Ontario Securities Commission | Commission des valeurs mobilières de l'Ontario | 22nd Floor, 20 Queen Street West, Toronto ON M5H 3S8 | 22e 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 BRADON TECHNOLOGIES LTD., JOSEPH COMPTA, ENSIGN CORPORATE COMMUNICATIONS INC. and TIMOTHY GERMAN

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

Hearing:	February 25, 2016	
Decision:	May 20, 2016	
Panel:	Christopher Portner	- Commissioner
Appearances:	Catherine Weiler	- For Staff of the Commission
	Pathik Baxi	- For Joseph Compta and Bradon Technologies Ltd.
	Timothy German	- Represented himself and Ensign Corporate Communications Inc.

TABLE OF CONTENTS

I. Background 1

II. German and Ensign's Adjournment Motion 2

III. Sanctions Analysis 3

A. Sanctions Requested by Staff 3
B. Compta and Bradon's Submissions 5
C. German and Ensign's Submissions 6
D. The Law 6
E. Application of the Sanctioning Factors 7
F. Previous Sanctions Decisions 10
G. Analysis and Findings 12
1. Trading and other prohibitions 12
2. Director and officer prohibitions 13
3. Reprimand 14
4. Disgorgement 14
5. Administrative penalties 16

IV. Costs 18

V. Conclusion 20

REASONS AND DECISION ON SACTIONS AND COSTS

I. BACKGROUND

[1] This was a sanctions and costs hearing (the "**Sanctions 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 Bradon Technologies Ltd. ("**Bradon**"), Joseph Compta ("**Compta**"), Ensign Corporate Communications Inc. ("**Ensign**") and Timothy German ("**German**" and, collectively with Bradon, Compta and Ensign, the "**Respondents**").

[2] By Statement of Allegations filed by Staff of the Commission ("**Staff**") on October 3, 2013, Staff alleged that, during the period from December 28, 2007 to April 20, 2011 (the "**Material Time**"), German and Ensign breached (i) subsection 25(1)(a) of the Act (in force before September 28, 2009) and subsection 25(1) of the Act (in force on and after September 28, 2009) (trading without registration); (ii) subsection 38(1)(a) of the Act (prohibited representations); and (iii) subsection 53(1) of the Act (illegal distribution of securities), and that each of the Respondents committed fraud thereby breaching section 126.1(b) of the Act[1] and acted contrary to the public interest. Staff also alleged that, as directors and officers of Bradon and Ensign, respectively, Compta and German are deemed to have also contravened Ontario securities law pursuant to section 129.2 of the Act.

[3] Following a hearing to consider the merits of Staff's allegations (the "**Merits Hearing**"), the Commission issued its Reasons and Decision on the merits on July 21, 2015 (the "**Merits Decision**")[2]. In the Merits Decision, the Commission found as follows:

(a) During the Material Time, German and Ensign traded in securities in Ontario for a business purpose within the meaning of the Act. Neither German nor Ensign was registered in any capacity with the Commission and there were no registration exemptions available in connection with such trades. Each of German and Ensign thereby repeatedly breached subsection 25(1)(a) of the Act, as in force prior to September 28, 2009, and subsection 25(1) of the Act, as in force on and after that date.

(b) German and Ensign engaged in trades and acts in furtherance of trades in Bradon shares as defined in the Act. The first trade by German of his Bradon shares to investors constituted a distribution of Bradon shares within the meaning of subsection 53(1) of the Act. As no preliminary prospectus or prospectus was filed in connection with those distributions to investors and no prospectus exemptions were available, the purported sale by German of his Bradon shares to investors during the Material Time repeatedly breached subsection 53(1) of the Act.

[1] Now subsection 126.1(1)(b) of the Act.
[2] *Re Bradon Technologies Ltd.* (2015), 38 O.S.C.B. 676.

(c) German and Ensign repeatedly breached subsection 38(1)(a) of the Act by making a prohibited representation to investors with the intention of effecting sales by German of his Bradon shares to those investors.

(d) German and Ensign perpetrated fraud in his purported sale of Bradon shares to investors and knowingly engaged in multiple acts, practices or courses of conduct that perpetrated that fraud. German and Ensign thereby repeatedly breached section 126.1(b) of the Act during the Material Time.

(e) Each of Compta and Bradon:

(i) committed fraud and thereby breached section 126.1(b) of the Act in their direct dealings with two investors, PB and WC, as described in the Merits Decision; and

(ii) knew or ought to have known by no later than November 23, 2009, that German was committing fraud and thereby also breached section 126.1(b) of the Act; and

(f) Each of the Respondents also acted contrary to the public interest within the meaning of section 127 of the Act.[3]

[4] At the Sanctions Hearing, Compta and Bradon were represented by counsel and German represented himself and Ensign.

[5] I was provided with the following by Staff:

(a) The Affidavit of Michael Ho, sworn December 8, 2015, with attached exhibits relating to the funds received and disbursed by the Respondents;

(b) The Affidavit of Michelle Spain, sworn December 8, 2015, relating to costs; and

(c) The Affidavit of Louisa Fiorini, sworn January 22, 2016, relating to the freeze directions issued by the Commission with respect to certain assets owned by Compta and Bradon (the "**Fiorini Affidavit**").

[6] Compta provided me with his Affidavit, sworn January 14, 2016, in which he asserted his and Bradon's inability to advance any funds or borrow money to pay any costs and/or financial sanctions. Compta was cross-examined on his Affidavit by Staff during the Sanctions Hearing.

[7] Although German attended the Sanctions Hearing in person, he did not present evidence or file written submissions, and when asked by me whether he wished to make oral submissions, he declined to do so.

II. GERMAN AND ENSIGN'S ADJOURNMENT MOTION

[8] At the commencement of the Sanctions Hearing on February 25, 2016, German and Ensign requested an adjournment on the grounds that their recently retained counsel required additional time to prepare (the "**Adjournment Motion**").

[9] Staff, but not counsel for Compta and Bradon, opposed the Adjournment Motion.

