from working in Canada and that this would force him to move out of the country. In our view, this submission is exaggerated.

[34] In *Mithras*, the Commission explained that the removal of individuals from the capital markets is an effective mechanism for protecting the public. In addition to trading prohibitions,

officer and director bans are another effective way to remove persons from participating in the capital markets.

[35] In our view, the use of director and officer bans will ensure that Mr. Rooney will not be put in a position of control or trust with any issuer. This is important because the misconduct in this matter was facilitated by Mr. Rooney in his capacity as a directing mind who had substantial influence and decision making power over the company. As set out in the Merits Decision, Mr. Rooney "was the directing mind and management of IMAGIN and responsible for the supervision, direction, control and operation of IMAGIN" (at para. 147).

[36] Mr. Rooney also informed us at the Sanctions and Costs Hearing that he has already resigned from IMGAIN. He explained that:

> …Rooney has recently in a shareholder letter disclosed his resignation as CEO while retaining the job of director of corporate development.
>
> The new CEO and chairman, named J.R. Richardson, is a long term resident of Calgary and will run Imagin, a federal corporation, out of Calgary, and he's doing it as we speak.
>
> Mr. Richardson is a talented, creative executive, and there are no side deals with Rooney. The other director is Greg Pappas, an Ontario-based chartered accountant with 20 years experience. Imagin is getting all their filings up-to-date, taxes, et cetera, et cetera, …
>
> (Hearing Transcript, November 12, 2009 at page 51 line 22 to page 52 line 10)

[37] We acknowledge that Mr. Rooney has proactively taken steps to find a successor CEO for IMAGIN and that he informed us that he voluntarily resigned from IMAGIN.

[38] Taking all of this into consideration, we find that it is appropriate that Mr. Rooney resign from any position he may hold as a director or officer of any issuer and that he be prohibited from acting as a director or officer of any issuer for a period of 15 years. The definitions of "director" and "officer" under Ontario securities law are set out in subsection 1.1 of the Act:

> "**director**" means a director of a company or an individual performing a similar function or occupying a similar position for any person;
>
> "**officer**", with respect to an issuer or registrant, means,
>
> (a) a chair or vice-chair of the board of directors, a chief executive officer, a chief operating officer, a chief financial officer, a president, a vice-president, a secretary, an assistant secretary, a treasurer, an assistant treasurer and a general manager,
>
> (b) every individual who is designated as an officer under a by-law or similar authority of the registrant or issuer, and

(c) every individual who performs functions similar to those normally performed by an individual referred to in clause (a) or (b);

[39] The combined sanctions of trading bans and prohibitions on acting as a director or officer of any issuer will provide general and specific deterrence to help ensure that similar conduct does not take place in the future.

Reprimand

[40] We find that it is appropriate that Mr. Rooney be reprimanded. The reprimand will provide strong censure of his misconduct and will impress on the public the importance of complying with the registration and prospectus provisions of the Act.

[41] As stated above, Mr. Rooney breached subsection 25(1)(a) of the Act by engaging in a prolonged systematic effort to solicit and sell IMAGIN securities. Mr. Rooney was the directing mind behind IMAGIN, he supervised IMAGIN employees and made important decisions at IMAGIN.

[42] Mr. Rooney also believes that he did nothing wrong and that he correctly interpreted the law. As stated above, he has not shown remorse for his actions. Even during the Sanctions and Costs Hearing, Mr. Rooney argued with the findings of the Panel in the Merits Decision and many of the arguments included in the Respondents' written submissions on sanctions are an attempt to re-litigate the merits. In order to participate in Ontario's capital markets, one must comply with the law. Having found non-compliance with the registration requirements in Ontario securities law, Mr. Rooney is reprimanded.

3. Administrative Penalty

[43] Staff requests that an administrative penalty of $100,000 be imposed on Mr. Rooney.

[44] In Staff's submission, any administrative penalty imposed on Mr. Rooney ought to reflect the severity of Mr. Rooney's misconduct. At paragraph 20 of their written submissions on sanctions, Staff submits that:

> The administrative penalty recommended against Rooney is also justified by the flagrant and conscious nature of his conduct and his regulatory history. Further, his seeming inability to accept responsibility for his actions ensures that there is no mitigation of the applicable sanction. Rooney's conduct demands a strong monetary sanction that will serve to remind him of the cost of failing to discharge his duties as a director and officer and the "unprofitability of repeated wrongdoing."

