Ontario Securities Commission
Commission des valeurs mobilières de l'Ontario
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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 MARLON GARY HIBBERT, ASHANTI CORPORATE SERVICES INC., DOMINION INTERNATIONAL RESOURCE MANAGEMENT INC., KABASH RESOURCE MANAGEMENT, POWER TO CREATE WEALTH INC. AND POWER TO CREATE WEALTH INC. (PANAMA)

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

Hearing:	August 1 and 13, 2012	
Decision:	September 27, 2012	
Panel:	James D. Carnwath, Q.C.	- Commissioner and Chair of the Panel
Appearances:	Swapna Chandra Jennifer Lynch	- For Staff of the Commission
	Paul Saguil	- For Marlon Gary Hibbert

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I. OVERVIEW

A. The Merits Decision

[1] The hearing on the merits in this matter took place over four days between December 5, 2011 and January 11, 2012 (*Re Marlon Gary Hibbert* (2012), 35 O.S.C.B. 8583 (the "**Merits Decision**")). The Ontario Securities Commission (the "**Commission**") found that the Respondents traded in securities without being registered where no exemptions were available contrary to subsection 25(1)(a) (pre-September 2009) and subsection 25(1) (post-September 2009) of the *Securities Act* R.S.O. 1990 c.S.5, as amended (the "***Act***") and contrary to the public interest; the Respondents acted as advisors without registration where no exemptions were available, contrary to subsection 25(1)(c) (pre-September 2009) and subsection 25(3) (post-September 2009) of the *Act* and contrary to the public interest; the Respondents engaged in the illegal distribution of securities, contrary to subsection 53(1) of the *Act* and contrary to the public interest; Marlon Hibbert ("**Hibbert**") perpetrated a fraud on investors contrary to subsection 126.1(b) of the *Act* and contrary to the public interest; and Hibbert misled Staff contrary to subsection 122(1)(a) of the *Act* and contrary to the public interest. Hibbert did not appear at the hearing on the merits.

B. Summary of the Findings

[2] In the Merits Decision, I made the following findings in respect of the conduct of the Respondents:

(a) Hibbert caused the incorporation of the corporate respondents to assist in the investment scheme. He was the directing mind of the companies, solicited investments over the phone and paid referral fees to investors who referred new investors;

(b) The contracts, prepared, solicited and signed by Hibbert and investors are securities as defined in subsection 1(1) of the *Act*;

(c) The Respondents were not registered with the Commission at any time and no exemptions from registration applied to the Respondents;

(d) Hibbert accepted and deposited investors funds into the bank accounts of the corporate respondents located in Canada;

(e) In addition to advising investors to invest, Hibbert created and posted a video clip touting the benefits of investing in Power to Create Wealth Inc. and promising a rate of return of up to 79.4% a year;

(f) Hibbert misappropriated funds for the benefit of himself, his wife and his charities. In particular, Hibbert caused approximately $673,000 to be transferred for the use of himself and his wife;

(g) Hibbert lied to investors by telling them that he was successful in trading in foreign exchange. There is no evidence to suggest that Hibbert ever made a profit in foreign exchange;

(h) Hibbert was the directing mind of the corporate respondents and controlled the trading of investor funds in foreign exchange. As such, he had subjective awareness that he was acting dishonestly and putting investors' funds at risk as a result of his trading;

(i) Hibbert composed the letters used to deceive investors as to the true state of affairs of their investment and misled investors as to the amount he had retained of their principal investment; and

(j) Hibbert misled Staff on more than one occasion during his examinations under oath.

C. Sanctions and Costs Hearing

[3] Following the Merits Decision, Staff and counsel for Hibbert appeared before me on August 1, 2012 with a joint recommendation for proposed sanctions. The agreement was predicated on Hibbert undertaking to transfer $650,000 of investor funds from a trading account in Panama to the Commission by way of a bank draft or a direct wire transfer. I observed that, based on my findings, Hibbert's undertaking to do anything was worth next to nothing. Both Staff and Hibbert's counsel, Mr. Saguil suggested an adjournment to give Mr. Hibbert sufficient time to effect such a transfer. I agreed and the matter was adjourned to August 13, 2012 at 2:30 p.m., peremptory to Hibbert.

