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 L. JEFFREY POGACHAR, PAOLA LOMBARDI, ALAN S. PRICE, NEW LIFE CAPITAL CORP., NEW LIFE CAPITAL INVESTMENTS INC., NEW LIFE CAPITAL ADVANTAGE INC., NEW LIFE CAPITAL STRATEGIES INC., 1660690 ONTARIO LTD., 2126375 ONTARIO INC., 2108375 ONTARIO INC., 2126533 ONTARIO INC., 2152042 ONTARIO INC., 2100228 ONTARIO INC., AND 2173817 ONTARIO INC.

REASONS FOR DECISION
(Sections 127 and 127.1 of the Act)

Hearing:	December 5, 7-9, and 12, 2011 January 20, 2012	
Decision:	March 28, 2012	
Panel:	Edward P. Kerwin Paulette L. Kennedy	- Commissioner and Chair of the Panel - Commissioner
Appearances:	Matthew Britton	- For Staff of the Commission
	No one appeared for the Respondents:	- Jeffrey Pogachar - Paola Lombardi

TABLE OF CONTENTS

REASONS FOR DECISION

I. BACKGROUND

A. History of the Proceeding

[1] This was a 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 the respondents, L. Jeffrey Pogachar ("**Pogachar**") and Paola Lombardi ("**Lombardi**") (collectively, the "**Respondents**") breached certain provisions of the Act and/or acted contrary to the public interest.

[2] A temporary cease trade order was first issued against the Respondents in this matter on August 6, 2008 and was subsequently varied and extended from time to time. On December 5, 2008, the temporary cease trade order was extended until the conclusion of the hearing on the merits.

[3] A Statement of Allegations was filed by Staff on August 7, 2008 in connection with a Notice of Hearing issued by the Commission on the same day, which were served on the Respondents. An Amended Statement of Allegations was filed by Staff on June 23, 2010 and an Amended Notice of Hearing was issued on June 30, 2010, which were served on the Respondents.

[4] New Life Capital Corp. ("**NLCC**"), New Life Capital Investments Inc. ("**NLCI**"), New Life Capital Advantage Inc. ("**NLCA**"), New Life Capital Strategies Inc. ("**NLCS**"), 1660690 Ontario Ltd. ("**1660690**"), 2126375 Ontario Inc., 2108375 Ontario Inc., 2126533 Ontario Inc., 2152042 Ontario Inc., 2100228 Ontario Inc., and 2173817 Ontario Inc. (together, the "**Numbered Companies**")(NLCC, NLCI, NLCA, NLCS, 1660690, and the Numbered Companies collectively referred to herein as "**New Life**"), all of which were named in the title of proceeding, entered into a settlement agreement dated January 18, 2011 by and through KPMG Inc. in its capacity as the Court-appointed Receiver and Manager of New Life (the "**Receiver**") with Enforcement Staff of the Commission ("**Staff**"), which was approved by the Commission on January 25, 2011.

[5] Alan S. Price ("**Price**"), who was named in the title of proceeding, entered into a settlement agreement with Staff dated October 29, 2010, which was approved by the Commission on November 10, 2010.

[6] This matter was adjourned on several occasions prior to the hearing on the merits. On March 25, 2011, the Commission ordered that the hearing on the merits in this matter would commence on December 5, 2011.

B. Preliminary Issues

(i) Motion to adjourn *sine die*

[7] On December 5, 2011, Lombardi attended before the Commission represented by her counsel, Eric Freedman, who requested that the hearing on this matter be adjourned *sine die* as a result of a decision dated November 30, 2011 rendered by Justice K. Neville Adderley of the Common Law & Equity Division of the Supreme Court of the Commonwealth of the Bahamas (the "**Bahamian Order**") in respect of the New Life receivership proceedings, which had been brought against New Life by the Commission under section 129 of the Act. Pursuant to the Bahamian Order, Adderley J. granted a motion brought by the Respondents for, among other things, the provision of a reasonable living allowance and reasonable conduct money out of the funds that are the subject of the receivership proceedings. Counsel for Lombardi submitted that the "conduct money" awarded by Adderley J. would afford her the ability to retain and pay for counsel to represent her before the Commission on the hearing on the merits. Accordingly, counsel for Lombardi requested an adjournment of the hearing on the merits *sine die* to await the outcome of the Receiver's appeal of the Bahamian Order and, should the appeal be denied, to permit Lombardi to retain counsel in Ontario with the conduct money awarded in the Bahamas.

[8] After reading the reasons of Adderley J., hearing submissions from the parties, taking into account the particulars of this matter, and considering all relevant factors including the factors set forth in rule 9.2 of the Commission's *Rules of Procedure*, this panel denied Lombardi's request for an adjournment and ordered the hearing on the merits to commence on December 7, 2011 for the following reasons:

a) The panel was not satisfied that the term "conduct money" provided for in the Bahamian Order was meant to include legal fees for Lombardi to participate in this proceeding in Ontario. Nothing was provided to the panel to indicate that "conduct money" is something other than the money usually paid to a person under the compulsion of a summons to witness to pay for their expenses to attend in court;

b) Lombardi did not provide sufficient reasons to support her request for an adjournment;

c) This matter has been adjourned on several occasions including at the prior request of the Respondents. On March 25, 2011, Commissioner Carnwath, upon granting an adjournment at that time, ordered that this hearing would commence on December 5, 2011, peremptory to the Respondents with or without counsel;

d) The request was opposed by Staff and was not supported by Pogachar, the other remaining Respondent in this proceeding;

e) Lombardi had available to her all documentation pertaining to this hearing since no later than August 23, 2011 by way of Staff's communication to her in respect of the hearing brief of documentation. There had been ample time for her to prepare;

f) The panel perceived that to proceed with the hearing would not be of significant prejudice to Lombardi who had more than 13 months to retain new counsel and more than three months to access and review the hearing brief. To the contrary, the panel

believed that granting the request for an adjournment would be of prejudice to the Commission and the investors;

g) It would be costly to reschedule the hearing for the Commission and the other parties affected by the hearing;

h) Lombardi did not provide evidence that she had made reasonable efforts to avoid the need for the request for an adjournment;

i) The panel did not believe the adjournment was necessary to provide an opportunity for a fair hearing; and

j) The panel determined that an adjournment would not be in the public interest.