[3] Merits Decision at paras. 125, 139, 148, 185, 186, 230, 236, 237, 244 and 245.

[10] I considered the oral submissions of German and Staff in the context of Rule 9 of the Commission's *Rules of Procedure*[4] and, for the following reasons, dismissed the Adjournment Motion:

(a) At a pre-hearing conference held on November 11, 2015, I specifically asked the parties if the proposed date for the Sanctions Hearing, namely, February 25, 2016, was convenient for them and all parties, including German (who had proposed the date to Staff prior to pre-hearing conference), advised me that it was;

(b) Staff's written submissions on sanctions and costs were served on German and Ensign on December 9, 2015 and Staff's reply submissions were served on German and Ensign on January 22, 2016, more than a month before the date of the Sanctions Hearing;

(c) Although Staff had previously advised German of the existence of the Commission's Litigation Assistance Program, German did not seek the assistance of counsel under the Program;

(d) German and Ensign notified Staff on the day before the commencement of the Sanctions Hearing of their intention to retain counsel but did not provide any evidence that counsel had actually been retained;

(e) The investors, including those in attendance at the Sanctions Hearing, had been waiting for a lengthy period of time for this matter to be concluded;

(f) German had not made any demonstrable effort to avoid the need for an adjournment and made the Adjournment Motion at the last possible moment; and

(g) Staff opposed the Adjournment Motion.

[11] I advised German that the dismissal of the Adjournment Motion did not preclude his right to be heard and, if he wished to do so, he could provide evidence and testify under oath at the Sanctions Hearing and make submissions with respect to the sanctions and costs sought by Staff. German did not testify and did not make any submissions with respect to sanctions and costs.

III. SANCTIONS ANALYSIS

A. Sanctions Requested by Staff

[12] Staff submits that the following sanctions in respect of each of the Respondents are appropriate and in the public interest, namely, that:

(a) Pursuant to clause 2 of subsection 127(1) of the Act, trading in any securities by each of the Respondents shall cease permanently;

(b) Pursuant to clause 2.1 of subsection 127(1) of the Act, the acquisition of any securities by each of the Respondents is prohibited permanently;

(c) Pursuant to clause 3 of subsection 127(1) of the Act, any exemptions contained in Ontario securities law do not apply to each of the Respondents permanently;

[4] (2014), 37 O.S.C.B. 4168.

(d) Pursuant to clause 6 of subsection 127(1) of the Act, each of the Respondents be reprimanded;

(e) Pursuant to clause 7, 8.1 and 8.3 of subsection 127(1) of the Act, each of German and Compta resign any positions he holds as a director or officer of an issuer, registrant or investment fund manager;

(f) Pursuant to clauses 8, 8.2 and 8.4 of subsection 127(1) of the Act, each of German and Compta is prohibited permanently from becoming or acting as a director or officer of any issuer, registrant or investment fund manager;

(g) Pursuant to clause 8.5 of subsection 127(1) of the Act, each of the Respondents is prohibited permanently from becoming or acting as a registrant, as an investment fund manager or as a promoter;

(h) Pursuant to clause 9 of subsection 127(1) of the Act, German pay an administrative penalty of $500,000, to be allocated to or for the benefit of third parties in accordance with paragraph 3.4(2)(b) of the Act;

(i) Pursuant to clause 10 of subsection 127(1) of the Act, German and Ensign jointly and severally disgorge to the Commission $1,655,505.68, to be allocated to or for the benefit of third parties in accordance with paragraph 3.4(2)(b) of the Act, and subject to the joint and several obligation with Compta and Bradon as described below;

(j) Pursuant to section 127.1, German and Ensign shall pay $196,870 for the costs of the investigation and hearing, for which they are jointly and severally liable;

(k) Pursuant to clause 9 of subsection 127(1) of the Act, Compta shall pay an administrative penalty of $300,000, to be allocated to or for the benefit of third parties in accordance with paragraph 3.4(2)(b) of the Act;

(l) Pursuant to clause 10 of subsection 127(1) of the Act, Compta and Bradon jointly and severally disgorge to the Commission $263,000, to be allocated to or for the benefit of third parties in accordance with paragraph 3.4(2)(b) of the Act, which shall be a joint and several obligation with German and Ensign, as described above; and

(m) Pursuant to section 127.1 of the Act, Compta and Bradon shall pay $84,373.11 for the costs of the investigation and hearing, for which they are jointly and severally liable.

[13] Staff submits that the sanctions it is requesting are proportionate to the Respondents' conduct and are in the public interest. Staff further submits that the proposed sanctions are justified by the gravity of the actions of the Respondents and the findings made by this Commission and should deter the Respondents and others from engaging in the same or similar conduct in the future.

[14] Staff submits that the Respondents' conduct was egregious and caused the investors both emotional and financial harm. The investors have all suffered a complete loss of their respective investments and are not likely to obtain redress, despite bringing civil proceedings against the Respondents.

[15] Staff also submits that fraud is one of the most serious securities law violations which decreases the confidence in the fairness and efficiency of Ontario's capital markets.

B. Compta and Bradon's Submissions

[16] Compta and Bradon submit that the sanctions and costs requested by Staff are highly punitive and seek to punish or remedy past conduct contrary to the purpose of section 127 of the Act.

[17] Compta and Bradon submit that the following sanctions and costs in respect of each of Compta and Bradon would be appropriate and in the public interest, namely, that:

(a) Compta and Bradon be prohibited for a period of five years from becoming or acting as a registrant, investment fund manager or promoter;

(b) Compta be prohibited for a period of five years from trading securities, subject to a carve-out for personal trading;

(c) Compta not be permitted to become a director of an issuer, registrant or investment fund manager for a period of five years but is permitted to continue to act as a director of Bradon;

(d) In the event that there are any distributions to Bradon shareholders as a result of the sale of Bradon or its technology, Bradon be required to hold any amounts that would otherwise be paid to German as a Bradon shareholder in trust for the investors; and

(e) Compta and Bradon be jointly and severally liable to pay $10,000 in costs.