[4] On the return date, Staff advised that no transfer had taken place and that Staff was prepared to make submissions on sanctions and costs. Not surprisingly, Staff sought more severe sanctions and a higher costs award than those agreed to in the earlier proposed joint submission.

[5] I have ignored the terms of the joint recommendation in my approach to sanctions. Also, I have not considered Hibbert's failure to transfer funds as an aggravating factor, nor have I considered his expressed intention to reimburse investors as a mitigating factor.

II. THE APPLICABLE LAW

A. Approach to the Imposition of Sanctions

[6] The Commission must ensure that the sanctions imposed in each case are proportionate to the circumstances and conduct of the particular respondent. The factors the Commission should consider include:

(a) the seriousness of the allegations;

(b) the respondent's experience in the marketplace;

(c) the level of a respondent's activity in the marketplace;

(d) whether or not there has been a recognition of the seriousness of the improprieties;

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

(f) any mitigating factors;

(g) whether the violations are isolated or recurrent;

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

(i) the size of any financial sanctions or voluntary payment when considering other factors;

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

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

(l) the reputation and prestige of the respondent;

(m) the shame or financial pain that any sanction would reasonable cause the respondent; and

(n) the remorse of the respondent.

(*Re Belteco Holdings Inc.* (1998), 21 O.S.C.B. 7743 at paras. 23-26;
Re M.C.J.C. Holdings Inc. (2002), 25 O.S.C.B. 1133 at paras. 10, 16-19 and 26)

[7] The Commission may also consider general and specific deterrence in crafting appropriate sanctions. The weight given to general deterrence will vary from case to case and is a matter within the discretion of the Commission (*Re Cartaway Resources Corp.*, [2004] 1 S.C.R. 672 at paras. 60 and 64; *Re Momentas Corp.* (2007), 30 O.S.C.B. 6475 at paras. 51-52).

B. Application of Factors

[8] I find the factors noted below to be particularly relevant in considering the appropriate sanctions to be applied.

i) The Seriousness of the Allegations

[9] The findings in the Merits Decision established serious contraventions of the *Act*, particularly fraud. The Commission has previously held that fraud is "one of the most egregious securities regulatory violations," both "an affront to the individual investors directly targeted"

and something that "decreases confidence in the fairness and efficacy of the entire capital market system." (*Re Al-Tar Energy Corp.* (2010), 33 O.S.C.B 5535 at para. 214).

[10] The Respondents committed a series of acts including illegal distribution, unregistered advising and unregistered trading of securities. Hibbert engaged in an ongoing course of deceitful and fraudulent conduct designed to personally enrich Hibbert at the expense of innocent investors.

[11] In the Merits Decisions, paras. 97-99, I made the following findings.

> [97] Hibbert deceived investors by misappropriating their funds to his own use and the use of his wife and charities. He caused payments of approximately $673,000 to be transferred to himself and his wife, including payments for leased vehicles. He caused payments of $483,848 to be paid to his ministries and charities and other charities founded and run by family members. He caused payments of $67,017 for other personal expenses, including VISA payments, school fees, hotels and gym memberships. The payments for personal expenses were made after payments to investors had stopped.
>
> [98] Hibbert lied to investors by telling them he was successful in trading in foreign exchange. There is no evidence to suggest that he ever made a profit in doing so. He lied to investors by providing monthly statements as to the success of their investments which did not reflect actual trading results. The statements showed growth of investors' funds when in fact losses were sustained. Investors believed their funds to be safe and earning returns. He lied to investors when he tried to explain why the payments of principal could not be made and provided a litany of excuses, which were untrue, as to why repayments of principal were not possible.
>
> [99] By virtue of Hibbert's deceptions and untruths, many investors lost their entire investment. To date, they are owed more than $8.2 million in principal, to say nothing of the promised returns of more than $13 million […].
>
> (*Re Marlon Gary Hibbert et al.* (2012), 35 O.S.C.B. 8583, at paras. 97-99)

