IN THE MATTER OF

The *Securities Act*

S.N.B. 2004, c. S-5.5

- and -

IN THE MATTER OF

STEVEN VINCENT WEERES and REBEKAH DONSZELMANN
(RESPONDENTS)

REASONS FOR THE DECISION ON SANCTIONS

Date of Hearing by Conference Call:	8 September 2011
Date of Decision on Merits:	29 November 2011
Date of Decision on Sanctions:	15 March 2012

Panel:

Denise LeBlanc, Q.C., Panel Chair

Céline Trifts, Panel Member

Kenneth Savage, Panel Member

Appearances:

Marc Wagg	Counsel for the Staff of the New Brunswick Securities Commission
Steven Weeres and Rebekah Donszelmann *per se*	

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REASONS FOR THE DECISION ON SANCTIONS

1. OVERVIEW

[1] On 29 November 2011, the New Brunswick Securities Commission ("Commission") rendered its Reasons for the Decision on the Merits in this matter ("Merits Decision").

[2] The Commission found that the respondents, Steven Vincent Weeres ("Weeres") and Rebekah Donszelmann ("Donszelmann") (collectively "Respondents"), breached New Brunswick securities law by contravening sections 45(a) and 71(1) of the *Securities Act* ("*Act*"), and that the Respondent Weeres breached the provisions of sections 58(2), 69(b) and 181 of the *Act*.

[3] After rendering the Merits Decision, the parties were provided the opportunity to deliver written submissions on sanctions related to the breaches within 30 calendar days from the issuance of the Merits Decision.

[4] The following are the Commission's reasons for the decision on the imposition and quantum of sanctions in regards to the Respondents ("Sanctions Decision"). This Sanctions Decision is to be read in conjunction with the Merits Decision.

2. ANALYSIS AND DECISION

Submissions of Parties

[5] On 29 December 2011, counsel for staff of the Commission ("Staff") filed written submissions on the imposition and quantum of sanctions.

[6] In its submissions, Staff sought the following relief:

1) an order pursuant to paragraph 184(1)(c) of the *Act* that the Respondents cease trading in securities in New Brunswick permanently;
2) an order pursuant to paragraph 184(1)(d)of the *Act* that any exemptions under New Brunswick securities law not apply to the Respondents permanently;
3) an order pursuant to paragraph 184(1)(i) of the *Act* that the Respondents be prohibited from becoming or acting as directors or officers of any issuer permanently;
4) an order pursuant to section 186 of the *Act* that the Respondents each pay an administrative penalty;
5) an order pursuant to paragraph 184(1)(p) of the *Act* that the Respondents disgorge $22,600.00 to the Commission; and
6) an order pursuant to section 185 of the *Act* that the Respondents pay costs in the amount of $13,575.00.

[7] On 22 December 2011, the Respondents filed separate written submissions purporting to address the imposition and quantum of sanctions. It warrants noting that the essence of the submissions made by the Respondents consisted of grievances related to the adjudicative process, denials of the findings made by the Commission in the Merits Decision and that, each of the Respondents' submissions did not generally address any potential sanctions to be ordered against them.

Imposition and Quantum of Sanctions

(a) Cease Trade Orders, Removal of Exemptions and Director and Officer Bans

[8] As previously indicated, Staff sought orders pursuant to paragraphs 184(1)(c),(d) and (i) of the *Act,* banning the Respondents from participating in New Brunswick's capital markets. Specifically, Staff requested orders that the Respondents cease trading in all securities, that any exemptions under New Brunswick securities law not apply to them and that the Respondents be prohibited from becoming or acting as directors or officers of any issuer.

Paragraphs 184(1) (c),(d) and (i) of the *Act*, at all material times to this matter, provided as follows:

> 184(1) The Commission may, if in its opinion it is in the public interest to do so, make one or more of the following orders:
>
> (c) an order that
> (i) trading in or purchasing cease in respect of any securities specified in the order, or
> (ii) a person specified in the order cease trading in or purchasing securities, specified securities or a class of securities;
>
> (d) an order that any exemptions contained in New Brunswick securities law do not apply to a person permanently or for such period as is specified in the order;
>
> (i) an order that a person is prohibited from becoming or acting as a director or officer of any issuer, registrant or mutual fund manager;

[9] The Commission may issue an order under section 184 if it finds that it is in the public interest to do so. The Commission has considered and described its public interest jurisdiction in several of its decisions, most recently in the *New Century International et al.* decision released on 29 November 2011, where it is stated at paragraph 16:

> ... along with protecting investors from unfair, improper or fraudulent practices, the Commission's public interest jurisdiction is protective and preventative, and is intended to be exercised to prevent likely future harm to capital markets.

