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 LYNDZ PHARMACEUTICALS INC., JAMES MARKETING LTD., MICHAEL EATCH and RICKEY MCKENZIE

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

Hearing:	March 28, 2012	
Decision:	July 31, 2012	
Panel:	Mary G. Condon Sinan O. Akdeniz	- Vice-Chair and Chair of the Panel - Commissioner
Appearance:	Jonathon Feasby	- For Staff of the Ontario Securities Commission
	Michael Eatch	- For himself and Lyndz Pharmaceuticals Inc.
	No one appeared for Rickey McKenzie or James Marketing Inc.	

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REASONS AND DECISION ON SANCTIONS AND COSTS

I. INTRODUCTION

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 it is in the public interest to make an order with respect to sanctions and costs against Lyndz Pharmaceuticals Inc. ("**Lyndz**"), James Marketing Ltd. ("**James Marketing**"), Michael Eatch ("**Eatch**") and Rickey McKenzie ("**McKenzie**") (collectively, the "**Respondents**").

[2] The hearing on the merits in this matter took place on May 31 and June 1, 2010 (the "**Merits Hearing**"), and the decision on the merits was issued on May 16, 2011 (2011), 34 O.S.C.B. 5845 (the "**Merits Decision**"). Following the release of the Merits Decision, a separate hearing to consider sanctions and costs was held on March 28, 2012 (the "**Sanctions and Costs Hearing**").

B. The Sanctions and Costs Hearing

[3] Staff of the Commission ("**Staff**") appeared at the Sanctions and Costs Hearing, made oral submissions and filed written submissions and a two-volume brief of authorities.

[4] Eatch appeared and made oral submissions on his own behalf and on behalf of Lyndz, of which he is the directing mind.

[5] No one appeared at the Sanctions and Costs Hearing for McKenzie or James Marketing, of which McKenzie is the directing mind. Staff provided an Affidavit of Service, sworn by Sharon Nicolaides on March 22, 2012, as well as a copy of a letter sent to Staff and the Respondents by the Secretary to the Commission providing notice of the hearing and stating "in the event you do not appear in person or are not otherwise represented, the hearing may proceed and an Order may be issued by the Commission in your absence" (together, the "**Evidence of Service**"). Based on the Evidence of Service, we were satisfied that McKenzie and James Marketing were given reasonable notice of the hearing in accordance with section 6 of the *Statutory Powers Procedure Act*, R.S.O. 1990, c. S.22, as amended (the "**SPPA**") and therefore that we were authorized to proceed in their absence, pursuant to subsection 7(1) of the SPPA and Rule 7.1 of the Commission's *Rules of Procedure* (2010), 33 O.S.C.B. 8017 (the "**Rules**").

C. The Merits Decision

1. The Allegations

[6] Staff alleged that Lyndz and Eatch distributed Lyndz securities to Ontario investors from 1999 to 2004, and that all of the Respondents distributed Lyndz securities to investors in the United Kingdom from 2005 to 2008.

[7] Specifically, Staff alleged that:

- The Respondents diverted funds raised through the sale of shares in Lyndz to the personal benefit of Eatch and McKenzie via James Marketing and Lyndz UK, contrary to subsection 126.1(b) of the Act;

- The Respondents distributed securities in Lyndz in Ontario without being registered to do so under the Act, without having filed a prospectus and without the benefit of an applicable exemption, contrary to subsection 53(1) of the Act;
- Eatch and Lyndz made statements in shareholder correspondence and marketing materials that were materially misleading or untrue or failed to state facts that were required to be stated to make the statements not misleading, contrary to subsection 126.2(1) of the Act. These representations included the claim, with the intention of effecting a trade in the securities of Lyndz, that a person or company would repurchase the outstanding securities of Lyndz, contrary to subsection 38(1)(a) of the Act; and
- Eatch and Lyndz purported to issue shares in Lyndz and conducted themselves as if the corporation was a going concern during a 26 month period when Lyndz was dissolved as an Ontario corporation, contrary to subsections 126.1(b) and 126.2(1) of the Act.

(Merits Decision, paragraph 14)

2. The Merits Hearing

[8] At the commencement of the Merits Hearing on May 31, 2011, Staff and the Respondents submitted that they were able to resolve the factual issues in dispute, and they jointly filed two Agreed Statements of Facts. The Agreed Statement of Facts with respect to Eatch and Lyndz (the "**Eatch Agreed Statement**") was appended to the Merits Decision as Schedule "A", and the Agreed Statement of Facts with respect to McKenzie and James Marketing (the "**McKenzie Agreed Statement**") was appended as Schedule "B" (together, the "**Agreed Statements**").

[9] Two preliminary issues arose: (i) whether Staff should be permitted to introduce additional evidence beyond the Agreed Statements; and (ii) whether Staff should be permitted to pursue its allegation of fraud, though the characterization of the Respondents' conduct as fraud had been removed from the Agreed Statements.

(a) Staff's Additional Evidence

[10] Staff submitted that it had the right to call Staff's forensic accountant, Yvonne Lo ("**Lo**"), to testify about her analysis of the source and use of funds in the bank accounts controlled by the Respondents ("**Staff's Source and Use Analysis**"). The Respondents questioned the need for Lo's evidence in light of their admissions in the Agreed Statements as to the amounts raised and disbursed.

[11] After an adjournment, Staff and the Respondents agreed that, instead of calling oral evidence from Lo, Staff would file Staff's Source and Use Analysis, the transcripts of examinations of Eatch and McKenzie (together, the "**Individual Respondents**"), correspondence between the Individual Respondents, and copies of different versions of the Lyndz business plan (the "**Lyndz Business Plan**") that were given to investors (collectively, the "**Documentary Evidence**").

[12] The Commission admitted the Documentary Evidence, which, along with the Agreed Statements, constituted the entirety of Staff's evidence at the Merits Hearing.

(b) The Fraud Allegation

[13] The second preliminary issue at the Merits Hearing was addressed at paragraphs 20-23 of the Merits Decision, as follows:

> Staff completed its case on May 31, 2010. After Staff summarized its position on the Respondents' alleged illegal distribution and fraudulent conduct in closing, the Respondents expressed their belief that Staff would not be requesting a finding of fraud pursuant to the parties' partial resolution of the matter. Specifically, the Respondents stated they believed they were no longer facing an allegation of fraud because the paragraphs relating to fraud were struck out of the Agreed Statements of Facts at a pre-hearing conference.
>
> Staff submitted the parties were aware that what was removed was an acceptance of a characterization of the conduct as "fraud", which is different from removing the conduct, and that the allegation of fraud would be advanced on the basis of the facts set out in the Agreed Statements of Facts. It would be completely unreasonable, in Staff's view, for the Respondents to have understood that they were no longer facing an allegation of fraud.
>
> The Panel confirmed with the Respondents that Staff was seeking a finding of fraud against them and provided two options for the Respondents to consider. The Respondents could elect to dispute the allegation of fraud based on the Agreed Statements of Facts and other evidence adduced in this proceeding. In the alternative, if the Respondents took the position that the Agreed Statements of Facts were signed in error and they preferred to proceed to a full merits hearing, the Panel would strike this proceeding and the matter would be heard by a new panel in a contested merits proceeding.
>
> The Panel adjourned the hearing to afford the Respondents an opportunity to carefully consider the two options presented to them. After the adjournment, the Respondents expressed a preference to proceed on the basis of the Agreed Statements of Facts and additional evidence admitted on consent by the parties. The Respondents were then given an opportunity to present their evidence and to make submissions.