(ii) Failure of the Respondents to Appear

[9] Although Lombardi attended before the Commission with counsel on December 5, 2011 for her motion to adjourn, on December 6, 2011, Lombardi advised the Secretary's Office in writing that neither she nor Pogachar would attend the hearing on the merits.

[10] By letter dated December 7, 2011 to the Commission, Pogachar also confirmed in writing that he would not attend the hearing on the merits in this matter.

[11] Section 7(1) of the *Statutory Powers Procedure Act*, R.S.O. 1990, c. S.22 (the "**SPPA**") provides that:

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

[12] The dates for the hearing on the merits of this matter were scheduled by Order of the Commission dated March 25, 2011, more than 8 months prior to the commencement of the hearing. Lombardi attended before the panel on the first day scheduled for the hearing on the merits. The Respondents both communicated in writing of their decision not to attend the hearing. It is with certainty that the panel finds that the Respondents were well aware of the hearing dates in this matter and were provided with sufficient time to prepare.

[13] We are satisfied that we were entitled to proceed in their absence in accordance with section 7(1) of the SPPA.

C. The Hearing on the Merits

[14] We heard evidence on the merits in this matter on December 7, 8, 9 and 12, 2011. At the conclusion of the hearing, we scheduled dates for the parties to file written submissions and to re-attend before the panel to make oral closing submissions. On January 20, 2012, we heard closing submissions by Staff. The Respondents did not attend the hearing on the merits and did not provide any closing submissions either in writing or in person.

[15] In light of the uncontroverted evidence presented at the hearing, the panel rendered its decision at the close of oral submissions on January 20, 2012. The panel found that the evidence shows on a balance of probabilities that the Respondents have breached sections 25(1)(a), 126.1(b), and 129.2 of the Act and acted contrary to the public interest. A copy of our Oral Decision dated January 26, 2012 is available at (2012), 35 O.S.C.B. 1131. Upon rendering our decision, we advised that we would set out our specific findings of fact in our reasons to be issued in due course. These are our reasons.

II. OVERVIEW OF THE HEARING

[16] New Life is a group of companies that carried on business in the viatical and life settlement industry. A viatical or life settlement is the sale of the benefits under a life insurance policy by a viator or life settlor of that policy (the "**Seller**") to a purchaser for an amount greater than the cash surrender value of the policy but lower than the face amount of that policy. By selling the benefits under a policy, the Seller receives an immediate cash payment to use as he or she wishes. The purchaser (in this case, New Life) becomes the irrevocable beneficiary of the policy, pays the premiums of the policy going forward, and receives the full face value of the death benefit of the policy when the Seller passes away.

[17] This proceeding relates to the sale of securities in New Life to approximately 600 investors in Canada for a total amount of approximately $22 million raised in investor funds. The securities of New Life were sold pursuant to offering documents which provided that 80% to 85% of the proceeds of the sale of securities would be used to purchase life insurance policies.

[18] Staff allege that from 2006 to 2008 (the "**relevant time**"), the Respondents, who were the principals of New Life, improperly engaged in trades or acts in furtherance of trades of securities of New Life without being registered under the required provisions of the Act. Staff further allege that the Respondents fraudulently enticed investors by causing NLCI to declare and pay dividends at a time when NLCI was not profitable, paying dividends from investor funds, and using investor funds for personal purposes, contrary to the representations made to the New Life investors. Staff also allege that, as the directors and officers of New Life, the Respondents authorized, permitted and acquiesced in the commission of breaches of the Act by New Life contrary to the public interest.

[19] Staff's specific allegations against the Respondents are set out in further detail below.

III. THE PARTIES

A. The Individuals

[20] Pogachar and Lombardi were married to one another and were directors and officers of the New Life companies at the relevant time.

[21] Since July 30, 2007, Pogachar has been registered as a trading officer and the designated compliance officer of NLCC.

[22] From July 30, 2007 to August 10, 2007, Lombardi was approved as a non-trading officer of NLCC and was subsequently registered as a trading officer of NLCC on August 10, 2007 and thereafter.

[23] Price is a lawyer and was a director of NLCI and an officer of 1660690 during the relevant time. There is no record of Price having been registered under the Act.

[24] There were no other directors or officers of New Life.

B. The New Life Corporations

[25] NLCC was incorporated under the Ontario *Business Corporations Act*, R.S.O. 1990, c. B.16 (the "**OBCA**") on November 7, 2005. NLCC did not carry on any active operations during the relevant time other than payment of expenses related to its subsidiaries. NLCC has been registered in the category of limited market dealer since July 30, 2007.

[26] NLCI was incorporated under the OBCA on December 22, 2005 and is a subsidiary of NLCC. NLCI purchased life insurance policies from U.S. residents to create an ownership interest in a pool of policies. NLCI issued and sold its shares to Canadian public investors. There is no record of NLCI having been registered under the Act at any time.

[27] NLCA was incorporated under the OBCA on December 19, 2005. It is a subsidiary of NLCC. NLCA purchased life insurance policies from U.S. residents and established the Numbered Companies to create multiple ownership interests in individual policies rather than a single interest in a pool of policies (as in the case of NLCI). NLCA issued and sold its shares to Canadian public investors. There is no record of NLCA having been registered under the Act at any time.

[28] The Numbered Companies were incorporated under the OBCA on various dates during the relevant time for the purpose of facilitating NLCA's investors' acquisitions of ownership interests in individual policies. The Numbered Companies issued and sold their non-voting shares to Canadian public investors. NLCA owned all of the voting shares of the Numbered Companies. There is no record of any of the Numbered Companies having been registered under the Act at any time.

