Ontario

Capital Markets Tribunal

Tribunal des marchés financiers

22nd Floor
20 Queen Street West
Toronto ON M5H 3S8

22e étage
20, rue Queen ouest
Toronto ON M5H 3S8

Citation: *Valentine (Re)*, 2024 ONCMT 21
Date: 2024-09-30
File No. 2022-7

IN THE MATTER OF
MARK EDWARD VALENTINE

REASONS AND DECISION

(Subsection 127(1) and section 127.1 of the *Securities Act*, RSO 1990, c S.5)

Adjudicators:	Cathy Singer (chair of the panel) Geoffrey D. Creighton Dale R. Ponder	
Hearing:	By videoconference, July 3, 2024	
Appearances:	Andrew Faith Ryan Lapensee Sean Grouhi	For the Ontario Securities Commission
	Greg Temelini Janice Wright	For Mark Edward Valentine

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REASONS AND DECISION

1. OVERVIEW

[1] In a decision on the merits dated March 20, 2024 (the **Merits Decision**),[1] the Capital Markets Tribunal found that Mark Edward Valentine breached a 2004 order of the Ontario Securities Commission which banned him permanently from acting as a director or officer of an issuer, and from trading in securities for 15 years (the **2004 Order**). By breaching the 2004 Order, he violated Ontario securities law.

[2] The Commission asks that we impose sanctions against Valentine pursuant to s. 127(1) of the *Securities Act* (the ***Act***),[2] and that we order him to pay a portion of the Commission's costs of the investigation and this proceeding.

[3] Valentine accepts the permanent market participation bans and disgorgement order sought against him, but does not accept the requested administrative penalties and costs orders.

[4] For the reasons set out below, we conclude it would be in the public interest to order that Valentine:

a. be permanently banned from participation in the securities market;

b. disgorge to the Commission $3,257,639.75 and US$10,732,503;[3]

c. pay administrative penalties totaling $1,000,000; and

d. pay $300,000 in respect of the Commission's costs.

2. BACKGROUND

[5] On December 16, 2004, Valentine entered into a settlement agreement with the Commission based on certain breaches of Ontario securities law. The settlement agreement led to the 2004 Order against Valentine to:

a. resign all positions he held as a director or officer of an issuer;

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[1] *Valentine (Re)*, 2024 ONCMT 11

[2] RSO 1990, c S.5

[3] Unless otherwise indicated, all references to currency in these reasons are to Canadian dollars.

b. be permanently prohibited from becoming or acting as a director or officer of any issuer (a. and b. collectively the **D&O Ban**); and

c. cease trading in securities for a period of 15 years (the **Trading Ban**).

[6] In 2022, the Commission alleged that Valentine breached these prohibitions by:

a. acting as a director and officer of many Ontario corporations;

b. participating in the sale of over 5 million shares in a corporation called Flyp Technologies Inc. (the **Flyp Sale**); and

c. participating in several "Stock Secured Financings", which were transactions involving trades of securities;

and as a result, violated Ontario securities law once again.

[7] Over the course of the merits hearing, Valentine admitted to the first two alleged breaches, and disputed the third.

[8] In the Merits Decision, we found that Valentine breached the D&O Ban by acting as a director and/or officer of 38 Ontario corporations, breached the Trading Ban by participating in the Flyp Sale, and further breached the Trading Ban by participating in the Stock Secured Financings.

[9] We dismissed an additional allegation against Valentine that he engaged in "conduct contrary to the public interest", having found no evidence of additional conduct warranting an order under s. 127 of the *Act*.

3. ANALYSIS

3.1 Introduction

[10] The Tribunal may impose sanctions under s. 127(1) of the *Act* where it finds it to be in the public interest to do so. The Tribunal's exercise of that jurisdiction must be consistent with the purposes of the *Act*, which include protecting investors from unfair, improper and fraudulent practices, and fostering fair and efficient capital markets and confidence in the capital markets.

[11] Sanctions are protective and are intended to prevent future harm to investors and to the capital markets.[4]

[12] In this case, the Commission seeks the following sanctions and costs against Valentine:

a. permanent prohibitions on his ability to participate in Ontario's capital markets;

b. administrative penalties of $2,000,000, representing $1,000,000 for the breach of the D&O Ban, and $1,000,000 for the breaches of the Trading Ban;

c. disgorgement of $3,257,639.75 and US$10,732,503; and

d. costs of $343,569.30.

[13] Valentine accepts the permanent market participation bans and disgorgement order sought against him, and proposes alternative administrative penalties (totalling $500,000) and an alternative costs order of $175,000.

[14] We will address each of the requested sanctions and costs orders in turn. We begin with a discussion of well-established sanctioning factors[5] that apply in this case.

3.2 Sanctioning factors

3.2.1 Seriousness of the misconduct

[15] The Commission submits that Valentine's misconduct involved a significant degree of seriousness for the following reasons:

a. Valentine's breaches of the 2004 Order began immediately once that order came into force;

b. Valentine breached the 2004 Order continuously for nearly two decades; and

c. Valentine breached the 2004 Order in three separate respects.

