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Citation: Pro-Financial Asset Management (Re), 2018 ONSEC 18
Date: 2018-04-23

IN THE MATTER OF
PRO-FINANCIAL ASSET MANAGEMENT INC.,
STUART MCKINNON and JOHN FARRELL

REASONS AND DECISION ON SANCTIONS AND COSTS
(Subsection 127(1) and Section 127.1 of the *Securities Act*, RSO 1990, c S.5)

Hearing: February 14, 2018

Decision: April 23, 2018

Panel:

AnneMarie Ryan	Commissioner and Chair of the Panel
Timothy Moseley	Vice-Chair
Janet Leiper	Commissioner

Appearances:

Derek Ferris Catherine Weiler	For Staff of the Commission
Andrew McCoomb	For Stuart McKinnon

No one appearing on behalf of Pro-Financial Asset Management Inc.

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REASONS AND DECISION ON SANCTIONS AND COSTS

I. INTRODUCTION

[1] In a decision issued on April 20, 2017[1] (the **Merits Decision**), a panel of the Commission (the **Merits Panel**) found that the respondents Pro-Financial Asset Management Inc. (**PFAM**) and Stuart McKinnon (**McKinnon**) committed various breaches of Ontario securities law. These included PFAM's failure to deal fairly, honestly and in good faith with its clients, and its failure to establish, maintain and apply policies and procedures that would establish an adequate system of controls and supervision. The Merits Panel also found that McKinnon breached his obligations as PFAM's Ultimate Designated Person (**UDP**), and, as a director and officer of PFAM, authorized, permitted or acquiesced in PFAM's breaches.[2]

[2] One of the most serious findings against PFAM and McKinnon arose out of PFAM's role in the distribution of nine series of principal protected notes (**PPNs**), on behalf of two banks. PFAM's conduct resulted in a deficiency of $1,222,549.45 (the **PPN Deficiency**) owing to holders of the PPNs (the **Noteholders**).

[3] For the reasons set out below, we conclude that PFAM's and McKinnon's breaches were serious, that they obtained $1,181,397.89 as a result of those breaches, and that it would therefore be in the public interest to:

a. require them to disgorge $1,181,397.89;

b. impose on each of them an administrative penalty of $200,000;

c. prohibit them from participating in the capital markets for 10 years; and

d. require them to pay, on a joint and several basis, costs of $487,950.34.

II. FACTUAL BACKGROUND AND HISTORY OF THE PROCEEDING

[4] PFAM was incorporated in Ontario[3] and was registered as an exempt market dealer, and as an investment counsel and portfolio manager[4]. McKinnon was President and Chief Executive Officer of PFAM and was registered as a dealing representative and UDP. McKinnon was the directing mind and indirect owner of PFAM since its incorporation.

[5] PFAM's registration as an exempt market dealer and McKinnon's registration as a dealing representative were suspended on May 17, 2013 pursuant to a Commission order. McKinnon continued to be registered as UDP and an approved officer and director until February 27, 2015 when PFAM's registration as a portfolio manager was also suspended pursuant to a Commission order.

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[1] *Re Pro-Financial Asset Management et al* (2017), 40 OSCB 3903, 2017 ONSEC 9.

[2] Prior to September 28, 2009, "Ultimately Responsible Person".

[3] PFAM was incorporated under the name Pro-Hedge Funds Inc. in 2002. It changed its name to Pro-Financial Asset Management Inc. on January 17, 2006.

[4] PFAM was registered as an exempt market dealer from September 2009 to May 2013 (previously as a limited market dealer from January 2004 to September 2009). The firm was also registered as an investment counsel and portfolio manager from October 2005 to September 2009, then as an adviser in the category of portfolio manager until February 2015. As of February 2015, PFAM was not registered in any capacity.

[6] The Commission issued a Notice of Hearing in 2014 in connection with Staff's Statement of Allegations, which alleged that PFAM and McKinnon had committed a number of breaches of Ontario securities laws.

[7] John Farrell, PFAM's Chief Compliance Officer (**CCO**), was also named as a respondent. Farrell entered into a Settlement Agreement with Staff, which was approved by the Commission on June 26, 2015.

[8] A merits hearing with the remaining respondents, PFAM and McKinnon, was held in 2016, and resulted in the Merits Decision issued on April 20, 2017.

[9] On November 16, 2017, the date that had been set for the sanctions and costs hearing, McKinnon brought two motions: first, for an order that a part of the sanctions and costs hearing be held in the absence of the public; and second, for an adjournment of the hearing. Following submissions, we dismissed the first motion and granted the second. Our reasons for these decisions are also set out below.

[10] The sanctions and costs hearing proceeded on February 14, 2018. McKinnon was represented by counsel and PFAM did not appear.

III. PRELIMINARY MOTIONS

A. McKinnon's Motion that a Part of the Sanctions and Costs Hearing Be Held in the Absence of the Public

1. The Nature of the Motion

[11] McKinnon asked that a part of the sanctions and costs hearing be held in the absence of the public. The *Statutory Powers Procedure Act* (**SPPA**)[5] and the *Ontario Securities Commission Rules of Procedure and Forms* (**Rules of Procedure**)[6] contemplate that, where intimate financial or personal or other matters are involved, such an order may be made as an exception to the general requirement that hearings take place in public.

[12] McKinnon filed written submissions in which he asserted that he has few assets, no income and significant liabilities. Staff filed an affidavit in response, questioning these assertions.

[13] McKinnon responded by providing for our review an affidavit that described his finances in greater detail. McKinnon did not formally file the affidavit, pending our ruling on his motion, which asked that certain parts of the affidavit, if filed, be kept confidential and not be made part of the public record. The portions over which that protection was sought contained information regarding McKinnon's financial liabilities and his relationship with various family members.

[14] McKinnon also asked us to receive a part of Staff's affidavit in the absence of the public. Staff's affidavit briefly described an agreement relating to the transfer of assets and advisors from Legacy Investment Management Inc. (of which McKinnon is a principal) to De Thomas Financial Corp., and included, as an exhibit, a copy of the agreement. Staff relied on the existence of the agreement to challenge McKinnon's assertion that he is not earning income, and that he is therefore limited in his ability to satisfy any monetary sanctions or costs orders.

[5] RSO 1990, c S.22.
[6] (2017), 40 OSCB 8988.