[18] Compta submits that he is insolvent and has no funds to pay an administrative penalty and that an administrative penalty of $300,000 is beyond his means.

[19] Compta and Bradon submit that the disgorgement order that Staff seeks against them is inappropriate and that they should not be subject to any disgorgement order. They argue that the $263,000 was not obtained fraudulently and were funds that Compta and Bradon received from German to purchase shares of Bradon.

[20] Compta and Bradon submit that a majority of the investors have already obtained redress against Compta and Bradon through a default judgement against them in the Ontario Superior Court of Justice in the amount of $888,610.50, plus costs.

[21] Compta submits that he did not incorporate Bradon for the purposes of defrauding potential investors and that Bradon was established as a legitimate company in which Compta invested his life savings to develop a high quality product.

[22] Compta and Bradon also submit that the prohibitions sought by Staff are not necessary to protect the public from future harm nor are they necessary to provide general and specific deterrence. Compta submits that, given the unique facts of this case, there is no risk of him committing any future improper actions and that he does not pose a threat to Ontario's capital markets.

C. German and Ensign's Submissions

[23] German and Ensign did not file written submissions or make oral submissions. (See also paragraphs [7] and [11] above.)

D. The Law

[24] When exercising its public interest jurisdiction under section 127 of the Act, the Commission must consider the purposes of the Act which, as set out in section 1.1 of the Act, are to (i) provide protection to investors from unfair, improper or fraudulent practices; and (ii) foster fair and efficient capital markets and confidence in the capital markets.

[25] Subsection 2.1(2) of the Act requires that, in pursuing the purposes of the Act, the Commission have regard for a number of fundamental principles including the following primary means for achieving the purposes of the Act:

> i. requirements for timely, accurate and efficient disclosure of information,
>
> ii. restrictions on fraudulent and unfair market practices and procedures, and
>
> iii. requirements for the maintenance of high standards of fitness and business conduct to ensure honest and responsible conduct by market participants.

[26] The sanctions imposed by the Commission must be protective and preventive to maintain high standards of behavior and to preserve the integrity of Ontario's capital markets. The role of the Commission is to impose sanctions that will protect investors and the capital markets from exposure to similar conduct in the future. As stated by the Commission in *Re Mithras Management Inc., (*1990), 13 O.S.C.B. 1600 ("***Mithras***"):

> …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.[5] [Emphasis added.]

[27] As stated by the Supreme Court of Canada in *Committee for Equal Treatment of Asbestos Minority Shareholders v. Ontario Securities Commission,* [2001] 2 S.C.R. 132 ("***Asbestos***"), the Commission's public interest mandate is neither remedial nor punitive;

[5] *Mithras* at 1610 and 1611.

instead, it is protective and preventive and is intended to prevent future harm to Ontario's capital markets.[6] The Court also stated that "[t]he role of the OSC under s. 127 is to protect the public interest by removing from the capital markets those whose past conduct is so abusive as to warrant apprehension of future conduct detrimental to the integrity of the capital markets."[7]

[28] The sanctions imposed must be appropriate and proportionate to the circumstances of the case and the conduct of each respondent. The Commission has enumerated a number of factors that it considers in determining sanctions including, the seriousness of the allegations that have been proved, the respondent's experience in the marketplace, the level of a respondent's activity in the marketplace, whether or not there has been any recognition by the respondent of the seriousness of the improprieties, whether there are any mitigating factors that should be considered, whether or not the sanctions may deter the respondents and other like-minded individuals from engaging in similar abuses of the capital markets in the future and the size of any profit (or loss avoided) from the illegal conduct.[8] In exercising its discretion, the Commission should consider the protection of investors and the efficiency of, and public confidence in, the capital markets generally.

E. Application of the Sanctioning Factors

[29] Having regard to the factors referred to in paragraph [28] above, I consider the following to be of particular relevance in this matter:

1. The seriousness of the allegations

[30] The breaches of the Act by the Respondents involve serious misconduct relating to unregistered trading, illegal distributions, prohibited representations and fraud.

[31] Registration requirements are an essential element of the securities regulatory regime and are intended to protect investors from unfair, improper or fraudulent practices (*Re Limelight Entertainment Inc. et al.* (2008), 31 O.S.C.B. 1727 at para. 135). The Commission found that neither German nor Ensign was registered with the Commission in any capacity and there were no registration exemptions available in connection with their trades in securities in Ontario for a business purpose.[9]

[32] The prospectus requirement set out in subsection 53(1) of the Act ensures that investors have sufficient information to properly assess the risks of an investment in a security and make informed decisions. The Commission did not find any prospectus exemption that would have been available to German in connection with the resale of his Bradon shares to investors.[10]

[33] The purpose behind subsection 38(1) of the Act, which prohibits a representation as to the resale or repurchase of securities, is to prevent investors from being misled as to the risk associated with the purchase of a security. The Commission found clear evidence

[6] *Asbestos* at para. 42.
[7] *Asbestos* at para. 43.
[8] For a non-exhaustive list of sanctioning factors that the Commission may consider, see *Re Belteco Holdings Inc.* (1998), 21 O.S.C.B. 7743 at 7746 and *Re M.C.J.C. Holdings Inc.* (2002), 25 O.S.C.B. 1133 at 1136.
[9] Merits Decision at para. 125.
[10] Merits Decision at para. 138.

that "German made repeated representations to investors with the intention of selling his Bradon shares that he or Ensign would, at the election of the investor, repurchase the Bradon shares sold to the investor at the price paid for them".[11]

[34] The Commission also found that German and Ensign "directly, intentionally and repeatedly defrauded the investors in Bradon shares… their conduct in the circumstances was the most egregious and directly caused the substantial harm suffered by investors."[12] With the exception of five investors who each received $25,000 back from Ensign and German, the Commission found that "investors have not received back from German or Ensign any of the funds paid by them for Bradon shares. It appears that investors have all suffered a complete loss of their investment. Some of them have lost their life savings."[13] A number of investors testified during the Merits Hearing and it is evident from their testimony that German and Ensign's conduct has had a significant and adverse financial and emotional effect on them.