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[4] *Committee for the Equal Treatment of Asbestos Minority Shareholders v Ontario (Securities Commission)*, 2001 SCC 37 at para 42

[5] *Belteco Holdings Inc (Re)*, (1998) 21 OSCB 7743 at 7746

[16] The Commission asks us to infer from the above that Valentine settled with the Commission in 2004 as a means of getting rid of the settled proceeding, with no real intention of being bound by the terms of the settlement.

[17] We decline to draw the inference the Commission invites us to, concerning Valentine's intentions in respect of the 2004 Order. There is insufficient evidence in the record to support such an inference.

[18] Valentine declined to testify in this proceeding, both at the hearing on the merits, and at the sanctions hearing. That is undoubtedly his right and we draw no inference from it. The result of that choice, nevertheless, is that we have no evidence from Valentine to explain his serious and repeated breaches of the 2004 Order.

[19] Valentine submits that he recognizes and accepts that his misconduct was serious, and warrants significant sanctions in the form of permanent market participation bans and the large disgorgement order sought by the Commission. Valentine notes that there is no evidence that any investor lost any funds. Nor is there any evidence that, apart from breaching the 2004 Order, his conduct was in any other way unlawful, or ran afoul of the *Act*.

[20] Valentine's misconduct was very serious. He repeatedly breached the 2004 Order immediately upon its issuance, over an extended period and in multiple transactions. Respect for and compliance with Tribunal orders is a critical element in the regulation of Ontario's capital market. A breach of a Tribunal order shows a disregard for the rule of law as well as for the Tribunal and its processes and undermines public confidence in capital markets.[6]

[21] We conclude that the misconduct is serious, and calls for serious sanctions.

3.2.2 Valentine's experience in the capital markets and history of misconduct

[22] There is no doubt that Valentine has significant experience in the capital markets. Nor is he a stranger to enforcement proceedings.

[6] *Stinson (Re)*, 2023 ONCMT 50 at para 18

[23] The Commission asks us to review Valentine's prior history of misconduct when considering what sanctions to order against him – including the misconduct that led to the 2004 Order and a U.S. criminal securities fraud conviction.

[24] Valentine's history is relevant to determining sanctions sufficient to deter Valentine from future breaches of Ontario securities law (including any order that arises from this proceeding), and to deter others from breaching orders of the Tribunal.

[25] As detailed in the Merits Decision, Valentine was the Chairman, a director and the largest shareholder of the now defunct Thomson Kernaghan & Co. Ltd., a registered investment dealer (**TK**). Valentine was himself a registrant with the Investment Dealers' Association of Canada (a predecessor of CIRO).

[26] Misconduct by Valentine in his roles at TK led to the 2004 Order. Also in 2004, he pleaded guilty to one criminal count of securities fraud in a U.S. court, was sentenced to probation and home detention, and was deported from the U.S.

[27] This history establishes that Valentine has had significant experience in capital markets and has been subject to prior enforcement proceedings. He was represented by counsel in respect of the settlement that gave rise to the 2004 Order. Put simply, he should have known better.

3.2.3 Recurrence of misconduct

[28] Valentine's breaches of the D&O Ban and Trading Ban were recurrent. Valentine began breaching the 2004 Order immediately after it came into effect and continued to do so for approximately 19 years.

[29] He failed to resign from two existing director and officer positions he held at the time of the 2004 Order, and then over subsequent years became a director and/or officer of 36 additional Ontario corporations.

[30] Although Valentine's participation in the Flyp Sale could be considered a one-time event, his trading activity in relation to the Stock Secured Financings was recurrent and there was evidence that Valentine obtained compensation for his involvement in those transactions over a period of at least three years.

[31] On a scale of isolated to recurrent, Valentine's misconduct was firmly at the recurrent end.

3.2.4 Mitigating factors

[32] The Commission submits that there are no mitigating factors present in this case.

[33] The Commission submits that there is no evidence that Valentine recognizes the seriousness of his misconduct, and his admissions came at such a late stage in the hearing process that the Commission was still required to investigate the breaches, commence this proceeding, prove the allegations and incur significant costs. The Commission also submits that Valentine gave false or misleading answers to questions about the Stock Secured Financings during his compelled examinations which negates any mitigating impact of his later admissions

[34] Valentine submits that there are mitigating factors present, including Valentine's conduct during the merits hearing leading to multiple efficiencies. This conduct is relevant to our costs analysis, and is discussed in more detail below in that context.

[35] On the question of mitigation as it relates to sanctions (as opposed to conduct relevant to costs) we find there are no substantial mitigating factors in this case. As noted, we have no evidence of Valentine's state of mind or any explanation for the breaches. Though, in his submissions, he states that he recognizes the findings against him are serious, there is no evidence of any remorse on his part.

