

**IN THE MATTER OF THE SECURITIES ACT,
R.S.O. 1990, c. S.5, AS AMENDED**

- and -

**IN THE MATTER OF
ROBERT THOMISLAV ADZIJA, LARRY ALLEN AYRES,
DAVID ARTHUR BENDING, MARLENE BERRY, DOUGLAS CROSS,
ALLAN JOSEPH DORSEY, ALLAN EIZENGA, GUY FANGEAT, RICHARD JULES
FANGEAT, MICHAEL HERSEY, GEORGE EDWARD HOLMES, TODD MICHAEL
JOHNSTON, MICHAEL THOMAS PETER KENNELLY, JOHN DOUGLAS KIRBY,
ERNEST KISS, ARTHUR KRICK, FRANK ALAN LATAM, BRIAN LAWRENCE,
LUKE JOHN MCGEE, RON MASSCHAELE, JOHN NEWMAN, RANDALL NOVAK,
NORMAND RIOPELLE, ROBERT LOUIS RIZZUTO AND MICHAEL VAUGHAN**

**SETTLEMENT AGREEMENT BETWEEN
STAFF OF THE ONTARIO SECURITIES COMMISSION
AND MICHAEL THOMAS PETER KENNELLY**

I. INTRODUCTION

1. By Notice of Hearing dated September 24, 1998 (the "Notice of Hearing"), the Ontario Securities Commission (the "Commission") announced that it proposed to hold a hearing to consider, among other things:

- (a) whether, pursuant to subsection 127(1) of the *Securities Act*, R.S.O. 1990, c. S.5 (the "Act"), it is in the public interest for the Commission to make an order that the exemptions contained in Ontario securities law do not apply to the respondent Michael Thomas Peter Kennelly ("Kennelly") permanently or for such time as the Commission may direct; and
- (b) such other orders as the Commission deems appropriate.

2. By Temporary Order dated September 24, 1998, the Commission ordered that trading in securities by Kennelly cease immediately except for trades in mutual fund securities and trades for his personal account (the "Temporary Order"). The Temporary Order was extended by Commission Orders dated October 9, 1998 and February 4, 1999.

II. JOINT SETTLEMENT RECOMMENDATION

3. Staff of the Commission ("Staff") agrees to recommend settlement of the proceeding respecting Kennelly initiated by the Notice of Hearing in accordance with the terms and

conditions set out below. Kennelly consents to the making of an order against him in the form attached as Schedule “A” based on the facts set out in Part III of this Settlement Agreement.

III. STATEMENT OF FACTS

Acknowledgement

4. Solely for the purposes of this proceeding, and of any other proceeding commenced by a securities regulatory agency, Staff and Kennelly agree with the facts set out in paragraphs 5 through 18 of this Settlement Agreement.

Facts

5. Saxton Investment Ltd. (“Saxton”) was incorporated on January 13, 1995. The respondent Allan Eizenga (“Eizenga”) was Saxton’s registered director. Saxton and Eizenga established numerous offering corporations, as listed below (the “Offering Corporations”).

The Saxton Trading Corp.
The Saxton Export Corp.
The Saxton Export (II) Corp.
The Saxton Export (III) Corp.
The Saxton Export (IV) Corp.
The Saxton Export (V) Corp.
The Saxton Export (VI) Corp.
The Saxton Export (VII) Corp.
The Saxton Export (VIII) Corp.
The Saxton Export (IX) Corp.
The Saxton Export (X) Corp.
The Saxton Export (XI) Corp.
The Saxton Export (XII) Corp.
The Saxton Export (XIII) Corp.
The Saxton Export (XIV) Corp.
The Saxton Export (XV) Corp.
The Saxton Export (XVI) Corp.
The Saxton Export (XVII) Corp.
The Saxton Export (XVIII) Corp.
The Saxton Export (XIX) Corp.
The Saxton Export (XX) Corp.
The Saxton Export (XXI) Corp.
The Saxton Export (XXII) Corp.
The Saxton Export (XXIII) Corp.
The Saxton Export (XXIV) Corp.
The Saxton Export (XXV) Corp.
The Saxton Export (XXVI) Corp.
The Saxton Export (XXVII) Corp.
The Saxton Export (XXVIII) Corp.
The Saxton Export (XXIX) Corp.
The Saxton Export (XXX) Corp.

The Saxton Export (XXXI) Corp.
The Saxton Export (XXXII) Corp.
The Saxton Export (XXXIII) Corp.
The Saxton Export (XXXIV) Corp.
The Saxton Export (XXXV) Corp.
The Saxton Export (XXXVI) Corp.
The Saxton Export (XXXVII) Corp.
The Saxton Export (XXXVIII) Corp.

6. Saxton and the Offering Corporations represented to the public that they were investing in businesses in Cuba and other Caribbean companies.