[35] The Commission found that Compta "committed two acts of fraud in his direct dealings with PB and WC by his failure to disclose the facts … and that, by no later than November 23, 2009, he knew or ought to have known that German was committing fraud. In each case, Compta thereby contravened section 126.1(b) of the Act."[14]

[36] Compta and Bradon submit that they were not the architects of the fraud and that Compta only had limited contact with two investors. Compta and Bradon also submit that they did not directly benefit from the funds that German and Ensign obtained from investors.

[37] Although the Commission found that Bradon and Compta's conduct was less egregious than that of German and Ensign, the Commission nevertheless found that "no fraud could have been committed by German but for Compta's actions or inactions".[15] In fact, the Commission found that, based on Compta's direct dealings with investors PB and WC, Compta "engaged in an act, practice or course of conduct relating to securities that perpetrated fraud".[16] Compta and Bradon benefited substantially from their own and German's fraudulent conduct given their receipt of $808,000 paid by German in connection with his subscription for shares of Bradon.[17]

2. Whether the violations were isolated or recurrent

[38] German and Ensign engaged in fraud through an intentional, ongoing and extended course of conduct of deceit and falsehoods that caused substantial harm and deprivation to investors, the majority of whom lost the full amount of their investments. German purported to sell Bradon shares to at least 46 investors for an aggregate purchase price of $1,755,505.68.

[39] Compta and Bradon submit that they do not have any prior history of improper conduct and that this is the first time they have been the subject of Commission proceedings.

[11] Merits Decision at para. 145.
[12] Merits Decision at para. 238.
[13] Merits Decision at para. 47.
[14] Merits Decision at para. 239.
[15] Merits Decision at para. 239.
[16] Merits Decision at para. 230.
[17] Merits Decision at para. 229.

[40] The Commission found that Compta knew or ought to have known that German was committing fraud by no later than November 23, 2009, from which it would follow that Compta had knowledge of German's and Ensign's activities for approximately 18 months. While Compta's actions may have been less egregious than German's, it is relevant that the Commission found that "no fraud could have been committed by German but for Compta's actions or inactions described in" the Merits Decision.[18]

3. The Respondents' experience in the marketplace

[41] No evidence was provided with respect to German's experience in the marketplace.

[42] Bradon and Compta submit that they had limited activity and experience in the marketplace. Compta was the President, a director and shareholder of Bradon. Bradon was not, however, a publicly-traded company and its shares were sold pursuant to the private issuer exemption. Compta understood that the private issuer exemption limited Bradon to issuing shares to a maximum of fifty individuals.

4. Profit made or loss avoided from illegal conduct

[43] Of the $1,755,505.68 obtained by German and Ensign from the purported sale of German's Bradon shares to investors, only five investors received $25,000 each in partial reimbursement of their respective investments. Bradon received $808,000 from German and Ensign for the sale of Bradon shares and the balance of $822,505.68 was retained by Ensign.[19]

5. Recognition of the seriousness of the improprieties

[44] During the Merits Hearing, German made some apologies on the record when cross-examining investor witnesses. Apart from these apologies, there is no evidence that German recognizes or acknowledges, or has any insight with respect to, the fraud which he perpetrated or the serious harm that he caused to investors as the result of his misconduct.

[45] Compta and Bradon submit that they are extremely remorseful that the trust they had placed in German was betrayed and that the investors were duped by German. They do not, however, recognize or acknowledge the fraud which they committed or their participation in the fraudulent scheme operated by German and Ensign, both of which caused serious harm to the investors.

6. Specific and general deterrence

[46] Both general and specific deterrence are important considerations when imposing sanctions. General deterrence requires the imposition of sanctions that will send a strong message to any other like-minded individuals that the misconduct engaged in by the Respondents is unacceptable and will not be tolerated by the Commission. Specific deterrence requires the imposition of sanctions that will discourage the Respondents from engaging in further misconduct in the future.

[18] Merits Decision at para. 239.
[19] Merits Decision at para. 183.

[47] In *Re Cartaway Resources Corp.*, [2004] 1 S.C.R. 672 ("***Cartaway***"), the Supreme Court stated that deterrence is "…an appropriate, and perhaps necessary, consideration in making orders that are both protective and preventive".[20] The Supreme Court also emphasized that deterrence may be specific to the respondent or general so as to deter the public at large:

> Deterrent penalties work on two levels. They may target society generally, including potential wrongdoers, in an effort to demonstrate the negative consequences of wrongdoing. They may also target the individual wrongdoer in an attempt to show the unprofitability of repeated wrongdoing. The first is general deterrence; the second is specific or individual deterrence: see C. C. Ruby, *Sentencing* (5th ed. 1999). In both cases deterrence is prospective in orientation and aims at preventing future conduct.[21]

7. Any mitigating factors

[48] Compta submits that he did not solicit or take any funds from any of the investors and that he is a businessman and entrepreneur. Bradon was established as a legitimate company in which Compta invested his life savings for the purpose of developing a high quality product.

[49] Compta and Bradon submit that they contributed to the efficiency and expediency of the proceedings by signing an Agreed Statement of Facts. In Staff's view, the Agreed Statement of Facts did not materially shorten the Merits Hearing.

[50] According to Staff, German and Ensign cooperated with Staff in connection with its investigation in only a very limited way.

F. Previous Sanctions Decisions

[51] Staff submits that, in determining the appropriate and proportionate sanctions in this matter, I should give particular consideration to the Commission decisions described in paragraphs [52] to [61] below.

[52] In *Re Al-Tar Energy Corp.* (2011), 34 O.S.C.B. 447 ("***Al-Tar***"), the Commission found that the respondents illegally traded and distributed securities, engaged in fraud and acted contrary to the public interest. The respondents raised a total of $658,109.03 from approximately 125 investors over 18 months.