[14] Eatch and Lyndz elected to introduce evidence. Eatch testified briefly, and he introduced a letter purporting to document the supportive views of Lyndz shareholders.

[15] McKenzie did not testify and McKenzie and James Marketing led no other evidence.

[16] The Respondents gave oral submissions at the end of the hearing.

3. The Merits Decision

[17] In the Merits Decision, the Commission made the following findings about the investment scheme:

> **1. The Investment Scheme**
>
> **(a) 1999-2004**
>
> From 1999 to 2004, Lyndz securities were distributed to residents of Ontario and other provinces through at least 47 transactions. At least 14 of the 47 transactions, including transactions with Ontario investors, were made in exchange for funds totalling over $400,000. The remainder of those transfers of securities were made as gifts to friends and family of Eatch who had assisted him with his business.
>
> **(b) 2005-2008**
>
> From 2005 to 2008, Lyndz securities were distributed from Ontario to more than 70 residents of the United Kingdom through over 150 transactions. Lyndz investors in the United Kingdom paid between $0.15 and $0.33 per share. Approximately $1,700,000 was raised during this period.
>
> (Merits Decision, paragraphs 46-47)

[18] The Commission made the following findings about the role played by Eatch and Lyndz:

> **2. The Role of Lyndz and Eatch**
>
> Eatch is the directing mind of both Lyndz and Lyndz UK.
>
> **(a) 1999-2004**
>
> From 1999 to 2004, Lyndz and Eatch distributed Lyndz shares to residents of Ontario and other provinces through at least 47 transactions. The over $400,000 raised from this distribution was used for payments to Eatch's partner, Eatch's personal expenses, and some for Lyndz' business expenses. A precise accounting of the disposition of these funds is not available.
>
> **(b) 2005-2008**
>
> From 2005 to 2008, Lyndz and Eatch distributed Lyndz' shares from Ontario to more than 70 residents of the United Kingdom through over 150 transactions. Specifically, Lyndz and Eatch engaged in numerous acts in furtherance of that distribution, including the following:
>
> - Eatch prepared the Lyndz Business Plan to be distributed to investors;
> - Eatch sent correspondence to prospective investors on Lyndz letterhead soliciting them to invest in the shares of Lyndz;

- Eatch, with McKenzie’s permission, sent correspondence to prospective investors on James Marketing letterhead soliciting them to invest in the shares of Lyndz;
- Eatch, with McKenzie’s permission, used James Marketing’s email account to invoice Lyndz’ investors on the letterhead of James Marketing and instruct them to make payments to James Marketing;
- Eatch personally sent share certificates to a majority of Lyndz’ investors;
- Eatch personally telephoned, met with and corresponded with investors in connection with their purchase of Lyndz securities; and
- Eatch maintained a bank account in the United Kingdom in the name of Lyndz UK for the purpose of receiving funds from James Marketing that had been deposited with James Marketing by Lyndz investors in exchange for shares in Lyndz (the “**Lyndz UK Account**”).

In all of the documents and correspondence sent to Lyndz’ shareholders by Lyndz and Eatch, Lyndz is purported to be developing a business of manufacturing and distributing pharmaceuticals and bringing affordable pharmaceuticals to the third world as a “humanitarian project”. For example, Eatch prepared the Lyndz Business Plan, various versions of which were distributed by him and his company to Lyndz investors. The Lyndz Business Plan contains the following information about the company:

- Lyndz was planning an acquisition of a pharmaceutical production facility in British Columbia;
- Lyndz was planning to build a pharmaceutical plant with the assistance of John Buttner, “an architect and an Austrian registered engineer with more than 30 years of experience in the design, construction and project management of industrial and commercial buildings”;
- Lyndz supported efforts to prevent and treat diseases and conditions in the developing world;
- Lyndz anticipated three different phases of financing over time; and
- A number of individuals were involved in Lyndz in management and consulting roles;

Lyndz and Eatch led investors to believe that the funds they exchanged for shares in Lyndz would be invested in the development of Lyndz’ proposed pharmaceutical business and humanitarian projects in

impoverished nations. However, this representation was false. There is no credible evidence that Lyndz had any legitimate underlying business or legitimate business purpose.

(Merits Decision, paragraphs 48-52)

[19] The Commission made the following findings about the role played by McKenzie and James Marketing:

3. The Role of James Marketing and McKenzie

McKenzie is the directing mind of James Marketing.

. . . .

(a) 1999-2004

Neither James Marketing nor McKenzie was involved in the distribution of Lyndz securities in this time period.

(b) 2005-2008

From 2005 to 2008, James Marketing and McKenzie distributed Lyndz shares from Ontario to more than 70 residents of the United Kingdom through over 150 transactions.

James Marketing and McKenzie engaged in numerous acts in furtherance of that distribution, including the following:

- McKenzie knowingly allowed Eatch to send correspondence to prospective investors on James Marketing letterhead soliciting them to invest in Lyndz;
- McKenzie gave Eatch access to James Marketing's email account for the purpose of allowing Eatch to invoice Lyndz' investors on the letterhead of James Marketing and instruct them to make payments to James Marketing;
- McKenzie personally sent share certificates to some Lyndz' investors;
- McKenzie personally telephoned, met with and corresponded with investors in connection with their purchase of Lyndz securities;
- James Marketing received funds totalling approximately $1,700,000 from the distribution of Lyndz' shares; and
- McKenzie maintained a bank account in the United Kingdom in the name of James Marketing (the "**James Marketing UK Account**") for the purpose of receiving funds from Lyndz investors.

In all documents and correspondence sent to Lyndz' shareholders by James Marketing and McKenzie, Lyndz is purported to be developing a

> business of manufacturing and distributing pharmaceuticals and bringing affordable pharmaceuticals to the third world as a "humanitarian project".
>
> James Marketing and McKenzie led investors to believe that the funds they exchanged for shares in Lyndz would be invested in the development of Lyndz' proposed pharmaceutical business and humanitarian projects in impoverished nations. However, this representation was false. Lyndz had no underlying business or legitimate business purpose. McKenzie, because of his involvement in the receipt and the application of the funds, knew or ought to have known Lyndz had no legitimate business purpose or engagement.
>
> (Merits Decision, paragraphs 53 and 55-59)

[20] The Commission found that Eatch received approximately $655,000 and McKenzie received approximately $700,000 of the investor funds raised from 2005 to 2008, and that the money was used for their personal expenses unrelated to the business of Lyndz or remains unaccounted for (Merits Decision, paragraphs 60-66).

