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

- AND -

IN THE MATTER OF
DAVID CHARLES PHILLIPS and JOHN RUSSELL WILSON

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

Hearing: May 11, 2015

Decision: October 28, 2015

Panel:	Edward P. Kerwin	- Chair of the Panel and Commissioner
Appearances:	Yvonne Chisholm Brooke Shulman	- For Staff of the Commission
	Bruce O'Toole	- For David Charles Phillips and John Russell Wilson

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REASONS AND DECISION ON SANCTIONS AND COSTS

I. INTRODUCTION

[1] This was a hearing, held on May 11, 2015, 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 David Charles Phillips ("**Phillips**") and John Russell Wilson ("**Wilson**"), (together, the "**Respondents**").

[2] In the decision on the merits, issued on January 14, 2015 (the "**Merits Decision**"), the Panel found that each of the Respondents breached subsections 126.1(b) and 44(2) of the Act and section 2.1 of Commission Rule 31-505, and acted contrary to the public interest

[3] The Panel found that each of the Respondents breached subsection 126.1(b) of the Act and acted contrary to the public interest by selling securities of First Leaside Group ("**FLG**") entities during the period between August 22 and October 28, 2011 (the "**Sales Period**") to investors (the "**FLG Sales Investors**"), without disclosing a report prepared by Grant Thornton Limited (the "**Grant Thornton Report**") and, in particular, the important facts in that report. The Respondents had the subjective knowledge that by not disclosing the Grant Thornton Report and the important facts in that report to FLG Sales Investors they put the financial or pecuniary interests of FLG Sales Investors at risk. Instead of disclosing the report, the Respondents represented that the state of FLG was of a certain character, when in reality, it was not. The Respondents' actions were deliberate and formed part of a willful strategy to continue to raise capital for FLG in order to meet its obligations across the spectrum of its entities.

[4] The Panel found that each of the Respondents breached subsection 44(2) of the Act and acted contrary to the public interest by making statements about FLG that a reasonable investor would consider relevant in deciding whether to enter into or maintain a trading or advising relationship with the respective Respondent. In light of the findings and recommendations in the Grant Thornton Report, the Respondents each made statements that were untrue or omitted information necessary to prevent their respective statements from being false or misleading in the circumstances in which they were made, thereby breaching subsection 44(2) of the Act and acting contrary to the public interest.

[5] The Panel found that each of Phillips and Wilson, as registrants, had a duty to deal fairly, honestly and in good faith with FLG Sales Investors, who were their clients, and that each of the Respondents failed to meet that duty, thereby breaching section 2.1 of Commission Rule 31-505 and acting contrary to the public interest. The Respondents prejudiced FLG Investors by favouring their own interests to raise additional capital for FLG. The Respondents' conduct constituted a breach of their duties as gatekeepers of the integrity of the capital markets by not disclosing the risks associated with an investment in FLG products, including the viability of FLG.

II. APPROPRIATE SANCTIONS

[6] In determining what sanctions should be imposed on the Respondents, I am guided by the underlying purposes of the Act set out in section 1.1: to provide

protection to investors from unfair, improper or fraudulent practices; and to foster fair and efficient capital markets and confidence in those markets.

[7] The purpose of an order imposing sanctions under section 127 of the Act is protective and preventative. It is to restrain future conduct that is likely to be prejudicial to the public interest in fair and efficient capital markets. As stated by the Supreme Court of Canada, "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."[1]

[8] The Supreme Court of Canada has recognized that general deterrence is an essential factor in imposing sanctions that are both protective and preventative.[2]

[9] In determining the appropriate sanctions, I must ensure that the sanctions are proportionate to both the particular circumstances of the case and the conduct of each Respondent. [3] I will also consider the range of sanctions ordered in similar cases.

[10] The Commission has considered the following non-exhaustive list of factors in determining the appropriate sanctions:

(a) the seriousness of the conduct and the breaches of the Act;

(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 by a respondent of the seriousness of the improprieties;

(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) the size of any profit made or loss avoided from the illegal conduct;

(g) the size of any financial sanction or voluntary payment when considering other factors;

(h) the reputation and prestige of the respondent;

(i) the shame or financial pain that any sanction would reasonably cause to the respondent;

(j) the effect any sanction might have on the livelihood of the respondent;

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[1] *Committee for the Equal Treatment of Asbestos Minority Shareholders v. Ontario (Securities Commission)*, [2001] 2 S.C.R. 132, at para. 43; *Re Mithras Management Ltd.* (1990), 13 O.S.C.B. 1600.
[2] *Re Cartaway Resources Corp.*, [2004] 1 S.C.R. 672 (***"Cartaway"***) at para. 60.
[3] *Re M.C.J.C. Holdings Inc.* (2002), 25 O.S.C.B. 1133 ("***M.C.J.C. Holdings***"), at 1134.

(k) the restraint any sanction may have on the ability of a respondent to participate without check in the capital markets; and

(l) any mitigating factors, including the remorse of the respondent.[4]

[11] The applicability and importance of each factor will depend on the particular circumstances of each respondent.

III. ISSUES

[12] The substantive issues raised by the parties' submissions regarding the appropriate sanctions are:

a. Should I order that the Respondents disgorge to the Commission amounts obtained as a result of their conduct and, if so, what amount should each of the Respondents be ordered to disgorge?

b. Should I order that the Respondents pay an administrative penalty and, if so, what amount should each of the Respondents be ordered to pay?

c. Should I impose securities trading, acquisition and exemption prohibitions on the Respondents and, if so, for how long, and what exceptions, if any, should be allowed?

d. Should I impose director, officer and registrant prohibitions on the Respondents, and, if so, for how long, and what exceptions, if any, should be allowed?

IV. ANALYSIS

A. Disgorgement

[13] Pursuant to paragraph 10 of subsection 127(1) of the Act, 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."