ii) The Level of the Respondents' Activity in the Marketplace

[12] The Respondents' activity took place over at least a four and one-half year period between January 2006 and May 2010. Violations of Ontario securities law in that period were widespread and repeated in the case of many of the 200 investors that Hibbert defrauded. This activity required multiple bank accounts, multiple companies, and transfer of investor funds to Panama from where information on trading or bank records was inaccessible to investors and Staff. Hibbert's fraudulent conduct raised $8.2 million from investors.

iii) The Respondents' Recognition of the Seriousness of the Breaches of Securities Law

[13] Hibbert did not appear at the merits hearing or the sanctions hearing. He made misleading or untrue statements in respect of the funds that had been transferred to Panama. He continued to mislead investors throughout the material time in respect of both his ability and intention to repay the funds or, at the very least, the principal invested. Hibbert had to recognize the seriousness of his actions and had to understand the effect he had on the many investors whom he left in desperate financial circumstances. This knowledge did not deter him from the course of conduct he pursued.

iv) The Profit Made from Illegal Conduct

[14] Hibbert collected approximately $8,411,528, from more than 200 investors by way of the investment scheme. Of these funds, Hibbert disbursed $673,000 for his personal use. A further $483,848 was given in donations to charities controlled by Hibbert or his family members, and $67,017 was used to pay other personal expenses of Hibbert. Hibbert repaid approximately $3,738,748.02 in principal and interest to investors during the material time.

v) The Restraint Any Sanctions May Have on the Ability of a Respondent to Participate Without Check in the Capital Markets

[15] Counsel for Hibbert submits Hibbert had little experience in capital markets and was not a registrant. Hibbert's only experience in the capital markets is limited to defrauding investors. He must be permanently banned from trading in securities.

vi) Specific and General Deterrence

[16] Staff submit that Hibbert abused a position of trust within his congregation and the larger community in order to continue to obtain investor funds over a number of years. Investors testified that they believed Hibbert because he was a "Man of God". Hibbert continued to deceive investors long after he knew that there was no reasonable prospect that he would ever be in a position to return investor funds. Hibbert's actions demonstrate a clear desire to deceive investors and use the monies, at least in part, to substantially improve the financial position of himself and his family.

[17] Staff accordingly submit that there is a need to send a strong message of specific deterrence to the Respondents.

[18] In 32 years of adjudication I have never encountered a more vile, more heinous fraud than that perpetrated by Hibbert on his unsuspecting parishioners. Investors who testified stressed the implicit trust they had in Hibbert because he was a "Man of God". Any sanctions imposed must dissuade him from ever repeating his conduct in this matter. Equally important is the requirement to dissuade persons like Hibbert who are tempted to take advantage of the trust reposed in them.

[19] The ease with which Hibbert raised over $8.4 million demonstrates a particular need to convey to any like minded individuals that any profits they make will be taken from them should they engage in fraudulent activity.

(C) Permanent Bans

[20] Given their conduct, the Respondents should be permanently banned from trading in securities, acquiring securities and having exempt status. Likewise, Hibbert should be permanently prohibited from acting as an officer or director in the securities industry.

(D) Disgorgement

[21] Pursuant to clause 10 of section 127(1) of the *Act*, the Commission has the power to order disgorgement of "any amounts obtained as a result of the non-compliance" with Ontario securities law. The Commission has previously held that "all money illegally obtained from investors can be ordered to be disgorged, not just the 'profit' made as a result of the activity." (*Re Limelight Entertainment Inc.* (2008), 31 O.S.C.B. 12030 ("***Limelight***") at para. 49).

[22] In *Limelight*, the Commission held it should consider the following factors when contemplating a disgorgement order, in addition to the general factors for sanctioning listed at paragraph 6 above:

> (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 market participants.
>
> (*Limelight*, above at para. 52)

[23] The total amount obtained as a result of the Respondents' non-compliance with Ontario's securities law is approximately $4,672,779.98. As directing mind of the corporate respondents, Hibbert must be ordered to disgorge the amount obtained.