[10] In this particular case, the Respondents breached several provisions of the *Act*, and caused harm to the integrity of New Brunswick's capital markets. In order to prevent this type of harm in the future, the Commission finds that it is in the public interest to issue orders against the Respondents banning them from participating in New Brunswick's capital markets.

[11] In the matter of *Erikson v. Ontario Securities Commission* 2003 CanLII 2451, the Superior Court of Justice of Ontario, on appeal, reviewed the factors considered by the Ontario Securities Commission when considering sanction:

- the seriousness of the allegations proved;
- the respondents' experience in the marketplace;
- the level of the respondents' activity in the marketplace;
- whether or not there has been recognition of the seriousness of the improprieties, and
- whether or not the sanctions imposed serve to deter not only those involved in the case being considered but also any like-minded people from engaging in similar abuses of capital markets.

[12] The Court, in reviewing the applicability of these factors to assessing the type of ban to impose, stated that:

> *[59] The tribunal addressed, in particular, the principal consideration of the need not to punish past conduct but to restrain future conduct likely to be prejudicial to the public interest in the integrity of capital markets. The tribunal in this respect quoted* In the Matter of Mithras Management Ltd. *(1990), 13 O.S.C.B. at pp. 1610-1611:*
>
> > Under sections 26, 123 and 124 of the Act, the role of this Commission is to protect the public interest by removing from the capital markets -- wholly or partially, permanently or temporarily, as the circumstances may warrant -- those whose conduct in the past leads us to conclude that their conduct in the future may well be detrimental to the integrity of those capital markets. We are not here to punish past conduct; that is the role of the courts, particularly under section 118 of the Act. We are here to restrain, as best we can, future conduct that is likely to be prejudicial to

> the public interest in having capital markets that are both fair and efficient. In so doing we must, of necessity, look to past conduct as a guide to what we believe a person's future conduct might reasonably be expected to be; we are not prescient, after all. And in so doing, we may well conclude that a person's past conduct has been so abusive of the capital markets as to warrant our apprehension and intervention, even if no particular breach of the Act has been made out.
>
> [Emphasis added]

[13] In past decisions, the New Brunswick Securities Commission has considered the following factors when determining the imposition of a ban from participation in the capital markets:

(a) the seriousness of the allegations proved

(b) the respondent's past conduct

(c) mitigating factors

(d) the respondent's experience in the capital markets and the respondent's level of activity in the capital markets

(e) whether the respondent recognizes the seriousness of the improper activity

(f) the harm suffered by investors as a result of the respondent's activities

(g) the benefits received by the respondent as a result of the improper activity

(h) the risk to investors and the capital markets in the jurisdiction, were the respondent to continue to operate in capital markets in the jurisdiction

(i) the damage caused to the integrity of the capital markets in the jurisdiction by the respondent's improper activities

(j) the need to deter not only those involved in the case being considered, but also any others who participate in the capital markets, from engaging in similar improper activity

(k) the need to alert others to the consequences of inappropriate activities to those who are permitted to participate in the capital markets, and

(l) previous decisions made in similar circumstances.

[14] In applying each of these factors to the present case, the Commission deems it appropriate, pursuant to paragraphs 184(1)(c),(d) and (i) of the *Act,* to impose upon the Respondent Weeres an order that he cease trading in securities in New Brunswick permanently, that any exemptions from New Brunswick securities laws not apply to him permanently and that he be prohibited from becoming or acting as a director or officer of any issuer permanently.