2. Analysis

[15] The open court principle is a central characteristic of justice in Canada, and applies to administrative proceedings, including those before the Commission. Clause 9(1)(b) of the SPPA provides that hearings are open to the public except where the tribunal is of the opinion that:

> intimate financial or personal matters or other matters may be disclosed at the hearing of such a nature, having regard to the circumstances, that the desirability of avoiding disclosure thereof in the interests of any person affected or in the public interest outweighs the desirability of adhering to the principle that hearings be open to the public.[7]

[16] As the Commission has previously held, the principle that hearings should be open to the public is fundamental. It promotes public confidence in the proceedings of an administrative tribunal such as the Commission.[8]

[17] McKinnon acknowledged that principle. However, he submitted that, in this case, the desirability of adhering to it is outweighed by the desirability of protecting his interests through the requested confidentiality order. McKinnon asserted that persons adverse in interest to him might make strategic use of detailed information about his and his family members' finances. He did not identify any other prejudice that would be caused by public disclosure of this information.

[18] Staff submitted that McKinnon's general assertion of potential harm failed to meet the necessary standard for departing from the principle of open proceedings. We agreed. McKinnon's financial position has obvious potential relevance to our decision as to both sanctions and costs. This relevance, combined with the important public interest in transparency, outweighed the non-specific and unsubstantiated potential harm that McKinnon relied on.

[19] We therefore concluded that McKinnon failed to establish a basis for applying the exception in clause 9(1)(b) of the SPPA, and we dismissed his motion.

B. McKinnon's Motion to Adjourn the Sanctions and Costs Hearing

[20] The sanctions and costs hearing was originally scheduled to proceed on November 16, 2017. McKinnon requested an adjournment in order to prepare a proper response to Staff's affidavit referred to in paragraph [12] above. Staff's affidavit was delivered to McKinnon late in the day on November 14, 2017. We considered McKinnon's motion against the backdrop of the events leading up to the motion, which are as follows.

[21] Staff delivered its initial written submissions on sanctions and costs in June 2017. By order dated August 23, 2017, the sanctions and costs hearing was set for November 16. At an interlocutory hearing on September 28, McKinnon's counsel agreed to deliver submissions by October 20, and Staff agreed to deliver any reply materials by November 10.

[22] On October 20, McKinnon's counsel advised that he would be unable to deliver submissions that day, but that he expected to do so by October 25. Staff did not object.

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[7] SPPA, s 9(1)(b).
[8] *Re HudBay Minerals Inc.* (2009), 32 OSCB 4427, 2009 ONSEC 18 at para 22.

[23] On October 25, McKinnon's counsel advised of an additional delay, due to a medical emergency in McKinnon's family. Counsel proposed to deliver submissions by November 9. Staff agreed to the requested extension, although noted its position that the sanctions and costs hearing should proceed on November 16 as scheduled.

[24] McKinnon delivered his written submissions in the late afternoon on November 9. The submissions included information about McKinnon's net worth and about a 2013 transaction that contributed to "the loss of" McKinnon's client assets, as well as a statement that McKinnon "has had not one client complaint" during his more than two decades as a registered financial advisor.

[25] No evidence was filed or referred to in support of those assertions.

[26] On the evening of November 14, Staff delivered the affidavit of Michael Denyszyn, a Manager in the Commission's Compliance and Registrant Regulation (**CRR**) Branch. That affidavit, which is six pages long and attaches nine exhibits, challenged McKinnon's assertions, referred to in paragraph [12] above, about his ability to pay sanctions or costs.

[27] Early the following day, McKinnon's counsel advised the Commission's Registrar that he would be seeking an adjournment of the hearing, in order to prepare a proper response to the Denyszyn affidavit.

[28] At the hearing on November 16, Staff opposed the adjournment request, citing sub-rule 29(1) of the Rules of Procedure, which provides that a sanctions hearing "shall proceed on the scheduled date unless a Party satisfies a Panel that there are exceptional circumstances requiring an adjournment." That rule sets an appropriately high bar for a party seeking an adjournment. We were satisfied that there were exceptional circumstances justifying the adjournment.

[29] In reaching that conclusion, we considered the following factors:

a. the principal delay in the original schedule was caused by unforeseen circumstances, *i.e.*, McKinnon's family medical emergency;

b. there was no suggestion that McKinnon deliberately delayed or tried to manipulate the process;

c. the sanctions and costs hearing might result in serious consequences for McKinnon, including substantial financial sanctions and lengthy bans from participation in the capital markets;

d. McKinnon needed more time to respond, including regarding whether he was continuing to earn compensation;

e. the Commission has an interest in making its decision based on a complete factual record; and

f. there would be no appreciable prejudice to Staff as the result of an adjournment.

[30] Taking all of those factors into account, we concluded that the public interest in proceeding expeditiously was outweighed by the need to ensure fairness to McKinnon. We adjourned the hearing to the earliest date on which McKinnon, all counsel and members of the panel were available.

IV. FINDINGS IN THE MERITS DECISION

[31] The Merits Panel found that PFAM and McKinnon committed a number of breaches of Ontario securities law.

[32] The most serious of the breaches related to the administration and distribution of nine series of PPNs. PPNs are investment products, usually issued by a bank, that promise to repay, at a minimum, the capital invested if the note is held to maturity. Noteholders can sell their PPNs prior to maturity (referred to as early redemption) on a secondary market provided by the issuing bank.

[33] PFAM entered into agreements with two banks to provide advisory, marketing, distribution and other services in relation to PPNs. Pursuant to those agreements, PFAM acted as the intermediary between investors and the banks, processing orders and funds from investors to the banks, and transferring funds from the banks back to investors at redemption or maturity. In its role as intermediary, PFAM was required to maintain books and records relating to the PPNs. In December 2012, PFAM realized that it had a shortfall of more than $500,000 in the funds that were due to investors for the maturity of the third of nine series of PPNs. Subsequent analysis across all series of PPNs showed a net deficiency of $1.2 million. The Merits Panel found that PFAM breached its duty to act fairly, honestly and in good faith with clients, contrary to OSC Rule 31-505 *Conditions of Registration* (**Rule 31-505**), as evidenced by the following:

a. submission of unsupported redemption requests;

b. mishandling of redemption payments;

c. failure to account for monies in the PFAM trust account;

d. deficiencies in record-keeping for PPNs; and

e. failure to investigate and communicate the PPN Deficiency.