(E) Administrative Penalties

[24] Staff seek an order for the payment of an administrative penalty in the amount of $1,000,000 against Hibbert. Counsel for Hibbert submits a more appropriate range is between $250,000 and $500,000, but certainly not more than $750,000.

[25] In cases involving the illegal distribution of securities, unregistered trading, misrepresentations, and particularly in cases involving fraud, the Commission has awarded significant administrative penalties.

[26] The Commission has held that an administrative penalty should be of a magnitude sufficient to ensure effective specific and general deterrence. Factors to be considered in determining an appropriate administrative penalty include: the scope and seriousness of a respondent's misconduct; whether there were multiple and/or repeated breaches of the *Act*; whether the respondent realized any profit as a result of his or her misconduct; the amount of money raised from investors; the harm caused to investors; and the level of administrative penalties imposed in other cases (*Re Rowan* (2009), 33 O.S.C.B. 91, paras. 67, 70 and 73; *Limelight*, above at paras. 67, 71 and 78).

[27] Persons like Hibbert who enjoy the trust and confidence of others must be deterred from acting as Hibbert has. Having regard to the cases cited by Staff and counsel for Hibbert, I find an appropriate amount to reflect the principal of general deterrence is the imposition of an administrative penalty of $750,000.

(F) Costs

[28] A costs order pursuant to section 127.1 of the *Act* is not a penalty. An order of costs is a way of recovering the costs of a hearing or investigation from persons or companies who have breached Ontario securities law or acted contrary to the public interest. It is recognized that a costs order will not necessarily recover the entirety of the costs incurred by the Commission but it is appropriate that a respondent pay some portion of the costs of a hearing where a respondent is found to have contravened securities law. In assessing the quantum of costs, the panel is entitled to take into consideration whether the respondent's conduct has contributed to the efficient hearing of the matter.

[29] I accept the submissions of counsel for Hibbert to the effect that this was neither a prolonged nor a complex hearing. Hibbert did not appear. In all the circumstances, I find that Hibbert should pay a costs award of $200,000.

(G) Reprimand

[30] I hereby reprimand Hibbert.

III. CONCLUSION

[31] It is ordered that:

(a) pursuant to s. 127(1)2 of the *Act*, all trading by the Respondents shall cease permanently;

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

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

(d) pursuant to s. 127(1)6 of the *Act*, I hereby reprimand Hibbert for his conduct;

(e) pursuant to s. 127(1)8 of the *Act*, Hibbert is prohibited from becoming or acting as a director or officer of any issuer permanently;

(f) pursuant to s. 127(1)8.2 of the *Act*, Hibbert is prohibited from becoming or acting as a director or officer of a registrant permanently;

(g) pursuant to s. 127(1)8.4 of the *Act*, Hibbert is prohibited from becoming or acting as a director or officer of an investment fund manager permanently;

(h) pursuant to s. 127(1)8.5 of the *Act*, Hibbert is prohibited from becoming or acting as a registrant, as an investment fund manager or as a promoter permanently;

(i) pursuant to s. 127(1)9 of the *Act*, Hibbert shall pay to the Commission an administrative penalty of $750,000, which is designated for allocation or for use by the Commission pursuant to section 3.4(2)(b) of the *Act*;

(j) pursuant to s. 127(1)10 of the *Act*, Hibbert shall disgorge to the Commission the amount of $4,672,779.98, which is designated for allocation or for use by the Commission pursuant to section 3.4(2)(b) of the *Act*; and

(k) pursuant to s. 127.1 of the *Act*, the respondents shall pay on a joint and several basis $200,000, representing partial costs and disbursements incurred by the Commission in the investigation and hearing.

Dated at Toronto this 27th day of September, 2012.

"*James D. Carnwath*"
James D. Carnwath, Q.C.