[15] As for the Respondent Donszelmann, the Commission orders, pursuant to paragraphs 184(1)(c),(d) and (i) of the *Act,* that she cease trading in securities in New Brunswick for a period of twenty (20) years, that any exemptions from New Brunswick securities laws not apply to her for a period of twenty (20) years and that she be prohibited from becoming or acting as a director or officer of any issuer for a period of twenty (20) years.

[16] The Commission's distinction between the Respondents in terms of the length of the ban is reflective of the fact that overall, the Respondent Weeres was the leader and had control over the matter which gave rise to these proceedings. The twenty (20) year ban imposed upon Donszelmann is onerous and recognizes the seriousness of the breaches of the Act which she committed. The permanent ban imposed upon the Respondent Weeres takes into account the whole of the breaches to the Act which he committed, including the breaches of the provisions of section 58(2) and 69(b).

(b) Administrative Penalties

[17] Staff is also seeking administrative penalties against both respondents pursuant to section 186 of the *Act*. The Commission's mandate is to provide protection to New Brunswick investors from unfair, improper or fraudulent practices and to foster fair and efficient capital markets. Section 186 of the Act enhances the Commission's mandate by empowering the Commission to impose administrative penalties where there has been a violation of New Brunswick securities law and it is in the public interest to do so. The provisions of section 186 are the following:

> 186(1) The Commission, after a hearing, may order a person to pay an administrative penalty of not more than $750,000 if the Commission
>
> (a) determines that the person has contravened or failed to comply with New Brunswick securities law, and
> (b) is of the opinion that it is in the public interest to make the order.
>
> 186(2) The Commission may make an order under this section notwithstanding the imposition of any other penalty on the person or the making of any other order by the Commission related to the same matter.

[18] In the Merits Decision, the Commission determined that the Respondents committed multiple breaches of New Brunswick securities law. Specifically, the Commission found that both Respondents traded in securities without having been registered to do so, and without having filed a prospectus with the Commission. In addition, the Respondent Weeres was found to have made prohibited representations, committed fraud and made untrue and misleading representations. These multiple breaches directly affected investors in New Brunswick's capital markets and amount to serious violations of the public interest. The Commission finds that this is an appropriate case in which to issue an order for administrative penalties against both Respondents.

[19] In determining the amount of an administrative penalty, the Commission refers to a number of factors and in this regard, notes its own decision in *Limelight Capital Management Ltd. et al.*, issued on 17 August 2007. In that decision, the Commission accepted a list of nine factors to consider when assessing administrative penalties, which have also been cited in decisions from other Canadian securities commissions:

> (a) The seriousness of the respondent's conduct, and whether the respondent recognizes the seriousness of the improper conduct;
> (b) Any harm suffered by investors as a result of the conduct;
> (c) The damage done to the integrity of the markets;
> (d) The need to deter others who participate in the capital markets from engaging in similar conduct;
> (e) The need to demonstrate the consequences of inappropriate conduct to others who participate in the capital markets;

(f) The respondent's experience, reputation and previous activity in the capital markets, including any sanctions;
(g) The extent to which the respondent was enriched;
(h) Previous decisions and similar circumstances; and
(i) Any mitigating factors.

[20] The Commission finds that all of these factors weigh against the Respondent Weeres in this matter, and the majority of factors weigh against the Respondent Donszelmann.

[21] The first factor focuses on the seriousness of the Respondents' conduct and whether they recognize the seriousness of their own conduct. The Respondents' misconduct was very serious in that they breached numerous provisions of the *Act*. Both Respondents were found to have illegally distributed securities in New Brunswick without having been registered to do so and without having filed a prospectus. Weeres was also found to have committed very serious breaches of the *Act*, including fraud, prohibited representations, and misleading and untrue representations. Additionally, in the Commission's view, the Respondents' submissions on sanctions demonstrate that they do not recognize or appreciate the seriousness of their conduct and they have not accepted responsibility for their misconduct, as they continue to dispute the findings made against them in the Merits Decision and show no remorse for the harm caused to certain investors and the integrity of New Brunswick's capital markets.