[45] In support of their administrative penalty request, Staff referred us to *Re Limelight et al.* (2008), 31 O.S.C.B. 12030 ("*Limelight Sanctions Decision*") and the *Momentas Sanctions Decision, supra*. According to Staff, the amounts of administrative penalties ordered in these cases provide guidance as to the appropriate quantum to apply to this case. Staff pointed out that

the *Limelight Sanctions Decision* is helpful because it explains that a $75,000 administrative penalty was imposed specifically to address the breaches of subsections 25(1) and 53(1) of the Act (*Limelight Sanctions Decision*, *supra* at para. 75). While the total administrative penalty imposed against the respondents in the *Limelight Sanctions Decision* was much higher, according to Staff, the amount of $75,000 can be used as a benchmark for other cases involving breaches of subsections 25(1) and 53(1) of the Act.

[46] With respect to the case law referred to by Staff, Mr. Rooney submits that Staff's cases are not on point. Mr. Rooney submitted at the hearing that:

> …the OSC here is clearly punitive and overreaching in their requests. They [use] the Limelight and the Momentas cases to measure penalties. In Limelight, Limelight indiscriminately, using telephone books, called people at home.
>
> (Hearing Transcript, November 12, 2010 at page 41 lines 13 to 17)

[47] In addition, Mr. Rooney pointed out that IMAGIN did not use investor funds indiscriminately as in the *Momentas Sanctions Decision* and *Limelight Sanctions Decision*:

> Imagin is not Momentas or Limelight. Of course, as I reiterate, since we didn't steal one and a half million, the OSC enforcement, as a demonstration of their punitive activity and suggestions, suggests that we should pay a hundred thousand dollars, twice the fine as if we stole it.
>
> (Hearing Transcript, November 12, 2010 at page 45 lines 10 to 15)

[48] In our view, the imposition of an administrative penalty is not required in this case. We find that the imposition of other sanctions such as director and officer bans are better suited to deter Mr. Rooney from engaging in similar conduct in the future. Director and officer bans will have the effect of restricting Mr. Rooney's activities in the capital markets more than any monetary sanction.

[49] In addition, we find that the case before us is not analogous to the administrative penalty case law referred to us by Staff. Staff cited the *Limelight Sanctions Decision*, which is a boiler room investment scheme case, as the basis for imposing an administrative penalty on Mr. Rooney. The *Limelight Sanctions Decision* involved an investment scheme where the company did not have any legitimate business purpose and was set up for the sole purpose of raising investor funds for the benefit of those behind the investment scheme.

[50] In the present case, Staff did not allege that the funds raised were used for inappropriate purposes. Staff did not provide any evidence about the use of funds in this case. And while we have concerns that investors do not appear to have received annual financial statements or to have been invited to annual shareholder meetings in accordance with corporate law, the evidence in this case was not investor focused. Rather, this case centered on the legal interpretation of the definition of a market intermediary and whether IMAGIN fell within it. We do not find it appropriate to impose an administrative penalty.

4. Section 37 of the Act

[51] At the time the conduct in this matter took place, subsection 37(1) of the Act provided:

> 37. (1) The Commission may by order suspend, cancel, restrict or impose terms and conditions upon the right of any person or company named or described in the order to,
>
> (a) call at any residence; or
>
> (b) telephone from within Ontario to any residence within or outside Ontario, for the purpose of trading in any security or in any class of securities.

[52] The current version of subsection 37(1) of the Act is substantially identical except that it also refers to derivatives, in addition to securities.

[53] Staff has requested pursuant to subsection 37(1)(b) of the Act that Mr. Rooney and IMAGIN be prohibited from telephoning from within Ontario to any residence within or outside Ontario for the purpose of trading in any security or in any class of securities, except that Mr. Rooney may telephone a registrant for the purpose of issuing trading instructions.

[54] In Staff's view, an order under section 37 is appropriate to prevent Mr. Rooney from using a telephone to call anyone at their residence, except a registered representative, for the purpose of effecting a trade in securities. According to Staff, the sanctions imposed as a whole will allow Mr. Rooney to engage in legitimate capital market activities and to invest for his own benefit. He simply will not be able to solicit investors by telephone.