[29] NLCS was incorporated under the OBCA on January 4, 2006 and is a subsidiary of NLCC. NLCS sourced and purchased life insurance policies in the United States and then transferred its ownership interest in the insurance policies to 1660690, designating NLCI as the beneficiary under the policies. NLCS did not issue shares to the public at any time.

[30] 1660690 was incorporated under the OBCA on July 29, 2005 and ultimately became a subsidiary of NLCI. 1660690 is listed as the owner of numerous policies with NLCI as the named beneficiary of such policies. 1660690 did not issue shares to the public at any time.

[31] None of the New Life companies has ever been a reporting issuer, filed a prospectus, or filed an offering memorandum with the Commission at any time.

C. Other Relevant Entities

[32] Lexington Consulting Inc. ("**Lexington**") was incorporated in the Commonwealth of the Bahamas on August 17, 2005. Lexington established a bank account with FirstCaribbean International Bank (Bahamas) Ltd. ("**FirstCaribbean**") in the Bahamas. Pogachar and Lombardi are Lexington's sole shareholders and the sole authorized signatories for Lexington's bank account at FirstCaribbean (the "**Lexington Account**"). The Lexington Account bank documents describe the business of Lexington as consulting in real estate and the life settlement industry.

[33] Amarcord International Inc. ("**Amarcord**") was incorporated in the Commonwealth of the Bahamas on October 9, 2007. Amarcord established a bank account with FirstCaribbean in the Bahamas (the "**Amarcord Account**"). Pogachar and Lombardi are the sole shareholders of Amarcord and are the sole authorized signatories for the Amarcord account.

IV. THE ALLEGATIONS

A. Trading Without Registration

[34] In the Amended Statement of Allegations, Staff allege that NLCI, NLCA and the Numbered Companies engaged in trading in securities and as such were required to be registered under the Act.

[35] Staff also allege that Pogachar and Lombardi engaged in acts in furtherance of trades of securities of NLCI, NLCA, and the Numbered Companies and as a result were required to be registered under the Act.

[36] Staff allege that in light of the failure of NLCI, NLCA, the Numbered Companies, and the Respondents to be registered, the Respondents' trading activities were contrary to section 25(1)(a) of the Act.

B. Fraudulent Conduct

[37] Staff allege that the Respondents engaged in acts, practices or courses of conduct relating to securities that they knew or reasonably ought to have known perpetrated a fraud on investors that were contrary to the public interest in breach of section 126.1(b) of the Act by:

a) Causing New Life to use investor funds to pay dividends both in cash and through a dividend reinvestment program (a "**DRIP**") in order to attract new investors to New Life; and

b) Using New Life funds raised from the sale of securities for their own personal purposes, including:

    (i) Transferring funds from New Life to Lexington and from Lexington to Amarcord for the purchase of real estate in the Bahamas and Ontario, luxury automobiles, a USD $1 million Bahamian government bond, and various personal effects;

(ii) Borrowing approximately CAD $1.1 million and USD $43,500 from New Life in the form of shareholder loans that were not repaid; and

(iii) Using the New Life funds to pay CAD $1.1 million of credit card debt on their personal credit cards.

C. Director and Officer Accountability

[38] Staff allege that the Respondents, in their capacity as directors and officers of New Life, authorized, permitted or acquiesced in New Life's commission of violations of the Act contrary to section 129.2 of the Act.

D. Conduct Contrary to Ontario Securities Law and the Public Interest

[39] Staff allege that all of the Respondents' actions were in breach of Ontario securities law and contrary to the public interest.

V. ISSUES

[40] This matter raises the following issues for our consideration:

a) Did the Respondents trade in securities of New Life without being registered to do so, contrary to section 25(1)(a) of the Act?

b) Did the Respondents engage or participate in acts, practices or courses of conduct relating to New Life securities that the Respondents knew or reasonably ought to have known perpetrated a fraud on persons or companies contrary to section 126.1(b) of the Act?

c) Did the Respondents, in their capacity as directors and officers of New Life, authorize, permit or acquiesce in the commission of violations of sections 25(1)(a) and 126.1(b) of the Act contrary to section 129.2 of the Act?

VI. EVIDENCE AND FINDINGS

A. Evidence Submitted at the Hearing

[41] At the outset of the hearing, Staff tendered exhibits which consisted of 30 volumes of documents and transcripts plus an additional 10 documentary exhibits. Staff called only one witness during the hearing, namely, Stephanie Collins, a senior forensic accountant with the enforcement branch of the Commission ("**Collins**"). Collins testified that she has had primary carriage of the New Life matter since May 2007.

[42] The exhibits tendered into evidence included, in part:

- TD Canada Trust bank records for New Life's CAD and USD accounts;
- TD Canada Trust bank records for the personal accounts of Pogachar and Lombardi;

- Personal visa statements for Pogachar and Lombardi from American Express, RBC Visa, and TD Visa (which were used for both business and personal purchases);

- Corporate documents and registration certificates for all relevant individuals and entities;

- Investor documents;

- Transcripts of voluntary interviews with investors;

- Policy documents;

- Documents from the Receiver which included, among other things, copies of the bank records from FirstCaribbean of the Lexington Account and Amarcord Account; and

- Tables prepared by Collins and the Receiver summarizing the source, movement, and application of funds recorded in the New Life, Lexington, and Amarcord bank accounts and the Respondents' bank accounts and credit card statements.

[43] Collins determined that the only source of potential profit for New Life was the maturation of the purchased policies. Once an insured subject of a purchased policy died, the policy would mature and the beneficiary, New Life, would receive payment. Collins concluded that from New Life's inception up until the time the Receiver was appointed in December 2008, none of the policies purchased by New Life had matured and thus New Life had not earned any profit.

[44] As noted above, Collins prepared summary tables which she included at the front of the New Life CAD and USD TD Canada Trust bank records (the "**TD Accounts**") and the TD Canada Trust, RBC and American Express credit card statements, summarizing the source and application of incoming and outgoing funds. During the hearing she reviewed in detail the tables that she had prepared and brought the panel's attention to the supporting documents behind them.