[36] We give no weight to the Commission's submission that Valentine gave false or misleading answers in his compelled examinations. This allegation was not made in the Statement of Allegations, nor was there any finding to that effect in the Merits Decision.

3.2.5 Specific and general deterrence

[37] The final factor to consider is the likely effect that any sanction would have on Valentine ("specific deterrence") as well as on others ("general deterrence").

[38] Valentine's conduct was serious, and the sanctions against him must be appropriately crafted to achieve specific and general deterrence. They must make clear how serious it is to breach a Tribunal order.

[39] Valentine submits that the sanctions he has agreed to (market participation bans and disgorgement order), and the alternative sanctions he proposes (including

$500,000 in administrative penalties), achieve both specific and general deterrence. Whether they are enough, however, we will address below in the discussion of administrative penalties.

3.3 Market participation bans

[40] The Commission asks that we impose permanent restrictions on Valentine's participation in Ontario's capital markets. Specifically, the Commission asks for an order that:

a. trading in any securities or derivatives by Valentine cease permanently;

b. the acquisition of any securities by Valentine cease permanently;

c. any exemptions in Ontario securities laws do not apply to Valentine permanently;

d. Valentine resign any positions as a director and/or officer of any issuer or registrant, including an investment fund manager;

e. Valentine be prohibited permanently from becoming or acting as a director and/or officer of any issuer or registrant, including an investment fund manager; and

f. Valentine be prohibited permanently from becoming or acting as a registrant, including an investment fund manager, or as a promoter.

[41] Valentine accepts the permanent market participation bans sought by the Commission as in the public interest. We agree. Permanent market participation bans reflect the seriousness of Valentine's misconduct and are necessary as an element of specific and general deterrence.

3.4 Administrative penalties

3.4.1 Introduction

[42] Paragraph 9 of s. 127(1) of the *Act* provides that if a person or company has not complied with Ontario securities law, the Tribunal may require the person or company to pay an administrative penalty of not more than $1,000,000 for each failure to comply. The Commission seeks administrative penalties of $1,000,000 for Valentine's breach of the D&O Ban and another $1,000,000 for his breaches of the Trading Ban.

[43] There is no formula for determining the quantum of an administrative penalty. In the past the Tribunal has emphasized the seriousness of the misconduct and the importance of specific and general deterrence as particularly relevant to determining the appropriate amount of an administrative penalty.[7]

[44] When ordering administrative penalties, the Tribunal must take care to avoid amounts that are so low that they may be viewed as a cost of doing business or a licence fee for unscrupulous market participants.[8]

[45] In deciding the appropriate administrative penalties, we have also taken a global view of the sanctions imposed on Valentine, taking into account the disgorgement order and market participation bans.

[46] Valentine submits that administrative penalties of $200,000 for the breach of the D&O Ban and $300,000 for the breaches of the Trading Ban are appropriate and in the public interest. A $2,000,000 administrative penalty, in addition to disgorgement and permanent market participation bans, he submits is too severe, punitive and outside the range of administrative penalties imposed in other cases.

[47] We conclude that an administrative penalty of $500,000 for the breach of the D&O Ban, and of $500,000 for the breaches of the Trading Ban, are appropriate in this case.

3.4.2 Breach of the D&O Ban

[48] The Commission submits that a $1,000,000 administrative penalty for Valentine's breach of the D&O Ban is reasonable, reflects its seriousness, and is in the public interest given the unprecedented nature of the misconduct, which involved 38 private companies over approximately 19 years.

[49] The Commission submits that we ought not consider ourselves bound by decisions of other Canadian securities regulatory authorities outside Ontario, which have ordered administrative penalties in the range of $10,000 to $200,000 against respondents for breaches of a director and officer ban involving primarily

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[7] *Pro-Financial Asset Management (Re)*, 2018 ONSEC 18 at para 84

[8] *Rowan v Ontario (Securities Commission),* 2012 ONCA 208 (***Rowan***) at para 49

private companies.[9] In those cases, the Commission argues, the respondents only breached the relevant orders by acting as *de facto* or *de jure* directors and/or officers of a small number of companies, and, in many cases, there was no evidence that the companies conducted much business or resulted in much benefit flowing to the respondents.

[50] The $1,000,000 figure proposed by the Commission, it submits, represents a sum of approximately $26,315 per corporation (of the 38 corporations), and incorporates a discount from comparable cases to account for the fact that some of the corporations in this case were inactive or were mere holding companies.

[51] The Commission submits that we also ought to consider the financial benefit Valentine received from his misconduct in determining the appropriate administrative penalty. The Commission tendered evidence, by way of example, of dividends paid to Valentine in relation to one of the 38 corporations of $51,750 and $86,250 in 2019 and 2020, respectively.