[14] Staff submit that Phillips, as the directing mind of the fraudulent scheme, bears responsibility for every sale made to FLG Sales Investors as part of the fraudulent scheme, including his sales of $3,388,626 of units to 46 FLG Sales Investors, and that he should be ordered to disgorge the entire amount of funds raised from FLG Sales Investors during the Sales Period of $18,756,168, less the amount of completed and pending distributions of $2,167,914 to FLG Sales Investors via the FLG receivership proceeding[5] for a net amount of $16,597,254.

[15] Staff submit that Wilson should be ordered to disgorge $7,817,739, which represents his sales of units to 94 FLG Sales Investors during the Sales Period totalling $8,945,865, less the amount of completed and pending distributions of $1,128,126 to those FLG Sales Investors via the FLG receivership proceeding.[6]

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[4] *Re Belteco Holdings Inc.* (1998), 21 O.S.C.B. 7743 at 7746 ("***Belteco Holdings***"); *M.C.J.C. Holdings,* at 1136.

[5] FLG Sales Investors have received $1,734,325 in the FLG receivership proceeding, and could receive a maximum of $2,167,914 (Affidavit of Jonathan Krieger, sworn February 17, 2015 ("***Krieger Affidavit***"), at para. 12)

[6] Affidavit of Stephanie Collins, sworn February 18, 2015 ("***Collins Affidavit***"), at para. 5.

Staff also submit that Wilson's obligation to disgorge the net amount of $7,817,739 should be joint and several with Phillips.

[16] The Respondents submit that no disgorgement order should be made because the FLG Sales Investors' funds were received by FLG entities who are not respondents in the proceeding, and not by the Respondents. If the FLG entities who ultimately received the funds were respondents, the Respondents acknowledge that they could have been jointly and severally obligated with those FLG entities to disgorge the funds obtained from the FLG Sales Investors. However, since those FLG entities are not respondents, the Respondents submit that the Commission cannot impose any disgorgement obligation on them. To do so, the Respondents submit, would be punitive and restitutionary and beyond the Commission's jurisdiction.

[17] I will first address the Commission's authority to make a disgorgement order. I will then address the factors the Commission considers when determining whether to make a disgorgement order and the circumstances of the Respondents' conduct.

(a) The Commission's authority to order disgorgement

[18] In *Limelight,*[7] the Commission held that it may order that all money illegally obtained from investors be disgorged. The Commission described its authority to order disgorgement as follows:

> [P]aragraph 10 of subsection 127(1) of the Act provides that disgorgement can be ordered with respect to "any amounts obtained" as a result of non-compliance with the Act. Thus, the 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. This approach also avoids the Commission having to determine how "profit" should be calculated in any particular circumstance. Establishing how much a respondent obtained as a result of his or her misconduct is a much more straightforward test. In our view, where there is a breach of Ontario securities law that involves the widespread and illegal distribution of securities to members of the public, it is appropriate that a respondent disgorge all the funds that were obtained from investors as a result of that illegal activity. In our view, such a disgorgement order is authorized under paragraph 10 of subsection 127(1) of the Act.[8]

[19] The "amount obtained" does not mean "the amount retained, the profit, or any other amount calculated by considering expenses and other possible

[7] *Re Limelight Entertainment Inc. et al.* (2008), 31 O.S.C.B. 12030 ("***Limelight***").
[8] *Ibid.* at para. 49.

deductions."[9] In short, it does not matter how the funds were used after they were obtained in contravention of the Act.

[20] The Commission may order a particular respondent to disgorge funds obtained in contravention of the Act regardless of whether that particular respondent personally obtained the funds.[10] For example, in *Streamline*, the British Columbia Securities Commission ("**BC Commission**") found that there was no evidence that the individual respondents personally benefitted or were personally enriched, in any material way, by the funds obtained from investors.[11] Nonetheless, the BC Commission ordered the individual respondents, jointly and severally with the corporate respondents, to disgorge the full amount of the funds obtained from investors. The BC Commission stated:

> In light of the critical importance of investor protection, the fact that the proceeds raised were used for the stated purpose of the investments should not automatically reduce a section 161(1)(g) [disgorgement] sanction. Whether the money raised was used for the stated purpose or not, the end result is the same – the investors have been denied the protections required by our securities laws and were harmed as a result of the misconduct. The purpose of a section 161(1)(g) payment is to remove from a respondent any amounts obtained through a violation of the Act. Given that, how a respondent spent the funds raised is not relevant for such purpose. Also, a respondent's ability to pay the amount is not relevant for such purpose.
>
> The plain wording of section 161(1)(g) supports our interpretation. To hold otherwise would be tantamount to importing into section 161(1)(g) a requirement that payment to the Commission be limited to personal gains enjoyed by a respondent or to some notion of profits, which interpretations have been specifically rejected by this Commission and by the Ontario and Alberta Securities Commissions.[12]

[21] Contrary to the Respondents' submission, the BC Commission's interpretation of its sanction provision does not depend on differences between the wording of that provision and s. 127 of the Act. The BC Commission held that the

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[9] *Streamline Properties Inc*., 2015 BCSECCOM 66 ("***Streamline***"), at paras. 49-50, quoting *Arbour Energy Inc.* 2012 ABASC 416 with approval.
[10] *Re Global Energy Group, Ltd*. (2013), 36 OSCB 12153 ("**Global Energy**"), at para. 80; *Limelight*, at paras. 59-62; *Re Sabourin* (2010), 33 OSCB 5299 ("***Sabourin***"), at paras. 69-70; *Streamline*, at para. 46; *Michael Patrick Lathigee*, 2015 BCSECCOM 78 ("***Lathigee"),*** at paras. 37, 42-46; *Oriens Travel & Hotel Management Corp*., 2014 BCSECCOM 352 ("***Oriens***"), at paras. 62-67; *David Michael Michaels*, 2014 BCSECOM 457 ("***Michaels***"), at para. 42; *Manna Trading Corp Ltd.*, 2009 BCSECCOM 595 ("***Manna***"), at paras. 42-44
[11] *Streamline,* at paras. 20-21.
[12] *Streamline*, at paras. 55-56.

disgorgement provisions in the BC and Ontario acts are identical in all relevant respects.[13]

[22] Individual respondents cannot shelter behind the corporate vehicles through which their conduct was carried out.[14] The Commission may order an individual respondent to disgorge funds obtained by a corporation involved in the misconduct. In a number of decisions of the Commission and the BC Commission, individual respondents have been ordered to disgorge amounts obtained by corporate respondents, on a joint and several basis.[15] Such an order contemplates that the individual respondents may ultimately be required to disgorge the full amount obtained in contravention of the Act if the corporate respondents do not satisfy the obligation.