[21] The Commission found that although most of the investors who purchased Lyndz securities from 2005 to 2008 were residents of the United Kingdom, the Commission had jurisdiction over the Respondents, considering the Respondents' admissions, in the Agreed Statements, that most of the correspondence to Lyndz investors was sent from Ontario, most instructions to financial institutions to transfer funds were issued in Ontario, and most of the cash withdrawals from investor funds occurred in Ontario (Merits Decision, paragraph 67). In addition, Eatch and McKenzie admitted they were residents of Ontario.

[22] The Commission noted that the fraud provision (subsection 126.1(b) of the Act) was proclaimed into force on December 31, 2005 and cannot apply to the distribution of Lyndz securities from 1999 to 2004.

[23] With respect to the 2005-2008 period, the Commission found that Eatch and Lyndz perpetrated a fraud by leading investors to believe that the funds they exchanged for shares in Lyndz would be invested in the development of Lyndz' proposed pharmaceutical business and humanitarian projects, although in fact Lyndz had no legitimate underlying business, by spending investors' money for personal purposes unrelated to the business of Lyndz, and by failing to exercise control over the disbursement of investor funds by McKenzie (Merits Decision, paragraphs 81-88).

[24] The Commission found that McKenzie and James Marketing perpetrated a fraud by allowing Eatch to use James Marketing's letterhead and email account to correspond with investors in connection with their purchases of Lyndz shares, thereby contributing to the misrepresentations perpetrated by Eatch and Lyndz and by disposing of $700,000 of investor funds for personal purposes unrelated to the business of Lyndz, though he knew that Lyndz did not have an active business (Merits decision, paragraphs 89-93).

[25] The Commission summarized its findings as follows:

> Based on the Agreed Statements of Facts and the evidence tendered at the Merits Hearing . . ., we find that this case involves an investment scheme in which the Respondents distributed securities to investors based on the

premise that their funds would be invested in the development of Lyndz' proposed pharmaceutical business and humanitarian projects in developing nations. That premise was misleading and false and as a result of the Respondents' activities, Lyndz' investors were deprived of their funds. Investor funds were diverted by the Respondents to their personal benefit rather than being invested in a pharmaceutical business.

(Merits Decision, paragraph 45)

[26] The Commission concluded that the Respondents distributed Lyndz securities without a preliminary prospectus and a prospectus having been filed and receipted by the Director, no exemption being available, contrary to subsection 53(1) of the Act; and that the Respondents perpetrated a fraud on Lyndz investors, contrary to subsection 126.1(b) of the Act.

II. SUBMISSIONS OF THE PARTIES

A. Staff's Submissions

[27] Staff requests that the following sanctions and costs orders be made against the Respondents:

- pursuant to paragraph 2, 2.1 and 3 of subsection 127(1) of the Act, that all trading in any securities by the Respondents cease permanently, and that all trading in securities of Lyndz and James Marketing cease permanently;
- pursuant to paragraph 2.1 of subsection 127(1) of the Act, that the acquisition of any securities by the Respondents cease permanently;
- pursuant to paragraph 3 of subsection 127(1) of the Act, that any exemptions contained in Ontario securities law do not apply to the Respondents permanently;
- pursuant to paragraph 6 of subsection 127(1) of the Act, that Eatch and McKenzie be reprimanded;
- pursuant to paragraphs 7 and 8 of subsection 127(1) of the Act, that Eatch resign all positions he holds as director or officer of any issuer and be prohibited permanently from becoming or acting as a director or officer of any issuer;
- pursuant to paragraphs 7 and 8 of subsection 127(1) of the Act, that McKenzie resign all positions he holds as director or officer of any issuer and be prohibited permanently from becoming or acting as a director or officer of any issuer;
- pursuant to paragraph 10 of subsection 127(1) of the Act, that Lyndz disgorge to the Commission the entirety of the $2,100,000 it obtained as a result of its non-compliance with Ontario securities law, to be allocated by the Commission to or for the benefit of third parties, in accordance with subsection 3.4(2)(b) of the Act, apportioned as follows:
  - $400,000 payable solely by Lyndz;
  - $345,000 payable jointly and severally with James Marketing;
  - $655,000 payable jointly and severally with James Marketing and Eatch; and

- $700,000 payable jointly and severally with James Marketing and McKenzie.

- pursuant to paragraph 10 of subsection 127(1) of the Act, that James Marketing disgorge to the Commission the entirety of the $1,700,000 it obtained as a result of its non-compliance with Ontario securities law, to be allocated by the Commission to or for the benefit of third parties, in accordance with subsection 3.4(2)(b) of the Act, apportioned as follows:
  - $345,000 payable jointly and severally with Lyndz;
  - $655,000 payable jointly and severally with Lyndz and Eatch; and
  - $700,000 payable jointly and severally with Lyndz and McKenzie.
- pursuant to paragraph 10 of subsection 127(1) of the Act, that Eatch disgorge to the Commission the sum of $655,000 he obtained as a result of his non-compliance with Ontario securities law, payable jointly and severally with Lyndz and James Marketing, to be allocated by the Commission to or for the benefit of third parties, in accordance with subsection 3.4(2)(b) of the Act;
- pursuant to paragraph 10 of subsection 127(1) of the Act, that McKenzie disgorge to the Commission the sum of $700,000 he obtained as a result of his non-compliance with Ontario securities law, payable jointly and severally with Lyndz and James Marketing, to be allocated by the Commission to or for the benefit of third parties, in accordance with subsection 3.4(2)(b) of the Act;
- pursuant to paragraph 9 of subsection 127(1) of the Act, that Eatch pay an administrative penalty of $750,000, to be allocated by the Commission to or for the benefit of third parties in accordance with subsection 3.4(2)(b) of the Act;
- pursuant to paragraph 9 of subsection 127(1) of the Act, that McKenzie pay an administrative penalty of $600,000, to be allocated by the Commission to or for the benefit of third parties in accordance with subsection 3.4(2)(b) of the Act;
- pursuant to section 37(1) of the Act, that Lyndz, James Marketing, Eatch and McKenzie be prohibited from telephoning any residence within or outside of Ontario for the purpose of trading in any security or derivative or in any class of securities or derivatives; and
- pursuant to section 127.1 of the Act, that Lyndz, James Marketing, Eatch and McKenzie pay, on a joint and several basis, the sum of $73,649.42, representing the costs and disbursements incurred in the investigation and hearing of this matter.

[28] Staff requests that amounts received by the Commission in compliance with the administrative penalty and disgorgement orders be allocated to or for the benefit of third parties, including investors who lost money as a result of investing in the investment schemes, in accordance with subsection 3.4(2)(b) of the Act, and that such amounts be distributed to investors who lost money as a result of investing in the fraudulent investment scheme on such basis, on such terms and to such investors as Staff in its discretion determines to be appropriate in the circumstances.