[55] Mr. Rooney argues that a prohibition on calling investors is over reaching and punitive and violates his Charter rights. Specifically, Mr. Rooney submitted at the hearing:

> I would ask the panel to consider Mr. Rooney's right under section 6 of the Charter that reads, "Every citizen has the right to take up residence in any province and, B, to pursue the gaining of a livelihood in any province."
>
> Mr. Feasby would suggest I can't even -- I turn in my Blackberry.
>
> The OSC's suggestions for sanctions is a de facto deportation of Mr. Rooney from Ontario and because of the potential ripple effect to other provincial commissions, securities commissions, perhaps a deportation from Canada.
>
> The OSC would not even have Rooney use his telephone inside or outside of Ontario in his role as CEO of a U.S. based, USA publicly traded company, which I am today.
>
> (Hearing Transcript, November 12, 2010 at page 62 line 15 to page 63 line 5)

[56] We disagree with Mr. Rooney's submissions on this issue. Mr. Rooney can participate in the capital markets. He is precluded from telephoning from within Ontario to any residence within or outside Ontario to sell securities. Mr. Rooney is still able to engage a registrant for the purpose of selling securities.

[57] Since the conduct in this case was a systematic process of solicitation and sale of IMAGIN securities by telephone, we find it appropriate to make an order under subsection 37(1)(b) of the Act to prevent the Respondents from telephoning to solicit trades. They are required to operate through a registrant for capital-raising activities.

[58] With respect to the Charter argument, we refer to our discussion of this issue at paragraph 26(f) of our Reasons. Mr. Rooney is not being deported from Canada and an order imposed under subsection 37(1)(b) of the Act will not restrict him from being employed in Canada or participating in the capital markets, under certain conditions.

VI. Costs

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

[60] Staff requested, pursuant to subsection 127.1(2) of the Act, that the Respondents be ordered to pay, jointly and severally, a total of $81,018.75 to cover the costs related to the hearing in this matter (this includes only the costs incurred after the Settlement Agreements with the Settling Respondents were entered into). During the hearing, we asked Staff to provide further written submissions and documentation to support their requests for costs, and we also provided Mr. Rooney with the opportunity to provide us with further written submissions regarding costs.

[61] After the hearing, both Staff and Mr. Rooney provided written submissions on the issue of costs.

[62] When Staff provided their written submissions on costs, Staff amended its costs request to $77,482.50, which can be itemized as follows:

(a) Litigation Counsel – 243.5 hours at $205 per hour for a total of $49,917.50; and

(b) Senior Investigator – 149 hours at $185 per hour for a total of $27,565.00.

[63] Staff explained that its costs were calculated in accordance with Staff's schedule of hourly rates for various members of Staff of the Enforcement Branch. In support of this request, Staff provided written submissions, an affidavit of Kathleen McMillan dated November 19, 2010 and detailed dockets (as required by Rule 18.1(2)(b) of the Commission's *Rules of Procedure*). These timesheets provided dates, numbers of hours worked and details of the tasks performed by each of the individuals listed in the bill of costs.

[64] Staff is only requesting costs relating to the litigation counsel and one senior investigator. In addition, Staff's bill of costs excludes any time spent by students-at-law and assistants and it

also does not include disbursements. The costs sought by Staff do not include the costs of the investigation stage of this matter and do not include the time spent preparing for this matter prior to the approval of the Settlement Agreements entered into by the Settling Respondents. In their written submissions on costs at paragraph 15, Staff explained that:

> To insure [*sic*] that the costs sought in this matter do not reflect time incurred dealing with issues related to the Settling Respondents and represent an efficient use of Staff resources, the hours reflected in Staff's Bill of Costs have been substantially reduced:
>
> (a) Costs have only been calculated subsequent to the February 5, 2009, approval of the Settlement Agreements by the other Respondents. As a result, the costs requested do not include the costs of the investigation in this matter, nor do they include time that could be attributed to the involvement of the other Respondents.

[65] According to Staff, the amount of costs paid by the Respondents should not be discounted because the conduct of the Respondents during the merits hearing unduly lengthened the process and contributed to an unnecessarily contentious hearing on the merits. Specifically, Staff submits at paragraphs 8 and 9 of their written submissions on costs:

> Following objections from Staff, the panel repeatedly cautioned Mr. Rooney to confine his evidence to relevant matters and not to make submissions on matters not in evidence. Mr. Rooney continually failed to heed the panel's directions, contrary to Rule 18.2(a).
>
> The hearing was not complex, nor was there an important legal issue to resolve. On the contrary, the applicable law was settled and the evidence was clear and compelling. Notwithstanding this, Mr. Rooney attempted to raise defences that were wrong on the plain language of the statute and the leading case law, both of which had been drawn to his attention. The Respondents also failed to make factual admissions on issues that were proven with clear and cogent evidence, and sometimes Mr. Rooney's own evidence. These failures on the part of the Respondents unnecessarily lengthened the proceeding, contrary to Rules 18.2(b), (c), (e), (f), (g), (h) and (j).