[23] The Respondents submit that the Commission does not have the authority to order them to disgorge funds they did not receive because such an order would be punitive. This submission is clearly contradicted by the principles and authorities referred to above. For example, in *Streamline,* the BC Commission stated (at para. 54) "[a]s a matter of general principle, we do not find payment of the full amount raised to be inequitable or punitive in circumstances where the proceeds raised were used for the purpose of the investments and not kept for personal gain by the respondents."

[24] The Respondents submit that the Commission does not have the authority to order them to disgorge funds they did not receive because such an order would be restitutionary. The Respondents cite *Strother v. 3464920 Canada Inc*.[16] in support of their submission that ordering a respondent to disgorge amounts he or she did not receive would be restitutionary, and *Fischer v. IG Investment Management Ltd.*[17] in support of their submission that the Commission may not make a restitutionary order.

[25] In *Strother*, the Supreme Court of Canada was not considering the disgorgement power in s. 127 of the Act. The Court was considering what measure of damages the plaintiff was entitled to for breach of fiduciary duty. In that context, the Court held that damages measured by the plaintiff's loss served a restitutionary purpose whereas damages measured by the defendant's gain served a prophylactic purpose. Disgorgement under s. 127 of the Act is not the same as damages and is not intended to compensate individual investors.[18] As noted by the Five Year Review Committee,

> "…restitution is not the same as disgorgement. Restitution is a remedy that aims to restore a person to the position they would have been in if not for the improper action of another. Disgorgement is an equitable remedy that aims to

[13] *Streamline*, at para. 47; see also *Lathigee*, at para. 40.
[14] *Limelight,* at para. 59; *Lathigee* at para. 46.
[15] *Limelight*, at paras. 59-62; *Re Al-tar Energy Corp* (2011), 34 OSCB 447 ("**Al-tar**"), at para. 71; *Sabourin*, at paras. 69-73; Re *Moncasa Capital Corp.* (2014), 37 OSCB 229 ("***Moncasa***"), at paras. 44-45; *Streamline*, at paras. 52-58; and *Lathigee*, at paras. 43-49.
[16] *Strother v. 3464920 Canada Inc*., 2007 SCC 24 ("***Strother***") (at paras. 75-77).
[17] *Fischer v. IG Investment Management Ltd.*, 2012 ONCA 47 ("***Fischer***"), (at para. 52), aff'd *AIC Limited v. Fischer*, 2013 SCC 69.
[18] *Ibid.* at para. 52.

> deprive a wrong-doer of illegally obtained amounts. These amounts may not necessarily be paid to the person who suffered loss, and even if they are so paid, may not be sufficient to return that person to their original position.
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> (Five Year Review Committee, "Reviewing the Securities Act (Ontario)" Final Report (2003), at p. 223)

[26] 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.

[27] In oral submissions, the Respondents acknowledged the Commission's authority to order them to disgorge amounts they did not receive. However, they submit that the Commission may only do so if the FLG entities that ultimately received the funds are respondents in the proceeding. Because those FLG entities are not respondents in this proceeding, the Respondents submit that no disgorgement order may be made.

[28] In February 2012, prior to the commencement of this proceeding, almost all of the FLG entities, including First Leaside Wealth Management Inc. ("**FLWM**"), First Leaside Securities Inc. ("**FLSI**"), First Leaside Finance Inc. ("**FL Finance**"), Wimberly Apartments Limited Partnership ("**WALP**"), 960510 Ontario Inc. which was WALP's general partner, and those entities in which FLG Sales Investors purchased units, became subject to a court-supervised wind-up. As a result, Staff submits, the FLG entities were not named as respondents in this proceeding to avoid depleting assets available to investors. Staff notes that in *XI Biofuels*,[19] the Commission did not make disgorgement orders against the corporate respondents in order to avoid depleting the assets available to investors.

[29] The Commission's decision in *Al-tar* is in keeping with the principles and authorities set out above. In particular, it is in keeping with the principle that the Commission's authority to order disgorgement is not limited to ordering an individual respondent to disgorge amounts he or she obtained personally.

[30] I find that the Commission has the authority to order the Respondents to disgorge the funds obtained in contravention of the Act in circumstances where the FLG entities that ultimately received the funds are not respondents in this proceeding.

(b) Disgorgement by the Respondents

[31] The Commission has considered the following factors, in addition to the general factors for sanctions, when contemplating a disgorgement order:

(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;

[19] *Re XI Biofuels* (2010), 33 OSCB 10963 ("***XI Biofuels***").

(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.[20]

[32] In prior decisions of the Commission and the BC Commission, the panel has exercised its discretion to order one or more of the respondents to disgorge less than the full amount obtained in contravention of the Act. The circumstances in which less than full disgorgement has been ordered generally fall into two categories.

[33] In the first category are those cases in which the funds obtained in contravention of the Act went to a third party over which the respondents did not have any control. In *Global Energy,* the Commission did not order disgorgement of funds it found were obtained by an individual, who was not a respondent, and who directed the funds to accounts over which the respondents did not have any control or authority.[21] In *Re MBS Group (Canada) Ltd.,*[22] Staff did not request, and the Commission did not order, the individual respondent, Balbir, to disgorge amounts that were transferred to the bank accounts of Electrolinks, which was not a respondent in the proceeding, because those amounts were transferred in the period before Balbir became a director of Electrolinks. In *Pacific Ocean Resources Corporation,*[23] the BC Commission did not make a disgorgement order because the investors' funds did not go to either of the respondents but went to a corporation over which neither of the respondents had control.[24] In *Michael*s, the BC Commission did not order the respondent to disgorge amounts retained by third party issuers in whose exempt market securities Michael's clients invested on his recommendation.[25]

[34] In *Re XI Biofuels,* the circumstances were somewhat different. In that case, the Commission did not order disgorgement by the corporate respondents, who had not been discharged from bankruptcy proceedings, in order to avoid depleting the assets available to compensate investors who lost money as a result of the respondents' non-compliance with the Act[26] but restricted the monetary orders, including disgorgement, to the individual respondents.