[53] The Commission issued a permanent cease trading and acquisition order against all of the respondents in *Al-Tar*, and permanently denied their reliance on any exemptions contained in Ontario securities law. The Commission also denied any exception or carve-out that would permit the individual respondents to trade in their respective registered retirement savings plans.

[54] The individual respondents in *Al-Tar* were ordered to pay administrative penalties ranging from $200,000 to $750,000.

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[20] *Cartaway* at para. 60.
[21] *Cartaway* at para. 52.

[55] In *Re Lyndz Pharmaceuticals Inc.* (2012), 35 O.S.C.B. 7357 ("***Lyndz***"), the Commission found that the respondents engaged in an illegal distribution and fraud, raising approximately $1.7 million from more than 70 investors. The respondents used the investor funds for personal purposes.

[56] The individual respondents in *Lyndz* were ordered to pay administrative penalties of $500,000 and $600,000 and to disgorge the total amount raised from investors. Although the respondents sought a personal trading carve-out, the Commission did not agree that they could be safely trusted to participate in the capital markets and ordered that they be permanently banned from the capital markets.

[57] In *Re Moncasa Capital Corp.* (2014), 37 O.S.C.B. 229, the Commission found that the respondents illegally traded and distributed securities, engaged in fraud and acted contrary to the public interest. The Commission ordered that the respondents, having been found to have raised approximately $1.2 million from 57 investors, be permanently banned from the market, disgorge the amount illegally raised and pay an administrative penalty of $400,000 on a joint and several basis.

[58] In *Re Rezwealth Financial Services Inc.* (2014), 37 O.S.C.B. 6731 ("***Rezwealth*"**), the Commission found that a Ponzi scheme operated by two of the respondents raised $3,018,649 from at least 56 investors over a period of three years. A second fraudulent scheme perpetrated by three other respondents raised $2,910,305 from at least 45 investors over a period of two years.

[59] The Commission in *Rezwealth* imposed permanent trading and acquisition bans without carve-outs on four of the respondents as they could not be trusted to participate in the capital markets, even in a limited capacity. The Commission also ordered administrative penalties ranging from $150,000 to $500,000 against the respondents based on their respective levels of participation in the fraudulent schemes.

[60] In *Re Portfolio Capital Corp.* (2015), 38 O.S.C.B. 7357 ("***Portfolio Capital***"), the Commission found that the corporate respondent was involved in a fraudulent scheme in which approximately 200 investors were defrauded of at least $1.7 million. The Commission ordered that the individual respondents continued to represent a risk to Ontario's capital markets and should be subject to permanent trading and acquisition bans.

[61] The Commission imposed administrative penalties in *Portfolio Capital* of $500,000 on the principal respondent and $150,000 on the second respondent who played a less active role in the fraud perpetrated on investors. The Commission found that the respondents should only be permitted to trade in RRSPs once the disgorgement, administrative penalties and costs ordered against them have been paid in full.

[62] Both Compta and Bradon rely on the Alberta Court of Appeal's decision in *Walton v. Alberta (Securities Commission*), 2014 A.B.C.A. 273 ("***Walton***"), in which the Court stated that "[a] monetary penalty that is beyond the capacity of the individual offender cannot be justified on the basis that it will deter others who are in a better financial condition." [22]

[22] *Walton* at para. 154.

[63] However, the Court in *Walton* also recognized that "if the maximum financial consequence of [a breach of the Act] was a disgorgement of the profits realized, there would be no true deterrent".[23] The Court did not indicate what the appropriate financial sanctions should be and, instead, found that it was not able to undertake a reasonable review of the sanctions ordered by the Alberta Securities Commission as its decision lacked the requirements of justification, transparency and intelligibility. As a result, the Court directed the Alberta Securities Commission to reconsider the issue of sanctions.

G. Analysis and Findings

1. Trading and other prohibitions

[64] Staff submits that, based on their conduct, the Respondents should be subject to permanent trading, acquisition and exemption bans, without any carve-outs.

[65] Compta and Bradon submit that the trading and acquisition bans sought by Staff are inappropriate as (i) Compta and Bradon were not the architects of the fraud; (ii) Compta only had limited contact with two investors; (iii) Compta did not solicit or take any funds from the investors; (iv) the majority of the funds that German received from the investors were obtained before the date the Commission deemed Compta to have been aware, or ought to have been aware, of German's fraud; (v) Compta and Bradon have been devastated by German's fraud and by the Commission's finding that they acted improperly; and (vi) section 127 of the Act is a regulatory provision and, as such, is protective and preventative and not remedial or punitive and is intended to prevent likely future harm to Ontario's capital markets.

[66] Compta and Bradon also submit that the imposition of lifetime bans sought by Staff would be unduly punitive. In their view, a trading ban of five years with a carve-out to permit Compta to conduct personal trading would be appropriate to achieve the objectives of section 127 of the Act.

[67] In *Erikson v. Ontario (Securities Commission),* (2003), 120 A.C.W.S. (3d) 144 ("***Erikson***'), the Divisional Court stated that "participation in the capital markets is a privilege and not a right."[24] As a permanent trading ban is among the most severe sanctions that the Commission may impose on a respondent, it is necessary to ensure that the sanctions imposed on each respondent remain "preventative in nature and prospective in orientation"[25] and do not rise to a level at which they are punitive. The Commission has held that it can only "look to past conduct as a guide to what we believe a person's future conduct might reasonably be expected to be".[26]

[68] In considering the appropriate length of a trading ban, I am mindful of the serious nature of the Respondents' misconduct and their failure to acknowledge or recognize their fraudulent conduct and the financial and emotional harm that such conduct has caused. Their apparent lack of insight in this regard gives rise to a material apprehension that they are likely to engage in similar conduct in the future if given the opportunity to do so.

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[23] *Walton* at para. 156.
[24] *Erikson* at para. 55.
[25] *Asbestos* at para. 45.
[26] *Mithras* at 1610 and 1611.