[52] Valentine submits that a $1,000,000 administrative penalty for his breach of the D&O Ban is too severe, punitive and outside the range of administrative penalties imposed in other cases. Valentine submits that caselaw suggests the appropriate range of administrative penalties for breach of the D&O Ban is $110,000 to $200,000. Of particular relevance, in Valentine's submission, are the *Alexander (Re)*[10] and *Cadman (Re)*[11] decisions:

a. In *Alexander*, the respondent breached a prior order of the British Columbia Securities Commission (**BCSC**) by, among other things, becoming a director and officer of seven issuers while prohibited from doing so by order of the BCSC. The BCSC found that Alexander's breaches were deliberate, and he engaged in dishonest conduct. The BCSC imposed an administrative penalty of $200,000 and permanent market participation bans.

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[9] *Jardine (Re)*, 2016 BCSECCOM 82 at para 38; *Dunn (Re)*, 2023 BCSECCOM 251 at para 59, leave to appeal to BCCA refused, 2023 BCCA 451; *Malone (Re)*, 2016 BCSECCOM 334 at para 25; *Alexander (Re)*, 2007 BCSECCOM 773 at para 55, aff'd, 2013 BCCA 111; *Spaetgens (Re)*, 2017 ABASC 38, var'd, 2018 ABCA 410; *Cadman (Re)*, 2015 ABASC 836

[10] 2007 BCSECCOM 773 (***Alexander***)

[11] 2015 ABASC 836 (***Cadman***)

b. In *Cadman*, the respondents breached a settlement agreement with the Alberta Securities Commission (**ASC**) where they agreed to refrain from acting as directors or officers of any issuers for two years. While the respondents formally resigned as directors and officers of 20 companies, they continued to function as directors and officers of these companies and were raising new capital from investors. The respondents also misled ASC staff when asked about their roles in their companies. The ASC ordered an administrative penalty of $110,000 for each of the respondents and five- and ten-year market participation bans.

[53] Valentine submits that these decisions set the upper limit for cases involving breaches of a D&O Ban, and the conduct at issue in both cases was far more serious than Valentine's.

[54] Valentine submits that in determining the appropriate administrative penalty for the breach of the D&O Ban, the following factors are also relevant:

a. Valentine openly admitted that he was a director and/or officer of the corporations at issue in his interviews with OSC staff;

b. Valentine did not attempt to conceal his roles in the various corporations;

c. aside from the fact of the D&O Ban, the activities engaged in by Valentine were legal business activities (*i.e.,* there was no allegation that any of the activities, in and of themselves, breached any provision of the *Act*);

d. the corporations were all private and were not reporting issuers; and

e. no investors or members of the public were harmed.

[55] For these reasons, Valentine submits that the appropriate administrative penalty for breach of the D&O Ban is $200,000.

[56] The factors and authorities submitted by Valentine persuade us that the Commission's proposed penalty of $1,000,000 for the breach of the D&O Ban is excessive. We are not persuaded that the Commission's "per corporation" calculation is of much assistance in reaching a reasoned conclusion. While no prior case shares the features of this proceeding, there is no case cited by either party which approaches the total sum proposed by the Commission.

[57] On the other hand, there is no case in which a breach of a director and officer ban has persisted for so long, in respect of so many companies, without any exculpatory explanation from the respondent. Valentine's decision to decline to testify (which, we emphasize, is fully within his rights) has left the panel with limited facts.

[58] Valentine breached the 2004 Order (settled with the assistance of counsel) from the moment it was issued, by failing to resign from his existing positions – the subject of a separate and explicit paragraph in the 2004 Order. He proceeded over the following 19 years, again in clear breach of the 2004 Order, to become a director and/or officer of 36 more Ontario corporations. As found in the Merits Decision, over a dozen of these corporations had substantial banking activity. Only on the eve of the merits hearing in this proceeding did Valentine resign his then-current director and/or officerships. This occurred after all the interlocutory proceedings leading to the merits hearing, during which Valentine was represented by counsel.

[59] In these circumstances, it is fair to call the breach of the D&O Ban by Valentine a flagrant one. It was persistent and open: Valentine is correct to submit that he did not attempt to conceal it. For whatever reason, Valentine determined that he would not be constrained by the D&O Ban. Such conduct, as we have found above, is very serious and should attract a serious sanction.

[60] We note that Valentine did attempt to adduce evidence of his understanding of the D&O Ban indirectly through the Commission's investigator. However, we rejected that attempt for the reasons explained in the Merits Decision.[12]

[61] Just as we have determined that the Commission's proposed administrative penalty for breach of the D&O Ban of $1,000,000 is too high, we conclude that Valentine's proposed administrative penalty of $200,000 is too low.

[62] There is an element of disregard for the rule of law which makes breaches of a Tribunal order particularly serious. In this case the breach was recurrent, persisted over a long period, and there is no mitigating evidence. Valentine had substantial experience in capital markets and was a former registrant, which are

[12] Merits Decision at paras 36-37

aggravating factors. The flagrant nature of the breach calls for an administrative penalty that achieves sufficient specific deterrence of Valentine, and general deterrence of any like-minded individuals who may be weighing a breach of a Tribunal order.