[34] The Merits Panel found that "McKinnon's attitude with respect to funds held in trust was completely improper."[9] It also found that "McKinnon's complete denial of any knowledge of the problems relating to the PPNs before December 2012 [was] not credible."[10]

[35] The Merits Panel also concluded that:

a. PFAM failed to exercise the degree of care, diligence and skill that a reasonably prudent person would exercise in the circumstances and, in doing so, breached the standard of care for investment fund managers, contrary to clause 116(b) of the *Securities Act*[11] (the **Act**);

b. PFAM failed to maintain the minimum working capital required of a registered firm and failed to report its capital deficiency, contrary to section 12.1 of NI 31-103 *Registration Requirements, Exemptions and Ongoing Registrant Obligations* (**NI 31-103**);

c. PFAM failed to keep satisfactory books, records or other documents, contrary to subsection 19(1) of the Act and sections 11.5 and 11.6 of NI 31-103;

[9] Merits Decision at para 112.
[10] Merits Decision at para 120.
[11] RSO 1990, c S.5.

d. PFAM failed to establish, maintain and apply policies and procedures that establish an adequate system of controls and supervision, contrary to subsection 32(2) of the Act and section 11.1 of NI 31-103;

e. McKinnon, as a director and officer of PFAM, authorized, permitted or acquiesced in PFAM's breaches set out in (a) through (d) above, and in paragraph [33] above, and is therefore liable pursuant to section 129.2 of the Act;

f. McKinnon breached his obligations as UDP of PFAM, contrary to section 5.2 of NI 31-103; and

g. PFAM and McKinnon's conduct was contrary to the public interest.

V. LEGAL FRAMEWORK FOR SANCTIONS

[36] Subsection 127(1) of the Act lists the sanctions that the Commission may impose where it finds that it is in the public interest to do so. The Commission must exercise this jurisdiction in a manner consistent with the purposes set out in section 1.1 of the Act:

> (a) to provide protection to investors from unfair, improper or fraudulent practices;
>
> (b) to foster fair and efficient capital markets and confidence in capital markets; and
>
> (c) to contribute to the stability of the financial system and the reduction of systemic risk.

[37] In making public interest orders under section 127 of the Act, the Commission exercises its jurisdiction in a protective manner to prevent likely future harm to Ontario's capital markets.[12] The Supreme Court of Canada has endorsed this approach, stating that:

> The 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.[13]

[38] The Commission has identified a non-exhaustive list of the factors to be considered with respect to sanctions generally, including the following, which we regard as being particularly relevant to this case:

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;

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[12] *Re Mithras Management Ltd.* (1990) 13 OSCB 1600 at 1610-1611.

[13] *Committee for Equal Treatment of Asbestos Minority Shareholders v Ontario (Securities Commission),* 2001 SCC 37 at para 43.

e. whether or not the sanctions imposed may serve to deter not only those involved in the case being considered, but any like-minded people from engaging in similar abuses of the capital markets;

f. any mitigating factors;

g. whether the violations are isolated or recurrent; and

h. the effect any sanction might have on the livelihood of a respondent.[14]

[39] With respect to the fifth of those factors, *i.e.*, specific and general deterrence, the Supreme Court of Canada has recognized that sanctions should be designed to discourage or hinder like behaviour in others and that the "weight given to general deterrence will vary from case to case and is a matter within the discretion of the Commission."[15]

[40] The Commission has also recognized that the sanctions imposed must be appropriate and proportionate to the circumstances of the case and the conduct of each respondent.[16]

[41] In addition, as emphasized by the Supreme Court of Canada, "[n]o one factor should be considered in isolation because to do so would skew the textured and nuanced evaluation conducted by the Commission in crafting an order in the public interest."[17] Further, the Commission has recently noted that "[g]iven the highly contextual nature of these various factors, sanctioning precedents, while helpful, may be of limited value when the Commission determines the appropriate mix of sanctions for a particular respondent."[18]

VI. FINANCIAL SANCTIONS

A. Introduction

[42] As we discussed above, we granted McKinnon's request for an adjournment of the sanctions and costs hearing so that, among other things, McKinnon would have an opportunity to respond to Staff's evidence regarding McKinnon's and his family's financial circumstances.

[43] At the sanctions and costs hearing, McKinnon adduced no documentary or oral evidence with respect to that issue. Following his counsel's closing submissions, McKinnon delivered an unsworn oral statement, in which, among other things, he stated that he "put everything [he] had into trying to turn PFAM around",[19] and that the resulting financial hardship has been significant and stressful.

[44] Staff suggested at the motions hearing in November 2017 that McKinnon may still be receiving, or may be entitled to receive, compensation relating to his previous business. Neither Staff nor McKinnon explored that issue at the sanctions and costs hearing, and we are therefore not in a position to make any

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[14] *Re Belteco Holdings Inc*. (1998), 21 OSCB 7743 at 7746; *Erikson v Ontario (Securities Commission),* [2003] OJ No 593 (Div Ct) (***Erikson***) at para 58; *Re MCJC Holdings Inc.* (2002), 25 OSCB 1133 at 1135; *Re MCJC Holdings Inc.* (2003), 26 OSCB 8206 at para 55.

[15] *Re Cartaway Resources Corp.,* 2004 SCC 26 (***Cartaway***) at para 64.

[16] *Re Bradon Technologies Ltd.* (2016), 39 OSCB 4907, 2016 ONSEC 9 at para 28.

[17] *Cartaway* at para 64.

[18] *Re Quadrexx Hedge Capital Management Ltd.* (2018), 41 OSCB 1023, 2018 ONSEC 3 at para 20 (***Quadrexx***).

[19] Transcript, p 145, lines 12-13.

relevant findings. Similarly, we have no evidentiary basis on which to draw conclusions in McKinnon's favour about his inability to pay financial sanctions or costs.

[45] We now turn to consider whether it would be in the public interest to order disgorgement and/or the payment of administrative penalties.