[29] Staff submits that the Respondents should be ordered to disgorge the amounts they obtained as a result of their non-compliance with the Act, and to pay administrative penalties of a magnitude sufficient to ensure effective specific and general deterrence, considering a number of factors. Staff submits that the Respondents engaged in significant contraventions of the Act over an extended period of time and that their conduct demonstrates their ability to plan and execute a complex securities fraud involving multiple bank accounts and corporations, a lengthy and detailed fraudulent business plan, and multiple distributions.

[30] Staff submits that the Agreed Statements merely reflect the Respondents' acknowledgement that Staff would likely be able to prove its case against them, and that the Respondents' refusal to admit that their conduct was fraudulent demonstrates their lack of remorse.

[31] Staff submits that there is no evidence that the Respondents have any experience in the capital markets other than conducting fraudulent distributions, and that their conduct demonstrates they must be permanently barred from participating in Ontario's capital markets.

[32] Staff submits that the level of planning and deliberation involved in the fraud, and the ongoing nature of the scheme, demonstrate the need to send a strong message of specific deterrence to Eatch and McKenzie. In addition, Staff submits that McKenzie's prior conviction for fraud over $5,000 demonstrates an increased need for specific deterrence in his case.

B. Eatch's Submissions

[33] At the Sanctions and Costs Hearing, Eatch stated that he did not receive anything close to the amount alleged by Staff, and that a banker's box of documentation has just become available to him that could substantiate some of his claims about where the investors' money went. He also stated that he was led to believe he was allowed to raise funds from up to 50 individuals in a private placement, and that a lawyer was involved.

[34] Eatch also stated that the Eatch Agreed Statement includes admissions that were untrue. He stated that he "was heavily compromised by Mr. McKenzie", who put him in "a very awkward situation and very embarrassing situation", and "made [Eatch] say that [he] had received all this cash" (Hearing Transcript, pp. 41-42). Eatch also stated that although he admitted using McKenzie's email account and writing letters on James Marketing letterhead, this "isn't altogether true": he "had some input into editing some of his content and letters and never used his e-mail" (Hearing Transcript, pp. 45-46).

[35] Essentially, Eatch claimed at the Sanctions and Costs Hearing that he believed the Respondents' conduct during the 1999-2004 period was legal, and that "the rest of it" – the Respondents' conduct during the 2005-2008 period – "is more severe with the ongoing antics of Mr. McKenzie" (Hearing Transcript, pp. 45-46).

[36] Responding specifically to Staff's request for an order requiring him to resign all positions he holds as director or officer of any issuer and prohibiting him permanently from becoming or acting as a director or officer of any issuer, Eatch stated that he would not be in a position to pay the amounts requested by Staff if he cannot be part of a company, and in any event, he has not been "able to get a decent job" because an

internet search of his name brings up the Commission's website, and his reputation "has been totally shot" (Hearing Transcript, p. 47). Eatch stated that he would, with time, be able to pay the $73,000 costs order requested by Staff.

[37] Finally, Eatch expressed remorse for his conduct.

C. Staff's Reply Submissions

[38] In reply, Staff submitted that we should give no weight to the claims made by Eatch at the Sanctions and Costs Hearing, for which no evidence was provided.

[39] With respect to Eatch's claim that he was coerced at the Merits Hearing, Staff submitted that the Respondents were given an opportunity to resile from the admissions made in the Agreed Statements and to proceed to a full hearing on the merits, but they declined.

[40] In response to Eatch's claim that he is unable to pay the requested sanctions and costs, Staff submitted that Eatch provided no evidence of his financial circumstances, though he was aware that Staff would be seeking significant sanctions as a result of the findings set out in the Merits Decision.

[41] Finally, Staff submits that Eatch's expression of remorse is contradicted by the evidence, in particular his denial that he engaged in fraud and all of the other allegations, and his attempt, at the Merits Hearing and the Sanctions and Costs Hearing, to resile from his admissions in the Eatch Agreed Statement.

III. THE LAW ON SANCTIONS

[42] Pursuant to section 1.1 of the Act, the Commission's mandate is (i) to provide protection to investors from unfair, improper or fraudulent practices; and (ii) to foster fair and efficient capital markets and confidence in capital markets. In *Committee for Equal Treatment of Asbestos Minority Shareholders v. Ontario (Securities Commission)*, [2001] 2 S.C.R. 132, the Supreme Court of Canada stated:

> … 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.
>
> (*Asbestos*, *supra*, at paragraph 45)

[43] The Commission has stated:

> […] 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.

(*Re Mithras Management Ltd.* (1990), 13 O.S.C.B. 1600, at pp. 1610 and 1611)

[44] The Commission has identified a number of factors to be considered, including:

(a) the seriousness of the allegations;

(b) the respondent's experience in the marketplace;

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

(d) whether or not there has been 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 obtained 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; and

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

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

[45] We find that these factors remain relevant in determining appropriate sanctions. However, the applicability and importance of each factor will vary according to the facts and circumstances of each case.

[46] General deterrence is an important factor that the Commission should consider when determining appropriate sanctions. In *Re Cartaway Resources Corp.*, [2004] 1 S.C.R. 672 ("***Cartaway***"), the Supreme Court of Canada stated that "[…] it is reasonable

to view general deterrence as an appropriate, and perhaps necessary, consideration in making orders that are both protective and preventive" (*Cartaway*, *supra*, at paragraph 60).

[47] In determining the appropriate sanctions to order, we must consider the specific circumstances in each case and ensure that the sanctions are proportionate to those circumstances (*M.C.J.C. Holdings*, *supra*, at 1134).

[48] Further, in imposing administrative penalties and disgorgement, we will consider the overall financial sanctions imposed on each respondent (*Re Sabourin Sanctions and Costs* (2010), 33 O.S.C.B. 5299 ("***Re Sabourin***"), at paragraph 59).

IV. APPROPRIATE SANCTIONS IN THIS MATTER

A. Preliminary Issue: Fresh Evidence

[49] As stated at paragraphs 11-12 above, the limited evidence provided at the Merits Hearing consisted of the Agreed Statements, the Documentary Evidence adduced by Staff, and the brief testimony given by Eatch.

[50] At the Sanctions and Costs Hearing, Eatch stated that certain of his admissions in the Eatch Agreed Statement were untrue, and that a recently discovered bankers' box of documents could substantiate some of his claims (see the discussion at paragraphs 33-35 above).

[51] Staff submitted that Eatch's submissions at the Sanctions and Costs Hearing were not supported by any evidence, and therefore they should be given no weight. Staff characterized Eatch's submissions concerning the Eatch Agreed Statement as evidence of lack of remorse.

[52] At the conclusion of the Sanctions and Costs Hearing, we ruled that we are not in a position, for purposes of the Sanctions and Costs Decision, to consider the fresh evidence with respect to the Merits Decision that was referred to by Eatch. We stated that it would be up to Eatch, if he so chose, to seek legal advice as to any avenues of redress he may have for bringing new evidence forward.