[35] In the second category are cases in which a respondent is found to be less culpable than other respondents. In *Sabourin,* the Commission made no disgorgement order against one of the individual respondents and ordered certain of the other individual respondents to disgorge only their net commissions, on the basis that those respondents were less culpable and to

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[20] *Limelight*, at para. 52.
[21] *Global Energy*, at para. 81.
[22] *Re MBS Group (Canada) Ltd.* (2013), 36 OSCB 3915, at para. 11.
[23] *Pacific Ocean Resources Corporation*, 2012 BCSECCOM 104.
[24] *Ibid*. at para. 27
[25] *Michaels*, at para. 46.
[26] *XI Biofuels,* at paras. 25, 72.

avoid double counting of the amounts "obtained" from investors. The directing mind of the corporate respondent was ordered to make full disgorgement.[27] In *Oriens,* the BC Commission did not make a disgorgement order against one respondent on the basis that he was less culpable. The directing mind of the corporate respondent was ordered to make full disgorgement.[28]

[36] In M P Global,[29] the Commission found that full disgorgement was not warranted in the circumstances of the respondents' conduct because that conduct did not involve an allegation of fraud. Instead of ordering full disgorgement, the Commission ordered the respondents to disgorge the amounts used by them for their personal benefit.[30]

[37] I now consider the circumstances of the Respondents' conduct.

[38] The Respondents were registrants. Phillips was registered with the Commission in various capacities since 1981 and held many roles as a registrant in respect of FLG entities, including Ultimate Designated Person of FLSI, before his registrations were suspended in February 2012. Wilson was registered with the Commission in various capacities since 2004, until his registrations were suspended in February 2012.

[39] Registrants hold a position of trust in the securities industry, and have a duty to deal fairly, honestly and in good faith with their clients. The Respondents failed to meet that duty.

[40] The Respondents committed fraud, which is one of the most egregious contraventions of the Act. The Respondents' actions were deliberate and formed part of a willful strategy to continue to raise capital for FLG in order to meet its obligations across the spectrum of its entities.

[41] FLG had a complex corporate structure comprised of about 161 limited partnerships and companies, with significant interrelationships among and a significant number of transactions and internal transfers between FLG entities.

[42] Phillips was the founder and CEO of FLG. He was FLG's directing mind, oversaw all aspects of its business and signed off on every sale of securities to investors.

[43] Wilson was a member of FLG's five-member senior management team.

[44] FLWM was the de facto parent company and the main operating entity of FLG. Phillips owned 100% of the common shares of and was the "driving mind" of FLWM. Wilson was a director of FLWM.

[45] Within FLWM, there were seven operating companies that provided all of the advisory services for FLG.

[46] One of the seven operating companies within FLWM was FLSI, which was registered as an investment dealer under the Act and as a member with IIROC. Phillips was CEO, President, Secretary, a director and Ultimate Designated Person of FLSI. Wilson was a director of FLSI and Vice President, Sales. He

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[27] *Sabourin*, at paras. 69-73.
[28] *Oriens*, at paras. 70-71
[29] Re *M P Global Financial Ltd.* (2012), 35 OSCB 9061 ("***M P Global***")
[30] *Ibid*. at paras. 49-51.

oversaw a sales team and also helped to co-ordinate communications to investors.

[47] The sales of securities of FLG entities to investors were completed through FLSI.

[48] During the Sales Period, FLG Sales Investors were sold securities of FLG entities with a total value of $18,756,168. In the Merits Decision, the Panel found that those funds were obtained as a result of the Respondents' fraud and in contravention of the Act.

[49] Phillips and Wilson were responsible for the majority of the sales of securities of FLG entities to FLG Sales Investors during the Sales Period. Phillips sold $3,388,626 of securities of FLG entities to 46 FLG Sales Investors and Wilson sold $8,945,865 of securities of FLG entities to 94 FLG Sales Investors.

[50] During the Sales Period, FLG Sales Investors were sold securities of eight FLG entities. Of the securities sold, only $78,448 were securities of WALP. However, unbeknownst to the FLG Sales Investors in securities of the other FLG entities, their funds were being used to fund a portion of WALP's operating costs in order to keep it afloat. It was noted in the Grant Thornton Report that WALP had a recurring cash flow deficiency and had become a drain on the resources of FLG.

[51] Wilson was a founding investor in WALP, and director of 960510 Ontario Inc., WALP's general partner.

[52] Funds were transferred between FLG entities, including to WALP, through FL Finance, which was FLG's central bank. Phillips was President, Secretary and a director of FL Finance. WALP borrowed the majority of money from FL Finance, which FL Finance, in turn, borrowed from other FLG entities. By August 2011 – the start of the Sales Period the practice of lending funds from one LP to another though FL Finance resulted in a cash flow shortfall within FLG. FL Finance did not have sufficient liquid assets to pay back the outstanding loans to the other LPs within FLG from which FL Finance had borrowed the funds. The Grant Thornton Report concluded that FLG, as a whole, would be facing a cash flow deficiency of approximately $15.9 mm, and its viability was dependent on continuing to raise new capital by attracting additional funds from investors.

[53] The court-supervised wind-up of the FLG entities is nearly complete. The FLG Sales Investors have received $1,734,325 in distributions, and as such their losses to the date of this sanctions hearing are $17,030,844. The evidence indicates that the maximum total potential distribution to FLG Sales Investors is approximately, $2,167,914, which would reduce their total losses to $16,597,254.

[54] In my view, a disgorgement order is appropriate in these circumstances because ascertainable amounts have been obtained as a result of the non-compliance of the Respondents with Ontario securities law and such an order will deter the Respondents and other market participants from similar misconduct.