B. Disgorgement

1. Introduction

[46] Paragraph 10 of subsection 127(1) of the Act authorizes the Commission to require a person who has not complied with Ontario securities law "to disgorge to the Commission any amounts obtained as a result of the non-compliance." Staff submits that PFAM obtained $1,181,397.89 as a result of the unsupported redemption requests and the failure to account for monies flowing into and out of the trust account, in contravention of PFAM's obligation to deal fairly, honestly and in good faith with its clients, as set out in section 2.1 of Rule 31-505.[20]

[47] Staff therefore seeks an order requiring PFAM and McKinnon to disgorge the $1,181,397.89, on a joint and several basis. For the following reasons, we will make that order.

2. Legal Framework

[48] Staff and McKinnon agree that, as the Commission has previously held, the purposes of a disgorgement order are to ensure that respondents do not benefit from their breaches of the Act, and to deter the respondents and others from engaging in similar misconduct.[21]

[49] So that these purposes may be achieved, a disgorgement order is not limited to profit made, funds retained, or a net amount calculated by taking expenses or other deductions into account. The words "any amounts obtained" in the Act do not imply or compel any such limitation; rather, they make a respondent potentially liable to disgorge the total of all funds received as a result of non-compliance. As the Superior Court of Justice (Divisional Court) has held, such an approach is "consistent with the plain wording of the legislation, the purpose of the legislation and prior case law"[22], especially given the importance of deterrence.

[50] While the Commission is authorized to order disgorgement of the full amount obtained, it need not do so. The Commission has set out various factors that it will take into account in determining whether a disgorgement order is appropriate, and if so, in what amount:

a. whether an amount was obtained by a respondent as a result of the non-compliance with Ontario securities law;

b. the seriousness of the misconduct and whether investors were seriously harmed;

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[20] *Merits Decision* at para 103.
[21] *Re Al-Tar Energy Corp.* (2011), 34 OSCB 447, 2011 ONSEC 1 at para 71.
[22] *Phillips v Ontario Securities Commission*, 2016 ONSC 7901 (Div Ct) (***Phillips DivCt***) at para 78, affirming *Re Phillips* (2015), 38 OSCB 617, 2015 ONSEC 36 (***Phillips OSC***); see also *Phillips DivCt* at para 71 on this point; see also *Re Limelight Entertainment Inc.* (2008), 31 OSCB 12030, 2008 ONSEC 28 (***Limelight***) at para 49.

c. whether the amount that a respondent obtained as a result of the non-compliance 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 on other market participants.[23]

[51] McKinnon proposes a modification of the first of these factors. He points to the Commission's 2008 decision in *Limelight*, where immediately prior to specifying the above factors, the Commission stated:

> [T]he legal question is not whether a respondent 'profited' from the illegal activity but whether the respondent 'obtained amounts' as a result of that activity. In our view, this distinction is made in the Act to make clear that all money illegally obtained from investors can be ordered to be disgorged, not just the 'profit' made as a result of the activity.[24] [emphasis added]

[52] McKinnon highlights the words "from investors" in the above quotation. In effect, he submits that the first factor listed above should read: "whether an amount was obtained by a respondent from investors as a result of the non-compliance with Ontario securities law". He notes that in this case, the money that PFAM received as a result of the unsupported redemption requests came from the banks rather than from the Noteholders. He submits that, as a result, no disgorgement order is warranted here.

[53] We do not accept this submission, for several reasons. First, the money obtained in *Limelight* did in fact come from investors, so the Commission's words simply conformed to the evidence. The Commission was not called upon to decide, and did not decide, whether a disgorgement order may extend to funds illegally obtained from sources other than investors. Second, it would be inconsistent with the purposes of a disgorgement order to immunize a respondent from exposure to such an order where a third party steps in to mitigate the harm suffered by the original investors. Third, McKinnon's submission is incompatible with the determination by the Superior Court of Justice (Divisional Court) that a disgorgement order may be appropriate "even where there is no loss to beneficiaries".[25]

[54] We therefore decline to adopt McKinnon's proposed modification. However, we do see this as an opportunity to refine the language used in describing the factors that inform the Commission's discretion as to what, if any, disgorgement order is made. In relation to the second factor, the Commission should take into account the seriousness of the misconduct and whether that misconduct resulted in serious harm, whether directly to original investors or otherwise.

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[23] *Phillips OSC* at para 31; *Limelight* at para 52.
[24] *Limelight* at para 49.
[25] *Pushka v Ontario Securities Commission*, 2016 ONSC 3041 (Div Ct) at para 251.

[55] We would make two additional refinements, consistent with existing decisions:

a. The third factor should be described as whether the amount obtained as a result of the non-compliance can be reasonably ascertained. No reference should be made to a particular respondent. This accords with the Superior Court of Justice (Divisional Court)'s determination that a disgorgement order against a respondent is not limited to the amount obtained personally by that respondent.[26]

b. The fourth factor should be described as whether those who suffered losses are likely to be able to obtain redress. No previous decisions confine the scope of this factor to situations in which "individuals" have suffered losses. To so confine the scope of this factor would be inconsistent with the general principles underlying the disgorgement sanction.

[56] For these reasons, we restate the test as follows. When considering whether a disgorgement order is appropriate, and if so in what amount, the Commission should take into account the following non-exhaustive list of factors (with our refinements underlined for reference):

a. whether an amount was obtained by a respondent as a result of the non-compliance with Ontario securities law;

b. the seriousness of the misconduct and whether that misconduct caused serious harm, whether directly to original investors or otherwise;

c. whether the amount obtained as a result of the non-compliance is reasonably ascertainable;

d. whether those who suffered losses are likely to be able to obtain redress; and

e. the deterrent effect of a disgorgement order on the respondents and on other market participants.

3. Analysis

[57] We will now apply each of those factors to the circumstances of this case.

(a) Did the respondents obtain an amount as a result of the non-compliance with Ontario securities law?

[58] Staff submits that PFAM obtained $1,181,397.89 as a result of its breach of section 2.1 of Rule 31-505 and therefore requests a disgorgement order in that amount. McKinnon challenges the request, both as to whether there should be a disgorgement order at all, and if so, in what amount.

[59] First, McKinnon submits, as noted above in paragraphs [51] and [52], that it is significant that the funds that PFAM received came from the banks, not from the investors. As we have explained, we reject that submission. The unsupported redemption requests by PFAM resulted in the banks giving PFAM monies that belonged to the Noteholders.

[26] *North American Financial Group Inc. v Ontario Securities Commission,* 2018 ONSC 136 (Div Ct) at para 217.