7. On or about October 7, 1998, the Court appointed KPMG Inc. (“KPMG”) as the custodian of Saxton’s assets. In early 1999, KPMG reported that the Offering Corporations had raised approximately \$37 million from investors. All funds invested in the Offering Corporations had been transferred to Saxton. At that time, KPMG held the view that the value of the Saxton assets, at its highest (as reported by related companies), was approximately \$5.5 million.

8. Kennelly became registered with the Commission under the Act to sell mutual fund securities and limited market products in late July 1993. Kennelly has not been registered with the Commission since mid-October 1998.

9. Between 1996 and 1998, Kennelly sold to Ontario investors securities of one or more of the Offering Corporations (the “Saxton Securities”). Kennelly sold the Saxton Securities to approximately 48 Ontario investors for a total amount sold of approximately \$2,500,000.

10. The Offering Corporations were incorporated pursuant to the laws of Ontario. Kennelly’s sales of the Saxton Securities constituted trades in securities of an issuer that had not been previously issued.

11. None of the Offering Corporations filed a prospectus with the Commission. By selling the Saxton Securities to his clients, Kennelly traded in securities, which trades were distributions, without a prospectus being filed or receipted by the Commission and with no available exemption from the prospectus requirements of Ontario securities law.

12. Kennelly failed to provide his clients with access to substantially the same information concerning the Saxton Securities that a prospectus filed under the Act would provide. Kennelly never reviewed an Offering Memorandum or financial statements respecting the Saxton Securities. None of Kennelly’s clients received an Offering Memorandum prior to purchasing the Saxton Securities. The only documentation provided to clients by Kennelly was vague promotional material prepared by Saxton.

13. Kennelly misrepresented to his clients the nature and the quality of the Saxton Securities. Kennelly told certain clients that they were purchasing a “GIC” from Saxton. Kennelly

misrepresented to certain clients that up to \$60,000 invested in Saxton was protected by deposit insurance.

14. Kennelly failed to inform his sponsoring firm that he was selling the Saxton Securities.

15. Kennelly failed to adequately assess the suitability of his clients' investments in the Saxton Securities. Kennelly actively solicited certain clients to move money out of secure investments into Saxton. One elderly client was advised by Kennelly to move money out of a bank term investment to purchase Saxton Securities. Another client invested \$800,000 in Saxton Securities from her late husband's \$1 million life insurance.

16. Kennelly told certain clients that he had personally invested in Saxton. This was not true. Kennelly informs Staff that his wife purchased approximately \$20,000 worth of the Saxton Securities.

17. Kennelly received commissions of approximately \$125,000 on the sales described in paragraph 9 above.

18. Kennelly's conduct in selling the Saxton Securities was contrary to Ontario securities law and the public interest.

IV. TERMS OF SETTLEMENT

19. Kennelly agrees to the following terms of settlement:

- (a) the making of an order:
 - (i) approving this settlement;
 - (ii) that trading in any securities by Kennelly cease for eight years with the exception that, after two years from the date of the approval of this settlement, Kennelly is permitted to trade securities for the account of his registered retirement savings plan (as defined in the *Income Tax Act (Canada)*);
 - (iii) that Kennelly is prohibited from becoming or acting as a director or officer of any issuer for eight years;
 - (iv) reprimanding Kennelly;
 - (v) that the Temporary Order no longer has any force or effect; and
 - (vi) that Kennelly will pay costs to the Commission in the amount of \$2,500;

- (b) Kennelly will undertake to the Commission that he will not apply to the Commission for registration for eight years; and
- (c) within one year prior to applying to the Commission for registration, Kennelly will successfully complete the Canadian Securities Course and Conduct and Practices Handbook Course.

V. STAFF COMMITMENT

20. If this settlement is approved by the Commission, Staff will not initiate any other proceeding under the Act against Kennelly in relation to the facts set out in Part III of this Settlement Agreement.

VI. APPROVAL OF SETTLEMENT

- 21. Approval of the settlement set out in this Settlement Agreement shall be sought at the public hearing of the Commission scheduled for October 9, 2002, or such other date as may be agreed to by Staff and Kennelly (the "Settlement Hearing"). Kennelly will attend in person at the Settlement Hearing.
- 22. Counsel for Staff or Kennelly may refer to any part, or all, of this Settlement Agreement at the Settlement Hearing. Staff and Kennelly agree that this Settlement Agreement will constitute the entirety of the evidence to be submitted at the Settlement Hearing.
- 23. If this settlement is approved by the Commission, Kennelly agrees to waive his rights to a full hearing, judicial review or appeal of the matter under the Act.
- 24. Staff and Kennelly agree that if this settlement is approved by the Commission, they will not make any public statement inconsistent with this Settlement Agreement.
- 25. If, for any reason whatsoever, this settlement is not approved by the Commission, or an order in the form attached as Schedule "A" is not made by the Commission:
 - (a) this Settlement Agreement and its terms, including all discussions and negotiations between Staff and Kennelly leading up to its presentation at the Settlement Hearing, shall be without prejudice to Staff and Kennelly;
 - (b) Staff and Kennelly shall be entitled to all available proceedings, remedies and challenges, including proceeding to a hearing of the allegations in the Notice of Hearing and Statement of Allegations of Staff, unaffected by this Agreement or the settlement discussions/negotiations;