[45] Collins also testified that once the Receiver was appointed in December 2008, she received copies of their reports and court materials for the related court proceedings in both Ontario and the Bahamas, which helped her trace the funds that were transferred out of the TD Accounts. The Receiver provided Collins with copies of the FirstCaribbean bank documents for the Lexington Account and the Amarcord Account and Collins used these documents in her analysis of the flow of the New Life investor funds. As a result of her ongoing communications with the Receiver regarding its investigation in Ontario and the Bahamas, Collins was able to speak to the findings set out in the Receiver's affidavit and supporting documents that were submitted as evidence at the hearing.

[46] From her review of all of the bank and credit card statements described above and in further detail below, Collins determined that CAD $22,508,607 was raised from the sale of securities in NLCI, NLCA, and the Numbered Companies to public investors, and that 80% to 85% of the funds were not used for the purpose of carrying on business by New Life as

represented in the NLCI offering memorandum. To the contrary, she determined that over 40% of the investors' funds were used for Pogachar's and Lombardi's personal purchases.

B. Hearsay

[47] Of the many volumes of documentary evidence tendered as exhibits, 20 of them contained business and bank records of New Life and the Respondents. With respect to these records and the hearsay evidence given by Collins about the Respondents' explanation of their expenses as documented therein, Staff directed the panel to the relevant provisions of the SPPA and the *Evidence Act*, R.S.O. 1990, c. E.23 (the "***Evidence Act***") as follows:

[48] Section 15(1) of the SPPA states:

> 15.(1) Subject to subsections (2) and (3), a tribunal may admit as evidence at a hearing, whether or not given or proven under oath or affirmation or admissible as evidence in a court,
>
> (a) any oral testimony; and
>
> (b) any document or other thing,
>
> relevant to the subject-matter of the proceeding and may act on such evidence, but the tribunal may exclude anything unduly repetitious.

[49] Staff referred us to the case of *Re Maple Leaf Investment Fund Corp.* (2011), 34 OSCB 11551 at para. 46 ("***Maple Leaf***"):

> Although hearsay evidence is admissible under the SPPA, we must determine the appropriate weight to be given to that evidence. A careful approach must be taken to avoid placing undue reliance on uncorroborated evidence that lacks sufficient indicia of reliability. (see *Starson v Swayze*, [2003] 1 S.C.R. 722 at para. 115; and *Sunwide, supra*, at para. 22.).

[50] We further note that in *The Law of Evidence in Canada*, it is stated that hearsay evidence is admissible and its weight is a matter for the tribunal to decide:

> In proceedings before most administrative tribunals and labour arbitration boards, hearsay evidence is freely admissible and its weight is a matter for the tribunal or board to decide, unless its receipt would amount to a clear denial of natural justice. So long as such hearsay evidence is relevant it can serve as the basis for the decision, whether or not it is supported by other evidence which would be admissible in a court of law.
>
> (John Sopinka, Sidney N. Lederman & Alan W. Bryant, *The Law of Evidence in Canada*, 2d ed. (Markham, Ont: LexisNexis Butterworths, 1999) at p.308)

[51] With respect to the bank and business records of New Life and the Respondents, section 33 of the *Evidence Act* provides as follows:

> (2) Subject to this section, a copy of an entry in a book or record kept in a bank is in any action to which the bank is not a party proof in the absence of evidence to the contrary of such entry and of the matters, transactions and accounts therein recorded.
>
> (3) A copy of an entry in such book or record shall not be received in evidence under this section unless it is first proved that the book or record was at the time of making the entry one of the ordinary books or records of the bank, that the entry was made in the usual and ordinary course of business, that the book or record is in the custody or control of the bank, or its successor, and that such copy is a true copy thereof, and such proof may be given by the manager or accountant, or a former manager of the bank or its successor, and may be given orally or by affidavit.

[52] Although Staff chose not to provide proof of the business and bank records as suggested in section 33(3) of the *Evidence Act*, we are satisfied of the authenticity of these documents. There is sufficient evidence that the books and records of the Respondents and New Life were made in the usual course of business as such records were either given to Collins by the Respondents themselves or obtained by way of summons. Further, we note that there is no evidence to suggest anything to the contrary.

[53] In consideration of the foregoing, we accept the validity of the documentary and hearsay evidence tendered by Staff subject to our consideration of the weight to be given to such evidence.

C. Summary of Findings

[54] The only New Life companies that issued and sold securities to the public were NLCI, NLCA, and the Numbered Companies. Overall, these New Life companies sold securities to approximately 600 investors in Canada.

[55] The corporate records and other evidence also indicate that either one or both of Pogachar and Lombardi were the sole directors and officers of all of the New Life companies between them, other than Price, who was not a controlling or directing mind and who is no longer a party to this proceeding.

[56] With respect to the use of investor funds received by New Life, the NLCI offering memorandum dated December 2005 (amended September 2006), which was one of various copies submitted into evidence, disclosed under "USE OF PROCEEDS" as follows:

> From the net proceeds of the offering, we expect to use between 80% and 85% to purchase and maintain the policy premiums of life insurance policies with MULEs from one to ten years and between 5% and 10% for marketing. We expect to use the remaining net proceeds (approximately 5% to 15%) for working capital and general corporate purposes.

[57] From the evidence submitted at the hearing and referred to herein, it is clear that New Life did not use investor funds as represented in the NLCI offering memorandum.

(i) The Dividend Payments

[58] The New Life promotional materials show that, among other things, the promise of an annual 8% dividend to be paid quarterly was a highlighted feature of the New Life securities for potential investors. The dividend was offered as either a cash return or as part of the DRIP.