[60] Second, McKinnon submits that there is no evidence that he obtained any amount as a result of the non-compliance. It is true that we were not directed to any evidence to show that funds flowed directly to McKinnon from the unsupported redemption requests. However, as explained above, this is not a precondition to the imposition of a disgorgement order on him. As the Commission has held, the directing mind of an entity that obtains funds as a result of a contravention of Ontario securities law may be jointly and severally liable for the disgorgement of those funds.[27] As PFAM's directing mind, McKinnon may be held liable to disgorge any amount obtained by PFAM.

[61] We conclude that PFAM obtained funds as a result of its breach of Ontario securities law and that both it and McKinnon may be subject to a disgorgement order in respect of those funds.

(b) Seriousness of the misconduct and whether the misconduct caused serious harm

[62] In the Merits Decision, the Merits Panel found that PFAM "knowingly" and "dishonestly" made the unsupported redemption requests,[28] and that McKinnon directed these actions.[29] This deliberate misconduct was particularly serious, coming as it did from a senior and experienced registrant who was the firm's UDP.

[63] The misconduct jeopardized investors' funds to a significant extent. Most of the harm associated with the misconduct was later transferred from the investors to the banks, but the investors' funds were at risk in the meantime. The banks' ultimate intervention does not reduce either the seriousness of the conduct or the harm that resulted.

(c) Is the amount obtained as a result of the non-compliance reasonably ascertainable?

[64] McKinnon challenges the methodology used by Staff to calculate the amount sought.

[65] The Merits Panel did not, and was not required to, specify the amount that PFAM obtained as a result of the unsupported redemption requests. However, as the Merits Panel found, an analysis prepared by Staff's senior forensic accountant revealed that "approximately 11,814 units (approximately $1.2 million par value of PPNs) more than the number requested by Noteholders were redeemed by PFAM".[30]

[66] The amount of the disgorgement order sought by Staff ($1,181,397.89) is based on that finding in the Merits Decision, and not on the amount of the PPN Deficiency, which is $41,151.56 greater. As the Merits Panel found, unsupported redemption requests were the largest contributing factor to the PPN Deficiency, but other factors also contributed, including price differences resulting from the time elapsed between the date at which the price was fixed and the actual

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[27] See, *e.g., Quadrexx* at para 46; *Phillips DivCt* at paras 77-78; *Limelight* at paras 59-60; *Re Blackwood & Rose Inc.* (2014), 37 OSCB 4699, 2014 ONSEC 12 at para 53.
[28] Merits Decision at para 103.
[29] Merits Decision at para 197.
[30] Merits Decision at para 88.

settlement date.[31] The extent to which the price differences contributed to the PPN Deficiency could not be accurately calculated, due to the poor state of PFAM's records.[32] Staff appropriately limits its disgorgement request to the lower and more reliable amount.

[67] Despite Staff's approach, McKinnon argues for a lower disgorgement amount (if we are to order disgorgement at all). He refers to a breakdown of the $1,222,549.45 PPN Deficiency, as contained in an April 2013 preliminary reconciliation report prepared for Staff by PFAM's former Chief Financial Officer.[33] According to that report, the PPN Deficiency consisted of:

a. $566,839.26 attributable to the price differences referred to in paragraph [66] above;

b. $230,293.56 attributable to an "opening balance variance", *i.e.*, an unexplained difference, at the time of closing on the original distribution of the notes, between records held by IAS (PFAM's record-keeper) and those held by Concentra (the trustee and escrow agent); and

c. $425,416.63, the reasons for which could not be explained, because of the absence of reliable records.

[68] McKinnon submits that any disgorgement order should exclude at least the first of the three components,[34] since those funds were "passed onto investors as…overpayment". We disagree. Even if the deficiency arose in part because PFAM mistakenly overpaid certain investors, that error may have come at the expense of other investors. It does not change the fact that when it came time for the banks to satisfy the deficiency, the $566,839.26 was not available for that purpose. PFAM obtained the funds as a result of a contravention of Ontario securities law, and it does not matter how PFAM used the funds after they were obtained.[35]

[69] We are satisfied that the amount of funds that PFAM obtained, at a minimum, is reasonably ascertainable. We accept Staff's submission that the appropriate amount is $1,181,397.89.

(d) Are those who suffered losses likely to be able to obtain redress?

[70] In our view, the onus does not lie on Staff to demonstrate that victims of misconduct are unlikely to obtain redress. In many cases, that determination would be extremely difficult, and would impose a burden that is inconsistent with the Commission's investor protection mandate. Rather, if a respondent is able to show that those who suffered losses are likely to obtain redress, that might be an appropriate reason to reduce a disgorgement amount, or to choose not to order any disgorgement at all.

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[31] Merits Decision at para 91.
[32] Merits Decision at para 88.
[33] Exhibit 38 in the merits hearing; Merits Decision at paras 85-87.
[34] In oral submissions, McKinnon's counsel cited the slightly higher amount of $425,418.74, which is the same as that shown in paragraph 62 of Staff's written submissions. However, the correct amount appears to be $425,416.63, as reflected in the reconciliation report.
[35] *Phillips OSC* at para 19.

[71] Here, McKinnon does not go so far as to say that he has shown that the banks are likely to obtain redress. Having said that, we are advised that one bank has commenced an action against PFAM and McKinnon arising out of the PPN Deficiency, though that action is currently inactive, and the other bank has not commenced an action. However, PFAM is insolvent. McKinnon asserts that he has "lost effectively his entire net worth in relation to PFAM and its breaches."[36] We therefore have no reason to reduce the amount of a disgorgement order in the hope that those who suffered losses can obtain redress elsewhere.

(e) Deterrent effect on the respondents and others

[72] It is essential both for the protection of investors and for the promotion of confidence in the capital markets that those entrusted with investor money strictly adhere to sound practices that reflect the importance of that trust. Even if PFAM's difficulties began as record-keeping issues, the findings in the Merits Decision reveal that there were numerous opportunities along the way for McKinnon to recognize the seriousness of those issues and to take immediate steps to address them. Not only did McKinnon fail to do so, he knowingly and dishonestly caused PFAM to make the unsupported redemption requests.

[73] The sanctions in this case must demonstrate unequivocally, to the respondents and others, that such a response is unacceptable. In the circumstances of this case, only an order in the full amount obtained will adequately fulfill the need for specific and general deterrence.