[63] We conclude that an administrative penalty in the amount of $500,000 achieves these goals and shall be ordered to be paid by Valentine in respect of his breach of the D&O Ban.

3.4.3 Breaches of the Trading Ban

[64] The Commission submits that an administrative penalty of $1,000,000 for Valentine's Trading Ban breaches is also fair and proportionate to Valentine's conduct given the gains received by Valentine, directly or indirectly, through his corporations.

[65] The Commission asserts that Valentine's lengthy history of securities regulatory violations warrants a significant administrative penalty in order to protect investors and foster fair and efficient capital markets, and that the proposed sanction represents less than 12% of the value of the benefit he received.

[66] The Commission relies on the following decisions in support of its request:

a. *Borealis International Inc (Re),*[13] where the Tribunal ordered the respondent to pay an administrative penalty of $300,000, which is over 700% of the approximately $42,000 in commissions he had received for his role in sales of securities in breach of a cease trade order.

b. *Da Silva (Re),*[14] where the Tribunal ordered Da Silva to pay an administrative penalty of $250,000, which is approximately 550% of the $45,280 in securities that Da Silva sold in breach of a cease trade order.

c. *Gold-Quest International (Re),*[15] where the Tribunal ordered a respondent to pay an administrative penalty of $300,000, representing approximately

[13] 2011 ONSEC 2 at para 91
[14] 2012 ONSEC 32 at paras 1 and 17
[15] 2010 ONSEC 30 at para 110

85% of the benefit he received in connection to commissions from sales of securities in breach of a cease trade order.

d. *MOAG (Re)*,[16] where the Tribunal ordered administrative penalties of $200,000 and $400,000 respectively against two respondents who breached a cease trade order by selling debentures and raising money from investors which was not repaid.

e. *Stinson (Re)*,[17] a fraud case in which the Tribunal ordered the respondents, jointly and severally, to pay an administrative penalty of $600,000, despite having found no evidence of any direct benefit to the respondents.

[67] Like the administrative penalty requested for the breach of the D&O Ban, Valentine submits that a $1,000,000 administrative penalty for his breaches of the Trading Ban is excessive and not in the public interest.

[68] Valentine submits that the cases relied upon by the Commission to justify the $1,000,000 figure involved multiple breaches of the *Act* and conduct far more egregious than that of Valentine's, and in any event, ranged from $200,000 to $600,000.

[69] Valentine submits that in determining the appropriate administrative penalty for Valentine's involvement in the Flyp Sale, the following factors are also relevant:

a. Valentine made no attempt to conceal his involvement in the Flyp Sale, and was under the impression that the Trading Ban did not apply to the circumstances of the transaction;

b. Valentine received no compensation respecting the Flyp Sale;

c. Valentine became involved in the Flyp Sale at the request of his friend, MS, who lacked the requisite corporate expertise to understand the transaction; and

d. a dispute arose over the entitlement of the proceeds of the Flyp Sale which was ultimately settled.

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[16] 2020 ONSEC 29 at paras 21 and 24

[17] 2023 ONCMT 50 at paras 11 and 48

[70] With respect to the Stock Secured Financings, Valentine submits that they required the Tribunal to consider a novel legal issue about whether the Stock Secured Financings met the definition of trade. Valentine also submits that aside from the fact of the Trading Ban, the activities engaged in by Valentine were legal business activities (*i.e.,* there was no allegation that any of the activities, in and of themselves, breached any provision of the *Act*).

[71] Valentine submits that he also aided the Commission in proving its allegations against him, as he admitted to his role in the Stock Secured Financings.

[72] For these reasons, Valentine submits that the appropriate administrative penalty for his breaches of the Trading Ban is $300,000.

[73] As with the administrative penalty for the breach of the D&O Ban, we find the Commission's proposed administrative penalty of $1,000,000 for breaches of the Trading Ban to be too high, and Valentine's proposed administrative penalty of $300,000 to be too low.

[74] We do not agree with Valentine's submission that the Stock Secured Financings presented a novel issue about the definition of a "trade". The structures of the trades involved a number of parties, but when broken out into their constituent parts, each transaction involved at least one clear "trade".[18]. The trade was an integral aspect of the Stock Secured Financings as they operated in practice, and as Valentine understood them to operate.[19] Moreover, it was the profit on those trades which formed the basis for Valentine's compensation.[20]

[75] As was the case for the D&O Ban, Valentine elected not to testify and we have no evidence of his understanding of the Trading Ban in respect of the Flyp Sale or otherwise. His attempt to adduce such evidence indirectly was rejected in the Merits Decision.[21]

[76] Valentine received very large amounts of money from his involvement in the Stock Secured Financings, which form the basis of a disgorgement order, as

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[18] Merits Decision at para 109
[19] Merits Decision at para 110
[20] Merits Decision at para 115
[21] Merits Decision at para 51

discussed below. Those amounts, in excess of $15,000,000, represent the benefit available to Valentine by breaching the Trading Ban.