[53] In deciding on appropriate sanctions and costs in this matter, we have given no consideration to the submissions of Eatch or Staff, described at paragraphs 50-51 above, with respect to the Eatch Agreed Statement. Those were matters for consideration at the Merits Hearing, but are not properly before us. We have considered only the Merits Decision and the submissions of Staff and Eatch made in the Sanctions and Costs Hearing.

B. Retrospectivity

[54] Although the illegal distribution of Lyndz securities began in 1999, paragraphs 9 and 10 of s. 127(1) of the Act, which gave the Commission power to order administrative penalties and disgorgement, did not take effect until April 7, 2003.

[55] In *Re Rowan Sanctions and Costs* (2010), 33 O.S.C.B. 91 ("***Re Rowan***"), at paragraphs 94-96, appeal dismissed, *Rowan v. Ontario (Securities Commission)*, 2012 ONCA 208, affirming [2010] O.J. No. 5681 (Div. Ct.), and in *Re White Sanctions and Costs* (2010), 33 O.S.C.B. 8893 ("***Re White***"), at paragraph 35, the Commission held

that s. 127(1)9 (administrative penalty) should not be applied retrospectively, and therefore an administrative penalty should not be ordered with respect to conduct prior to April 7, 2003. In both cases, the administrative penalty requested by Staff was reduced to reflect only post-April 7, 2003 conduct.

[56] In *Re White*, *supra*, at paragraph 36, the Commission held that because disgorgement is not a penalty, but an order that illegally obtained funds be removed from the wrongdoer, s. 127(1)10 applies to all amounts obtained as a result of a respondent's non-compliance with Ontario securities law, whether obtained before or after April 7, 2003.

[57] We agree with *Re Rowan* and *Re White*. Accordingly, we have considered only the Respondents' conduct after April 7, 2003 in considering Staff's administrative penalty request, but our disgorgement order is not limited to amounts obtained after April 7, 2003.

C. Specific Sanctioning Factors Applicable in this Matter

[58] 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 and by sending a strong message of specific and general deterrence.

[59] 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 the findings made in the Merits Decision.

1. The seriousness of the proven allegations

[60] The Commission's findings, set out in paragraphs 17-26 above, demonstrate the seriousness of the Respondents' conduct. The Commission found that the Respondents distributed Lyndz securities without a prospectus, where no prospectus exemption was available, contrary to subsection 53(1) of the Act, and that the Respondents perpetrated a fraud on Lyndz investors, contrary to subsection 126.1(b) of the Act.

[61] The Commission found that the Respondents engaged in a fraudulent distribution of Lyndz securities that raised $2.1 million from investors, on the basis of their representations to investors that the money raised would be used to develop a business of manufacturing and distributing pharmaceuticals and bringing affordable pharmaceuticals to the third world as a "humanitarian project". These representations, contained in the Lyndz Business Plan and in correspondence sent to Lyndz investors, were false or misleading. In the Merits Decision, the Commission stated that Lyndz "does not have any assets, employees or physical location. It has no legitimate underlying business or legitimate business purpose" (Merits Decision, paragraph 82).

[62] Moreover, the Commission found that "contrary to what Lyndz and Eatch claimed about the company, few if any funds were invested in the development of Lyndz' pharmaceutical business or humanitarian projects". Instead, investors' money was used by the Respondents for purposes unrelated to the business of Lyndz or remains unaccountable. The Commission concluded that Lyndz investors were deprived of the funds they invested in Lyndz as a result of the Respondents' dishonest acts (misrepresentation and unauthorized diversion of investor funds) and that the

Respondents knowingly perpetrated a fraud (Merits Decision, paragraphs 85-88 and 91-93).

[63] The Commission has stated that fraud is "one of the most egregious securities regulatory violations" and is both "an affront to the individual investors directly targeted" and something that "decreases confidence in the fairness and efficiency of the entire capital market system" (*Re Al-tar Energy Corp. Sanctions and Costs* (2011), 34 O.S.C.B. 447 ("***Re Al-tar***"), at paragraph 214, citing *Re Capital Alternatives Inc.* (2007), A.B.A.S.C. 79 ("***Re Capital Alternatives***") at paragraph 308, citing D. Johnston & K.D. Rockwell, *Canadian Securities Regulation*, 4th ed., Markham: Lexis Nexis, 2007 at 420).

2. The level of the Respondents' activity in the marketplace

[64] The Respondents' non-compliance with Ontario securities law was not an isolated incident. It took place over an extended period of time and involved multiple transactions. In the Merits Decision, the Commission found that Eatch and Lyndz distributed Lyndz shares to investors in Ontario and other provinces through at least 47 transactions from 1999 to 2004, and that Eatch and Lyndz, along with McKenzie and James Marketing, distributed Lyndz shares to approximately 70 residents of the U.K. through over 150 transactions from 2005 to 2008 (Merits Decision, paragraphs 49-50 and 55-56).

3. The profit made or loss avoided as a result of the Respondents' non-compliance

[65] In the Merits Decision, the Commission found that the Respondents raised approximately $2.1 million from the sale of Lyndz securities, Eatch personally obtained approximately $655,000 of Lyndz investor funds, McKenzie personally obtained approximately $700,000 of Lyndz investor funds, and the remaining funds raised from Lyndz investors remain unaccounted for.

4. Remorse: the Respondents' recognition of the seriousness of their conduct

[66] We do not accept Staff's submission that the Respondents' refusal to admit fraud in the Agreed Statements attests to a lack of remorse. For the reasons given in paragraph 53 above, we consider the disagreement between Staff and the Respondents about the omission of any reference to fraud in the Agreed Statements to be a neutral factor with respect to sanctions and costs.

[67] Nevertheless, we are not persuaded that remorse is a mitigating factor in this case.

[68] McKenzie has not expressed any remorse for his conduct and did not appear at the Sanctions and Costs Hearing.

[69] Eatch did appear, and stated that he was sorry and "extremely remorseful" (Hearing Transcript, p. 47). However, other comments made by Eatch at the Sanctions and Costs Hearing lead us to question whether Eatch understands the seriousness of his misconduct. Referring to Staff's request for an order that each of the Individual Respondents resign all positions he holds as a director or officer of an issuer and be prohibited permanently from becoming or acting as a director or officer of an issuer, Eatch stated that he would not be able to pay the monetary sanctions requested by Staff

if he could not be a director or officer of a company. More troubling are his comments suggesting that he would like to resume his capital-raising activities. He said: "I do have an outfit still very interested in working with me with respect to my mobile pharmaceutical project" (Hearing Transcript, p. 44). A little later, he said:

> . . . some of the technology we have is in affiliation with another corporation, specifically in the water treatment part of this. And they're very anxious – anxiously looking at my whole mobile pharmaceutical plant which involved an integral part of this water technology, how to get bog water into potable water or water available for manufacturing of pharmaceuticals on the site. The idea behind that was like – it was about 12 different tractor trailers each purposely built to do something, one tabulating, one granulating, one capsulating, and one packaging, one just for water. And that was the idea of the humanitarian act that we were bringing to play. Unfortunately, everything sort of seized and stopped, and I wasn't really there to oversee it properly. So I am to blame.
>
> (Hearing Transcript, pp. 46-47)

[70] We are concerned that Eatch appears to be of the view that the only problematic aspects of his conduct were his "extremely clouded" judgment, which, according to Eatch, allowed him to be compromised by McKenzie, and his failure to "oversee" the humanitarian project (Hearing Transcript, pp. 43 and 47). We find that Eatch does not recognize the seriousness of his conduct.