[55] I find that it is in the public interest in these circumstances to order that Wilson disgorge, jointly and severally with Phillips, $7,817,739, being the amount of securities Wilson personally sold to FLG Sales Investors less the maximum distribution to those investors from the court-supervised wind-up. Although Wilson was a member of management of FLG, he was not the directing mind of FLG.

[56] I find that it is in the public interest in these circumstances to order that Phillips disgorge a total amount of $16,597,254 including the $7,817,739 that is to be disgorged jointly and severally with Wilson, which is the total amount obtained in contravention of the Act less the maximum distribution to investors from the court-supervised wind-up because Phillips was FLG's directing mind, oversaw all aspects of FLG's business and signed off on every sale of securities to FLG Sales Investors.

[57] The amounts disgorged by Phillips and Wilson are to be designated for allocation or use by the Commission pursuant to subsection 3.4(2)(b) of the Act.

B. **Administrative Penalties**

[58] The purpose of an administrative penalty is to deter the particular respondents and other like-minded persons from engaging in the same or similar conduct in the future.[31] In order to be a deterrent, the amount of an administrative penalty should bear some reference to the amount raised from investors. Larger administrative penalties may be appropriate where multiple violations of the Act occur or when the respondents have raised large amounts of money in contravention of the Act.[32] With respect to the Respondents' conduct, fraud generally requires higher administrative penalties.[33] I will consider the circumstances of the specific conduct of each of the two Respondents and the level of administrative penalties imposed in similar cases.[34] I will also consider the total financial sanctions – administrative penalty and disgorgement – ordered in respect of each Respondent.[35]

[59] Staff and the Respondents referred to the following cases in their submissions regarding the appropriate administrative penalty: *Al-tar; Limelight*; *Re Moncasa Capital Corp.* (2014), 37 O.S.C.B. 229 ("***Moncasa***"); *Re Pogachar* (2012), 35 OSCB 6479 ("***Pogachar***"); *Re Rezwealth Financial Services Inc.* (2014), 37 OSCB 6731 ("***Rezwealth***"); *Sabourin*; and *Re York Rio Resources Inc.* (2014), 37 OSCB 3422 ("***York Rio***"). The table below briefly summarizes the range of administrative penalties imposed in these cases, in descending order, and the amounts ordered disgorged:

Sabourin:	• The panel ordered Sabourin and the corporate respondents to pay an administrative penalty of $1.2 million, on a joint and several basis, and the other respondents to pay administrative penalties ranging from $50,000 to $150,000. • The panel distinguished between Sabourin and the other individual respondents based on, among other things, that Sabourin concocted and orchestrated the investment scheme and knew that the investments were a sham, and was the directing mind of the corporate respondents.[36]

[31] *Limelight*, at para. 67.
[32] *Al-tar*, at para. 47; *Limelight* at para. 78.
[33] *Sabourin*, at para. 77.
[34] Sabourin, at para. 75; *Limelight* at para. 71.
[35] *Sabourin* at paras. 59 and 74; *Limelight*, at para. 78.
[36] *Sabourin,* at paras. 7, 77-86.

	• The panel ordered Sabourin and the corporate respondents to disgorge $27.9 million, on a joint and several basis, and certain of the other respondents to disgorge commissions received by them.
York Rio:	• The panel ordered the two corporate respondents and three of the individual respondents, York, Schwartz and Runic, to pay an administrative penalty of $1.0 million each and the remaining four individual respondents to pay administrative penalties ranging from $75,000 to $200,000. • The Panel distinguished between York, Schwartz and Runic and the other individual respondents on the basis that these three respondents were the directing minds of the schemes, whereas the other individual respondents' participation was more limited.[37] • The panel ordered the individual respondents to disgorge, on a joint and several basis with the corporate respondents, a total of $16.7 million.
Pogachar:	• The panel ordered each of the individual respondents to pay an administrative penalty of $750,000. • The panel ordered the individual and corporate respondents to disgorge $21,908,607, on a joint and several basis.
Al-tar:	• The panel ordered the following administrative penalties: $750,000 (Campbell), $650,000 (Da Silva), $500,000 (O'Brien), $200,000 (Sylvester) • The panel distinguished between the respondents based on, among other things, the degree of their involvement in the fraud, prior discipline (Campbell and Da Silva), and breach of a Commission cease trade order (Campbell and Da Silva).[38] • The panel ordered: the respondents Al-tar, O'Brien, Campbell and Da Silva to disgorge $615,199.50, on a joint and several basis; and the respondents Alberta Energy, Drago Gold, Campbell and Sylvester to disgorge $42,909.53, on a joint and several basis.
Rezwealth:	• The panel ordered the following administrative penalties: Blackett ($500,000); Ms. Ramoutar ($250,000); Mr. Ramoutar ($150,000); Smith ($25,000) and Tiffin ($25,000). • The panel distinguished between Blackett and the Ramoutars on the basis that Blackett created and operated a fraudulent Ponzi scheme from its inception, while the Ramoutars became participants in the fraud at a later date.[39] Smith and Tiffin were not found to have committed fraud.

[37] *York Rio,* at paras. 78-81
[38] *Al-tar*, at paras. 48-57.
[39] *Rezwealth*, at para. 108-110.

	• The Panel ordered: Blackett to disgorge $1,474,377, on a joint and several basis with one of the corporate respondents; Rezwealth and the Ramoutars to disgorge a total of $1,146,936, and the other respondents to disgorge fees received by them.
Moncasa:	• The panel ordered the individual and corporate respondent to pay an administrative penalty of $400,000, on a joint and several basis. • The panel ordered the individual and corporate respondent to disgorge $1,231,800, on a joint and several basis.
Limelight:	• The panel ordered the following administrative penalties: Limelight ($200,000); Da Silva ($200,000); Campbell ($175,000); and Daniels ($50,000). • The Panel determined that Da Silva and Campbell should pay higher administrative penalties than Daniels to reflect that they were the directing minds, and that Da Silva should pay a higher administrative penalty than Campbell to reflect other conduct.[40] • The panel ordered that Limelight, Da Silva and Campbell disgorge $2,747,089.45, on a joint and several basis.