[22] The second factor is the harm suffered by investors as a result of the Respondents' conduct. As indicated in the Merits Decision, Weeres was found to have defrauded investor CC of $22,600.00. This act resulted in a significant financial loss to CC. In addition, although Donszelmann did not defraud CC of her property, she contributed to the financial harm suffered by CC by her involvement in illegally distributing securities in New Brunswick by creating an investment opportunity in the Project, as set out and defined in the Merits Decision, organizing and running information and training sessions intended to promote the Project and soliciting individuals to invest in the Project.

[23] The third factor is the damage done to the integrity of the capital markets. The Respondents were found to have committed numerous breaches of the *Act*, leading to a negative effect on the integrity of the capital markets and warranting a significant deterrent response.

[24] The fourth factor is the need to deter others who participate in the capital markets. The Supreme Court of Canada's decision in *Re Cartaway Resources Corp*., [2004] S.C.J. No. 22, speaks to the Commission's role in the imposition of sanctions for violations of law. The *Cartaway* matter confirmed that the Commission may consider both general and specific deterrence in making orders under its public interest jurisdiction. As indicated at paragraph 52 of that decision:

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

[25] The Commission finds that it is critical to send a strong message that breaches of the *Act* carry significant consequences, especially the more serious offences committed by Weeres, including fraud, prohibited representations and misleading or untrue statements. Administrative penalties will act as a specific deterrence for both Weeres and Donszelmann to demonstrate the unprofitability of their wrongdoings, and as a general deterrence for others in preventing similar misconduct in the future. This issue also ties into the fifth factor outlined in *Limelight, being* the need to demonstrate the consequences of inappropriate conduct to others who participate in the capital markets. Market participants need to understand that breaches of New Brunswick securities laws will result in serious penalties for the misconduct.

[26] The sixth factor is the Respondents' experience, reputation and previous activity in the capital markets, including any sanctions. The Respondent Weeres has been subject to previous regulatory activity in both Alberta and Saskatchewan. During the course of 1999 and 2000, Weeres was the subject of Settlement Agreements and Orders with the Alberta Securities Commission and the Saskatchewan Financial Securities Commission for illegally distributing securities in those provinces. The evidence shows that the Respondent Weeres has repeatedly violated securities laws in Canada. The Respondent Donszelmann has no known history with any securities regulators in Canada's capital markets.

[27] The seventh *Limelight* factor considers the extent to which the Respondents were enriched. In this matter, the Respondents were enriched by the funds that were deposited into the SMGI bank account from all the investors, as well as the personal funds of witness AA through the use of her personal credit card. As found in the Merits Decision, the Respondents used the SMGI bank account for various purposes, including their personal expenses.

[28] The eighth factor is the consideration of previous decisions in similar circumstances. Staff has referred the Commission to various decisions of securities regulators throughout Canada who have ordered administrative penalties for various breaches of securities legislation. In terms of the Respondent Weeres, Staff referred to several cases which referenced the imposition of administrative penalties surrounding findings of fraud, among other misconduct.

[29] In *Re Thow, et al.*, 2007 BCSECCOM 758, the British Columbia Securities Commission ("BCSC") described the seriousness of a finding of fraud at paragraphs 73 to 74:

> We have described other provisions that Thow contravened as fundamental to our system of regulation. The prohibition against fraud, however, is the most fundamental of all. Nothing strikes more viciously at the integrity of our capital

> markets than fraud. When the fraud is committed by a registrant, the damage is even greater.
>
> Thow's contravention of the prohibition against fraud is therefore a particular consideration in assessing both specific and general deterrence in our orders. The market as a whole must understand that a finding of fraud will result in a significant penalty.

In that matter, the BCSC went on to order that Thow pay an administrative penalty of $6,000,000.00.

[30] In the recent case of *Re Al-Tar Energy Corp.*, 2011 CarswellOnt 62, the Ontario Securities Commission ("OSC") also emphasized the importance of high administrative penalties in cases involving fraud, and stated the following at paragraph 47:

> The Individual Respondents engaged in fraudulent conduct that warrants the imposition of substantial administrative penalties. We do not consider the amount of the administrative penalties requested by Staff to be sufficient to deter similar conduct in the future. In our view, to be a deterrent, the amount of an administrative penalty must bear some reference to the amount raised from investors through the investment scheme. In addition, in cases where fraud and repetitive conduct over an extended period is involved, higher administrative penalties are necessary. In order to deter, an administrative penalty must be more than a fee for or cost of carrying out a fraudulent scheme.
>
> [Emphasis Added]

[31] In *Re Al-Tar*, the four respondents who were found to have committed fraud were ordered to pay administrative penalties of $750,000.00, $650,000.00, $500,000.00 and $200,000.00 respectively.