5. Specific deterrence

[71] Given our concerns expressed at paragraphs 69-70 above, we place significant weight on specific deterrence in determining the appropriate sanctions to be ordered with respect to Eatch.

[72] Specific deterrence is also a significant factor with respect to McKenzie. Paragraph 31 of the McKenzie Agreed Statement states:

> In 2001, McKenzie was convicted of fraud over $5000 and conspiracy to commit an indictable offence under the *Criminal Code*, and received a total sentence of two years less a day. The offences for which McKenzie was incarcerated concerned the telemarketing of a fraudulent gemstone investment from Ontario to Canadian investors, including Ontario residents.

[73] At paragraph 54 of the Merits Decision, the Commission stated that McKenzie's prior conviction "is irrelevant to our consideration on the merits and will be disregarded." However, we find that McKenzie's prior conviction is important in determining appropriate sanctions in this case. Like his conduct in the present matter, McKenzie's past conduct involved conduct of a financial nature – a fraudulent investment scheme. We accept that McKenzie's repeated conduct demonstrates an increased need for specific deterrence in his case.

[74] Our sanctions order must effectively prevent and deter Eatch and McKenzie from engaging in any further illegal or fraudulent conduct in the marketplace.

D. Appropriate Sanctions in this Matter

1. Reprimand

[75] We find it appropriate to reprimand the Respondents, pursuant to paragraph 6 of s. 127(1) of the Act, in order to reaffirm publicly that the Commission will not tolerate illegal and fraudulent conduct such as occurred in this case.

[76] The Respondents, by engaging in an illegal and fraudulent distribution of Lyndz securities in contravention of s. 53(1) and s. 126.1(b) of the Act, wrongfully deprived investors of $2.1 million dollars. Eatch and McKenzie misled investors about the business of Lyndz, and used the money that Lyndz investors were led to believe would be used to develop a pharmaceutical business and humanitarian project for personal purposes unrelated to the business of Lyndz. Much of the investors' money remains unaccounted for, and there appears to be little prospect that investors will be able to recover their losses.

[77] The Respondents are reprimanded for their non-compliance with Ontario securities law.

2. Market Participation Orders

[78] Staff submits that the Respondents should be subject to a permanent trading, acquisition and exemption ban, without a carve-out for personal trading in an RRSP account. Staff also seeks an order that each of the Individual Respondents resign any positions he holds as director or officer of an issuer and that both are subject to permanent director and officer bans.

[79] As noted at paragraph 36 above, Eatch objected to Staff's request for a director and officer ban on the basis that it would prevent him from earning a living sufficient to pay any monetary orders imposed by the Commission. Eatch also expressed his ongoing interest in the mobile pharmaceutical project, which leads us to have a concern that if Eatch is allowed to act as a director or officer of an issuer, he may once again engage in illegal distributions of securities. For the reasons stated at paragraphs 58-74 above, and particularly considering the seriousness of the proven allegations against Eatch as well as Eatch's failure to recognize the seriousness of his conduct, we find that Eatch cannot be trusted to act as a director or officer of any issuer. We also find that McKenzie, already a repeat offender, cannot be trusted to act as a director or officer of any issuer. We find that Eatch and McKenzie should be subject to an order that they resign all positions they hold as director or officer of an issuer and be banned permanently from becoming or acting as a director or officer of an issuer, pursuant to paragraphs 7 and 8 of subsection 127(1) of the Act, to ensure that they are never again in a position of control or trust of any issuer.

[80] We accept Staff's submission that the conduct of the Respondents demonstrates that they must be permanently barred from participating in Ontario's capital markets. We find that the Respondents should be subject to a permanent trading, acquisition and exemption ban, without a carve-out, pursuant to paragraphs 2, 2.1 and 3 of s. 127(1) of the Act, because their fraudulent conduct, which included providing misleading documents and correspondence to investors and engaging in unauthorized diversion of investor funds for personal purposes, demonstrates that they cannot be safely trusted to

participate in the capital markets in any way (*Re St. John* (1998), 21 O.S.C.B. 3851, at paragraphs 130-133; *Re Ochnik* (2006), 29 O.S.C.B. 3929, at paragraphs 108-113); *Re Al-tar*, *supra*, at paragraph 31; and *Re Global Partners Capital Sanctions and Costs* (2011), 34 O.S.C.B. 10023 ("***Re Global Partners***"), at paragraphs 54-55, and the cases cited therein).

[81] The permanent trading, acquisition and exemption bans and permanent director or officer bans we are ordering will remove the Respondents from our capital markets and protect the investing public.

3. Subsection 37(1) Orders

[82] Staff seeks orders prohibiting the Respondents "from telephoning any residence within or outside of Ontario for the purpose of trading", pursuant to subsection 37(1) of the Act, which, at the time of the conduct in this matter, stated as follows:

> **37(1) Order prohibiting calls to residences** - 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.

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

[84] Staff's request for a s. 37(1) order was first set out in Staff's written submissions on sanctions and costs, which were served on the Respondents on February 22, 2012, some nine months after the Merits Decision was issued and just five weeks before the Sanctions and Costs Hearing. We were not provided with any explanation for this delay. In our view, fairness generally requires that respondents be given notice of the case they have to meet, including the nature of the orders requested by Staff, prior to the commencement of the merits hearing. In these circumstances, we are not persuaded a subsection 37(1) order is in the public interest in this case.

4. Disgorgement

[85] As stated in paragraph 27 above, Staff seeks an order that the Respondents disgorge the amounts they obtained as a result of their contraventions of Ontario securities law, pursuant to s. 127(1)10 of the Act. That provision states that if a person or company has not complied with Ontario securities law, the Commission may make an order requiring the person or company to disgorge to the Commission any amounts obtained as a result of the non-compliance.

[86] The disgorgement remedy is intended to ensure that respondents do not retain any financial benefit from their non-compliance with Ontario securities law so as to provide specific and general deterrence (*Re Sabourin*, *supra*, at paragraph 65). The Commission has held that "all money illegally obtained from investors can be ordered to

be disgorged, not just the 'profit' made as a result of the activity" (*Re Limelight Sanctions and Costs* (2008), 31 O.S.C.B. 12030 ("***Re Limelight***"), at paragraph 49).

[87] In the Merits Decision, the Commission found that Eatch received approximately $655,000 and McKenzie received approximately $700,000 of the investor funds received from 2005 to 2008 (Merits Decision, paragraphs 62 and 65). Although Eatch disputed the $655,000 figure at the Sanctions and Costs Hearing, he provided no evidence in support of that finding, which was based, in part, on paragraphs 24-25 of the Eatch Agreed Statement, and we ruled that we were not in a position to consider fresh evidence in relation to the Merits Decision (see paragraphs 52-53 above).