[60] Staff seek an administrative penalty in the amount of $1,000,000 as against Phillips and $750,000 against Wilson. Staff submit that administrative penalties in these amounts are appropriate given the range of administrative penalties imposed in *Sabourin, York Rio* and *Pogachar*. Staff submit that those cases establish the appropriate range because the amount obtained from investors in those matters is comparable to the almost $19 million that Phillips and Wilson obtained from FLG Sales Investors. Staff submit that FLG Sales Investors were no less entitled to the protection of securities laws simply because there was some real estate involved and because FLG had been a real business. Staff submit that there are no mitigating factors.

[61] Staff submit that it is appropriate to impose a higher administrative penalty on Phillips because he was the directing mind of the fraud.

[62] The Respondents also distinguish between Phillips and Wilson in their submissions.

[63] The Respondents submit that the appropriate administrative penalties are $300,000 against Phillips and $150,000 against Wilson. The Respondents submit that the administrative penalties sought by Staff are not warranted by the Respondents' conduct, which, they submit, is distinguishable from the conduct in *Sabourin*, *York Rio* and *Pogachar* for three reasons. First, FLG was a real business, in which the Respondents invested. The Commission found that the Respondents perpetrated a fraud by failing to disclose important information, which is not the same as finding that the business was a fraud and created solely to defraud investors. Second, the Respondents' conduct occurred over a short

[40] *Limelight*, at paras. 75-79.

period of time: the Sales Period was between August 22 and October 28, 2011. Third, none of the funds obtained from FLG Sales Investors was used by the Respondents for their personal benefit.

[64] The Respondents submit that administrative penalties in the amounts suggested by them are appropriate given the range of administrative penalties imposed in *Rezwealth* and *Moncasa*, cases in which the businesses were wholly fraudulent and the fraud committed by the respondents was planned from the outset. In addition, the Respondents submit that the circumstances of their conduct includes the following, which they submit are mitigating factors:

a. The Board of Directors was fully aware of the Grant Thornton Report;

b. The independent directors had met with Grant Thornton to discuss the Grant Thornton Report;

c. The sales made during the Sales Period were done with the knowledge of the board of directors and external corporate counsel;

d. Several directors and their family members, made purchases during the Sales Period;

e. All sales made during the Sales Period were reported to the OSC on a weekly basis;

f. The Respondents' conduct was not the cause of investors' losses. It was only when it became clear that the cease trade order would not be lifted that the independent committee determined that there was too much "regulatory risk" and FLG was not going to be viable;

g. The Respondents cooperated with Staff through its lengthy investigation of FLG.

[65] I agree with Staff and the Respondents that there is a distinction between Phillips and Wilson in the sense that Phillips was the directing mind of FLG and of the fraud, and that it would be appropriate to impose a larger administrative penalty on Phillips. As is clear from the table above, the Commission has previously made such a distinction.

[66] In my view, the circumstances of the Respondents' conduct warrants higher administrative penalties than those imposed in *Moncasa* and *Rezwealth*, but less than those imposed in *Sabourin, York Rio and Pogachar.* While I agree with the Respondents' submissions that their conduct is distinguishable from the conduct of the respondents in *Sabourin, York Rio and Pogachar,* for the reasons they submitted, nonetheless, their conduct was still very serious. The Commission found that their actions were deliberate and formed part of a willful strategy to continue to raise capital for FLG, in breach of the Act, in order to meet its obligations across the spectrum of its entities. The Respondents obtained approximately $19 million from investors in contravention of the Act, which is far greater than the amounts at issue in *Moncasa* and *Rezwealth*, and in the range of the amounts at issue in *Sabourin*, *York Rio* and *Pogachar*.

[67] I do not accept the Respondents' submission that the circumstances set forth in paragraph [64] above are mitigating factors. In particular, I do not agree with

the Respondents' submission that their conduct was not the cause of investors' losses.

[68] The Commission found that each of the Respondents engaged in or participated in an act, practice or course of conduct relating to securities that they knew would perpetrate a fraud on FLG Sales Investors, contrary to subsection 126.1(b) of the Act and contrary to the public interest. The Respondents sold securities of FLG entities without disclosing the Grant Thornton Report and the important facts therein, which they knew would perpetrate a fraud on the FLG Sales Investors. The Respondents' conduct put the financial or pecuniary interests of FLG Sales Investors at risk. The Commission also found that each of the Respondents breached subsection 44(2) of the Act and section 2.1 of Commission Rule 31-505 and acted contrary to the public interest.

[69] I find that in these circumstances it is in the public interest to impose an administrative penalty of $700,000 on Phillips and an administrative penalty of $400,000 on Wilson. These amounts are proportionate to their misconduct and, together with the amounts that they are to disgorge, will deter them and other like-minded persons from engaging in similar conduct in the future.

[70] The amounts paid to the Commission in satisfaction of the administrative penalties are to be designated for allocation or use by the Commission pursuant to subsection 3.4(2)(b) of the Act.

C. Trading and Other Prohibitions

[71] Staff submit that the Respondents should be subject to permanent trading, acquisition and exemption prohibitions in order to remove them permanently from participation in Ontario's capital markets. Staff submit that permanent bans are appropriate given that the Respondents committed fraud. The Commission has repeatedly ordered permanent trading, acquisition and exemption prohibitions in circumstances where the respondents were found to have engaged in fraud. Participation in the capital markets is a privilege, not a right[41] and, Staff submit, the Respondents cannot be trusted to participate in the capital markets in the future. Staff submit that there should be no "carve-out" from these prohibitions.

[72] The Respondents submit that any trading, acquisition and exemption prohibitions imposed must relate to their misconduct, and note that in *Re Conrad M. Black et al.* [42] the Commission did not impose a trading prohibition because the allegations did not involve trading. The Respondents submit that five year trading, acquisition and exemption prohibitions are proportionate to the circumstances of their conduct, including factors that they submit are mitigating and are discussed above. The Respondents submit that these prohibitions should have a "carve-out" so that the Respondents may trade in their own accounts on their own behalf. Their misconduct, they submit, did not involve trading on their own behalf in a manner that affected the integrity of the markets like market manipulation or insider trading. Therefore, the Respondents submit, the purpose of investor protection is not met by prohibiting the Respondents from trading on their own behalf.