[77] We bear in mind the Ontario Court of Appeal's observation that substantial administrative penalties are necessary to remove economic incentives for non-compliance.[22] While we are not persuaded that the percentage-of-profit analysis of cases presented by the Commission is of much assistance, we agree with the directional thrust of those cases that administrative penalties must present a compelling downside to offset the potential upside of a breach.

[78] Valentine is correct that the cases relied upon by the Commission involve conduct that in some respects is more serious than Valentine's, on occasion involving fraud. However, we have determined that Valentine's conduct is very serious, involving as it does (in respect of the Stock Secured Financings) several transactions over a number of years giving rise to very large payments for Valentine's benefit.

[79] Weighing the sanctioning factors we have already discussed, and particularly in light of the large sums involved and the need for both specific and general deterrence, we conclude that an administrative penalty in the amount of $500,000 shall be ordered to be paid by Valentine in respect of his breaches of the Trading Ban.

3.5 Disgorgement

[80] The Commission requests that Valentine be ordered to disgorge the $3,257,639.75 and US$10,732,503 he was found in the Merits Decision to have received in connection with his breaches of the Trading Ban. Such an order is authorized by paragraph 10 of s.127(1) of the *Act*, which refers to disgorgement of "any amounts obtained" as a result of non-compliance with Ontario securities law.

[81] Valentine accepts that the requested disgorgement order is appropriate.

[82] In this case, it is clear to us that the amounts requested by the Commission were obtained by Valentine as a result of his breaches of the Trading Ban. We

[22] *Rowan* at para 49

consider it to be in the public interest for Valentine to disgorge $3,257,639.75 and US$10,732,503.

3.6 Costs

[83] Section 127.1 of the *Act* authorizes the Tribunal to order a respondent to pay the costs of an investigation and of the proceeding that follows it, if the respondent has been found to have contravened Ontario securities law. A costs order is designed to reduce the burden on market participants to pay for investigations and enforcement proceedings.

[84] The Commission seeks costs of $343,569.30 against Valentine.

[85] The Commission provided an affidavit outlining costs and disbursements, which shows the costs of the investigation, pre-hearing activities and the merits hearing. The affidavit lists members of the Commission (including outside counsel) who participated in each phase, the hourly rates for their positions (which have been previously approved by the Tribunal), and the time spent by them on each activity. The costs incurred, according to the Commission's affidavit, calculated in this manner added up to $640,723.75, consisting of fees of $416,836.25 and disbursements of $223,887.50.

[86] The Commission noted that this initial figure had already been reduced from its actual costs, by excluding a number of items, including:

a. the time spent by employees in the Case Assessment, E-Discovery & Analytics, and Quasi-Criminal Serious Offences Teams;

b. the time spent by employees who recorded 35 or fewer hours on the matter; and

c. the time spent by Case Leads and Assistant Investigators.

[87] The costs sought, the Commission submits, represent a further discount of over 46% compared to the costs incurred. This reduction is to account for, among other things:

a. time spent by Commission employees to bring external counsel, who were retained six weeks before the start of the merits hearing, up to speed on the file;

b. time spent by external counsel to get up to speed;

c. the Commission's unsuccessful adjournment motion in September 2023;

d. reducing the hourly rate charged by external counsel to the lower government rate; and

e. ending the time claimed for all litigators and investigators at March 20, 2024 (the date of the Merits Reasons).

[88] Although a respondent found to have contravened Ontario securities law should expect to pay costs, a large costs award can reasonably be viewed as punitive. The potential for such an award may adversely affect a respondent's willingness, and ability, to pursue a full defence.[23] Further, as is the case with an administrative penalty, determining the amount of a costs award is not a science. The Tribunal should apply a balanced approach that takes into account various factors.[24]

[89] Previous cases have noted a number of factors which are relevant in determining whether costs being sought are reasonable. Those factors include the seriousness of the misconduct, the complexity of the allegations and the length of the hearing, and the degree of success that the Commission has in establishing its allegations.[25]

[90] The Commission submits that the requested costs order reflects the seriousness and complexity of the breaches in this matter, Valentine's unnecessary complication of the merits hearing by opposing the Commission's reasonable adjournment request, and the Commission's success at proving its allegations against Valentine. Furthermore, as noted above, the Commission stresses that the costs sought are significantly discounted from the costs actually incurred.

[91] Valentine takes issue with the amount of costs requested, and submits a costs award of $175,000 is appropriate given his conduct in the hearing, including several admissions he made at the merits hearing, the Commission's conduct, and a comparison to the costs ordered in a recent Tribunal fraud decision (*Feng*).