[88] We accept Staff's submission that the amounts obtained by each of the two Individual Respondents should be disgorged jointly and severally with the two companies (Lyndz and James Marketing) through which they acted.

[89] Accordingly, Eatch will be ordered to disgorge to the Commission the amount of $655,000 that he obtained as a result of his non-compliance with Ontario securities law, on a joint and several basis with Lyndz and James Marketing. McKenzie will be ordered to disgorge to the Commission the amount of $700,000 that he obtained as a result of his non-compliance with Ontario securities law, on a joint and several basis with Lyndz and James Marketing.

[90] In the Merits Decision, the Commission found that Eatch and Lyndz raised over $400,000 through the distribution of Lyndz securities from 1999 to 2004; McKenzie and James Marketing were not involved during this period (Merits Decision, paragraphs 46 and 49). In recognition of Eatch's admission, in the Eatch Agreed Statement, that he obtained $655,000, Staff requests and we agree that Lyndz alone should be ordered to disgorge to the Commission the amount of $400,000 that it obtained as a result of its non-compliance with Ontario securities law from 1999 to 2004.

[91] In the Merits Decision, the Commission found that the Respondents raised approximately $1.7 million through the distribution of Lyndz securities from 2005 to 2008 (Merits Decision, paragraph 47). In addition to the $655,000 obtained by Eatch and the $700,000 obtained by McKenzie, another $345,000 of investor funds remains unaccounted for. Accordingly, Lyndz and James Marketing will be ordered to disgorge to the Commission, on a joint and several basis, the amount of $345,000 that these entities obtained as a result of their non-compliance with Ontario securities law from 2005 to 2008.

[92] The amounts ordered to be disgorged, as set out in paragraphs 89-91 above, shall be designated for allocation to or for the benefit of third parties, pursuant to s. 3.4(2)(b) of the Act.

5. Administrative Penalty

[93] As stated in paragraph 27 above, Staff seeks an order, pursuant to s. 127(1)9 of the Act, that Eatch pay an administrative penalty of $750,000 and that McKenzie pay an administrative penalty of $600,000.

[94] Staff submits that the administrative penalties requested are appropriate in the circumstances, considering the factors identified in paragraphs 29-32 above, the totality of the sanctions and the amount of disgorgement requested, and balancing the magnitude

of the harm done to investors by the Respondents against that found in several other Commission cases. Staff provided, as a Schedule to their written submissions, a summary of cases, setting out the facts as proven and the sanctions ordered in *Re Global Partners*; *Re Al-tar*; *Re Chartcandle* (2010), 33 O.S.C.B. 10405 ("***Re Chartcandle***"); *Re Sulja Bros.Building Supplies Ltd. Sanctions and Costs* (2011), 34 O.S.C.B. 7515 ("***Re Sulja Bros.***"); *Re Lehman Cohort Global Group Inc. Sanctions and Costs* (2011), 34 O.S.C.B. 2999 ("***Re Lehman Cohort***"); *Re Sabourin*; *Re Limelight*; *Re Capital Alternatives*; and *Re Anderson* (2003) BCSECCOM 184 (British Columbia Securities Commission).

[95] In our view, the goals of specific and general deterrence are most effectively met by administrative penalties that are proportional to each respondent's culpability in the matter, take all the circumstances into account, consider administrative penalties imposed in similar cases, and have regard to any aggravating and mitigating factors (*Re Belteco*, *supra*, at 7747; *Re M.C.J.C. Holdings Inc. supra*, at 1134 and 1136; *Re Limelight*, *supra*, at paragraph 71; *Re Rowan*, *supra*, at paragraph 106; *Re Sabourin*, *supra*, at paragraph 75; *Re White*, *supra*, at paragraph 50; and *Re IMAGIN*, *supra*, at paragraph 20).

[96] In summary, the Commission found, in the Merits Decision, that Eatch and McKenzie engaged in an illegal distribution of Lyndz securities, contrary to s. 53(1) of the Act, by raising approximately $1.7 million from more than 70 investors in over 150 transactions from 2005 to 2008. Although investors were led to believe that their money would be used in the development of Lyndz' proposed pharmaceutical business and humanitarian projects in the third world, this representation was false, and Lyndz had no underlying business or legitimate business purpose. Investor funds were used for the personal purposes of Eatch and McKenzie unrelated to the business of Lyndz or remain unaccounted for. The Commission found that the Respondents engaged in fraud contrary to s. 126.1(b) of the Act. The Respondents' non-compliance with Ontario securities law was very serious conduct contrary to the public interest. We find that Eatch and McKenzie should be ordered to pay administrative penalties of a magnitude sufficient to ensure effective specific and general deterrence.

[97] We are mindful that we have little basis for assessing aggravating and mitigating factors in this matter because of the limited evidence that was presented in the Merits Hearing, apart from McKenzie's admission relating to his prior fraud conviction, which was set out at paragraph 31 of the McKenzie Agreed Statement. Based on the Commission's findings in the Merits Decision, and having considered the previous cases relied on by Staff, we find that the Respondents' misconduct and investor losses in this case fall neither at the most nor the least serious end of the spectrum. Considering all of the relevant factors, we find that Eatch should be ordered to pay an administrative penalty of $500,000, rather than the $750,000 requested by Staff. We find that McKenzie should be ordered to pay an administrative penalty of $600,000, as requested by Staff.

[98] These amounts shall be designated for allocation to or for the benefit of third parties, pursuant to s. 3.4(2)(b) of the Act.

V. COSTS

A. Staff's Claim for Costs

[99] Staff seeks an order that the Respondents pay, on a joint and several basis, the sum of $73,649.92, representing the costs and disbursements incurred in the hearing of this matter, pursuant to s. 127.1(2) of the Act and Rule 18 of the Commission's Rules.

[100] In support of its costs claim, Staff filed the Affidavit of Kathleen McMillan, sworn February 21, 2012, which includes a summary of the hours spent by the three members of Staff whose time is claimed, as well as the receipts for preparation of the hearing briefs and binders. Staff submits that they have attempted to produce a conservative calculation of costs, and they note that they have not claimed for the investigation of the matter, they claimed only for the time of three members of Staff, although nine members of Staff docketed hours on the file, and they limited their claim for hearing preparation time to the four weeks before the start of the Merits Hearing on May 31, 2010. Staff also submits that the costs claimed have been calculated according to a schedule of hourly rates recommended by a consultant to be used by Staff to calculate costs.

[101] Staff submits that its already conservative claim for costs should not be reduced on the basis of the Respondents' admissions in the Agreed Statements because the Respondents made these admissions only on the very brink of the hearing, after Staff had already prepared for a contested hearing. Staff submits that because of the lateness of the Respondents' admissions, the majority of Staff's preparation time and the amounts disbursed in preparing Staff's hearing briefs were costs thrown away. Staff also submits that the Respondents refused to admit liability, causing substantial time to be wasted on hearing preparation. Staff submits that the majority of the costs incurred would have been avoided if the Respondents had conducted themselves in a manner consistent with clauses (h) and (j) of Rule 18.2.