(f) Conclusion

[74] McKinnon and PFAM's repeated, deliberate and dishonest conduct, and the need to deter them and others from engaging in similar conduct, outweigh any inclination we might have had to apply discretionary reduction in the amount of the disgorgement order. It is in the public interest for us to require the respondents, jointly and severally, to disgorge the sum of $1,181,397.89, being the full amount that PFAM received as a result of its contravention of section 2.1 of Rule 31-505.

C. Administrative Penalty

1. Submissions

[75] Staff proposes an administrative penalty of $200,000 against each of McKinnon and PFAM. Staff argues that these administrative penalties are appropriate and proportionate due to the seriousness of the breaches and the fact that multiple breaches of different types occurred over a prolonged period of time.

[76] McKinnon requests that his administrative penalty be in the range of $25,000 to $50,000 since Farrell was required by the settlement agreement to pay an administrative penalty of only $25,000.

[77] McKinnon further submits that the $200,000 amount that Staff seeks is excessive, considering the impact that the failure of the PFAM business has had on his personal financial affairs.

[36] McKinnon's Written Submissions at para 63.

2. Analysis

[78] The Commission has stated in previous decisions that the purpose of administrative penalties is to "deter the particular respondents from engaging in the same or similar conduct in the future and to send a clear deterrent message to other market participants that the conduct in question will not be tolerated in Ontario capital markets."[37] Thus, the Commission intends that administrative penalties will achieve both specific and general deterrence.

[79] In support of its position, Staff directed us to the administrative penalties imposed in several previous decisions. While no two cases are identical, these decisions bear useful similarities to this case. They address breaches of sections 19 and 116 of the Act and section 2.1 of Rule 31-505, and they provide a general reference point for the possible range of sanctions.

[80] *Sextant Capital Management Inc. (Re)*[38] involved a fraud related to improper payments of almost $7 million. The Commission found that the three individual respondents, all of whom were registrants, breached their duty to deal fairly, honestly, and in good faith with clients (contrary to section 2.1 of Rule 31-505) and their duties as investment fund managers (contrary to section 116 of the Act). The Commission found that one of the three individual respondents had committed fraud. No finding of fraud was made with respect to the other two, who were officers of the corporate respondent. The Commission imposed administrative penalties against these respondents of $250,000 and $50,000.

[81] *Norshield Asset Management Inc. (Re)*[39] involved a much greater amount lost by investors ($159 million) and the administrative penalties imposed were commensurate with the seriousness of the misconduct. The individual respondents Xanthoudakis and Smith were registrants who held positions as officers and directors and were the directing minds of the company. They communicated information to investors that was based on artificially inflated net asset values (**NAVs**), engaged in paper transactions to inflate NAVs, and preferred redemption requests for some investors over others. They were also generally unable to account for investors' funds as they did not have up-to-date or proper records. The misconduct, which led to significant losses for investors, was a breach of section 2.1 of Rule 31-505 and section 19 of the Act. The respondents were each ordered to pay administrative penalties of $1,000,000 for the breach of section 2.1 of Rule 31-505 and $1,000,000 for the breach of section 19 of the Act.

[82] In *Juniper Fund Management Corp. (Re)*,[40] the respondents were found to have committed various breaches of Ontario securities law pertaining to investment funds over a period of time. The Commission found that they failed to keep books and records necessary for the proper recording of its business transactions and financial affairs contrary to subsection 19(1) and section 116 of the Act. An aggravating factor was that the respondents did not take active steps to correct the inaccuracies in their records. An administrative penalty of $500,000 was ordered against the respondent Brown, on a joint and several basis with Juniper Fund Management.

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[37] *Limelight* at para 67.
[38] (2012), 35 OSCB 5213, 2012 ONSEC 17 (***Sextant***).
[39] (2010), 33 OSCB 7171, 2010 ONSEC 16 (***Norshield***).
[40] (2015), 38 OSCB 1679, 2015 ONSEC 3 (***Juniper***).

[83] We do not accept McKinnon's position that any administrative penalty imposed on him should be similar to that imposed in the settlement with Farrell. First, Farrell's administrative penalty was agreed to in the context of a settlement, not a contested hearing. The sanctions imposed pursuant to a settlement agreement may be less severe than those that might have been imposed after contested merits and sanctions hearings.[41] Second, although Farrell held a senior role as CCO, McKinnon was the UDP and directing mind of PFAM; as such, he bore the ultimate responsibility to ensure that PFAM complied with Ontario securities law, and was ultimately responsible for the multiple breaches that spanned several years.

[84] The seriousness of the Merit Panel's findings also figures prominently in determining what administrative penalty should be imposed. PFAM's management of the PPN business resulted in a deficiency of investor monies of $1.2 million. McKinnon argues that investors were not put at risk because the banks eventually paid the Noteholders. However, this view ignores the harm to investors who received lower prices than they were entitled to receive, as well as the harm to investors whose payments were delayed up to two years. Further, as we have already explained, the banks were harmed by the fact that they subsequently "were obligated to pay $1.2 million more than they would otherwise have been required to pay."[42] McKinnon's assertion that the banks were obligated to pay the investors in any event is incorrect, since the banks believed, understandably, that PFAM had already paid investors pursuant to the redemption requests.

[85] As we have explained above, the many breaches of Ontario securities law resulted from the respondents' failure to establish, maintain and apply adequate compliance systems, to keep proper books and records, and to deal fairly, honestly and in good faith with their clients. This misconduct, along with the serious issues related to the PPNs, was recurrent and spanned several years. We consider these circumstances to be an aggravating factor in determining the appropriate administrative penalty.

[86] We conclude that an administrative penalty in the amount of $200,000 for each of PFAM and McKinnon is appropriate, proportionate and in the public interest.

VII. NON-FINANCIAL SANCTIONS

A. Trading Bans

1. Submissions

[87] Staff requests that all trading or acquisition of securities by McKinnon be prohibited for 10 years and that any exemptions contained in Ontario securities law not apply to McKinnon for 10 years.

[88] Staff also requests that all trading or acquisition of securities by PFAM be prohibited and that that any exemptions contained in Ontario securities law not apply to PFAM for 10 years.

[41] *Re Sentry Investments Inc.* (2017), 40 OSCB 3435, 2017 ONSEC 7 at paras 5-6.
[42] Merits Decision at para 102.