[59] The transcripts of Staff's interviews with New Life investors show that the potential for dividends was a significant reason for such investors to invest in New Life. Under the heading "Description of Share Capital" the NLCI Offering memorandum dated December 2005 (amended September 2006) provided as follows:

> Our authorized share capital consists of an unlimited number of Class A Common Shares and an unlimited number of Class B Common Shares. All of the issued and outstanding Class B Common Shares are owned by New Life Capital Corp., a company which is wholly-owned by our President and Chief Executive Officer.
>
> The Class A Common Shares and Class B Shares are identical in all respects except for their dividend features. Holders of class A Common Shares are entitled to a non-cumulative annual dividend of 8% calculated on the stated capital thereof *if, as and when* declared by our board of directors. Holders of Class B Common Shares are also entitled to receive dividends if, as and when declared by our board of directors provided that the dividends payable on the Class A Common Shares have been declared and paid….(emphasis in original)

[60] The NLCI corporate records show that the Class A Common Shares were the shares that were sold to the New Life investors. The NLCI offering memorandum dated October 31, 2007, under the heading "Dividends" provided as follows:

> To date, the board of directors of the Company has declared and paid an 8% dividend on the Class A Shares at the end of each quarter…

[61] Further, in a letter sent to investors titled "Message from the President and CEO of New Life Capital Investments Inc." dated November 9, 2007, Pogachar stated as follows:

> Since inception, we have issued approximately 1,176,300 units of the Company (consisting of one class A share and one-half of one class A share purchase warrant) for gross proceeds of approximately $5.8 million. We are pleased to note that the board of directors of the Company has consistently declared and paid dividends to its class A shareholders on a quarterly basis.

[62] The corporate records of NLCI contain resolutions declaring dividends on a quarterly basis from July 2006 until July 2008 for a total sum of approximately CAD $1,106,660.61 notwithstanding that, as noted above, none of the policies had matured and as such New Life had not made any profit during that time. Of that amount, Collins testified that she was able to determine that approximately CAD $600,000 in dividend payments was paid to investors in cash and concluded that the balance of the dividend payments were likely intended to have been directed to the proposed issuance of shares through the DRIP.

(ii) Transfer of Funds to Accounts in Bahamas

[63] The records from the TD Accounts show that there were large withdrawals from the TD Accounts during the relevant time. Collins testified that Pogachar explained to her that these transfers were for the purpose of purchasing new insurance policies but he did not provide any supporting documents to substantiate his explanation. Collins was unable to reconcile Pogachar's explanation of the large withdrawals with the purchase of any of New Life's policies. The Lexington Account bank records, however, do reconcile with the withdrawals from the TD Accounts.

[64] The bank records submitted into evidence show that the large withdrawals from the TD Accounts were deposited into the Lexington Account in the Bahamas. In the Lexington opening account records there is a letter dated August 26, 2005 wherein Pogachar indicated to FirstCaribbean, in part, as follows:

> The reason for the aforementioned account is to facilitate Paola and my initiatives in personal wealth building.
>
> The account will be funded as a direct result from the professional consulting services that are provided to Lexington's already growing client base. All monies received will be directly from clients and paid to the account of Lexington Consulting Inc.

[65] The Lexington records show that from November 2007 to July 2008 amounts aggregating approximately USD $7,092,597 were transferred from the TD Accounts to the Lexington Account at FirstCaribbean and that the majority of those funds were ultimately transferred to the Amarcord Account.

[66] On the Amarcord opening bank account documents, Pogachar indicated that the purpose of the Amarcord Account at FirstCaribbean was for "personal wealth accumulation" and that the source of its initial deposit was Lexington. The Amarcord records show that from November 2007 to July 2008, amounts aggregating approximately USD $6,872,752 were transferred from the Lexington Account to the Amarcord Account.

(iii) Luxury Expenses

[67] As noted above, the bank records from the Amarcord Account show that amounts aggregating approximately USD $6,872,752 were transferred from the Lexington Account to the Amarcord Account, which amount was almost entirely spent on personal luxury goods and expenses for the Respondents.

[68] In particular, the Amarcord Account records show that of the funds deposited into the Amarcord Account, the Respondents withdrew funds for the following expenses:

a) USD $181,633.17 to Little Switzerland for jewellery;

b) USD $1,029,956 to purchase Bahamian government bonds;

c) CAD $784,305.38 to Maranello Sports Inc. for two Ferrari automobiles purchased in Ontario;

d) CAD $605,155.45 and USD $48,125.48 paid in trust to the law firm of Gowlings in Ontario for what was ultimately determined by the Receiver to be for the purchase of land near Fort Erie, Ontario; and

e) USD $2,600,200 paid in trust to the law firm of Lennox Paton in the Bahamas for what was ultimately determined by the Receiver to be for the purchase of a condominium in the Bahamas.

[69] Collins verified these transactions by following the large transfers made from the TD Accounts to the Lexington Account and ultimately to the Amarcord Account. Although we did not see any documentary evidence showing the actual purchases of the properties, we are satisfied that Collins' evidence, combined with the corresponding Receiver's evidence, the TD Canada Trust and FirstCaribbean bank records, and the circumstantial evidence establish that these purchases were, on a balance of probabilities, likely to have occurred.

(iv) The Shareholder Loans and Credit Card Payments

[70] Collins testified that during her investigation of the New Life financial records, including the TD Accounts and the Respondents' personal credit card statements, the Respondents advised her that they took shareholder loans from New Life in the amounts of approximately CAD $1,094,463 and USD $43,500.00; however, the correspondence submitted into evidence between the Respondents and Aird & Berlis LLP, counsel for New Life, clearly shows that there was no corporate documentation in regard to these loans.

[71] Collins also determined that the Respondents used approximately CAD $1,238,736.33 to pay their personal credit cards balances. Upon request, the Respondents provided copies of their credit card statements to Staff; however, the Respondents redacted any charges on the statements that they claimed were "personal." Ultimately, Staff obtained unredacted copies of the credit card statements directly from the banks by way of summons. The unredacted credit card statements show that the charges incurred were a combination of cash advances, New Life business expenses, and personal expenses. The TD Account records and the Respondents' credit card statements together show that the Respondents used CAD $769,996.33 from NLCI and CAD $468,740.00 from NLCC to pay a total amount of CAD $1,238,736.33 for charges incurred on their credit cards.