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[41] *Erikson v. Ontario (Securities Commission),* [2003] O.J. No. 593 (Div. Ct.) at para. 55.
[42] *Re Conrad M. Black et al.* (2015), 38 OSCB 2043 ("**Black**"), at para. 162.

[73] The Commission has found that the Respondents' conduct involved selling securities to FLG Sales Investors without disclosing the Grant Thornton Report. That conduct of the Respondents involved trading, as that term is defined in the Act. In imposing sanctions, the Commission has not drawn a distinction between conduct where the trading itself affected the integrity of the markets – e.g. market manipulation – and conduct where the trading is part of a scheme to obtain funds from investors in contravention of the Act. The Commission has imposed permanent trading, acquisition and exemption prohibitions in a number of cases involving the latter conduct in order to remove the respondents from participation in the capital markets.[43] The Commission has also not granted the respondent's request for a carve-out in cases where the respondents' conduct involved fraud, but did not include trading on their own behalf.[44]

[74] I find it appropriate and in the public interest in these circumstances that the Respondents cease trading in securities, be prohibited from acquiring securities, and that exemptions contained in Ontario securities law not apply to them permanently in order to remove the Respondents from participation in the capital markets.

[75] I do not agree with the request of the Respondents for a broad, general "carve-out". Nonetheless, I find it appropriate and in the public interest that the Respondents be granted a limited exemption for certain personal trading after they have made full satisfaction of the payments ordered in respect of administrative penalties and disgorgement for each Respondent.

[76] Each Respondent will be ordered to cease trading permanently in any securities, except, after payment has been made in full in respect of administrative penalties and disgorgement for each Respondent, trading shall be permitted only in mutual fund, exchange-traded fund or index fund securities for the account of any registered retirement savings plans, tax free savings accounts and self-directed retirement savings plans (as defined in the Income Tax Act (Canada)) in which the Respondent and/or his spouse have sole legal and beneficial ownership, and such trading is carried out through a registered dealer in Canada to whom he must give a copy of this Order at the time he opens or modifies these accounts.

[77] Each Respondent will be prohibited permanently from acquiring securities, except, after payment has been made in full in respect of administrative penalties and disgorgement for each Respondent, the acquisition of any securities by the Respondent shall be permitted only in mutual fund, exchange-traded fund or index fund securities for the account of any registered retirement savings plans, tax free savings accounts and self-directed retirement savings plans (as defined in the Income Tax Act (Canada)) in which the Respondent and/or his spouse have sole legal and beneficial ownership, and such trading is carried out through a registered dealer in Canada to whom he must give a copy of this Order at the time he opens or modifies these accounts.

D. **Director, Officer and Registrant Prohibitions**

[43] See *Al-tar*, *supra,* at paras. 31-33*; Pogachar*, *supra*, at paras. 5, 28*; Moncasa*, *supra*, at paras. 9, 26-28*; York Rio, supra*, at paras. 14-18, 61*.*

[44] *Al-tar, supra*, at para. 33.

[78] Staff submit that the Respondents should be subject to permanent director and officer prohibitions 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. Staff submit that permanent prohibitions are appropriate given that the Respondents committed fraud, and note that the Commission has repeatedly ordered permanent director and officer prohibitions in circumstances where the respondents were found to have engaged in fraud.[45]

[79] The Respondents submit that any prohibitions imposed must relate to their misconduct, and cite *Black* as an example of a case where the prohibitions requested by Staff were not imposed because those prohibitions did not relate to the respondents' conduct. In oral submissions the Respondents conceded that their misconduct related to their roles as registrants, and a lifetime prohibition on the Respondents becoming registrants was appropriate. The Respondents submit that director and officer prohibitions should not be imposed because their misconduct related to their roles as registrants - selling investments to their clients - and not to their roles as officers or directors of FLG entities. The Respondents submit that this is demonstrated by the fact that Staff has not proceeded against any of the FLG entities or other members of the board of directors.

[80] In the alternative, if director and officer prohibitions are imposed, the Respondents submit that these prohibitions should be limited both in timeframe and scope. With respect to timeframe, they submit that five year prohibitions are appropriate. With respect to scope, the Respondents submit that a restriction on acting as directors or officers of any reporting issuer, registrant or investment fund manager serves the purpose of investor protection. The Respondents submit that prohibiting them from becoming director or officers of an "issuer" as that term is defined in the Act, would be overly broad and not connected to their misconduct.

[81] As discussed in more detail above, the Respondents' fraud was carried out through FLG entities of which they held various positions including director and officer. The Commission has determined in similar circumstances that permanent director and officer prohibitions are appropriate.[46]

[82] Furthermore, the FLG entities, through which the Respondents committed fraud on the FLG Sales Investors, were not "reporting issuers" but were simply "issuers". I am not satisfied that it is in the public interest that they be permitted to continue as directors and officers of an "issuer". There is a need to deter the Respondents and to protect the public from the Respondents in respect of serving as a director or officer of any issuer.

[83] I find that it is appropriate and in the public interest in these circumstances that the Respondents resign any positions each of them holds as a director or officer of an issuer, registrant or investment fund manager, and that each Respondent be prohibited permanently from becoming or acting as a director or officer of any issuer, registrant or investment fund manager. Each of the Respondents shall be prohibited permanently from acting as a registrant, an investment fund manager

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[45] See *Al-tar*, *supra,* at paras. 34-37*; Pogachar*, *supra*, at par. 29*; Moncasa*, *supra*, at para. 26*; York Rio, supra*, at para. 100; *Rezwealth, supra,* at paras. 90-94*.*

[46] *Al-tar, supra,* at paras. 36-37; *Rezwealth, supra*, at paras. 90-94.

or as a promoter. These orders will ensure that the Respondents will not be placed in a position of control or trust in Ontario's capital markets, and will ensure general and specific deterrence for the Respondents and like-minded individuals.