[89] Staff refers to the oft-cited statement by the Commission that "participation in the capital markets is a privilege, not a right."[43] Staff submits that the breaches of Ontario securities law are serious and that they warrant removing the respondents from the capital markets for a period of time.

[90] McKinnon requests that there be no ban on trading or acquisition of securities. He submits that banning him from trading or acquiring securities would be purely punitive and that no such sanctions are warranted because his conduct at issue was related to administrative and accounting failures and not directly related to trading in the public markets. He argues that there is no "rational connection"[44] between a complete trading ban and protecting the public markets.

2. Analysis

[91] As Staff has pointed out, participation in the capital markets is a privilege, not a right. PFAM acted as a market intermediary[45], and was thus involved in trading activity between the issuing banks and investors, either directly or indirectly through another registrant. Given PFAM's improper conduct with respect to this trading, and given McKinnon's direction of that activity, it is appropriate in this case to remove the respondents from participation in the capital markets for a period of time.

[92] The 10-year duration of the ban is also appropriate when measured against other cases dealing with similar breaches. For example, in *Sextant*, a 10-year trading ban was imposed on Ekonomidis and a three-year trading ban was imposed on Natalie Spork due to her more limited role. In both *Norshield* and *Juniper*, the Commission imposed permanent trading bans; however, these cases can be distinguished as they dealt with larger investor losses. Specifically, *Norshield* involved investor losses of $159 million, and in *Juniper,* the investors lost $2,154,389 as a result of the receiver's payment to the banks to settle claims related to the misconduct.

[93] McKinnon does not request a carve-out for limited personal trading, in the event that we decide to impose a prohibition against him trading. He provided no information related to any current holdings of securities and the need to be able access any holdings, either for the purpose of selling securities to pay monetary sanctions or costs, or for living expenses. He has also not requested carve-outs for registered plan holdings for himself or family members. We therefore did not consider, and we do not order, any such carve-out.

B. Director & Officer and Registration Bans

1. Submissions

[94] Staff requests that McKinnon be required to resign all positions that he holds as a director or officer of any issuer, registrant or investment fund manager, and further that he be prohibited from becoming or acting as a director or officer of any issuer, registrant or investment manager for 10 years.

[95] Staff also requests that McKinnon be banned from becoming or acting as a registrant, as an investment fund manager or as a promoter for 10 years.

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[43] *Erikson* at para 55.
[44] McKinnon's written submissions at para 47.
[45] Merits Decision at para 67.

[96] Staff states that the sanctions sought are warranted due to the seriousness of the conduct, which occurred repeatedly over a number of years involving multiple areas of the business. Staff points specifically to the two compliance reviews in 2009 and 2011, that identified some of the same deficiencies that the Merits Panel found had persisted.

[97] McKinnon submits that even if we find that it is appropriate to prevent him from being able to carry out similar conduct as a director or officer of a registrant, we need not go farther and prohibit him from actually being a registrant. Alternatively, he submits, a registration ban need not be as long as the ban on being a director, officer or UDP.

[98] McKinnon also requests that the panel consider the fact that the request to reinstate his registration was not approved by the CRR Branch in 2015 and is still pending. He says that this has effectively taken him out of the capital markets for the past several years, and he asks that we consider this to be "time served"[46] in imposing any bans.

[99] McKinnon emphasizes that without being registered he will be unable to continue the financial advisory work that has been his career to date. He advises that he is willing to take additional compliance courses to show his commitment to better compliance. He therefore requests that the ban on being a director, officer or UDP of any issuer, registrant or investment fund manager be limited to six months and that there be no ban on him being a registrant.

2. Analysis

[100] The basic requirements for registration are proficiency, integrity and financial solvency.[47] Registrants are rightly held to a high standard of conduct given the level of trust that investors place in them and because registrants have an obligation to deal fairly, honestly and in good faith with their clients.

[101] Further, those individuals who hold senior positions such as CCO or UDP have greater responsibilities in regard to the activities of the firms they oversee. They are responsible for promoting a culture of compliance with Ontario securities law. As pointed out in the Merits Decision, "McKinnon failed to carry out his obligations as UDP by failing to appropriately supervise the activities of PFAM and by failing to establish and maintain the firm's required compliance with securities legislation."[48]

[102] The Merits Decision recognized the operational pressures that PFAM was under and the stresses that it encountered as a result of repeated reviews of PFAM by Staff of the Commission's CRR Branch. However, much of this could have been prevented if PFAM had dealt with the identified issues in a timely manner. For example, as noted in the Merits Decision, "[h]ad McKinnon and PFAM adequately addressed the concerns raised by the CRR Branch after its first review, they might have avoided many of the difficulties and regulatory costs which they later incurred."[49]

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[46] McKinnon's Written Submissions at paras 51 and 70.
[47] Subclause 27(2)(a)(i) of the Act.
[48] Merits Decision at para 214.
[49] Merits Decision at para 217.

[103] We do not accept McKinnon's argument that we should deduct, from any registration ban we might impose, the time that has elapsed since the CRR Branch decided not to approve the reinstatement of his registration. The CRR Branch's decision was guided by different considerations and was not an enforcement response. We must determine appropriate sanctions in the context of this enforcement proceeding, and in doing so, we must take into account all of the factors discussed above. In particular, we consider it important not to undermine the deterrent effects of any order we might make, by reducing the applicable period.

[104] We are mindful of the effect of a registration ban on McKinnon's ability to pursue his chosen career. However, his serious, repeated, deliberate and dishonest conduct, together with his fundamental failure to recognize and carry out the important obligations associated with his position of trust and responsibility, do not allow us to accede to McKinnon's request. To do so would be inconsistent with the Commission's obligations to protect investors and to promote confidence in the capital markets.

[105] During the sanctions and costs hearing, we asked Staff why it was not requesting a permanent ban on registration as an officer or director of a registrant, given the seriousness of the breaches. Staff responded that it considered a 10-year ban appropriate, citing the ban applied in *Sextant* to the respondent who had a senior role with a registrant but was not found to have committed fraud. Staff submitted that a permanent ban was not necessary and referred us to *Norshield* and *Juniper* where permanent bans were imposed but which involved greater losses to investors. Staff submitted that a 10-year ban would strike the appropriate balance given the conduct in this case. A ban longer than 10 years may have been appropriate given the circumstances of this case, but after considering Staff's submissions, we will not impose a lengthier ban than that sought.