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[23] *Feng (Re)*, 2023 ONCMT 12 (***Feng***) at para 96

[24] *Solar Income Fund Inc (Re)*, 2023 ONCMT 3 at para 166

[25] *Paramount Equity Financial Corporation (Re)*, 2023 ONCMT 20 at para 132

[92] Valentine submits he did nothing to unnecessarily lengthen the duration of the proceeding or obstruct the Commission's investigation but, rather, aided the Commission in proving its allegations through his responses to compelled examinations which were tendered as evidence during the merits hearing. Further, Valentine submits that he only contested one novel legal issue during the merits hearing: whether the Stock Secured Financings met the definition of a "trade".

[93] With respect to the Commission's conduct during the merits hearing, Valentine highlights the following as justifications for lowering the requested costs award:

a. the Commission served on Valentine, in the period leading up to the hearing, a hearing brief containing thousands of documents, but ultimately only 337 documents were entered into the record at the merits hearing; and

b. the Commission's conduct resulted in an unnecessary adjournment motion which the Commission lost and now seeks to use to justify increased costs against Valentine.

[94] Valentine further submits that the merits hearing took place over fewer than four days in total (spread out over seven hearing days to accommodate scheduling challenges). By comparison, in *Feng*, which was heard by the Tribunal over six days, the Tribunal ordered the respondent to pay approximately $200,000 in costs. Valentine submits that the costs sought in this case, which are 1.5 times greater than that awarded in *Feng*, would be punitive and outside the range of reasonableness.

[95] We find the approach taken by the Commission in calculating its costs to be proper and the only issue is whether any reduction to the amount sought is appropriate.

[96] The Commission was faced with the unexpected departure of its lead counsel only weeks before the scheduled beginning of the merits hearing. On September 6, 2023, a differently constituted panel denied the Commission's request for an adjournment on this basis, for reasons issued on October 5, 2023.[26] The merits

[26] *Valentine (Re)*, 2023 ONCMT 33

hearing began as scheduled on September 29, 2023, and all evidence was concluded by October 12, after six days of hearing which included some partial days to accommodate witness availability.

[97] A change in counsel is always disruptive, always causes extra effort and cost, and it is always difficult to isolate and extract the cost of the disruption. One can debate its degree, but here, occurring as it did so close to the start of the merits hearing, it was naturally substantial.

[98] The Commission has attempted to reflect the additional cost of the change of counsel. In its costs sought, it has reduced the time spent by internal counsel, and by the new external junior counsel, during what it termed "the litigation phase", by 50%, and has attempted to exclude all time related to the adjournment motion.

[99] We are not persuaded that these reductions, though substantial, adequately reflect the change in counsel. For example, the time of the new external senior counsel was not reduced for time learning the new file, but only for the adjournment motion. The Commission's decision on reductions are not unreasonable, but are also not amenable to any precise verification.

[100] Valentine bore no responsibility for the change in counsel. It is clear that the change caused disruption and increased the Commission's costs in a manner that cannot be quantified with precision. The change also increased the respondent's costs: while the Commission's time on the adjournment motion can be excluded from its claim, that leaves untouched the additional costs Valentine incurred in his response to it. In these circumstances we conclude a modest reduction in the costs sought is appropriate, to reflect the unquantifiable aspects of the late change in counsel.

[101] Another element raised by Valentine deserves comment: the Commission's delivery of a hearing brief with nearly 3,000 documents and an affidavit incorporating approximately 1,500 of them. As Valentine submits, only a fraction of these documents were ultimately entered into evidence.

[102] The Commission responds that, unaware that Valentine would admit two of the three alleged breaches in his opening at the merits hearing, it was obliged to anticipate that it might need the documents to prove all three allegations.

[103] In fact, however, that is essentially what occurred at the merits hearing. As commented upon in the Merits Decision,[27] Valentine purported to admit the allegations, but not the facts which underpinned the allegations. As a result, the Commission was required to introduce all the necessary evidence to establish all three of the breaches, which included substantial documentary evidence. Even so, that evidence engaged only a fraction of the documents in the hearing brief.

[104] We are persuaded that the Commission did not "cull" adequately the documents it would rely on, prior to delivery of the hearing brief. It may be that this was a result of the late change in counsel, and is an element of the unquantifiable disruption we note above.

[105] Advances in technology make it increasingly easy to create, collect, aggregate and deliver massive numbers of electronic documents. To achieve just, expeditious and cost-effective proceedings, the parties bear a responsibility to apply reasoned judgement in the preparation of hearing briefs and documentary evidence. They should exclude documents which they conclude will not be necessary at the hearing, on any reasonable scenario. Obviously, counsel will err on the side of inclusion, to be prepared for the unexpected twists and turns in a hearing. That is expected and prudent. However, prudence is not reflected by uncritical inclusion of every available electronic document.

[106] We do not conclude that this is what the Commission did in this case. We are persuaded, though, that too light a touch was brought to whatever filtering was done of the disclosure documents in the preparation of the hearing brief and affidavit. The gap between the number of documents in the brief and those ultimately used in the hearing, to establish all three breaches, is too wide.