[72] In addition to the application of the New Life funds noted above, the Receiver determined that approximately USD $1 million was paid from the Amarcord funds for personal purposes as follows:

a) Advances to Lombardi in the amount of USD $145,872.50;

b) Advances to Pogachar in the amount of USD $519,071.63;

c) Payment to RBC visa in the amount of USD $248,841.86; and

d) Payment to TD visa in the amount of USD $113,095.55.

(v) Overall use of Investor Funds

[73] At the conclusion of the hearing, Collins provided the panel with a breakdown of what the New Life, Lexington and Amarcord records show to be the use of proceeds of the New Life investor funds. She testified that amounts aggregating CAD $22,508,607 were received from investors and of that amount the funds were used approximately as follows:

a) 30% of investors' funds were spent on purchasing insurance policies and paying premiums and agent fees;

b) 15.5% of investors' funds were used for business expenses;

c) 3% of investors' funds were used to pay dividends in cash;

d) 5% of investors' funds were used to pay credit card bills which included both personal and business expenses;

e) 10% of investors' funds remained in the New Life accounts when the accounts were frozen in August 2008;

f) 5% of investors' funds were paid to the Respondents personally; and

g) 31.5% of investors' funds were transferred to Lexington.

[74] In the panel's view, the evidence presented at the hearing was uncontroverted and well corroborated.

VII. THE LAW AND ANALYSIS

A. Standard of Proof

[75] The panel needs to assess each of the issues before it by scrutinizing the evidence with care in determining whether, on a balance of probabilities, it is more likely than not that the alleged event occurred. The Supreme Court of Canada has held that the evidence must be sufficiently clear, convincing and cogent to satisfy this standard. (*F.H. v. McDougall,* [2008] 3 S.C.R. 41 at paras. 40 and 46.)

[76] As noted above, we have the discretion to admit relevant evidence that might not otherwise be admissible as evidence in a court such as hearsay evidence. In determining what weight, if any, to assign to evidence in this matter, we have considered the sources of the evidence and whether the parties had an opportunity to cross examine on that evidence.

B. Trading without Registration

Did the Respondents engage in unregistered trading of securities contrary to section 25(1)(a) of the Act?

[77] Staff allege that the Respondents breached section 25(1)(a) of the Act in the period from 2006 to 2008. During that time, the Act provided as follows:

> 25. (1) No person or company shall,
>
> (a) trade in a security or act as an underwriter unless the person or company is registered as a dealer, or is registered as a salesperson or as a partner or as an officer of a registered dealer and is acting on behalf of the dealer…
>
> and the registration has been made in accordance with Ontario securities law and the person or company has received written notice of the registration from the Director and, where the registration is subject to terms and conditions, the person or company complies with such terms and conditions.

[78] Section 1(1) of the Act during that time provided the following relevant definitions:

> "dealer" means a person or company who trades in securities in the capacity of principal or agent.
>
> …
>
> "trade" or "trading" includes,
>
> (a) any sale or disposition of a security for valuable consideration, whether the terms of payment be on margin, installment or otherwise, but does not include a purchase of a security or, except as provided in clause (d), a transfer, pledge or encumbrance of securities for the purpose of giving collateral for a debt made in good faith,
>
> …
>
> (e) any act, advertisement, solicitation, conduct or negotiation directly or indirectly in furtherance of any of the foregoing;

[79] This Commission has held that the inclusion of the word "indirectly" in the definition of "trade" or "trading" reflects the intention by the Legislature to capture conduct which seeks to avoid registration requirements by doing indirectly that which is prohibited directly (*Re Momentas Corp.* (2006), 29 O.S.C.B. 7408 at para. 79 ("***Momentas***")). It has also held that a respondent who accepts investors' funds for the purpose of an investment carries out an act in furtherance of a trade (*Re Lett* (2004), 27 O.S.C.B. 3215 at paras. 48-51 and 64 ("***Lett***")).

[80] An act is also in furtherance of a trade if there is a sufficient proximate connection between the act and the trade in securities:

> There is no bright line separating acts, solicitations and conduct indirectly in furtherance of a trade from acts, solicitations and conduct not in furtherance of a

> trade. Whether a particular act is in furtherance of an actual trade is a question of fact that must be answered in the circumstances of each case. A useful guide is whether the activity in question had a sufficient proximate connection to an actual trade. (*Re Costello* (2003), 26 O.S.C.B. 1617 at para. 47)

[81] Examples of activities that have fallen within the scope of "acts in furtherance of a trade" are set out in *Momentas* at paragraph 80 and include:

a) Providing potential investors with subscription agreements to execute;

b) Distributing promotional materials concerning potential investments;

c) Issuing and signing share certificates;

d) Preparing and disseminating materials describing investment programs;

e) Preparing and disseminating forms of agreements for signature of the investors;

f) Conducting information sessions with groups of investors; and

g) Meeting with individual investors.

[82] The Commission's records indicate that NLCC has been registered as a limited market dealer since July 2007 and that Pogachar and Lombardi have been registered as trading officers of NLCC under the category of limited market dealer since July and August 2007, respectively. NLCC, however, did not issue and sell shares to investors.

[83] The corporations involved in issuing and selling shares in this matter are NLCI, NLCA, and the Numbered Companies, none of which was registered under the Act at any time according to the section 139 certificates. Further, neither Pogachar nor Lombardi was registered as a trading officer of NLCI, NLCA, or the Numbered Companies at any time according to their section 139 certificates.