[32] In another recent case of *Re Sirianni*, 2011 ABASC 616, a panel of the Alberta Securities Commission found that a respondent illegally distributed securities without having filed a prospectus, made misleading or untrue statements and engaged in fraud. The ASC ordered, *inter alia*, an administrative penalty of $180,000.00 and stated the following at paragraph 7:

> Sirianni has admitted to very serious contraventions of Alberta securities laws. Violations of our prohibitions on illegal distributions, misleading statements and fraud are among the most serious types of contraventions, as they all strike at the integrity of our capital market and participants' confidence in that market. Sirianni's misconduct has harmed identifiable investors financially and has understandably shaken their confidence in the integrity of our capital market. His actions have also harmed the reputation of Alberta's capital market and have jeopardized investor confidence in the integrity of that market.

[33] In terms of the Respondent Donszelmann, Staff relied on the following case law:

- *Re Goldbridge Financial Inc.,* 2011 CarswellOnt 284
- *Re Schneider,* 2005 ABASC 154

In *Goldbridge*, the Ontario Securities Commission spoke, at paragraph 95, to the importance of the requirement to register in order to sell securities:

> This is serious conduct that is contrary to the public interest. The registration requirements of the Act serve an important role to protect investors and ensure that the public deals with individuals who have met the necessary proficiency requirements, good character and ethical standards. The Respondents should have taken the necessary steps to ensure that they had the proper registration in place and that their activities were in compliance with securities law.

[34] Further, in the matter of *Re Schneider*, the respondent Schneider was found to have traded in and distributed securities without being registered and without having

filed a prospectus. Schneider was subjected to a four-year cease trade order and was ordered to pay an administrative penalty of $10,000.00 plus costs. In addressing the matter of the quantum of his penalty, the Alberta Securities Commission stated the following in paragraphs 51 to 53:

> We do wish to comment on the modest amount of the $10 000 administrative penalty agreed to by the parties. In our view, in cases in which activity results in an illegal distribution of securities, the appropriate sanction will generally invoice a more substantial administrative penalty coupled with a denial-of-exemptions order for a period of time. The substantial administrative penalty would provide appropriate specific and general deterrence. The denial-of-exemptions order would provide the protective and preventative effect by removing the individual from participating in the exempt market for the appropriate period of time.
>
> In other circumstances, we may have been inclined to impose a significantly larger administrative penalty coupled with a denial-of-exemptions order.
>
> However, in all the circumstances of this particular case, we conclude that the orders jointly proposed by the parties are reasonable in nature, that the specific sanction sought falls within the acceptable range, and that such orders are in the public interest.

[35] In this matter, neither the Respondent Weeres nor the Respondent Donszelmann have recognized the gravity of their actions. On the contrary, they have consistently denied them. In our view, the administrative penalty should therefore reflect that.

[36] Finally, taking into account the last *Limelight* factor, the Commission does not find that there were any mitigating factors of a material nature to consider in awarding administrative penalties in this case.

[37] The Commission has considered the imposition and quantum of administrative penalties requested by Staff in this matter against the background of the above factors

and relevant case law. In light of the foregoing, the Commission's conclusions is that the Respondent Weeres should be subject to an administrative penalty of $200,000.00 and that the Respondent Donszelmann should be subject to an administrative penalty of $25,000.00.

[38] As such, the Commission orders, pursuant to subsection 186(1) of the Act, that the Respondent Weeres pay an administrative penalty in the amount of $200,000.00 and that the Respondent Donszelmann pay an administrative penalty in the amount of $25,000.00.