- (c) the terms of this Settlement Agreement will not be referred to in any subsequent proceeding, or disclosed to any person, except with the written consent of Staff and Kennelly or as may be required by law; and
- (d) Kennelly agrees that he will not, in any proceeding, refer to or rely upon this Settlement Agreement, the settlement discussions/negotiations or the process of approval of this Settlement Agreement as the basis for any attack on the Commission's jurisdiction, alleged bias or appearance of bias, alleged unfairness or any other remedies or challenges that may otherwise be available.

VII. DISCLOSURE OF SETTLEMENT AGREEMENT

26. Except as permitted under paragraph 22 above, this Settlement Agreement and its terms will be treated as confidential by Staff and Kennelly until approved by the Commission, and forever, if for any reason whatsoever this settlement is not approved by the Commission, except with the consent of Staff and Kennelly, or as may be required by law.

27. Any obligations of confidentiality shall terminate upon approval of this settlement by the Commission.

VIII. EXECUTION OF SETTLEMENT AGREEMENT

28. This Settlement Agreement may be signed in one or more counterparts which together shall constitute a binding agreement.

29. A facsimile copy of any signature shall be as effective as an original signature.

DATED this 3rd day of October, 2002

WITNESS

MICHAEL THOMAS PETER KENNELLY

DATED this 8th day of October, 2002

**STAFF OF THE ONTARIO
SECURITIES COMMISSION**

MICHAEL WATSON
Director, Enforcement Branch

SCHEDULE “A”

**IN THE MATTER OF THE SECURITIES ACT,
R.S.O. 1990, c. S.5, AS AMENDED**

- and -

**IN THE MATTER OF
ROBERT THOMISLAV ADZIJA, LARRY ALLEN AYRES, DAVID ARTHUR
BENDING, MARLENE BERRY, DOUGLAS CROSS, ALLAN JOSEPH DORSEY,
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THOMAS PETER KENNELLY, JOHN DOUGLAS KIRBY, ERNEST KISS,
ARTHUR KRICK, FRANK ALAN LATAM, BRIAN LAWRENCE, LUKE JOHN
MCGEE, RON MASSCHAELE, JOHN NEWMAN, RANDALL NOVAK, NORMAND
RIOPELLE, ROBERT LOUIS RIZZUTO AND MICHAEL VAUGHAN**

ORDER

(Subsection 127(1) and section 127.1)

WHEREAS on September 24, 1998, the Ontario Securities Commission (the “Commission”) issued a Notice of Hearing pursuant to section 127 of the *Securities Act*, R.S.O. 1990, c. S.5, as amended (the “Act”) respecting Michael Thomas Peter Kennelly (“Kennelly”) and others;

AND WHEREAS on September 24, 1998, the Commission made a Temporary Order as against Kennelly and others, such Temporary Order which was extended by Commission Orders dated October 9, 1998 and February 5, 1999 (the “Temporary Order”);

AND WHEREAS Kennelly entered into a Settlement Agreement dated • (the “Settlement Agreement”) in which he agreed to a proposed settlement of the proceedings, subject to the approval of the Commission;

AND UPON reviewing the Settlement Agreement and the Statement of Allegations of Staff of the Commission and upon hearing submissions from Cross and from Staff of the Commission;

AND WHEREAS the Commission is of the opinion that it is in the public interest to make this Order pursuant to subsection 127(1) and section 127.1 of the Act;

IT IS ORDERED THAT:

1. the attached Settlement Agreement is approved;
2. pursuant to subsection 127(1), paragraph 2, trading in any securities by Kennelly cease for eight years commencing on the date of this Order except that, after two years, Kennelly may trade securities for the account of his registered retirement savings plan (as defined in the *Income Tax Act (Canada)*);
3. pursuant to subsection 127(1), paragraph 8, Kennelly is prohibited from becoming or acting as a director or officer of any issuer for eight years commencing on the date of this Order;
4. pursuant to subsection 127(1), paragraph 6, Kennelly is reprimanded;
5. the Temporary Order as against Kennelly no longer has any force or effect; and
6. pursuant to section 127.1, Kennelly will pay costs to the Commission in the amount of \$2,500.

DATED at Toronto this 9th day of October, 2002