[69] Based on the foregoing, I find that the Respondents should cease trading and acquiring securities permanently and that any exemptions contained in Ontario securities law should not apply to them permanently.

[70] With respect to the trading carve-out requested by Compta, I agree with Staff's submission that, as the Commission noted with respect to the respondents who perpetrated fraud in *Lyndz*, individual respondents such as Compta and German who commit fraud cannot be "safely trusted to participate in the capital markets in any way".[27]

2. Director and officer prohibitions

[71] Staff requests that, to ensure that neither of them will be placed in a position of control or trust with respect to any issuer or registrant in the future, Compta and German be required to resign any positions that they hold as a director or officer of an issuer, registrant or investment fund manager and that they be prohibited permanently from becoming or acting as a director or officer of any issuer, registrant or investment fund manager. Further, Staff requests that the Respondents be prohibited permanently from becoming or acting as a registrant, as an investment fund manager or as a promoter.

[72] In making the foregoing request, Staff relies on the Commission's decision in *Al-Tar* in which the Commission ordered permanent director and officer bans against the individual respondents who facilitated their misconduct through companies controlled by them.[28]

[73] Compta objects to the director and officer bans sought by Staff. In Compta's view, a prohibition from becoming a director or officer of an issuer, registrant or investment fund manager for a period of five years with Compta being permitted to continue to act as a director of Bradon would be appropriate in the circumstances.

[74] In addition to his submissions described in paragraphs [16] to [22] above, Compta submits that he does not have any history of improper conduct and that the stigma from this proceeding and a finding that he acted improperly would serve as ample general and specific deterrence.

[75] In my view, a finding of impropriety alone would not serve as a specific or general deterrent. Such a finding would also not provide for any form of restriction on fraudulent and unfair market practices and procedures or promote the requirements for the maintenance of high standards of fitness and business conduct to ensure honest and responsible conduct by market participants.

[76] Based on the foregoing, I find that each of Compta and Ensign should be ordered to resign from any positions that either of them holds as a director or officer of an issuer, registrant or investment fund manager and that each of German and Compta be permanently prohibited from becoming or acting as a director or officer of any issuer, registrant or investment fund manager.

[77] I also find that each of the Respondents should be prohibited permanently from becoming or acting as a registrant, as an investment manager or as a promoter.

[27] *Lyndz* at para. 80.
[28] *Al-Tar* at paras. 34-37.

3. Reprimand

[78] It is clear that, having breached multiple provisions of the Act, the conduct of the Respondents was contrary to the public interest and the Respondents are, accordingly, reprimanded for their misconduct and for the damage they have caused to investors and to the integrity and reputation of Ontario's capital markets.

4. Disgorgement

[79] Paragraph 10 of subsection 127(1) of the Act provides that, if a person or company has not complied with Ontario securities law, the Commission may order the person or company to disgorge to the Commission "any amounts obtained as a result of the non-compliance."

[80] Staff seeks the following disgorgement order, namely, that:

(a) German and Ensign jointly and severally disgorge to the Commission $1,655,505.68; and

(b) Bradon and Compta jointly and severally disgorge to the Commission $263,000, which represents the amount fraudulently obtained by them following Compta's fraudulent dealings with PB on October 26, 2009, and during Compta and Bradon's participation in German and Ensign's fraud.

[81] German and Ensign did not provide any submissions with respect to the issue of disgorgement.

[82] Compta and Bradon submit that disgorgement is inappropriate in the circumstances because they were not the architects of the fraud and in many ways were also victimized by German. They also submit that Compta only had minimal contact with two investors and, by the time that the Commission found that Compta and Bradon should have been aware of German's fraud, the majority of the investor funds had already been obtained by German. Compta and Bradon also submit that they did not directly benefit from investor funds.

[83] Compta and Bradon submit that significant financial sanctions (both disgorgement and an administrative penalty) would have a devastating effect on them as they have already suffered enormously from German and Ensign's fraud. Their livelihood would be in jeopardy if significant sanctions are imposed. German's actions and this enforcement proceeding have brought great shame to Compta and Bradon, they have suffered irreparable damage to their reputations and have been financially ruined.

[84] In *Limelight Entertainment Inc. et al.* (2008), 31 O.S.C.B. 12030 ("***Limelight Sanctions***"), the Commission held that, as paragraph 10 of subsection 127(1) of the Act refers to "any amounts obtained", "all money illegally obtained from investors can be ordered to be disgorged, not just the profit made as a result of the activity."[29]

[85] In its recent decision in *David Charles Philips and John Russell Wilson,* (2015), 38 O.S.C.B. 9311 ("***Phillips****"*), the Commission stated that:

[29] *Limelight Sanctions* at para. 49.

> The "amount obtained" does not mean "the amount retained, the profit, or any other amount calculated by considering expenses and other possible deductions." In short, it does not matter how the funds were used after they were obtained in contravention of the Act.[30]

[86] The Commission also stated in *Phillips* that:

> The Commission is authorized to order that the full amount obtained in contravention of the Act be disgorged, which amount may equate, and has equated in some cases, to the amount of the losses of the investors, but that does not make the order restitutionary.[31]

[87] The *Limelight Sanctions* case sets out a non-exhaustive list of factors for consideration in connection with a disgorgement order, including:

(a) Whether an amount was obtained by a respondent as a result of non-compliance with the Act;

(b) The seriousness of the misconduct and the breaches of the Act and whether investors were seriously harmed;

(c) Whether the amount that a respondent obtained as a result of non-compliance with the Act is reasonably ascertainable;

(d) Whether the individuals who suffered losses are likely to be able to obtain redress; and

(e) The deterrent effect of a disgorgement order on the respondents and other market participants.[32]

[88] *Limelight Sanctions* also states that, once Staff has proven on a balance of probabilities the amount illegally obtained by a respondent, the risk of uncertainty in calculating disgorgement should fall on the wrongdoer whose non-compliance with the Act gave rise to the uncertainty.[33]

[89] During the Merits Hearing, Staff proved on a balance of probabilities that German and Ensign received a total of $1,755,505.68 from investors.[34] However, as noted in paragraph [43] above, German and Ensign did return a total of $125,000 to five investors.[35] As a result, the total amount obtained by German and Ensign is $1,630,505.68.