V. COSTS

[84] The Commission has discretion, under s. 127.1 of the Act, to order a person or company to pay the costs of an investigation and hearing if the Commission is satisfied that the person or company has not complied with Ontario securities law or has not acted in the public interest.

[85] Staff seeks to recover costs from the Respondents totaling $340,867.50, on a joint and several basis. In support of its request, Staff provided a Bill of Costs, which includes the Affidavit of Rita Pascuzzi sworn February 17, 2015 (the "**Pascuzzi Affidavit**"). The Pascuzzi Affidavit appends detailed dockets of Staff. The amount sought by Staff does not include all of Staff's time, and represents a discount of almost 50% to the actual costs incurred. Staff submit that the admissions made by the Respondents did not reduce the length of the hearing because the central issues were contested and remained to be proved, including the importance of the Grant Thornton Report and Phillips' and Wilson's interactions with investors.

[86] The Respondents submit that Staff's request is disproportionate, excessive and unjustified based on the facts and precedent, and request that the Respondents pay costs in the amount of $150,000. The Respondents submit that they are unable to provide a detailed response to Staff's request for costs, because there is insufficient detail in the materials provided by Staff. The Respondents submit that they took an efficient and cooperative approach to the hearing on the merits which is a relevant consideration.

[87] In exercising my discretion to order costs, I considered the factors in Rule 18.2 of the Commission's Rules of Procedure (2014), 37 OSCB 4168, and the factors cited by the Commission in *Re Ochnik* (2006), 29 OSCB 5917, including:

a. The importance of early notice of an intention to seek costs;

b. The seriousness of the allegations and the conduct of the parties; and

c. The reasonableness of the costs requested by Staff.[47]

[88] I note that costs have been sought from the outset of this proceeding. I also note that the allegations and findings of the Commission in respect of the conduct of the Respondents involve fraud, which is one of the most egregious contraventions of the Act, as well as other serious breaches of the Act and securities law. I find that the complexity of the structure and operations of the FLG entities, and the activities of the Respondents within that structure and those operations, contributed to greater investigative and hearing costs. I find that the costs requested by Staff are reasonable and well supported by the evidence.

[89] Having considered the foregoing, I find that it is appropriate to award costs in the amount of $340,867.50 on a joint and several basis against Phillips and Wilson.

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[47] *Ochnik*, at para. 29

VI. CONCLUSION

[90] For the reasons stated above, I find that it is in the public interest to impose the following sanctions, and will issue an order to that effect:

(a) pursuant to paragraph 2 of subsection 127(1) of the Act, trading in any securities by each of Phillips and Wilson shall cease permanently, except, after payment has been made in full in respect of administrative penalties and disgorgement for each Respondent, trading shall be permitted only in mutual fund, exchange-traded fund or index fund securities for the account of any registered retirement savings plans, tax free savings accounts and self-directed retirement savings plans (as defined in the Income Tax Act (Canada)) in which the Respondent and/or his spouse have sole legal and beneficial ownership, and such trading is carried out through a registered dealer in Canada to whom he must give a copy of this Order at the time he opens or modifies these accounts.

(b) pursuant to paragraph 2.1 of subsection 127(1) of the Act, the acquisition of any securities by each of Phillips and Wilson shall be prohibited permanently, except, after payment has been made in full in respect of administrative penalties and disgorgement for each Respondent, the acquisition of any securities by the Respondent shall be permitted only in mutual fund, exchange-traded fund or index fund securities for the account of any registered retirement savings plans, tax free savings accounts and self-directed retirement savings plans (as defined in the Income Tax Act (Canada)) in which the Respondent and/or his spouse have sole legal and beneficial ownership, and such trading is carried out through a registered dealer in Canada to whom he must give a copy of this Order at the time he opens or modifies these accounts.

(c) pursuant to paragraph 3 of subsection 127(1) of the Act, any exemptions contained in Ontario securities law shall not apply to each of Phillips and Wilson permanently;

(d) pursuant to paragraph 7 of subsection 127(1) of the Act, Phillips and Wilson shall resign any position that they hold as a director or officer of an issuer;

(e) pursuant to paragraphs 8, 8.2 and 8.4 of subsection 127(1) of the Act, Phillips and Wilson shall be prohibited permanently from becoming or acting as a director or officer of any issuer, registrant or investment fund manager;

(f) pursuant to paragraph 8.5 of subsection 127(1) of the Act, Phillips and Wilson shall be prohibited permanently from becoming or acting as a registrant, as an investment fund manager or as a promoter;

(g) pursuant to paragraph 9 of subsection 127(1) of the Act, Phillips shall pay an administrative penalty of $700,000 for his non-compliance with Ontario securities law, to be designated for allocation or use by the Commission, pursuant to subsection 3.4(2)(b) of the Act;

(h) pursuant to paragraph 9 of subsection 127(1) of the Act, Wilson shall pay an administrative penalty of $400,000 for his non-compliance with Ontario securities law, to be designated for allocation or use by the Commission, pursuant to subsection 3.4(2)(b) of the Act;

(i) pursuant to paragraph 10 of subsection 127(1) of the Act, Phillips and Wilson shall jointly and severally disgorge to the Commission a total of $7,817,739 that was obtained as a result of their non-compliance with Ontario securities law, to be designated for allocation or use by the Commission, pursuant to subsection 3.4(2)(b) of the Act;

(j) pursuant to paragraph 10 of subsection 127(1) of the Act, Phillips, in addition, shall disgorge to the Commission a total of $8,779,515 that was obtained as a result of his non-compliance with Ontario securities law, to be designated for allocation or use by the Commission, pursuant to subsection 3.4(2)(b) of the Act; and

(k) pursuant to subsection 127.1 of the Act, Phillips and Wilson shall jointly and severally pay $340,867.50 for the costs incurred in this matter.

Dated at Toronto this 28th day of October, 2015.

"Edward Kerwin"

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Edward P. Kerwin