[66] The Respondents take the position that they should not bear the burden of paying the full amount requested for costs because the legal issues involved in this case were unclear and important to resolve. Specifically, at paragraph 12 of their written costs submissions, the Respondents state that:

> … [the] issues were unclear and needed thoughtful adjudication, therefore they request another result than the costs requested by Staff. According to the Respondents', they alone should not bear the full cost of a hearing that is clarifying an unclear area of the law, such as the definition of a market intermediary.

[67] Further, the Respondents do not take issue with the amount of costs calculated by Staff. They only take issue with the fact that they must bear the burden of paying all costs. As submitted at paragraphs 2 and 3 of the Respondents' written costs submissions:

> The Respondents do not have any challenge of the amount or magnitude of the Staff's submission to costs incurred by the Staff in completing their duty to bring this matter to conclusion. [*sic*] Because of the Respondents position that this case is in fact very important in setting a precedent for future OSC cases we have asked the Panel to consider that [costs] be set for this purpose alone at $1.00 however if the Staff will agree that this case is important and will sit down with the Respondents with diligence and respect, and negotiate to submit a settlement recommendation mutually agreed upon to the Panel, then the Respondents will endorse the Staff's recommendation for costs.
>
> The Respondents hope that the Panel will focus on just two issues under Rule 18.2 in determining the issue of costs under s.127.1.
>
> (c) The importance of the issues;
>
> (g) Whether the respondent participated in the proceeding in a way that helped the Commission understand the issues before it.

[68] We have reviewed the documentation provided by Staff relating to the costs of this proceeding and we note that Staff is only requesting costs incurred after the other respondents in this matter settled. In the circumstances, we find that it is appropriate to order that the Respondents pay costs, jointly and severally, in the amount of $57,482.50. In this specific case, we have reduced the amount of costs payable by the Respondents by $20,000.

[69] As noted above, the Respondents did make Form 45-501 filing payments to the Commission, which indicates that the Respondents did not seek to ignore *all* aspects of the application of Rule 45-501 to their activities. The Merits Hearing dealt with Rule 45-501 and provided guidance regarding the definition of a market intermediary and its relationship to capital raising activities. We find that it is appropriate to take this into account as a factor to reduce the amount of costs payable by the Respondents. Nevertheless, Mr. Rooney's conduct in this matter prolonged the hearing and this added to the costs incurred by Staff. Therefore, Mr. Rooney must still bear some of the costs of this matter. Taking into account the full context of the hearing, we find it is appropriate to order costs in the amount of $57,482.50.

VII. Decision on Sanctions and Costs

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

[71] We will issue a separate order giving effect to our decision on sanctions and costs and we order that:

(a) pursuant to paragraph 2 of subsection 127(1) of the Act, Mr. Rooney cease trading in securities of IMAGIN permanently;

(b) pursuant to paragraph 3 of subsection 127(1) of the Act, any exemptions in Ontario securities law do not apply to Mr. Rooney or IMAGIN for a period of 15 years;

(c) pursuant to paragraph 6 of subsection 127(1) of the Act, Mr. Rooney is reprimanded;

(d) pursuant to paragraph 7 of subsection 127(1) of the Act, Mr. Rooney resign any position he holds as a director or officer of any issuer;

(e) pursuant to paragraph 8 of subsection 127(1) of the Act, Mr. Rooney is prohibited from acting as a director or officer of any issuer for a period of 15 years;

(f) pursuant to subsections 127.1(1) and (2) of the Act, Mr. Rooney and IMAGIN are jointly and severally liable to pay the sum of $57,482.50 toward the costs of the hearing that were incurred by the Commission; and

(g) pursuant to subsection 37(1)(b) of the Act, Mr. Rooney and IMAGIN are prohibited from telephoning from within Ontario to any residence within or outside Ontario for the purpose of trading in any security or in any class of securities, except that Mr. Rooney may telephone a registrant for the purpose of issuing trading instructions.

Dated at Toronto this 30th day of June, 2011.

"*Mary G. Condon*" "*Margot C. Howard*"

Mary G. Condon Margot C. Howard