(c) Disgorgement

[39] A disgorgement order is intended to remove any amounts a wrongdoer has obtained as a result of contravening New Brunswick securities law. The Commission may order disgorgement for a breach of New Brunswick securities law pursuant to paragraph 184(1)(p) of the *Act*, which reads as follows:

> 184(1) The Commission may, if in its opinion it is in the public interest to do so, make one or more of the following orders:
>
> (p) if a person has not complied with New Brunswick securities law, an order requiring the person to disgorge to the Commission any amounts obtained as a result of the non-compliance.

[40] Staff seeks an order pursuant to paragraph 184(1)(p) of the *Act* that the Respondents disgorge to the Commission $22,600.00. This figure represents the amount that CC invested into the Project that was created and promoted by the Respondents.

[41] In support of its disgorgement request, Staff referred the Commission to a non-exhaustive list of factors to consider prior to making an order for disgorgement. This list was set out by the OSC in *Re Limelight Entertainment Inc.*, 2008 CarswellOnt 7634, where the OSC stated the following at paragraph 52:

[42] In our view, the Commission should consider the following issues and factors when contemplating a disgorgement order in circumstances such as these:

> (a) whether an amount was obtained by a respondent as a result of non-compliance with the Act;
>
> (b) the seriousness of the misconduct and the breaches of the Act and whether investors were seriously harmed;
>
> (c) whether the amount that a respondent obtained as a result of non-compliance with the Act is reasonably ascertainable;
>
> (d) whether the individuals who suffered losses are likely to be able to obtain redress; and
>
> (e) the deterrent effect of a disgorgement order on the respondents and other market participants.

[43] This Commission accepts Staff's submission that the aforementioned issues and factors should be considered in granting a disgorgement order in the circumstances of this proceeding.

[44] In assessing the first factor, it is clear that the Respondents obtained funds as a result of non-compliance with the *Act*. Both Respondents were found to have illegally distributed securities by creating and promoting the investment opportunity in the Project, which led CC to invest $22,600.00. Weeres was also found to have defrauded CC of the $22,600.00. These funds, which were deposited into the SMGI bank account, were used by the Respondents for various purposes, including their personal expenses.

[45] In terms of the second factor, as noted throughout this decision, the misconduct of the Respondents and the breaches of the *Act* were very serious in nature, and the harm suffered by investor CC was significant in that she lost $22,600.00.

[46] It is clear that the third factor has also been met. As noted above, the Respondents obtained the $22,600.00 invested by CC by having full access to and

using the funds deposited into the SMGI bank account for various purposes, including their personal expenses.

[47] In assessing the fourth factor, we find that it is not likely that CC will be able to obtain redress for the financial loss she has suffered. She has not received any payments pursuant to the agent agreement she signed with SMGI and that were promised to her by Weeres. In addition, it is not likely that she will receive any payments in the future, as SMGI discontinued operations in 2009 and is currently insolvent.

[48] Finally, the Commission finds that an order for disgorgement in these proceedings would deter both Respondents, and other market participants, from conducting similar misconduct in the further.

[49] As such, the Commission orders, pursuant to paragraph 184(1) (p) of the *Act*, that the Respondents disgorge $22,600.00 to the Commission.

(d) Costs

[50] The Commission may order costs if they are satisfied that a respondent has not complied with New Brunswick securities law, and if the Commission is of the opinion that a respondent has not acted in the public interest. For the reasons set out, the Commission finds it appropriate to issue an order against the Respondents for costs in this matter.

[51] Staff presented a summary of costs within the Submission on Sanctions pursuant to section 185 of the *Act* and Local Rule 11-501 *Procedures for Hearings Before a Panel of the Commission*. Staff submitted a total claim for investigative and hearing costs in the amount of $13,575.00. The Commission accepts Staff's summary of costs, and therefore orders that the Respondents shall jointly and severally pay costs in the amount of $13,575.00.

3. CONCLUSION

[52] Having considered the reasons as set out above, the Commission finds that it in the public interest to issue the above sanctions in this matter.

Dated this 15th day of March 2012.

"original signed by"

Denise LeBlanc, Q.C., Panel Chair

"original signed by"

Céline Trifts, Panel Member

"original signed by"

Kenneth Savage, Panel Member

New Brunswick Securities Commission
85 Charlotte Street, Suite 300
Saint John, NB E2L 2J2

Telephone: 506-658-3060
Fax: 506-658-3059