[90] Taking into account the *Limelight Sanctions* factors described above, I find that:

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[30] *Phillips* at para. 19.
[31] *Phillips* at para. 26.
[32] *Limelight Sanctions* at para. 52.
[33] *Limelight Sanctions* at para. 53.
[34] Merits Decision at para. 26.
[35] See also Merits Decision at para. 28, 62 and 180, Hearing Transcript, December 5, 2014, pages 10-16 and Exhibit 6 page EXH0000477.

(a) A total of $1,755,505.68 was received from investors as a result of the fraudulent conduct of the Respondents, of which an amount of $125,000 was returned to five investors resulting in a net loss incurred by the investors of $1,630,505.68 in the aggregate;

(b) Compta and Bradon received $263,000 from Ensign;

(c) The conduct of the Respondents, which harmed the investors both emotionally and financially, was reprehensible;

(d) The civil proceedings initiated by some of the investors against the Respondents has failed to provide redress for the investors notwithstanding Compta's submissions to the contrary;[36]

(e) German and Ensign's misconduct was prolonged and conducted for a period exceeding three years; and

(f) In the circumstances, a disgorgement order is required to provide a significant specific and general deterrent.

[91] Based on the foregoing, I find that it is appropriate and in the public interest to order that all the Respondents disgorge to the Commission $263,000 on a joint and several basis.

[92] I also find that it is appropriate and in the public interest to order that German and Ensign disgorge to the Commission $1,367,505.68 on a joint and several basis.

5. Administrative penalties

[93] Staff seeks an administrative penalty against German in the amount of $500,000 given the fact that he was the principal architect of the fraud relating to the sale of Bradon's shares. Staff also seeks an administrative penalty against Compta in the amount of $300,000 given the Commission's finding that Compta's actions were less egregious than those of German and that Compta had limited contact with investors.

[94] The Act permits the Commission to order up to $1.0 million for each breach of the Act to serve as specific and general deterrence to respondents and like-minded individuals from conducting themselves in a manner that is contrary to the Act. However, in each specific instance in which the Commission considers an administrative penalty to be warranted, the amount ordered cannot be so excessive that it is punitive.

[95] German was found to have repeatedly breached four separate provisions of the Act and to have acted contrary to the public interest over a period exceeding three years. German was the principal architect of the fraud and the Commission found that German "directly, intentionally and repeatedly defrauded the investors".[37] Through his fraudulent conduct, German demonstrated indifference to Ontario's securities laws. The administrative penalty that Staff seeks is reasonable and consistent with previous cases involving fraudulent schemes of a similar size.[38]

[36] See para. 8 of the Fiorini Affidavit.
[37] Merits Decision at para. 238.
[38] See for example, *Rezwealth,* and *Lyndz.*

[96] Based on the foregoing, I find that German should be required to pay an administrative penalty of $500,000, an amount that is both proportionate and reasonable in the circumstances.

[97] Staff seeks an administrative penalty against Compta in the amount of $300,000 which reflects the Commission's finding that Compta's actions were "less egregious" than German's and that he had limited direct contact with investors.[39]

[98] Staff submits that Compta's ability to pay is a relevant sanctioning factor, but by no means a determinative factor. Staff submits that, without any supporting documentation, the Commission should give Compta's submissions relating to his ability to pay financial sanctions little weight, if any.

[99] Staff also submits that the approach to the ability to pay as a relevant but not determinative factor as set out in *Re Sabourin*, (2010) 33 O.S.C.B. 5299 ("***Sabourin***") makes logical sense. Staff submits that, if the Commission accepts the approach proposed by Compta and Bradon, individuals with no assets could engage in fraud and face no real sanctions.

[100] Compta submits that an administrative penalty is not warranted because he was not the architect of the fraud and in many ways was also victimized by German who had been a trusted friend. Compta further submits that the administrative penalty sought by Staff is highly punitive and would not serve to prevent future harm to Ontario's capital markets. He also submits that the administrative penalty sought by Staff is inappropriate as he does not have the means to pay a large administrative penalty or cost award because he is without funds.

[101] Compta submits that his ability to pay an administrative penalty is a relevant factor that the Commission should consider in determining whether an administrative penalty is warranted. He relies on *Walton* for the principle that imposing a monetary penalty on a respondent that is beyond the capacity of the respondent to pay cannot be justified on the grounds that it will deter others who are in a better financial condition.

[102] The Commission has previously held that the ability to pay is not a determinative factor in considering whether financial sanctions are appropriate. More specifically the Commission held in *Sabourin* that:

> We accept the ability to pay is a relevant consideration in determining the appropriate financial sanctions to be imposed. We do not accept that as a predominant or determining factor, but it is clearly relevant in the total mix of factors and considerations. [40]

[103] The foregoing principle has been restated and applied in other Commission decisions.[41]

[104] The Supreme Court of Canada in *Guidon v. Canada*[42] held that an administrative penalty is penal if it is "out of proportion to the amount required to achieve regulatory purposes".[43]

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[39] Merits Decision at para. 239.
[40] *Sabourin* at para. 60.
[41] *Re FactorCorp Inc.* (2013), 36 O.S.C.B. 9582, *Rezwealth* and *Re York Rio Resources Inc.* (2014), 37 O.S.C.B. 3422.

[105] The Ontario Court of Appeal in *Rowan v Ontario (Securities Commission)*, 2012 ONCA 208 ("***Rowan***"), found that:

> Penalties of up to $1 million per infraction are…entirely in keeping with the Commission's mandate to regulate the capital markets where enormous sums of money are involved and where substantial penalties are necessary to remove economic incentives for non-compliance with market rules.[44]

[106] In the circumstances, and given the fact that the Fiorini Affidavit discloses that Compta does own assets, it is entirely appropriate that an administrative penalty be imposed on Compta as a signal to him and to like-minded individuals that the Commission views fraudulent activity as one of the most serious breaches of the Act which will result in serious consequences.