B. Analysis and Conclusion

[102] Rule 18.2 says the following:

> **18.2 Factors Considered When Awarding Costs** – In exercising its discretion under section 127.1 of the Act to award costs against a person or company, a Panel may consider the following factors:
>
> (a) whether the respondent failed to comply with a procedural order or direction of the Panel;
>
> (b) the complexity of the proceeding;
>
> (c) the importance of the issues;
>
> (d) the conduct of Staff during the investigation and during the proceeding, and how Staff's conduct contributed to the costs of the investigation and the proceeding;
>
> (e) whether the respondent contributed to a shorter, more efficient, and more effective hearing, or whether the conduct of the

respondent unnecessarily lengthened the duration of the proceeding;

(f) whether any step in the proceeding was taken in an improper, vexatious, unreasonable, or negligent fashion or in error;

(g) whether the respondent participated in the proceeding in a way that helped the Commission understand the issues before it;

(h) whether the respondent participated in a responsible, informed and well-prepared manner;

(i) whether the respondent co-operated with Staff and disclosed all relevant information;

(j) whether the respondent denied or refused to admit anything that should have been admitted; or

(k) any other factors the Panel considers relevant.

[103] As Staff acknowledges in its written submissions, a costs order is not a sanction. Section 127.1 of the Act gives the Commission discretion to order costs so that the Commission can recover the costs of a hearing or investigation from a person or company who has not complied with Ontario securities law or acted contrary to the public interest. The factors set out in the Commission's Rule 18.2 are intended to encourage efficient use of the Commission's adjudicative resources.

[104] In this case, we are not persuaded that it is in the public interest to make a costs order against the Respondents, for two reasons.

[105] First, the Respondents, who were self-represented, were facing an allegation of fraud, as well as an allegation of illegal distribution. The fraud provision of the Act was proclaimed into law on December 31, 2005, and fraud allegations, which are amongst the most serious securities allegations, continue to raise novel issues at the Commission.

[106] In addition, we are not persuaded that the Respondents "refused to admit liability, causing substantial time to be wasted on the hearing and the preparation of written submissions", thereby engaging clause (j) of Rule 18.2. Based on the Merits Decision, we find that Staff and the Respondents disagreed about the scope of the Agreed Statements, and in particular whether Staff's allegation of fraud was still before the Commission, and we have no basis for concluding that the Respondents "refused to admit anything that should have been admitted." In our view, having admitted the essential facts, the Respondents were entitled to a hearing before the Commission to determine whether they had committed fraud.

[107] In the circumstances, considering the procedural and legal issues in this proceeding, we do not find it appropriate to impose a costs order under s. 127.1 of the Act.

VI. CONCLUSION

[108] Accordingly, for the reasons given above, we find that it is in the public interest to order the following sanctions, which reflect the seriousness of the Respondents' non-

compliance with Ontario securities law and will deter the Respondents and other like-minded people from engaging in similar conduct.

[109] Our sanctions order will impose significant financial obligations on the Respondents. Eatch will be ordered to pay an administrative penalty of $500,000, and to disgorge to the Commission, on a joint and several basis with Lyndz and James Marketing, the amount of $655,000 that he obtained as a result of his non-compliance with Ontario securities law. McKenzie will be ordered to pay an administrative penalty of $600,000, and to disgorge to the Commission, on a joint and several basis with Lyndz and James Marketing, the amount of $700,000 that he obtained as a result of his non-compliance with Ontario securities law. Lyndz alone will be ordered to disgorge the amount of $400,000 that it obtained as a result of its non-compliance with Ontario securities law. Lyndz will also be ordered to disgorge, on a joint and several basis with James Marketing, the remaining $345,000 that the Respondents obtained as a result of their non-compliance with Ontario securities law. All these amounts will be designated for allocation to or for the benefit of third parties, pursuant to s. 3.4(2)(b) of the Act.

[110] We will issue a separate order giving effect to our decisions on sanctions and costs, as follows:

> 1. pursuant to paragraph 2 of subsection 127(1) of the Act, all trading in any securities by Eatch, Lyndz, McKenzie and James Marketing shall cease permanently, and all trading in securities of Lyndz and James Marketing shall cease permanently;
>
> 2. pursuant to paragraph 2.1 of subsection 127(1) of the Act, the acquisition of any securities by Eatch, Lyndz, McKenzie and James Marketing shall cease permanently;
>
> 3. pursuant to paragraph 3 of subsection 127(1) of the Act, any exemptions contained in Ontario securities law do not apply to Eatch, Lyndz, McKenzie and James Marketing permanently;
>
> 4. pursuant to paragraph 6 of subsection 127(1) of the Act, Eatch and McKenzie are hereby reprimanded;
>
> 5. pursuant to paragraphs 7 and 8 of subsection 127(1) of the Act, Eatch shall resign all positions he holds as a director or officer of any issuer and he is prohibited permanently from becoming or acting as a director or officer of any issuer;
>
> 6. pursuant to paragraphs 7 and 8 of subsection 127(1) of the Act, McKenzie shall resign all positions he holds as director or officer of any issuer and he is prohibited permanently from becoming or acting as a director or officer of any issuer;
>
> 7. pursuant to paragraph 10 of subsection 127(1) of the Act, Lyndz shall disgorge to the Commission the amount of $400,000, to be designated for allocation to or for the benefit of third parties, in accordance with subsection 3.4(2)(b) of the Act;

8. pursuant to paragraph 10 of subsection 127(1) of the Act, Lyndz and James Marketing shall jointly and severally disgorge to the Commission the amount of $345,000, to be designated for allocation to or for the benefit of third parties, in accordance with subsection 3.4(2)(b) of the Act;

9. pursuant to paragraph 10 of subsection 127(1) of the Act, Eatch, Lyndz and James Marketing shall jointly and severally disgorge to the Commission the amount of $655,000, to be designated for allocation to or for the benefit of third parties, in accordance with subsection 3.4(2)(b) of the Act;

10. pursuant to paragraph 10 of subsection 127(1) of the Act, McKenzie, Lyndz and James Marketing shall jointly and severally disgorge to the Commission the amount of $700,000, to be designated for allocation to or for the benefit of third parties, in accordance with subsection 3.4(2)(b) of the Act;

11. pursuant to paragraph 9 of subsection 127(1) of the Act, Eatch shall pay an administrative penalty of $500,000, to be designated for allocation to or for the benefit of third parties, in accordance with subsection 3.4(2)(b) of the Act; and

12. pursuant to paragraph 9 of subsection 127(1) of the Act, McKenzie shall pay an administrative penalty of $600,000, to be designated for allocation to or for the benefit of third parties, in accordance with subsection 3.4(2)(b) of the Act.

DATED at Toronto this 31st day of July 2012.

"Mary G. Condon"	*"Sinan O. Akdeniz"*
Mary G. Condon	Sinan O. Akdeniz