[84] After reviewing all of the evidence previously referred to herein, as well as evidence of New Life's promotional materials, documents that were sent directly to investors by New Life, and transcripts of interviews of investors, we find that the Respondents engaged in the following activities with respect to NLCI, NLCA, and the Numbered Companies, which constitute acts in furtherance of a trade:

a) Provided subscription agreements for execution by potential investors for the purchase of New Life securities;

b) Distributed the NLCI offering memorandum concerning potential investment in New Life securities;

c) Issued and signed warrant and share certificates in respect of New Life securities;

d) Maintained control over the TD Accounts and received and deposited investor funds into such accounts;

e) Caused the declaration and payment of dividends to New Life investors;

f) Conducted presentations at seminars to promote New Life and New Life securities;

g) Promoted and operated the DRIP in respect of New Life securities;

h) Disseminated advertising and marketing materials promoting New Life and New Life securities as an investment program; and

i) Met with potential individual investors.

[85] In *Lett* at paragraphs 54-64, the Commission held that where investors transferred, deposited or caused to be deposited significant funds into the accounts of the corporations which had been opened by the individual respondent, by accepting investors' funds, the respondent had carried out acts in furtherance of a trade. In this matter, the Respondents had sole control over the New Life TD Accounts and the evidence clearly shows that the Respondents opened the TD Accounts and accepted investors' funds in the total amount of approximately CAD $22,508,607.

[86] The Commission has found that it must adopt a contextual approach to determine whether non-registered individuals or companies have engaged in acts in furtherance of a trade by looking at the totality of the conduct and the setting in which the acts have occurred, the primary consideration of which is the effects the acts had on those to whom they were directed (*Momentas* at para. 77).

[87] In light of our acceptance of the evidence referred to above, we find that the Respondents have acted in breach of section 25(1)(a) of the Act (as it then was) by engaging in acts in furtherance of the trade of securities of NLCI, NLCA and the Numbered Companies without being registered in accordance with Ontario securities law.

C. Fraudulent Conduct

Did the Respondents engage in fraudulent conduct contrary to section 126.1(b) of the Act?

[88] Section 126.1(b) of the Act provides as follows:

> 126.1 A person or company shall not, directly or indirectly, engage or participate in any act, practice or course of conduct relating to securities, derivatives or the underlying interest of a derivative that the person or company knows or reasonably ought to know,
>
> …
>
> (b) perpetrates a fraud on any person or company.

[89] This Commission has adopted the interpretation of fraud as enunciated by the British Columbia Court of Appeal in *Anderson v. British Columbia (Securities Commission)* (2004) BCCA 7 at para. 27 ("***Anderson***") leave to appeal denied at [2004] S.C.C.A. No.81, wherein the Court dealt with a similar provincial securities fraud provision. In *Anderson* at paragraph 26, Justice Mackenzie notes, and this Commission has agreed, that such a fraud provision includes a prohibition against participation in transactions where participants know or ought to know that fraud is being perpetrated by others as well as against those who participate in perpetrating the fraud itself. Mackenzie J. cites the reasons of Madam Justice McLachlin in *R. v. Théroux*, [1993] 2 S.C.R. 5 at 20 ("***Théroux")***, where she summarizes the elements of fraud as follows:

> …the *actus reus* of the offence of fraud will be established by proof of:
>
> 1. the prohibited act, be it an act of deceit, a falsehood or some other fraudulent means; and
>
> 2. deprivation caused by the prohibited act, which may consist in actual loss or the placing of the victim's pecuniary interests at risk.
>
> Correspondingly, the *mens rea* of fraud is established by proof of:
>
> 1. subjective knowledge of the prohibited act; and
>
> 2. subjective knowledge that the prohibited act could have as a consequence the deprivation of another (which deprivation may consist in knowledge that the victim's pecuniary interests are put at risk).

[90] Accordingly, the *actus reus* part of the offence requires proof of two elements: a dishonest act and a deprivation.

[91] With respect to the dishonest act of fraud, the term "other fraudulent means" has been held to include the use of corporate funds for personal purposes, non-disclosure of important facts, exploiting the weakness of another, unauthorized diversion of funds, and unauthorized arrogation of funds or property (*Théroux* at para. 18).

[92] The second element, deprivation, is established by proof that the dishonest act caused detriment, prejudice, or risk of prejudice to the economic interests of the victim (*Théroux* at para. 27). Actual economic loss is not required; rather, proof of prejudice or the risk of prejudice to an economic interest is sufficient to establish this element of fraud. "Risk of prejudice" includes the act of inducing an alleged victim through dishonesty and taking some form of economic action, even if that action did not cause economic loss: *Maple Leaf* at paras. 314 and 315. It is not necessary to prove that a respondent received an economic benefit or gain from the conduct (*Théroux* at para. 19).

[93] With respect to *mens rea*, Mackenzie J. notes in *Anderson* at paragraph 27 as follows:

> McLachlin J. also cited with approval at 23 the words of Taggard J.A. who stated in *R. v. Long* 1990 CanLII 5405 (BC CA), (1990), 51 B.C.L.R. (2d) 42, 61 C.C.C. (3d) 156 at 174:

> …the mental element of the offence of fraud must not be based on what the accused thought about the honesty or otherwise of his conduct and its consequences. Rather, it must be based on what the accused knew were the facts of the transaction, the circumstances in which it was undertaken and what the consequences might be of carrying it to a conclusion. [underlining in original]

[94] The first element of *mens rea* required to establish fraud, subjective knowledge of a prohibited act, can be inferred from the totality of the evidence. This element does not require direct evidence of the respondent's knowledge at the time of the alleged fraud. The second element, proof of the subjective knowledge that the prohibited act could cause deprivation, requires proof that the respondent was reckless or willfully blind to the consequence of his or her conduct. A sincere belief that no risk or deprivation would materialize does not vitiate fraud: *Maple Leaf* at paras. 318-321.

[95] With respect to a corporation, it is sufficient to show that its directing minds knew or reasonably ought to have known that the acts of the corporation perpetrated a fraud to prove a breach of subsection 126.1(b) of the Act: *Re Al-Tar Energy Corp.* (2010) 33 OSCB 5535 at para. 221.