VIII. COSTS

A. Submissions

[106] Staff requests that McKinnon, jointly and severally with PFAM, be ordered to pay $487,950.34 towards the costs of Staff's investigation and the costs related to the merits hearing.

[107] Staff submits that this is a conservative amount, as it represents a substantial discount of approximately 56.1% to the actual costs incurred during Staff's investigation, pre-hearing preparation and the merits hearing. Those costs were supported by proper documentary evidence, and were calculated based on hourly rates previously adopted by the Commission.

[108] The merits hearing was conducted over 17 days, with almost 700 exhibits.

[109] McKinnon submits that ordering costs against him on a joint and several basis with PFAM places an undue burden on him since PFAM is insolvent.

[110] McKinnon further argues that costs should be allocated between himself and PFAM in proportion to their respective involvement in the allegations. He estimates that PFAM is responsible for 90% of the work involved in this proceeding. He requests a costs order against him of no more than $50,000.

B. Analysis

[111] Costs are designed to reduce the burden on market participants to pay for investigations and enforcement proceedings. They are discretionary.

[112] This was a complex matter involving multiple breaches of the Act. The allegations against the respondents were serious and addressed the most fundamental obligations of registrants in the management of their business. The hearing itself was lengthy and involved numerous witnesses and exhibits.

[113] Staff was successful in proving its allegations against PFAM and McKinnon and has applied a substantial discount to the total costs incurred.

[114] We do not accept McKinnon's argument that PFAM should bear a greater portion of the cost allocation. It is impossible to separate McKinnon's actions from those of PFAM. McKinnon was the Chief Executive Officer, the UDP and the directing mind of PFAM. As noted in the Merits Decision, "PFAM failed to discharge the duties and responsibilities of a registered firm and McKinnon, as an officer and director of PFAM, authorized, permitted or acquiesced in those breaches and ultimately failed his responsibilities as URP and as UDP".[50]

[115] It is appropriate that costs be assigned on a joint and several basis against PFAM and McKinnon. The amount of $487,950.34, requested by Staff, is both appropriate and proportionate.

IX. CONCLUSION

[116] In his closing submissions, McKinnon characterized this matter as "essentially a compliance case"[51] which involved record-keeping, processing and management and administration problems. He stated that "the findings suggest a firm in PFAM that was simply trying to make ends meet and hoping that the PPN discrepancy would essentially resolve itself".[52] He further stated that while the Merits Panel found that PFAM's conduct was dishonest, "not all instances of dishonest conduct are created equal",[53] and that this was a case of "self-preservation".[54]

[117] As the Merits Panel noted in the Merits Decision, there was no evidence that McKinnon himself received any direct financial benefit from any of the failures of the firm; in fact, McKinnon put his own money into the firm to keep the business viable. But the Merits Panel also pointed out that McKinnon's and PFAM's focus was on furthering the business operations of PFAM rather than on its obligations as a registrant.

[118] We recognize that there is no evidence of direct personal benefit to McKinnon and we agree with him that not all instances of dishonest conduct are equal. Staff made no allegation of fraud and there was no such finding in the Merits Decision. However, registrants are not entitled to use monies given to them in trust for the purpose of "making ends meet". Registrants must not place their self-interest in keeping their businesses operational ahead of the interests of investors.

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[50] Merits Decision at para 221.
[51] Transcript, at p 107, line 6.
[52] Transcript, at p 104, lines 25 to 27.
[53] Transcript, at p 105, line 5.
[54] Transcript, at p 105, line 7.

[119] Registrants have a duty to the investors who place their trust in them and must ensure that they manage their operations with care, diligence and good faith. They must comply with securities regulations that are intended to protect investors.

[120] McKinnon's suggestion that this is a compliance case involving record keeping, processing and administrative problems does not fully reflect the nature and seriousness of the misconduct here. This case is about a registrant firm which failed in its duty to have in place the necessary policies and procedures as well as an adequate system of controls and supervision in order to ensure compliance with Ontario securities law. This failure led to the breaches found against them and ultimately the sanctions which we have imposed. PFAM and McKinnon failed to fulfill their most basic responsibilities as registrants.

[121] For these reasons, we will issue an order as follows:

1. Pursuant to paragraph 2 of subsection 127(1) of the Act, McKinnon and PFAM are prohibited from trading in any securities for 10 years;

2. Pursuant to paragraph 2.1 of subsection 127(1) of the Act, McKinnon and PFAM are prohibited from acquiring any securities for 10 years;

3. Pursuant to paragraph 3 of subsection 127(1) of the Act, all exemptions contained in Ontario securities law shall not apply to McKinnon and PFAM for 10 years;

4. Pursuant to paragraphs 7, 8.1 and 8.3 of subsection 127(1) of the Act, McKinnon shall resign from any positions he holds as a director or officer of any issuer, registrant or investment fund manager;

5. Pursuant to paragraphs 8, 8.2 and 8.4 of subsection 127(1) of the Act, McKinnon is prohibited from becoming or acting as a director or officer of any issuer, registrant or investment fund manager for 10 years;

6. Pursuant to paragraph 8.5 of subsection 127(1) of the Act, McKinnon and PFAM are prohibited from becoming or acting as a registrant, an investment fund manager or a promoter for 10 years;

7. Pursuant to paragraph 9 of subsection 127(1) of the Act, McKinnon and PFAM shall each pay to the Commission an administrative penalty of $200,000.00, within 30 days of the date of this decision;

8. Pursuant to paragraph 10 of subsection 127(1) of the Act, McKinnon and PFAM shall jointly and severally disgorge to the Commission $1,181,397.00, within 30 days of the date of this decision;

9. Each of the payments required by paragraphs 7 and 8 of this Order is designated for allocation or use by the Commission in accordance with subclause 3.4(2)(b)(i) or (ii) of the Act; and

10. Pursuant to section 127.1 of the Act, McKinnon and PFAM shall jointly and severally pay the Commission costs of $487,950.34, within 30 days of the date of this decision.

Dated at Toronto this 23rd day of April 2018.

"AnneMarie Ryan"
AnneMarie Ryan

"Timothy Moseley"
Timothy Moseley

"Janet Leiper"
Janet Leiper