

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

AND

**IN THE MATTER OF
JOSE CASTANEDA**

HEARING HELD PURSUANT TO SECTION 127 OF THE ACT

SETTLEMENT HEARING RE: JOSE CASTANEDA

HEARING: Thursday, March 27, 2008

PANEL: Wendell S. Wigle, QC -Commissioner and Chair of the Panel
David L. Knight, FCA -Commissioner

APPEARANCES: Hugh Craig -For the Ontario Securities Commission
Paul De Souza

Jose Castaneda -Self-represented

ORAL RULING AND REASONS

The following text has been prepared for the purpose of publication in the Ontario Securities Commission Bulletin and is based on excerpts of the transcript of the hearing. The excerpts have been edited and supplemented and the text has been approved by the Chair of the Panel for the purpose of providing a public record of the decision.

Chair:

[1] This was a hearing under section 127 of the *Securities Act*, R.S.O. 1990, c. S.5, as amended (the “Act”) for the Ontario Securities Commission (the “Commission”) to consider whether it is in the public interest to approve the proposed Settlement

Agreement between Staff of the Commission (“Staff”) and the respondent, Jose Castaneda (“Castaneda”).

[2] By way of background, in September 1998, a temporary cease trade order was issued pending a hearing into allegations that Castaneda traded without appropriate registration contrary to subsection 25(1) of the Act. On June 7, 2000, the Commission approved a settlement agreement pursuant to which Castaneda was reprimanded and prohibited from trading in securities for 5 years and he agreed that he would not apply for registration in any capacity for 15 years (the “Prior Settlement Agreement”). The temporary cease trade order and the cease trade order agreed to in the Prior Settlement Agreement will be referred to as the “Prior Cease Trade Orders”.

[3] The matter before us today arises out of a Notice of Hearing and Statement of Allegations dated June 20, 2005; an amended Statement of Allegations was issued on December 19, 2005. Staff alleged that Castaneda breached the Prior Cease Trade Orders and acted contrary to the public interest by engaging in discretionary trading for several clients without the appropriate registration and without an exemption from registration requirements, contrary to subsection 25(1) of the Act. A cease trade order was issued on June 7, 2005, and on June 20, 2005 it was extended until the hearing is concluded and a decision of the Commission is rendered or until the Commission considers appropriate.

[4] In the Settlement Agreement before us today, Staff and Castaneda agreed that between 1999 and 2003, Castaneda continued to engage in the same type of unauthorized trading activity that had resulted in the Prior Cease Trade Orders and the Prior Settlement Agreement. It is agreed that Castaneda entered into joint venture profit-sharing agreements with numerous individuals during this period authorizing him to engage in “speculative short term trading of currency forward or spot contracts” at his absolute discretion. It is further agreed that Castaneda improperly traded in foreign currencies and commodity futures for his clients and did not inform his clients about the Prior Cease Trade Orders or Prior Settlement Agreement.

[5] According to the agreed facts in the Settlement Agreement, John M. invested approximately \$200,000 with Castaneda over a period of roughly 18 months pursuant to a joint venture profit-sharing agreement. In early 2001, at John M.’s request, Castaneda returned the entirety of his funds plus some profits.

[6] The agreed facts also state that Paul M. and Clara M. invested \$900,000 with Castaneda between February and July 2002 pursuant to a joint venture agreement. Although he never provided account statements, Castaneda consistently told Paul M. and Clara M. that he was making money for them through currency trading and was reinvesting their profits, and by March 2003, he reported to them that their initial investment had grown substantially. In the summer of 2003, Castaneda informed Paul M. and Clara M. that all their money was gone.

[7] Also according to the agreed facts, Andrew M. gave Castaneda \$50,000 to be invested pursuant to a joint venture profit-sharing agreement. In May 2003, Castaneda informed Andrew M. that all his money had been lost and he would not receive any return on his investment.

[8] According to the Settlement Agreement, Castaneda admitted that he traded without registration as required by subsection 25(1) of the Act and acted contrary to the public interest by trading while he was prohibited from trading under the Prior Cease Trade Orders.

[9] In addition to the allegations before the Commission under section 127 of the Act, Castaneda was charged with two *Provincial Offences Act* offences under section 122 of the Act in relation to the same underlying facts: trading without registration contrary to subsection 25(1) of the Act, and trading at a time when he was prohibited from trading under the Prior Cease Trade Orders. Castaneda was also charged with the indictable offence of “fraud over \$5,000” contrary to paragraph 380(1)(a) of the *Criminal Code of Canada* (the “Criminal Code”) in relation to Paul M. and Clara M.

[10] On May 10, 2007, Castaneda pleaded guilty to the two offences under the Act and he pleaded guilty to the Criminal Code offence on October 24, 2007. Castaneda was sentenced on January 18, 2008 by Justice D.A. Fairgrieve, 2008 ONCJ 69 (CanLII).

[11] In determining the appropriate sentence for the fraud conviction, Justice Fairgrieve considered aggravating factors including the amounts of the losses suffered, the protracted period over which the offences occurred, the false representations Castaneda made to Paul M. and Clara M. and Andrew M., his diversion of funds to unauthorized uses, and his exploitation of vulnerable people who had placed their confidence in him. Accordingly, Justice Fairgrieve found that a conditional sentence would not be consistent with the deterrence and denunciation principles of sentencing in this case and that a period of actual incarceration was required. Mitigating factors considered were Castaneda’s remorse, his guilty pleas, the absence of a prior record and his poor health.

[12] With respect to the offences under the Act, Justice Fairgrieve accepted that specific and general deterrence were the primary objectives because of Castaneda’s prior history of having worked 35 years in the financial sector.

[13] Castaneda was sentenced to six months’ imprisonment for each of the offences under the Act and two years less a day for the Criminal Code conviction, all of the sentences to be served concurrently because they arose from the same general transactions and because consecutive sentences would mean incarceration in a federal penitentiary.

[14] Though he recognized there was little likelihood Castaneda would be able to make significant restitution, Justice Fairgrieve made a freestanding restitution order under paragraph 738(1)(a) of the Criminal Code that Castaneda pay Paul M. and Clara M. \$798,500 (\$800,000 less the \$1,500 payment he already made) and that he pay Andrew M. the sum of \$50,000.

[15] In the Settlement Agreement before us today, Staff and Castaneda agree to an order that Castaneda is permanently restricted from registering under Ontario securities law, that he is permanently prohibited from acquiring or trading in any securities, that any exemptions contained in Ontario securities law do not apply to him permanently, and that he is permanently prohibited from becoming an officer or director of any issuer.

[16] We find that the agreed sanctions will protect the public interest by permanently removing Castaneda from the capital markets.

[17] Accordingly, we have considered your submissions presented to us today and the Settlement Agreement. We have also reviewed the reasons of Mr. Justice Fairgrieve where he dealt with the sentencing of Mr. Castaneda for two offences under the Securities Act to which he pleaded guilty on May 10, 2007, and as well as an indictable offence for fraud over \$5,000 contrary to the Criminal Code to which he pleaded guilty on October 4, 2007, and we also take into account the facts as set out in these reasons and further that Mr. Justice Fairgrieve made an order that there be a freestanding restitution order pursuant to the Criminal Code, that Mr. Castaneda repay in total of \$850,000. Having considered that, we are prepared to approve the terms of the settlement agreed to.

Approved by the Chair of the Panel on April 4, 2008.

“Wendell S. Wigle”

Wendell S. Wigle, QC