[107] Based on the foregoing, I find that Compta should pay an administrative penalty of $300,000.

IV. COSTS

[108] Staff seeks the payment by the Respondents of $271,195, representing the costs incurred by Staff, and $10,048.11 for disbursements for a total of $281,243.11. In claiming such amounts, Staff has discounted its costs by almost 42% and excluded a significant amount of time recorded in connection with Staff's investigation and the hearings related to this matter.

[109] Staff submits that its costs should be apportioned between the Respondents on the basis that German and Ensign pay 70% or $196,870 of such costs on a joint and several basis and that Compta and Bradon pay 30% or $84,373.11 of such costs on a joint and several basis.

[110] Staff submits that the proposed allocation is reasonable on the following grounds:

(a) Compta and Bradon were cooperative with Staff during Staff's investigation, responded within a reasonable timeframe and generally provided the requested documentation or information; and

(b) By contrast, German was less cooperative during Staff's investigation and claimed that his business records relating to the sale of Bradon shares were inaccessible to him because he had been evicted from his office space.

[111] Compta and Bradon submit that the costs sought by Staff are not reasonable or appropriate and that they should be responsible for a portion of Staff's costs in the range of $10,000.

[112] Compta and Bradon also submit that they cooperated with Staff to reduce Staff's costs in this matter, agreed to a brief Agreed Statement of Facts before the Merits Hearing, only called one witness during the Merits Hearing, acted appropriately throughout the

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[42] 2015 SCC 41.
[43] *Guidon v. Canada* at para. 77.
[44] *Rowan* at para. 49.

investigation and hearing and complied with all procedural orders and directions of the panel.

[113] Section 127.1 of the Act gives the Commission the power to order a respondent to pay the costs of an investigation and hearing if it is satisfied that the person has breached the Act or has acted contrary to the public interest. A costs order is not a sanction but rather a means by which the Commission can recover some of the costs it has expended in connection with the investigation and hearing of a matter.

[114] In *Re Ochnik*, 2012 ONCA 208 ("***Ochnik***"), the Commission lists the following criteria that have been considered in awarding costs[45]:

(a) Failure by staff to provide early notice of an intention to seek costs may result in a reduced costs award, as early notice may have facilitated early settlement, thereby reducing overall costs;

(b) The seriousness of the charges and the conduct of the parties;

(c) Abuse of process by a respondent may be a factor in increasing the amount of costs;

(d) The greater investigative/hearing costs that the specific conduct of a respondent required in the case; and

(e) The reasonableness of the costs requested by staff.

[115] The Commission's *Rules of Procedure* set out the following factors to be considered with respect to costs:

> **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;

[45] *Ochnik* at para. 29.

(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.

[116] I find that the costs sought by Staff are reasonable in the circumstances and determined on a conservative basis given the discounting and exclusion of certain costs described in paragraph [108] above. I also find that the allocation of such costs between the Respondents proposed by Staff is similarly reasonable.

[117] Based on the foregoing, Compta and Bradon shall pay, on a joint and several basis, investigation and hearing costs of $84,373.11.

[118] German and Ensign shall pay, on a joint and several basis, investigation and hearing costs of $196,870.

V. CONCLUSION

[119] I will issue an order giving effect to my findings on sanctions and costs as follows:

(a) Pursuant to paragraph 2 of subsection 127(1) of the Act, trading in any securities by each of the Respondents shall cease permanently;

(b) Pursuant to paragraph 2.1 of subsection 127(1) of the Act, the acquisition of any securities by each of the Respondents is prohibited permanently;

(c) Pursuant to paragraph 3 of subsection 127(1) of the Act, any exemptions contained in Ontario securities law do not apply to each of the Respondents permanently;

(d) Pursuant to paragraph 6 of subsection 127(1) of the Act, each of the Respondents is reprimanded;

(e) Pursuant to paragraphs 7, 8.1 and 8.3 of subsection 127(1) of the Act, each of German and Compta shall resign any positions each holds as a director or officer of an issuer, registrant or investment fund manager;

(f) Pursuant to paragraphs 8, 8.2 and 8.4 of subsection 127(1) of the Act, each of German and Compta is prohibited permanently from becoming or acting as a director or officer of any issuer, registrant or investment fund manager;

(g) Pursuant to paragraph 8.5 of subsection 127(1) of the Act, each of the Respondents is prohibited permanently from becoming or acting as a registrant, as an investment fund manager or as a promoter;

(h) Pursuant to paragraph 9 of subsection 127(1) of the Act, German shall pay an administrative penalty of $500,000, which amount shall be designated in accordance with paragraphs (b)(i) or (ii) of subsection 3.4(2) of the Act;

(i) Pursuant to paragraph 9 of subsection 127(1) of the Act, Compta shall pay an administrative penalty of $300,000, which amount shall be designated in accordance with paragraphs (b)(i) or (ii) of subsection 3.4(2) of the Act;

(j) Pursuant to paragraph 10 of subsection 127(1) of the Act, the Respondents shall disgorge to the Commission $263,000, on a joint and several basis, which amount shall be designated in accordance with paragraphs (b)(i) or (ii) of subsection 3.4(2) of the Act;

(k) Pursuant to paragraph 10 of subsection 127(1) of the Act, German and Ensign shall disgorge to the Commission $1,367,505.68, on a joint and several basis, which amount shall be designated in accordance with paragraphs (b)(i) or (ii) of subsection 3.4(2) of the Act;

(l) Pursuant to section 127.1 of the Act, German and Ensign shall pay, on a joint and several basis, $196,870 for the costs of the investigation and hearing; and

(m) Pursuant to section 127.1 of the Act, Compta and Bradon shall pay, on a joint and several basis, $84,373.11 for the costs of the investigation and hearing.

Dated at Toronto this 20th day of May, 2016.

"Christopher Portner"

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Christopher Portner