[96] Applying the principles set out above, we believe that the Respondents are guilty of committing fraud as set out in section 126.1(b) of the Act. The *actus reus* of the offence is clearly established. The Respondents committed deliberate falsehoods. Those falsehoods caused or gave rise to deprivation. Examples of the *actus reus* of fraud are as follows:

a) The Respondents had sole control of the TD Accounts and did not use the proceeds of the sale of securities in New Life for the purposes set out in the NLCI offering memorandum;

b) The Respondents transferred over 40% of the funds raised from investors to entities in the Bahamas and to themselves personally; and

c) The Respondents deceived investors by representing that they were earning dividends from their investment in New Life when in fact the source of any paid dividends was new investor funds as New Life had not earned any profit.

[97] As a result of the foregoing, the investors' funds were put at significant risk – a risk which ultimately materialized. Although the Respondents used a portion of the investor funds for business purposes, the remaining 40% of investor funds were put at risk when the Respondents chose to transfer these funds to the Bahamas and then proceeded to take steps to misappropriate these funds for personal luxuries. This, we believe, is sufficient to establish deprivation.

[98] With respect to *mens rea*, we find examples of the *mens rea* of fraud as follows:

a) The Respondents knew that they were causing New Life to use investor funds in a manner that was inconsistent with the representations made in the NLCI offering memorandum;

b) The Respondents knew that causing New Life to use funds for purposes other than those represented in the NLCI offering memorandum would put investors' funds at risk;

c) The Respondents knew that diverting approximately 30% of the funds to themselves for personal luxury purchases put investors' funds at risk; and

d) The Respondents knew that causing New Life to make fictitious DRIP declarations and cash dividend payments to investors at a time when New Life had not earned a profit would attract new investors on false representations.

[99] The Respondents knew their actions to be false when they transferred New Life funds to the Lexington and Amarcord accounts in the Bahamas and used such funds for personal purchases. The Respondents knew that their actions were depriving investors of something they thought they had – security in New Life's ownership of life insurance policies. Although it appears that New Life did purchase some life insurance policies, it is clear that the proportion of investors' funds used to purchase policies fell significantly short of the 80% to 85% as represented in the NLCI offering memorandum. Instead, the Respondents, as the sole signatories on the New Life, Lexington and Amarcord bank accounts, knowingly transferred investor funds into their hands for personal gain. The Respondents knew that they were placing investor funds at risk.

[100] We find that the Respondents deliberately lied to investors by means of written misrepresentations with respect to the use of proceeds in the NLCI Offering Memorandum. They further misrepresented the profitability of New Life by purporting to pay dividends when in fact these amounts were paid from investors' funds. The Respondents' lies were told to induce potential investors to purchase securities of New Life. We find that the Respondents knew at the time they made these misrepresentations that investors' funds were not being used for the purposes as set out in the Offering Memorandum and that the information disseminated about the declaration and payment of dividends including the DRIP was entirely a falsehood as no profits had been earned that would have permitted such dividends.

[101] Accordingly, for all of the reasons set out above, we find that Pogachar and Lombardi have contravened section 126.1(b) of the Act.

D. Director and Officer Accountability

Did the Respondents authorize, permit or acquiesce in New Life violating the Act?

[102] Staff allege that the Respondents, being directors and officers of the New Life companies, should be held accountable pursuant to section 129.2 of the Act, which provides as follows:

> For the purposes of this Act, if a company or a person other than an individual has not complied with Ontario securities law, a director or officer of the company or person who authorized, permitted or acquiesced in the non-compliance shall be deemed to also have not complied with Ontario securities law, whether or not any proceeding has been commenced against the company or person under Ontario

> securities law or any order has been made against the company or person under section 127.

[103] In *Momentas* at paragraph 118, this Commission has determined that the threshold for finding a director or officer liable pursuant to section 129.2 of the Act is low:

> Although these terms have been interpreted to include some form of knowledge or intention, the threshold for liability under section 122 and 129.2 is a low one, as merely acquiescing the conduct or activity in question will satisfy the requirement of liability. The degree of knowledge of intention found in each of the terms "authorize", "permit" and "acquiesce" varies significantly. "Acquiesce" means to agree or consent quietly without protest. "Permit" means to allow, consent, tolerate, give permission, particularly in writing. "Authorize" means to give official approval or permission, to give power or authority or to give justification.

[104] The Respondents were involved in all aspects of the New Life companies. They engaged in New Life's marketing activities, were the sole signatories on all of the New Life bank accounts, used their personal credit cards for all of New Life's business purchases, directed the distribution of investor funds, and were the primary signatories on all of the documents under the New Life letterhead. It is difficult to conclude anything other than that the Respondents authorized, permitted, and acquiesced in all aspects of the New Life business.

[105] In light of the evidence referred to herein, we find that Pogachar and Lombardi, as directors, officers and principal directing minds of New Life, authorized, permitted and acquiesced in the commission of the violations of sections 25(1)(a) and 126.1(b) of the Act by New Life, contrary to section 129.2 of the Act.

VIII. CONCLUSION

[106] Accordingly, we find that the Respondents acted contrary to the public interest and contravened Ontario securities law through the following breaches of the Act:

a) The Respondents traded in securities of NLCI, NLCA and the Numbered Companies without being registered to trade in securities in accordance with Ontario securities law, contrary to section 25(1)(a) of the Act;

b) The Respondents engaged in acts relating to securities that they knew or reasonably ought to have known perpetrated a fraud on investors contrary to section 126.1(b) of the Act; and

c) The Respondents, in their capacity as directors and officers of New Life, authorized, permitted and acquiesced in New Life's non-compliance with Ontario securities law contrary to section 129.2 of the Act.

[107] The Respondents are directed to contact the Office of the Secretary within 15 days to set a date for a sanctions and costs hearing, failing which a date will be set by the Office of the Secretary.

Dated at Toronto this 28th day of March, 2012.

"Edward P. Kerwin"	*"Paulette L. Kennedy"*
Edward P. Kerwin	Paulette L. Kennedy