[107] Over-inclusion of documents also puts a respondent to the added expense of unnecessary review. It can also lengthen proceedings. In this case, the better part of the first day of the merits hearing was consumed with discussion of how to deal with the voluminous materials referenced in the investigator's affidavit.

[27] Merits Decision at paras 29-30 and 40

[108] We conclude that a modest reduction should be made in the costs sought by the Commission, to reflect the unquantifiable effects of over-inclusion of documents in the hearing brief.

[109] Valentine seeks credit for having done "nothing to unnecessarily lengthen the duration of the proceeding. To the contrary his conduct shortened the merits hearing." We view it as a given that parties should do nothing to unnecessarily lengthen a proceeding.

[110] As noted, Valentine did purport to admit two of the three allegations against him. In the ordinary case, a respondent's admission of allegations should be recognized as being likely to make a hearing more efficient. In this case, however, we find that Valentine's admissions did not have that effect. They were only made at the opening of the merits hearing after all hearing preparation was complete. They were qualified in a manner which required the Commission to lead full evidence to establish all the breaches. The admissions, and Valentine's conduct, did nothing to materially reduce, or extend, the merits hearing duration, and they have no weight in our assessment of costs.

[111] Valentine cites *Feng* as a recent Tribunal authority, where a hearing that took six days gave rise to a costs order of approximately $207,000. In the present case, he submits, the time in evidence was the equivalent of four days. By comparison to *Feng,* a costs order in the amount sought by the Commission would be punitive and outside the range of reasonableness.

[112] We do not agree. While a degree of comparability of costs for Tribunal proceedings is desirable, each case depends on the circumstances it presents. It is difficult to compare proceedings based on hearing days (or any other single factor) alone.

[113] This proceeding was originally scheduled for 15 hearing days. The Commission submitted it should take no more than 10, and that proved to be correct. Regardless, the parties anticipated a lengthy hearing. Both parties' counsel deserve credit for conducting their cases in a manner that reduced the hearing time to less than their estimates.

[114] In *Feng,* the Commission sought costs of approximately $265,000, reduced from costs incurred of approximately $337,000. The Tribunal granted costs of

approximately $207,000, which it characterized as a total 40% discount from the costs incurred.

[115] Behind those figures, though, are the elements of how complex the allegations, investigation and hearing may have been in the circumstances unique to that case.

[116] In this proceeding, the D&O Ban implicated 38 corporations over a 19-year period; the Stock Secured Financings involved numerous offshore transactions, communications with foreign regulatory authorities, and multiple parties. It is not difficult to infer that the investigation was complicated and time consuming. We have no basis on which to question the propriety of the Commission's time spent on this proceeding.

[117] We conclude that the Commission's costs are fairly calculated and reasonable but should be subject to modest reductions to reflect:

a. the unquantifiable disruption occasioned by the late change in counsel; and

b. the insufficient discipline in culling documents included in the hearing brief.

[118] As a result, we order Valentine to pay the Commission's costs in the amount of $300,000.

4. CONCLUSION

[119] For the above reasons, we order that:

a. pursuant to paragraph 2 of subsection 127(1) of the *Act*, trading in any securities or derivatives by Valentine shall cease permanently;

b. pursuant to paragraph 2.1 of subsection 127(1) of the *Act*, the acquisition of any securities by Valentine is prohibited permanently;

c. pursuant to paragraph 3 of subsection 127(1) of the *Act*, any exemptions contained in Ontario securities law do not apply to Valentine permanently;

d. pursuant to paragraphs 7, 8.1 and 8.3 of subsection 127(1) of the *Act*, Valentine shall immediately resign from any positions that he holds as a

director or officer of any issuer or registrant, including an investment fund manager;

e. pursuant to paragraphs 8, 8.2 and 8.4 of subsection 127(1) of the *Act*, Valentine is permanently prohibited from becoming or acting as a director or officer of any issuer or registrant, including an investment fund manager;

f. pursuant to paragraph 8.5 of subsection 127(1) of the *Act*, Valentine is permanently prohibited from becoming or acting as a registrant, including as an investment fund manager, or as a promoter;

g. pursuant to paragraph 9 of subsection 127(1) of the *Act*, Valentine shall pay:

   i. an administrative penalty of $500,000 for his breach of the D&O Ban; and

   ii. an administrative penalty of $500,000 for his breaches of the Trading Ban;

h. pursuant to paragraph 10 of subsection 127(1) of the *Act*, Valentine shall disgorge to the Commission $3,257,639.75 and US$10,732,503; and

i. pursuant to section 127.1 of the *Act*, Valentine shall pay to the Commission $300,000 for the costs of the investigation and hearing.

Dated at Toronto this 30th day of September, 2024

"Cathy Singer"

Cathy Singer

"Geoffrey D. Creighton"

Geoffrey D. Creighton

"Dale R. Ponder"

Dale R. Ponder